COURT FILE NUMBER	**2101-00814**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD., AND PETROWORLD ENERGY LTD.

SUPPLEMENTAL BRIEF OF LAW AND ARGUMENTS OF THE APPLICANTS,

CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD. AND PETROWORLD ENERGY LTD,

IN SUPPORT OF AN APPLICATION RETURNABLE FEBRUARY 10, 2020 AT 3:00 P.M. BEFORE THE HONOURABLE MR. JUSTICE D. B. NIXON

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Matti Lemmens / Tiffany Bennett Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9511 / 232-9119 Facsimile: (403) 266-1395 Email: MLemmens@blg.com / TiBennett@blg.com File No. 441112/000017

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I. INTRODUCTION

1. This Supplemental Bench Brief is submitted on behalf of the Applicants, Calgary Oil & Gas Syndicate Group Ltd. ("**Syndicate Group**"), Calgary Oil and Gas Intercontinental Group Ltd. ("**Intercontinental**") (in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership (the "**Limited Partnership**")), Calgary Oil and Syndicate Partners Ltd. ("**Syndicate Partners**") and Petroworld Energy Ltd. ("**Petroworld**" and, collectively, the "**Companies**"), in opposition to a Cross-Application by Crown Capital Partner Funding LP, by its general partner Crown Capital LP Partner Funding Inc. (collectively, "**Crown Capital**") for the appointment of an interim receiver in respect of the Limited Partnership, Intercontinental, and Syndicate Partners and such other relief as more particularly set out therein.

2. For the reasons already set out in the Companies' Bench Brief filed February 8, 2021, this Honourable Court should grant the Companies and the Limited Partnership protection accorded under the *Companies' Creditors Arrangement Act* (the "*CCAA*")[1], and dismiss Crown Capital's Cross-Application. It is inappropriate to grant Crown Capital's Cross-Application to appoint an interim receiver and other related relief at this time given, among other things, the Companies' ongoing restructuring efforts, the value of the Companies' assets, the market improvements in the oil and gas industry The record does not support the allegations raised by Crown Capital, whose proposed appointment of an interim receiver, and an eventual full receiver, fails to appreciate the value of the Companies' and the Limited Partnership's business as a going concern. Specifically, there is no evidence that the assets are at risk of deterioration or that the appointment of an interim receiver is necessary to protect the Companies' estate or Crown Capital's interest.

II. FACTS

3. The facts supporting the relief sought by the Companies are more particularly set out in the Affidavit sworn by Ryan Martin, the Respondent's corporate representative (the "**Martin Affidavit**")[2] and the supplemental Affidavit sworn by Ryan Martin (the "**Supplemental**

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*] [**TAB 1]**
[2] Affidavit of Ryan Martin, sworn on February 5, 2021 at para 1 [**Martin Affidavit**].

Affidavit" and collectively, the "**Martin Affidavits**").[3] Capitalized terms not otherwise defined herein have the same meanings as ascribed to them in the Martin Affidavits.

III. ISSUES

4. The Companies respectfully request that this Honourable Court determine the following issue and sub-issues:

   (a) Should the interim receiver be appointed?

      (i) Should an interim receiver be appointed despite the absence of a reasonable notice period under section 244 of the BIA?

      (ii) What is the test for appointment of an interim receiver?

      (iii) Should a *CCAA* Initial Order be issued instead of an interim receivership order?

IV. LAW AND ANALYSIS

A. An Interim Receiver Should Not Be Appointed

(a) Crown Capital did not give Reasonable Notice to Enforce its Security

5. This Court's jurisdiction to appoint an interim receiver is found in section 47 of the *Bankruptcy and Insolvency Act*, which provides the following:

> **47(1) Appointment of interim receiver**
> If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates…
>
> **47(3) When appointment may be made**
> An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (a) the debtor's estate; or

[3] Supplemental Affidavit of Ryan Martin, sworn on February 10, 2021 [**Supplemental Affidavit**].

(b) the interests of the creditor who sent the notice under subsection 244(1).[4]

6. In general, a secured creditor must provide notice when seeking to enforce a security on all or substantially all of the inventory, accounts receivable, or other property of an insolvent person that was used in relation to a business.[5] It is a precondition of any interim receivership order under this section that notice of intention to enforce security under section 244 of the *BIA* has or is about to be sent to the debtor.[6]

7. The purpose of the section 244 notice requirement is to provide insolvent persons with an opportunity to negotiate and reorganize their financial affairs.[7] Although section 47(1) permits a creditor to apply for an order appointing an interim receiver before the 10-day notice period has expired, in this instance the Applicant provided only 2 days' notice of its intention to seek the requested order, at a time when there has been no risk of deterioration to the value of the assets. If the Companies' Application is successful, a comeback application will be scheduled within the next 10 days. The appointment of an interim receiver is more appropriately dealt with at such comeback application. The *CCAA* provides for adequate means of maintaining the *status quo*.

8. The Companies further submit that Crown Capital's lack of adequate notice is heightened due to the fact that it only filed the application to appoint an interim receiver after the Companies' initial *CCAA* filing, as an attempt to defeat the Companies' *CCAA* Application despite the fact that there are no exigent circumstances and Crown Capital was willing to continue under, and even extend, the Forbearance Agreement. A longer notice period is warranted given that Crown Capital's security is not at risk of any potential deterioration. Consequently, the Companies have not been given a fair opportunity to negotiate and reorganize their financial affairs, and the order appointing an interim receiver would be inappropriate at this time.

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[4] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 47(1) and (3) [***BIA***] [**TAB 2**].
[5] *BIA* at s 244(1) [**TAB 2**].
[6] *Big Sky Living Inc., Re*, 2002 ABQB 659 at para 7 [**TAB 3**].
[7] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 53 [**TAB 4**].

(b) The Test for Appointment of the Interim Receiver is Not Met

9. As set out above, section 47(3) of the *BIA* provides that the test for the appointment of an interim receiver is simply whether the appointment is "necessary for the protection of (a) the debtor's estate; or (b) the interests of the creditor who sent the notice under subsection 244(1)."[8]

10. The Companies submit that an interim receiver is unnecessary for the protection of its estate and for the protection of Crown Capital's interests. Crown Capital's interests are adequately protected by the Limited Partnership's ongoing operation of the Ferrier assets, which has continued under the Forbearance Agreement for approximately 4 months. Not only have the Companies and the Limited Partnership been left to maintain those operations, but the same had been condoned by Crown Capital which even sought to further amend the Forbearance Agreement to carry on with the arrangement. Additionally, Crown Capital's interests will remain under the Initial Order granted to the Companies pursuant to the *CCAA* through the appointment of a Monitor and the Companies' and the Limited Partnership's interest in continuing the business as a going concern.

11. In particular, while the Initial Order does not expressly prohibit the Companies from selling the Property, it is clear that the Companies will not do so in absence of Court approval and the Monitor's consent. Further, the Companies are seeking to restructure their business, not liquidate it, the Property is essential for the continued operation and restructuring of the business. Accordingly, the Companies will not be seeking to sell or transfer the assets and there is no need to appoint an interim receiver to protect the Companies' estate. Crown Capital faces no further prejudice and its interests are adequately protected without the appointment of an interim receiver.

(c) The Circumstances Favor *CCAA* Protection Instead of the Appointment of an Interim Receiver

12. Though the cases cited below are in the context of a *CCAA* application competing with a full receivership application, and the matter at hand involves an interim receivership

[8] *BIA*, s 47(1)(3) [**Tab 2**].

application, it is the Companies' submission that since the Application contemplates an eventual full receivership, similar legal principles can apply.

13. Both a receivership order and an Initial Order under the *CCAA* "are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented."[9]

14. Some of the relevant factors the Court considers in determining which process is appropriate include:

    (a) Whether there is a contractual right to appoint a receiver;[10]

    (b) Whether there is a risk of harm to the security of creditors;[11]

    (c) Whether there is a reasonable possibility restructuring will succeed – this requires a germ of a reasonable and realistic plan, particularly where there is opposition from major stakeholders; an insufficient or non-existent plan will militate in favor of a receivership;[12]

    (d) Whether the debtor has acted with good faith and due diligence in addressing issues causing its financial troubles; and[13]

    (e) The timing of the *CCAA* application. Receivership will be preferred where a debtor with no previous intent to restructure brings an application after being served with a receivership application.[14]

15. In this case, restructuring under the *CCAA* is the most appropriate path forward. The proposed *CCAA* proceedings do not prejudice Crown Capital's security in any way, given that the Companies will be unable to sell the Property without Court and Monitor approval. Further, the Companies seek to continue production with the Ferrier assets and have even

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[9] *Romspen Investment Corp v 6711162 Canada Inc*, 2014 ONSC 2781 at para 61 [**TAB 5**].
[10] *Affinity Credit Union 2013 v Vortex Drilling Ltd*, 2017 SKQB 228 at para 38 [**TAB 6**].
[11] *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 at para 51 [**TAB 7**].
[12] *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at para 14 [***Tallgrass***] [**TAB 8**].
[13] *Tallgrass* at para 13 [**TAB 8**].
[14] *Callidus v Carcap*, 2012 ONSC 163 at para 58 [**TAB 9**].

sought a partnership with the Nation to further develop these assets. Accordingly, there is no risk of deterioration of the assets. To the contrary, market conditions have improved and it is expected that the preservation of the Companies and the Limited Partnership as a going concern will provide greater value to the stakeholders.

16. Further, the Companies' *CCAA* restructuring efforts are more than a "germ of a reasonable and realistic plan". The Ferrier assets are central to the ongoing viability of the Companies and the Limited Partnership, and have continued to produce in significant volumes relative to other producing wells in the province.

17. In addition, the Companies have continued to act in good faith and with due diligence in addressing their financial problems, they are not merely attempting to delay entering receivership. This is evidenced by the fact that the Companies are attempting to diligently proceed with a restructuring effort under the *CCAA*. As set out in the Supplemental Martin Affidavit, the Companies previously brought forward two proposals to pay out Crown Capital's debt and are currently in discussions with a third-party for a restructuring proposal with a view to pay out Crown Capital's debt. Additionally, the Companies expect to be in a position to pay portions of the principal amounts, full monthly interest payments, and full GOR payments to Crown Capital as well as some payments to trade creditors, while they finalize this third-party transaction.

18. Finally, the Companies brought the *CCAA* application before Crown Capital filed its interim receivership application and there is a genuine intent by the Companies' to restructure their business. The Companies did not apply for *CCAA* protection simply to delay or avoid receivership, they applied in order to restructure their business and ensure a fair outcome for all of their stakeholders.

19. Additionally, the particular assets involve oil and gas leases with the Sunchild First Nation, which would only be transferrable with Band Council Resolution. The oil and gas leases between and the Companies and Sunchild Oil & Gas Ltd. (the "**Sunchild Leases**"), as assigned through Indian Oil and Gas Canada, are distinct from a typical oil and gas leases because they are not freely assignable contracts. Sections 25(1) and (5) of the *Indian Oil and Gas Regulations* provides that an assignment of any rights or interests conferred by a

an oil and gas lease on first nation lands must be approved by the Minister of Indigenous Services and by a Band Council Resolution.[15]

20. The Sunchild First Nation continues to support the Companies in their restructuring efforts and has expressed a strong desire to continue working with the Companies, including on further collaborations related to the Ferrier assets.[16] It is possible that a subsequent operator would not enjoy the same rapport with Sunchild First Nation and will not receive the requisite Band Council Resolution for the assignment of the Sunchild Leases, creating further financial losses for the Companies, the Limited Partnership and their stakeholders. As a result, it is the Companies' submission that it will be more economically efficient for the Sunchild Leases to remain in the Companies' control as it is the preferred outcome for the Sunchild First Nation as a major stakeholder in the Ferrier assets.

21. As a result of the foregoing, it is the Companies' submission that the *CCAA* Initial Order sought by the Companies provides the best path forward for the various stakeholders.

V. CONCLUSION

22. The Companies urgently require the continued protection of the *CCAA* in order to continue to organize and give effect to their restructuring plan so that they may maximize the value available for all of their stakeholders. It is inappropriate to grant the relief requested by Crown Capital at this time as, among other things, there is no evidence of any risk to the assets nor that protection from the appointment of a receiver is necessary. The Companies submit that the protection provided by the *CCAA* will provide additional time for the Companies and the Limited Partnership to restructure their debts and business with a view to carrying on as a going concern,

[15] *Indian Oil and Gas Regulations*, SOR/2019-196 at s 25(1) and (5) [**TAB 10**].
[16] Supplemental Affidavit at paras 3-5.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 10th day of February 2021.

BORDEN LADNER GERVAIS LLP

Per: _____

Matti Lemmens / Tiffany Bennett
Solicitors for the Applicants, Calgary Oil & Gas Syndicate Group Ltd., Calgary Oil and Gas Intercontinental Group Ltd. ((in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership), Calgary Oil and Syndicate Partners Ltd., and Petroworld Energy Ltd.

VI. LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB NO.	DOCUMENT DESCRIPTION
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
2.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
3.	*Big Sky Living Inc., Re*, 2002 ABQB 659
4.	*Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53
5.	*Romspen Investment Corp v 6711162 Canada Inc*, 2014 ONSC 2781
6.	*Affinity Credit Union 2013 v Vortex Drilling Ltd*, 2017 SKQB 228
7.	*Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65
8.	*Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432
9.	*Callidus v Carcap*, 2012 ONSC 163
10.	*Indian Oil and Gas Regulations*, SOR/2019-196

Canada Federal Statutes
Companies' Creditors Arrangement Act

R.S.C. 1985, c. C-36

Currency

An Act to facilitate compromises and arrangements between companies and their creditors

R.S.C. 1985, c. C-36, as am. R.S.C. 1985, c. 27 (2nd Supp.), ss. 10 (Sched., item 3), 11; S.C. 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d), (2); 1997, c. 12, ss. 120-127; 1998, c. 19, s. 260; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2000, c. 30, ss. 156-158; 2001, c. 9, ss. 575-577; 2001, c. 34, s. 33; 2002, c. 7, ss. 133-135; 2004, c. 25, ss. 193-195; 2005, c. 3, ss. 15, 16; 2005, c. 47, ss. 124-131 [ss. 124, 126 amended 2007, c. 36, ss. 105, 106.]; 2007, c. 29, ss. 104-109; 2007, c. 36, ss. 61(1), (2), (3) (Fr.), (4), 62 (Fr.), 63-73, 74(1), (2) (Fr.), 75-82, 112(17), (20), (23) [s. 63 repealed 2007, c. 36, s. 112(15).]; 2009, c. 33, ss. 27-29; 2012, c. 16, s. 82; 2012, c. 31, ss. 419-421; 2015, c. 3, s. 37; 2017, c. 26, s. 14; 2018, c. 10, s. 89; 2018, c. 27, s. 269; 2019, c. 29, ss. 136-140.

Currency
Federal English Statutes reflect amendments current to December 10, 2020
Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part II — Bankruptcy Orders and Assignments (ss. 42-49) [Heading amended 2004, c. 25, s. 26.]
Interim Receiver

Most Recently Cited in: Mise sous séquestre de la Fiducie familiale Serge Lavoie , 2020 QCCS 2526, 2020 CarswellQue 8412, EYB 2020-359656, 322 A.C.W.S. (3d) 360 | (C.S. Qué., Aug 4, 2020)

R.S.C. 1985, c. B-3, s. 47

s 47.

Currency

47.

47(1) Appointment of interim receiver

If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

47(2)Directions to interim receiver

The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(c) take conservatory measures; and

(d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

47(3)When appointment may be made

An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

47(4)Place of filing

An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Amendment History

1992, c. 27, s. 16(1); 2005, c. 47, s. 30(1); 2007, c. 36, s. 14

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Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 244

s 244.

Currency

244.

244(1) Advance notice

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

244(2)Period of notice

Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

244(2.1)No advance consent

For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

244(3)Exception

This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

244(4)Idem

This section does not apply where there is a receiver in respect of the insolvent person.

Amendment History

1992, c. 27, s. 89(1); 1994, c. 26, s. 9

Currency

Federal English Statutes reflect amendments current to December 10, 2020
Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

End of Document

2002 ABQB 659
Alberta Court of Queen's Bench

Big Sky Living Inc., Re

2002 CarswellAlta 875, 2002 ABQB 659, [2002] A.W.L.D. 461, [2002] A.J. No. 886, 115 A.C.W.S. (3d) 13, 318 A.R. 165, 37 C.B.R. (4th) 42

IN THE MATTER OF THE INSOLVENCY OF BIG SKY LIVING INC.

Slatter J.

Judgment: June 3, 2002
Docket: Edmonton 96892

Counsel: *J.H. Hockin*, for HSBC Bank of Canada

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy --- Interim receiver — Powers, duties and liabilities
Bank provided $1,500,000 in financing to debtor — Debtor had numerous other creditors — Bank sought ex parte order appointing interim receiver — Bank drafted order granting receiver extensive powers and protection — Other creditors either consented to or did not oppose order — Draft order went well beyond purpose and intent of appointing interim receiver — Most terms beyond those granted by statute were not permitted — Some relief was also denied due to lack of notice to affected parties — Other avenues were open for obtaining such extensive relief.
Annotation

In this decision, Slatter J. analyses the scope of an ex parte order appointing an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act* (the "BIA") which permits an interim receiver to be appointed where the court is satisfied that a notice by a secured creditor is about to be sent or has been sent under s. 244(1) of the BIA. Slatter J. is to be commended for his thorough analysis of the scope and breadth of the order sought. Such an analysis is, unfortunately, not a common practice in the case of ex parte orders even though such orders may have very significant impact on the rights of third parties. It is also uncommon to see a similar analysis of the powers granted to a court-appointed receiver. Such an analysis is very long overdue.

As Slatter J. states, s. 47 of the BIA was enacted in 1992 for the purpose of protecting the rights of a secured creditor during the 10-day period that the secured creditor is prevented from enforcing its security. Prior to its amendment in 1992, the BIA provided for the appointment of an interim receiver to take possession of the property of the debtor during the period between the filing of a petition in bankruptcy and the making of a bankruptcy receiving order. Upon the bankruptcy adjudication, the appointment of an interim receiver is terminated and the trustee of the bankrupt estate assumes the powers over the property of the debtor granted by the BIA. Section 47(1) authorizes the appointment of an "interim" receiver. A logical interpretation of the section, taking into account the prior provisions of the BIA authorizing the appointment of an interim receiver when a petition in bankruptcy is filed, would be to have the appointment of an interim receiver under s. 47(1) terminate when the secured creditor has the right to enforce its security. Slatter J. recognized the interim nature of the appointment but did not make any finding with regard to the period of its efficacy since the debtor had consented to the making of the order.

In this decision, Slatter J. clearly recognized the impact on third parties of many of the provisions of the draft order and considered the various draft sections from that perspective. The difficulty faced by Slatter J. was that there has been no significant debate as to whether or not a s. 47(1) interim receiver should be used for the purpose of assisting a secured creditor in enforcing

its security as opposed to protecting the assets in the interval between the appointment of the interim receiver and the time the secured creditor is entitled to enforce its security. That section of the BIA was not enacted with the former purpose in mind and, as a result, no attempt was made in it to determine what rights should be available to a secured creditor and the effect of those rights on other parties.

Most of the provisions of the draft order in this case have been adapted from orders staying proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"). Justification for such provisions in a CCAA order has been that such provisions are necessary for an effective restructuring of the debtor company for the benefit of all stakeholders. In most instances such a justification does not exist when a s. 47(1) receiver is appointed.

In this annotation I will not discuss each of the sections of the decision of Slatter J. since this would involve a much more comprehensive article than an annotation. However, I clearly support the principle followed by him that an interim receiver appointed to assist a secured creditor in realizing on its security should not be granted rights and powers greater than those available to a secured creditor under statutory or common law until such an approach has received explicit statutory approval. Nevertheless, s. 244(1) of the BIA imposes a stay of proceedings on a secured creditor enforcing its contractual rights and it is clearly equitable that during the period that the rights of the secured creditor are stayed, the status quo should be maintained. A comprehensive stay is necessary for the protection of the estate of the debtor and the position of the secured creditor.

One of the reasons secured creditors support the appointment of a s. 47(1) interim receiver is that the BIA is a federal statute and orders made under its jurisdiction are enforceable across Canada. This permits a receivership to be administered in one jurisdiction and avoids the cost of auxiliary proceedings in other provinces where assets of the debtor may be located. This approach was upheld by Farley J. in the case of *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, 27 C.B.R. (3d) 148, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]). In that case, where a s. 47(1) interim receiver was appointed by the Ontario Court, Farley J. held that parties with possible lien claims against real property in the Yukon could have their rights to file liens barred by an order of an Ontario court. However, in that case, Farley J. referred the issue as to the validity of any lien claims that were filed in the Yukon to the Yukon courts. The extraprovincial powers of a s. 47(1) interim receiver were also recognized in the case of *Re Party City Ltd.*, 2002 CarswellOnt 1259, 34 C.B.R. (4th) 81 (Ont. S.C.J. [Commercial List]), where Cumming J. appointed a receiver already appointed under s. 101 of the *Courts of Justice Act* (Ontario) to be a receiver under s. 47(1) of the BIA in order to facilitate, at the least possible expense, the conveyance of assets in the Provinces of Manitoba, Alberta and British Columbia.

The most important impact of this decision of Slatter J. is that it should initiate a comprehensive discussion of the principles which should be applied and the appropriate relief to be granted when there is an application for a s. 47 interim receiving order. As in most bankruptcy issues, rights granted to one party usually derogate from rights available to another party and an equitable balancing of the positions of the affected parties is required.

David E. Baird, Q.C.

Table of Authorities

Cases considered by *Slatter J.*:

Bank of Montreal v. Lundrigans Ltd., 12 C.B.R. (3d) 170, 100 Nfld. & P.E.I.R. 36, 318 A.P.R. 36, 92 D.L.R. (4th) 554, 1992 CarswellNfld 17 (Nfld. T.D.) — considered

Bre-X Minerals Ltd., Re, 2001 ABCA 255, 2001 CarswellAlta 1363, 29 C.B.R. (4th) 1, 206 D.L.R. (4th) 280, [2002] 2 W.W.R. 71, 12 C.P.C. (5th) 41, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re)* 293 A.R. 73, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re)* 257 W.A.C. 73, 97 Alta. L.R. (3d) 1 (Alta. C.A.) — considered

Central Trust Co. v. Major Properties Inc., 70 C.B.R. (N.S.) 288, 1987 CarswellBC 527 (B.C. S.C.) — considered

Griffiths v. Secretary of State for Social Services, [1973] 3 All E.R. 1184, [1974] Q.B. 468 (Eng. Q.B.) — considered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) — referred to

Parsons v. Sovereign Bank of Canada (1912), [1913] A.C. 160, 9 D.L.R. 476 (Ontario P.C.) — considered

Powdrill v. Watson, [1995] 2 A.C. 394 (Eng. C.A.) — considered

Rizzo & Rizzo Shoes Ltd. (Receiver of) v. Rizzo & Rizzo Shoes Ltd. (Trustee of), 37 C.C.E.L. 74, 8 C.B.R. (3d) 291, *(*sub nom. *Peat Marwick v. Zittrer, Siblin & Associates Inc.)* 91 C.L.L.C. 14,038, 81 Alta. L.R. (2d) 242, [1991] 6 W.W.R. 62, *(*sub nom. *Rizzo & Rizzo Shoes Ltd., Re)* 119 A.R. 330, 1991 CarswellAlta 321 (Alta. Q.B.) — considered

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of), *(*sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245, *(*sub nom. *Roynat Inc. v. Allan)* 61 Alta. L.R. (2d) 165, *(*sub nom. *Roynat Inc. v. Allan)* [1988] 6 W.W.R. 156, *(*sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173, 1988 CarswellAlta 299 (Alta. Q.B.) — referred to

Standard Trust Co. v. Lindsay Holdings Ltd. (1994), 15 C.E.L.R. (N.S.) 165, 29 C.B.R. (3d) 297, [1995] 3 W.W.R. 181, 100 B.C.L.R. (2d) 378, 17 B.L.R. (2d) 127, 1994 CarswellBC 634 (B.C. S.C.) — considered

Toronto Dominion Bank v. Leonard Industries Ltd. (1983), [1984] 1 W.W.R. 120, 49 C.B.R. (N.S.) 241, 31 Sask. R. 139, 1983 CarswellSask 60 (Sask. Q.B.) — considered

Toronto Dominion Bank v. W-32 Corp., [1983] 5 W.W.R. 476, 47 A.R. 174, 27 Alta. L.R. (2d) 37, 50 C.B.R. (N.S.) 78, 1983 CarswellAlta 264 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 13.3(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06 [en. 1992, c. 27, s. 9(1)] — referred to

s. 14.06(1) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(1.1) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(1.2) [en, 1997, c. 12, s. 15(1)] — considered

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(3) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(6) [en. 1997, c. 12, s. 15(1)] — considered

s. 47 — considered

s. 47(2) — considered

ss. 69-69.4 — considered

s. 215 — considered

s. 244 — considered

s. 247 — considered

Employment Standards Code, R.S.A. 2000, c. E-9

s. 5 — considered

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally — referred to

s. 1(tt) "person responsible" (iii) — referred to

s. 134(b) "operator" (vi) — referred to

Judicature Act, R.S.A. 2000, c. J-2

Generally — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7

Generally — considered

s. 64(c) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 386 — considered

R. 387(2) — considered

R. 548 — considered

***Slatter J.*:**

1 The issue on this application is the proper scope of an *ex parte* order appointing an interim receiver under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Facts

2 The debtor Big Sky Living Inc. owns and is developing a piece of land in Parkland County, just west of Edmonton. HSBC Bank of Canada provided financing for the project, and took as security a general security agreement and a mortgage on the lands. HSBC has advanced approximately $1.5 million to Big Sky.

3 There are other creditors and interested parties. Country Squire 2000 Inc., the previous owner of the lands, has a second mortgage on the title. 416099 Alberta Ltd. claims an interest in the lands and has filed a caveat to protect it. Atco Gas and Pipelines Inc. has a right-of-way across the lands, and proposes to install a high pressure gas pipeline which may require an increased setback between the right-of-way and the development, and which may therefore affect the value of the property. Eng-Con Holdings Ltd. has been installing utility infrastructure on the lands. On May 23, 2002 Eng-Con filed a builder's lien on the property for $587,887.

4 The filing of the builder's lien caused concerns for HSBC. On May 30, 2002 HSBC gave Big Sky ten days' notice of its intention to enforce its security, as required by s. 244 of the *Bankruptcy and Insolvency Act*. On May 31, 2002 HSBC commenced these proceedings, and on June 3, 2002 it applied to Smith, J. for an interim receiver under s. 47 of the *Bankruptcy and Insolvency Act*. Smith, J. was apparently concerned by the short notice that had been received by some of the other interested parties, a problem that was compounded by the breadth and complexity of the proposed order, which is 15 pages long. For ease of reference a copy of the order that Smith, J. granted is attached to these reasons, with those portions that she added in handwriting shown in italics. As can be seen, Smith, J. granted the order effective until Friday, June 7, 2002 only, and directed that the order be renewed in Chambers on that date. On June 7th the matter came before me in Chambers for review. Upon reviewing the Order I became concerned about the breadth of some of the clauses, and I indicated to counsel that I was not prepared to grant the Order in the form tendered. I invited counsel to provide me with argument and authorities as to the proper scope of the Order, and to permit counsel to do so I extended the Order twice. Counsel appeared before me on June 21, 2002 and presented argument, at which point I extended the Order again, pending delivery of these Reasons for Decision.

5 Counsel advises that Big Sky, 416099, and Eng-Con are now consenting to the Order. Country Squire and Atco are not opposing it. This eliminates any concerns that the Court might have had about the impact of the Order on those parties. There remain, however, concerns about the scope and breadth of the Order.

The Statutory Framework

6 The jurisdiction to appoint an interim receiver is found in s. 47 of the *Bankruptcy and Insolvency Act*, which reads as follows:

> **47.(1)** - Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> **(2)** - The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.
>
> **(3)** - An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (a) the debtor's estate; or
>
> (b) the interests of the creditor who sent the notice under subsection 244(1).

7 It is precondition to the appointment of an interim receiver under this section that notice of intention to enforce security has or is about to be sent. That condition has been complied with in this case. The test is then whether it is "necessary for the protection of the estate or the creditors" to appoint an interim receiver. Smith, J. obviously felt that this condition had been satisfied, and I respectfully agree. The question is then what powers and directions should be given to the interim receiver. The wording of s. 47(2) is very wide, but in granting powers to the interim receiver the Court should have regard to what is truly "necessary for the protection" of the estate or the creditor.

8 Section 47 appears to contemplate that an interim receiver will be appointed for a brief period only, to protect the interest of the creditors while the 10-day notice period under s. 244 is running. The section does not appear to contemplate that the interim receiver will actually carry on the business of the debtor, although that is the intention of HSBC in this case. However, given the consent or lack of opposition by the key players described above, this issue need not be explored further. HSBC had the power to appoint a receiver under its general security agreement, and it could also have applied for a receiver under the *Judicature Act*, or it could have petitioned Big Sky into bankruptcy. HSBC obviously found the interim receivership route to be more convenient, and the other parties concur.

Statutory Protection for an Interim Receiver

9 There are a number of provisions in the *Bankruptcy and Insolvency Act* that provide some protection to an interim receiver. These provisions are primarily designed to allow the interim receiver to deal with the debtor's assets in an orderly way, without being bombarded by litigation or burdened by frequent court appearances. They protect the interim receiver from some risks and claims which Parliament has obviously felt should not, for reasons of fairness or convenience, be visited upon the receiver. By limiting the exposure of receivers, these provisions undoubtedly helped reduce the overall costs of receiverships.

10 The key provisions that provide protection for an interim receiver are as follows:

> **14.06(1)** No trustee is bound to assume the duties of trustee in matters relating to assignments, receiving orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.
>
> **(1.1)** In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes an interim receiver or a receiver within the meaning of subsection 243(2).

(1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

. . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

. . .

215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

In addition to s. 14.06(2), other sections of the *Act* deal with environmental risks in some detail. Section 14.06(4) limits the obligation of the interim receiver to comply with orders made to remedy any environmental condition. To obtain the protection of this section, the interim receiver must either comply with the order, abandon the property in question, contest the order, or apply for a stay of the order. The *Act* also provides a super priority for the costs of remedying certain environmental damage.

11 The Order applied for by HSBC is in many respects prospective, and it goes far beyond the provisions of the *Act*. It gives the interim receiver the power to deal with matters that have not yet arisen, and in all likelihood will never arise. The Order might be described as a "standard form order", and it attempts to anticipate problems or issues that might arise in a receivership. It obviously makes sense for the Order to be wide enough that the Interim Receiver does not have to be back in Court continuously seeking advice and direction on small points. There is nothing particularly objectionable in using precedents and standard form orders. However, an applicant tendering an order for signature by the court has a duty to edit it in each case to make sure that it is appropriate for the particular circumstances.

12 Of greater concern is the fact that the Order purports to affect the rights of parties that have not been served with the proceedings to date, and have probably not even been served with the Order. Those parties include employees, unsecured creditors, government agencies, landlords, and many others. While it is appropriate to anticipate *powers* that the Interim Receiver might require in the future, it is less appropriate to try and anticipate and cut off *rights* of third parties that might exist. When an order purports to affect the rights of persons who have not been given notice of the proceedings, then it is an *ex parte* order as against those persons and the usual principles apply. The Applicant has a duty to make full disclosure to the Court. The relief sought is extraordinary, and should only be granted in a clear case. Generally speaking, the order should be no wider than the circumstances require. Relief which is not urgent should not be granted *ex parte*, but should await proper notice. Further, it is generally contemplated that *ex parte* orders will be served forthwith on all affected parties; it is clear that the Applicant does not propose to serve all affected parties (for example landlords, employees and contractors) until some particular need arises.

13 A further problem with the Order in question is that it is in some respects "legislative" in nature. Not only does it purport to give the Interim Receiver certain powers, and to cut off the rights of others, it then goes on to provide sweeping definitions and descriptions of what those rights and immunities encompass. In many cases the provisions of the Order go far beyond the statutes that are in place. It is generally inappropriate for the Court to define what Parliament has chosen not to define, and to expand at large on what particular statutory provisions mean. These parts of the Order are declaratory in nature. The Court has

always been careful about issuing declaratory judgments, and will not issue them when the issues are moot, where the issues are overly abstract or academic, or where there is no necessity on the facts of the particular case to issue a declaration. There are good reasons for these rules, relating to the constitutional division of powers and relating to the role of a common law court in developing the law. Some clauses in the tendered Order are objectionable on this basis.

14 Counsel for the Applicant was unable to provide any authority supporting an order of the scope asked for. He was able to provide copies of two interim receivership orders granted by the Ontario Superior Court of Justice - Commercial List, but these were simply copies of the orders as granted and there were not written reasons provided to explain the orders.

15 With those general comments in mind, some of the specific clauses in the order require examination.

Solicitor-Client Notice Requirements

16 Clause 3 of the Order directs all persons to deliver all of the property of the debtor to the Interim Receiver. This is the essence of the receivership order. Included is a direction that all documents belonging to the debtor be delivered over, and in this respect the Order is directed at all "legal counsel". In *Bre-X Minerals Ltd., Re* (2001), 97 Alta. L.R. (3d) 1, 293 A.R. 73, 206 D.L.R. (4th) 280, [2002] 2 W.W.R. 71 (Alta. C.A.) the Court held that a trustee does not have a general power to waive solicitor-client privilege of the debtor. Accordingly, this provision in the Order is overly broad unless it specifically exempts privileged documents, as it is not clear that an interim receiver would have greater rights.

Exemption From Notice Requirements

17 Clause 5(f) of the order grants the Interim Receiver the power to sell assets, and ends with this clarification:

> . . . and in any case without compliance with the provisions of Part V of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 or any other notice, statutory or otherwise, which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, in respect of which notices the Receiver be and is hereby relieved.

In my view, the Court should not grant relief in this form. It is legislative in nature, in the sense that it purports to exempt the Interim Receiver from the provisions of the *P.P.S.A.*, and any other statute to the same effect. Parliament has not seen fit to grant interim receivers any such blanket statutory exemption, and it is inappropriate for the Court to purport to do so. If the Interim Receiver can establish that it is in fact exempt from the provisions mentioned, whether for constitutional or other reasons, then it may proceed as it is advised. However, until there is an express legislative provision exempting interim receivers from the *P.P.S.A.*, or a binding decision of a court to the same effect, this provision should not appear in an *ex parte* receivership order.

18 While s. 64(c) of the *P.P.S.A.* gives the Court the jurisdiction to dispense with notice, I do not believe that it was ever contemplated that the Court would grant a blanket exemption in the form contemplated by this Order. There may be particular instances involving particular sales where the Interim Receiver does not wish to give notice to particular persons or groups of persons. In those cases the Interim Receiver should apply, setting out the full particulars of the circumstances that have arisen, and ask for an order dispensing with the service of notice as required.

Bankruptcy

19 Paragraph 5(u) of the Order authorizes the Interim Receiver to assign the debtor into bankruptcy, and "to act as Trustee in Bankruptcy of the estate". Section 13.3(2) of the *Act* recognizes that it is not always appropriate for a receiver to act as a trustee in bankruptcy. There is no urgency involved, and nothing on the record to justify this relief. The provision anticipates a future state of affairs that is unknown, and this provision is not justified.

Landlords

20 Clause 5(x) of the order allows the Interim Receiver to surrender any part of any leased premises, "in which case only the prorated portion of the occupation costs shall apply". It is not clear on the record whether Big Sky has any leased premises, but it is clear that any landlord has not been served with notice of this application. There is nothing on the record that would establish

any urgency justifying the granting of this type of relief in an interim order on an *ex parte* basis. If the Interim Receiver believes that it has this type of power at law, and the order is merely intended to be declaratory of that power, then the Interim Receiver should simply proceed to exercise the rights it believes it has. However, if the Interim Receiver wishes to have that right declared and crystalized by the Court, and set out in an order that is enforceable by the usual methods, then the Interim Receiver is under an obligation to serve notice on the landlord whose rights are being affected. This is a good example of a provision in the Order which is designed to prospectively cut off the rights of a party who has not been served with any of the proceedings.

Variation of the Order

21 There are a number of provisions in the Order that provide that an affected party can apply for a variation. Variation of *ex parte* orders is provided for by Rule 387(2), but such a provision is almost invariably also included in the *ex parte* order. Variation clauses are also advisable in orders granting general relief, such as receivership orders, because one can never anticipate all of the ramifications of the order.

22 It is sometimes argued that the variation clause mitigates any concerns the Court might have about third parties whose rights are affected by the order. The argument is that any such party can simply come forward and have the order varied. While the variation clauses can provide some comfort to the Court, they are not a complete answer. First of all, an order with a variation clause in effect reverses the burden of proof, and there is no reason why the affected party should face that burden when the order was granted *ex parte*. Secondly, the affected party may be prejudiced because it cannot do the prohibited thing without first obtaining leave of the Court, and the passage of time might well prejudice that party. Thirdly, there is an expense in making the initial application. Here, of course, there is a balancing of interests involved, because the Interim Receiver must have some ability to carry on with the business of a debtor without undue interference by unilateral acts of third parties. However, as a general rule, variation clauses are not a complete answer to the type of sweeping provisions included in this Order.

23 In paragraph 6 of the Order, the Interim Receiver is given the right to apply to vary the Order on two days' notice. All the other provisions of the Order providing for variation by third parties (such as paragraphs 8 and 30, and paragraph 33 as it originally read) provide for seven days' notice. It is customary for orders of this type to provide for variation on two days' notice, the time set out in Rule 386, and no reason was given why a general enlargement of time under Rule 548 is called for. If two days is insufficient notice in a particular case, the Interim Receiver can apply for an adjournment or other relief.

Contracting Parties

24 Paragraph 7 of the Order is directed at those who have contracts with the debtor, including "all persons, firms, corporations, governments, governmental agencies, municipalities, counties and other entities of any kind or nature", including all of the officers, directors and agents of Big Sky. Each of these persons are restrained from "varying, amending, terminating, cancelling or breaching any contracts or agreements with the debtor". In case someone should discover any way of circumventing the staggering breadth of this provision in the Order, the topic is picked up again in paragraphs 9(c), (d), (e) and (f). By paragraph 9(c) all persons are restrained from "accelerating, terminating, suspending, modifying or cancelling any agreements". Paragraph 9(c) ends up with a form of mandatory *ex parte* injunction requiring all persons to "continue to perform and observe" all agreements. It would appear to be wide enough to prevent any employee from resigning. Paragraph 9(f) of the Order restrains the exercise of certain options, remedies or rights, most of which would arise by contract. Paragraph 9(e) restrains even the "asserting or perfecting" of any right.

25 There are innumerable contracting parties who might be affected by these provisions, most of whom have no notice of the proceedings. Assuming that the contracting parties would have the right to act as contemplated under their contracts but for the provisions of this Order, then their rights are being interfered with without notice to them. If it is being suggested that this interference with contractual rights is the legal consequence of an interim receivership, then the provisions of the Order are merely declaratory and probably redundant. As such they would fall afoul of the rule against abstract and potentially moot declarations. These provisions of the order are also legislative in nature. There is nothing in the *Bankruptcy and Insolvency Act* which restrains contracting parties in the manner set out in this Order. Parliament not having seen fit to enact such a provision, it is inappropriate for the Court to attempt to do so under the guise of granting a receivership order.

26 In any event the rights of contracting parties should not be swept away or crystalized in a court order on an *ex parte* basis unless urgency can be shown. There is nothing on the record that would establish why such relief is necessary for the protection of the debtor's estate. There is also no evidence of any urgency justifying this relief being granted *ex parte*.

27 The only portion of these clauses which is justified is the provision in the middle of paragraph 9(c) which restrains the interference with any utilities or telecommunications being provided to the debtor. Because of the duty of public utilities to provide service on payment, and the severe effect that disruption to these services would have, those provisions may remain in the Order. The Applicant has leave to make further submissions justifying any other provision of clauses 7 and 9.

Restraint on Proceedings

28 Paragraph 9 of the Order opens with a general restraint on any proceedings against the Interim Receiver or the property of the debtor. The Order then goes on to provide two pages of single-spaced detail about the general restraint on proceedings, which is said to be "for greater clarity and without limitation". Paragraph 30 is on the same topic and to the same effect. Some general observations are appropriate. First of all, it is well known that s. 69 through to s. 69.4 of the *Act* impose a general stay of proceedings during a bankruptcy. The provision of a stay is one of the central tenets of the bankruptcy system, as it allows the trustee to realize the assets of the debtor in an orderly way. However, it is significant that none of the sections providing a stay extend to an interim receivership. It has been suggested that absent a statutory authority the Court can control actions against a receiver, but not against the debtor: *Toronto Dominion Bank v. W-32 Corp.* (1983), 27 Alta. L.R. (2d) 37, 47 A.R. 174, 50 C.B.R. (N.S.) 78 (Alta. Q.B.).

29 The only restraint on proceedings relating to interim receiverships is to be found in s. 215, and it merely states that no action shall be brought against the interim receiver for any action taken pursuant to the *Act*, without the leave of the Court. It should be noted that this is a prohibition against actions against the interim receiver, as opposed to actions against the property of the debtor. It is accordingly of some concern that the Applicant is seeking an order from the Court which provides a stay of proceedings in circumstances where Parliament has not seen fit to impose one. Nevertheless, I am satisfied that in most circumstances the orderly management of the affairs of the debtor will require some protection for the interim receiver from inappropriate litigation: see F. Bennett, Bennett on Receiverships (2d ed., 1999) at pp. 221-24. Any general stay should however make it clear that leave of the Court to sue may be obtained *nunc pro tunc*, to avoid the issues that arose in *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 61 Alta. L.R. (2d) 165, 69 C.B.R. (N.S.) 245 (Alta. Q.B.).

30 The second observation I would make about the Order is that while the preamble of paragraph 9 talks about "proceedings", the detail of the paragraph then goes beyond matters that would normally be considered "proceedings". While it may be a legitimate drafting technique in a contract to provide expansive and artificial definitions, it is generally inappropriate to do so in a court order, and it is certainly inappropriate to do so unless the Applicant specifically draws the provisions in question to the attention of the Court.

31 I have already mentioned (supra, para. 24) paragraph 9(c), which deals with the rights of contracting parties, and not really with proceedings at all. In addition, paragraph 9(b) states that proceedings "shall specifically include any access to or development of any utility right-of-way affecting the property or any part thereof". Counsel quite properly drew this provision to my attention, and indicated that it was an attempt to deal with the possibility that Atco might enter upon its right-of-way and install its high pressure gas line, before the Interim Receiver would have an opportunity to properly assess that issue. Since Atco is not opposing this order, I am no longer concerned about the substance of the paragraph. However, any provision like this one designed to have specific effect against one person should have been drafted naming the particular party (Atco), and it should not have been worded so generally as to cover any and all utility rights-of-way. Further, this specific provision should have appeared in a separate paragraph, to emphasize that it was an application for specific relief against a specific party, and was not simply a request for general powers for the Interim Receiver. I understand that the Interim Receiver and Atco are discussing this issue, and they may address the proper wording of the clause in the Order as required.

32 Paragraph 9(b) includes a prohibition against the termination of any permits or licenses affecting the debtor. This provision is of some concern, because there is no indication of what these licenses or permits may consist, and accordingly there can be no assurance that the Court has any jurisdiction to interfere with them. However, licenses or permits may well be in the same category as utilities and telecommunications, in that their termination might well affect the viability of the enterprise. I am therefore prepared to grant an order that no license or permit affecting the debtor should be terminated or suspended except on seven days' notice to the Interim Receiver. That would give the Interim Receiver sufficient time to seek whatever remedies might be available to it in the circumstances.

33 Paragraph 9(g) of the order provides that no person may make demand upon, send notice to, or declare default with respect to the debtor or its property. The record does not establish that such a provision is necessary for the preservation of the estate. The sending of such notices can at most fix the legal rights of the parties. It will not involve physical interference with the property of the debtor or its business. If persons have such rights, there is no obvious reason why the Court should intervene *ex parte* and take those rights away from them, especially in such a broad and general way. If it is a legal effect of an interim receivership that such rights may not be exercised, then this provision of the Order is redundant in any event, and any purported exercise of the rights will presumably be ineffective. The Applicant is at liberty to address this issue if it can establish that any of the rights mentioned should be restrained.

34 Paragraph 9(h) of the Order again has nothing to do with proceedings, but deals with deposits made by the Interim Receiver. There would appear to be no urgency in this regard, and no reason to deprive people on an *ex parte* basis of whatever rights they may have. If the Interim Receiver wants to make deposits on conditions, it is free to do so. If any other specific problems arise, the Interim Receiver can apply for advice and directions.

35 In summary, I am prepared to grant some general protection to the Interim Receiver against litigation. However, the provisions of the Order should provide that:

a) proceedings outstanding on the date of the Order are stayed for 30 days, without affecting any steps taken before service of the Order;

b) proceedings commenced after the date of, but before service of the Order are stayed for 30 days from service;

c) after service of the Order a party may commence and serve new proceedings, but they may not be further prosecuted without leave of the Court.

Expansive definitions that are not found in the *Act* should not be provided in the Order, except that I am prepared to grant relief as set out in the first three lines of paragraph 9(b) as it may not be apparent to the untrained reader that realization remedies are "proceedings". I am prepared to grant an order restraining interference with utilities and telecommunications as previously indicated. I am also prepared to grant an order restraining interference with licenses as previously stated. The balance of paragraph 9 is unwarranted in the circumstances.

Employees

36 Paragraph 11 of the Order, which is more than one page in length, deals with the rights of employees. No employees have been served with these proceedings, and they accordingly have no notice of this application.

37 The status of employment contracts on the appointment of a receiver is somewhat unclear. Where the appointment is made privately under a security agreement, then contracts of employment are not necessarily terminated: *Griffiths v. Secretary of State for Social Services* (1973), [1974] Q.B. 468 (Eng. Q.B.), at 485; *Powdrill v. Watson*, [1995] 2 A.C. 394 (Eng. C.A.), at 440. There is authority that a court directed receivership results in the automatic termination of employment contracts: *Toronto-Dominion Bank v. Leonard Industries Ltd.* (1983), 49 C.B.R. (N.S.) 241 (Sask. Q.B.); *Central Trust Co. v. Major Properties Inc.* (1987), 70 C.B.R. (N.S.) 288 (B.C. S.C.). But the leading case of *Parsons v. Sovereign Bank of Canada* (1912), [1913] A.C. 160 (Ontario P.C.), at 171 suggests that termination is neither automatic nor universal:

> ... The inference is that as between the company and the appellants the contracts continued to subsist. The receivers and managers were exercising the powers of continuing the business given to them under the orders of the Court by taking no actual steps to determine the relations between the company and the appellants. The state of matters was one totally different from that in *Reid v. Explosives Co., Ld.* (1887), 19 Q.B.D. 264, where the appointment by the Court of receivers and managers was held, having regard to the character of the contract in that case, which was one of personal service, to have put an end to it. As Fry L.J.,however, points out in his judgment at p. 269, even in the case of contracts of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The company remained in legal existence, and so did its contracts, until put an end to otherwise.

The suggestion that employment contracts are terminated on a receivership is based on the common law rule that the personal nature of such agreements prevents their assignment, a concept that appears somewhat artificial in the modern economy, and the context of the continuation of a business by a receiver.

38 There is authority that a bankruptcy has the effect of terminating employment: *Rizzo & Rizzo Shoes Ltd. (Receiver of) v. Rizzo & Rizzo Shoes Ltd. (Trustee of)*, [1991] 6 W.W.R. 62, 81 Alta. L.R. (2d) 242, 119 A.R. 330, 8 C.B.R. (3d) 291 (Alta. Q.B.). There does not appear to be authority to the same effect respecting an interim receivership under s. 47. In any event, if a party wishes to have legal rights declared and crystalized by court order, the rules of procedure require that the affected parties be given notice. This requirement of service cannot be avoided by an argument that the rights in question are "obvious".

39 Paragraph 11 starts out by providing that all employment is "hereby" terminated. I am prepared to assume that the Interim Receiver may unilaterally terminate the employment of the employees. If the Interim Receiver did so, or if that is the legal effect of a receivership, it might well be appropriate on notice to seek a declaration of the Court to confirm that fact. However, that is a far different thing from asking the Court, by court order, to terminate employees, or to declare that result, if only because there is no evidence on the record whatsoever to justify such action. A further problem arises in that an employee might be terminated by this Order, but not find out about the termination until sometime later when he or she is actually served with the Order. Accordingly, the provision for termination should not be included. The Interim Receiver may terminate employees if it wishes, and may apply for further relief on notice to affected employees.

40 Paragraph 11 goes on to provide that if the Interim Receiver employs any person formerly employed by the debtor, the employment shall be deemed not to be continuous. The paragraph then goes on for many lines detailing the rights that such employees will not have. It goes on to provide that the Interim Receiver is not liable to the employees for any unpaid wages "whether pursuant to statute or common law". The Interim Receiver is essentially asking the Court to grant it a blanket exemption from the laws relating to employment, including any statutes. If the Interim Receiver is entitled to such immunity by operation of the *Bankruptcy and Insolvency Act*, so be it. In that event the provision is merely declaratory and redundant. It is objectionably wide, abstract and theoretical, and I decline to exercise my discretion to grant declaratory relief on this basis, *ex parte*, even if the Applicant is right about the law. If the Applicant is not right about the law, then there is no basis on which the Court could sweep away the rights of all these unknown employees. I say no more about the substantive law except to note s. 5 of the *Employment Standards Code*, R.S.A. 2000 c. E-9:

> **5.** For the purpose of this Act, the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged *or if it continues to operate under a receiver or receiver manager*. (emphasis added)

Also relevant is s. 14.06(1.2) of the *Bankruptcy and Insolvency Act,* which deals with the continuation of employment by the Interim Receiver. The exact interplay of these two sections is complex, and while the Receiver might argue that the provincial

provision is inapplicable for constitutional reasons, the very presence of these sections makes it inappropriate to include in the Order the sweeping words of paragraph 11. Section 14.06(1.2) does not exempt the debtor's estate or the Interim Receiver from all of the common and statutory law of employment. Nor does that section state that employment is "not continuous"; it merely states that the Interim Receiver is not liable for certain claims *ex officio*.

41 Paragraph 11 goes on to provide that if the Interim Receiver chooses to pay an employee, the employee is deemed to have assigned his or her rights to the Interim Receiver. Again, if the Interim Receiver wishes to obtain an assignment of rights from an employee, that assignment should be obtained in writing from the employee, and not indirectly by a court order.

42 In summary, the whole of paragraph 11 is overly broad, theoretical and abstract, and does not belong in an *ex parte* receivership order of this type.

Environmental Risks

43 The increased societal sensitivity to environmental damage and contamination created new issues for receivers and trustees in bankruptcy. Particularly problematic were provisions in environmental legislation that imposed liability not only on those who contaminated property, but on those who thereafter came to own or control that property. In 1992 Parliament addressed those problems by the new provisions found in s. 14.06 of the *Bankruptcy and Insolvency Act*, which provisions were modified and extended to interim receivers in 1997: see Marin and Ilchenko, "Environmental Liabilities of Trustees and Receivers" (1997), 14 Nat. Ins. Rev. 19. In addition to limiting the liability of trustees and interim receivers for environmental damage, the *Act* now provides a super priority for the costs of environmental clean-ups.

44 The case law on the environmental liability of receivers is sparse and inconsistent. In *Bank of Montreal v. Lundrigans Ltd.* (1992), 92 D.L.R. (4th) 554, 12 C.B.R. (3d) 170 (Nfld. T.D.) the Bank applied for an order appointing a receiver, but with a limit on the environmental liability of the receiver to the net value of any contaminated property. It was submitted that no receiver would take the appointment without this protection, or an indemnity for these risks that the Bank was not prepared to give. The issue was argued on notice to the federal and provincial governments, who opposed the order. The key finding of the Court was that the various pieces of environmental legislation in question did not purport to impose liability for past environmental damage on receivers, as the definitions of those responsible for such damage did not expressly include receivers. On this interpretation of the legislation the order sought was merely declaratory of the law, namely that the environmental liability of the receiver was limited to the net value of the assets.

45 The *Lundrigans* case was not followed in *Standard Trust Co. v. Lindsay Holdings Ltd.* (1994), [1995] 3 W.W.R. 181, 29 C.B.R. (3d) 297 (B.C. S.C.) [hereinafter *Lindsay*]. *Lindsay* was decided after the 1992 amendments to the *Bankruptcy and Insolvency Act* provided some protection to trustees, but before the 1997 amendments extended that protection to receivers. The applicant in *Lindsay* wanted an order exempting the receiver from all past, present and future environmental liability, except for failure to comply with written directions from environmental regulators. Both levels of government were given notice, and opposed this blanket exemption from the law, and the effective delegation to the regulators of the environmental management of the assets in the estate. The Court in *Lindsay* held that environmental legislation did apply to receivers, even if they were not specifically named in the legislation. The Court held at paras 14 - 15:

> Rather than suggest that the legislation must specifically *include* entities not intended to be made liable, the more logical approach would be to expect legislation to *exclude* those not liable. This is precisely the approach taken by Parliament with respect to trustees in bankruptcy. Under a recent amendment to the *Bankruptcy and Insolvency Act*, R.S.C. 1992, c. 27, s. 9, the potential environmental liability of a trustee has been expressly limited. No similar limitation is given to receivers in any legislation and accordingly I conclude that the legislators intended them to fall within the ambit of environmental legislation.
>
> To make the order requested the court would have to find jurisdiction within its own Rules, the *Law and Equity Act* or its inherent jurisdiction. Rule 47 provides that the court may appoint a receiver "either unconditionally or on terms ..." The *Law and Equity Act* empowers the court to appoint a receiver and the order may be made "on terms and conditions

that the court thinks just." Neither of these, in my opinion, empowers the court to impose conditions that conflict with statutory duties, rights or liabilities.

The order was refused.

46 In Alberta, it is clear that receivers are bound by environmental legislation. They are expressly included among the "persons responsible" mentioned in sections 1(tt)(iii) and 134 (b)(vi) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, ch. E-12 (*"E.P.E. Act*"). The scope of the liability of a receiver was discussed by the Court of Appeal in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280, 80 C.B.R. (N.S.) 84 (Alta. C.A.). There is no basis for holding that a receiver in Alberta has any immunity for environmental damage beyond what is found in s. 14.06, or the *E.P.E. Act* itself. As was held in ***Lindsay***, the Court has no general jurisdiction to grant exemptions from statutes.

47 The provisions of s. 14.06(2) are fairly short and have been reproduced *supra*, paragraph 10. Essentially they provide that a receiver is only liable for environmental damage arising after the receiver's appointment and because of its gross negligence or wilful misconduct. The Court is given no power to extend or limit the protection given. The Applicant has turned those brief provisions into over one page of text in the Order, encompassing clauses 22 through 28.

48 The initial problem with the proposed environmental provisions in the Order is that they contradict other provisions of the Order. Paragraph 2 of the Order places all of the assets of the debtor under the power of the Interim Receiver. Paragraph 28 then provides that the Order does not vest in the Interim Receiver care or control of any property which "may be" environmentally polluted. This latter clause is unacceptable, because at best it creates great uncertainty as to which properties are under the control of the Interim Receiver, and at worst it gives the Interim Receiver some sort of *ex post facto* right to elect whether it has been in control of property or not. Sections 14.06(4)(c) and 14.06(6) contemplate the abandonment of contaminated property by the receiver, which is the process that should be followed if this later becomes necessary.

49 There would be nothing objectionable to a provision in the Order which essentially parallels s. 14.06(2) of the *Bankruptcy and Insolvency Act*. While such a provision might be redundant in legal terms, it is helpful to note those provisions in the Order. However, the Order as drafted goes considerably beyond this. First of all, it deems the Interim Receiver not to be an occupier for the purposes of "environmental legislation". The *Bankruptcy and Insolvency Act* does no such thing. There is no indication what environmental legislation is being referred to, or whether the Court has any jurisdiction to make this type of declaration. No notice has been given to any Department of Environment or other regulator who might have an interest in the matter. These provisions are legislative in nature, in the sense that the Court is being asked to extend general and unlimited immunity to the Interim Receiver.

50 Paragraph 23 of the Order does roughly parallel section 14.06(2) of the *Bankruptcy and Insolvency Act*. However, it goes further in that it states that the Interim Receiver's immunity comes into effect on the later of the appointment of the Interim Receiver, or the date the Interim Receiver goes into possession. Section 14.06(2) contains no such provision. Presumably if Parliament had intended to extend that type of immunity, it would have done so.

51 Paragraphs 26 and 27 of the Order purport to define "Environmental Legislation" and "Adverse Environmental Condition". Parliament did not see fit to define either of these terms, and did not see fit to exempt trustees from all of the requirements of environmental legislation as implied by paragraph 23 of the Order. For example, I note that clause 14.06(3) of the *Act* requires the Interim Receiver to make any reports or disclosures called for by such legislation. Counsel for the Applicant indicated that these definitions were to "provide comfort" to the Interim Receiver, and to clarify what the *Act* "really means". He indicated that receivers have more faith in court orders than in the *ex post facto* interpretation of statutory provisions. Whether that be so, Parliament did not see fit to define these terms, and I cannot see why the Court should do so prospectively and in a factual vacuum.

52 Paragraph 25 of the Order limits the Interim Receiver's liability for environmental damage to the "Net Realizable Value of the Property" in the estate. Again, the *Bankruptcy and Insolvency Act* contains no such provision. If Parliament had intended a cap on the liability of receivers, it presumably would have provided for one. Furthermore, I note that the Net Realized Value

of the property is defined in paragraph 29 as being net of the remuneration of the Interim Receiver and a number of other items including "distributions of proceeds". Accordingly, if the estate was only large enough to pay the secured creditors and the Interim Receiver's compensation, there would be nothing left and the Interim Receiver would be absolved of any liability whatsoever. After distribution of the assets, the Interim Receiver's liability is limited under the Order to the amount of its fees. I am unable to see on what basis the Court could grant this sort of relief *ex parte* and before the Interim Receiver has even gone into possession.

53 In summary, the environmental clauses provided in this order are inappropriate. The Applicant is at liberty to insert a clause which essentially parallels the provisions of s. 14.06(2) of the *Act*.

General Protection of the Receiver

54 Paragraph 29 purports to limit the liability of the Interim Receiver to the Net Realizable Value of the estate. I have already commented on the breadth and effect of the definition of Net Realizable Value of the assets.

55 Paragraph 29 purports to protect the Interim Receiver from all kinds of liability "whatsoever", including negligence and wilful misconduct. Paragraph 29 is so broad it even appears to protect the Interim Receiver if one of its employees negligently injured someone in a motor vehicle accident while acting in the scope of the employee's duties. It contradicts s. 247 of the *Act* which requires the receiver to act honestly and in a commercially reasonable manner. It purports to cap the liability of the Interim Receiver in connection with any environmental legislation, or labour or employment laws, something that s. 14.06(1.2) does not do. There is no obvious jurisdiction in the Court to exempt anybody from the general operation of statutes, or excuse liability for their own negligence, or to limit their liability. Apart from the environmental damage cases mentioned, there does not appear to be a decision where it has been attempted. Even the *Lundrigans* case is based on the premise that it was merely declaratory of the law. There is no provision in the *Bankruptcy and Insolvency Act* which provides any limit on the liability of receivers, whether tied to the net value of the estate or otherwise. There may situations, such as the one that arose in *Lundrigans*, where the public interest requires a receiver to wind up a high risk enterprise but no one will accept the assignment without some protection. Whether the Court can grant that protection will have to be decided when the point arises. But these protective clauses should not be included in all receivership orders as a matter of routine, and they should only be granted on notice to all governments and interested parties. In my view, the provisions of Clause 29 are unjustified on this record. The Applicant may include in the Order a provision that paraphrases s. 215. A provision paraphrasing s. 247 should also be included.

56 The indemnity in paragraph 16 is acceptable, but the reference to "gross negligence" should be a reference to "commercial reasonableness", the standard found is s. 247.

Conclusion

57 In conclusion, the Applicant has established that it is entitled to an interim receivership order in accordance with s. 47 of the *Bankruptcy and Insolvency Act*. However, the order tendered for signature is overly broad, and overly declaratory and legislative in nature. It purports to affect in general terms the rights of broad and undefined classes of parties who have not received notice of this application. It goes far beyond what is necessary for the protection of the estate of the debtor. It attempts to provide the Interim Receiver with immunities and protections that are not authorized by statute. The Order as presently granted will be extended for a further five days from the date of these Reasons, during which time the Applicant can draft and submit a further order for signature.

Order accordingly.

APPENDIX
Order of Smith, J. dated June 3, 2002

DISTRICT OF ALBERTA — COURT NO. 96892
DIVISION NO. 1 — ESTATE NO. _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF

THE INSOLVENCY OF

BIG SKY LIVING INC.

BEFORE THE HONOURABLE —MADAM JUSTICE L.P.L.J. SMITH—IN CHAMBERS, LAW COURTS,—EDMONTON, ALBERTA	)—) —) —)	— ON MONDAY, THE 3{RD} —DAY OF JUNE, 2002.

ORDER APPOINTING INTERIM RECEIVER

UPON the application of the **HSBC BANK CANADA** (the "Bank"); AND UPON having read the Affidavit of DAVID BELL, filed; AND UPON hearing counsel for the Bank;

AND UPON IT APPEARING that the Bank has a security interest in all present and after-acquired personal property of **BIG SKY LIVING INC.** (the "Debtor"), and has a first mortgage registered against title to certain real property located in the Province of Alberta;

AND UPON IT APPEARING that the Bank has sent to the Corporation the notice prescribed by Subsection 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (as amended) (the "BIA");

AND UPON IT APPEARING to this Honourable Court that there is sufficient urgency and reason for abridging notice of this application;

AND UPON IT APPEARING that it is necessary for the protection of the interests of the Bank and of the Debtor's estate that this Order be granted;

And upon Big Sky not appearing, though served, Atco and Country Squire not appearing, though served, Engcon Holdings appearing on a watching brief;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The time for service of the Notice of Motion and the Affidavit(s) is hereby abridged so that this Motion is properly returnable today and that further notice is hereby dispensed with.

2. Effective as of 12:01 a.m. Mountain Standard Time on the date hereof, KMPG Inc. is hereby appointed interim receiver pursuant to section 47(1) of the BIA (the "Receiver") without security of all of the property, assets and undertaking of the Debtor (collectively, the "Property"), with power to act at once to administer, manage, take control of, receive, preserve, protect, dispose of, deal with and sell the Property or any part thereof as it sees fit subject to further Order of this Court to the extent required herein, and the Receiver is hereby empowered and authorized to take possession and control of the Property, and any and all proceeds, receipts and disbursements arising out of or from the Property, and to act at once in respect thereof, until further Order of this Court.

3. The Debtor, its present and former officers, directors, solicitors, agents, custodians, managers, employees, servants, limited partners, shareholders, members, contractors, any persons acting on their instructions or behalf including, without

limitation, any accountants thereof or legal counsel thereto, and all other persons having notice of this Order (collectively, the "Affected Persons"), shall forthwith grant access to and deliver possession of the Property of every nature and kind whatsoever, wheresoever situate to the Receiver including, without limitation: (a) all monies, cash on hand, cheques, post-dated cheques and remittances of any kind relating to the Property; (b) all books, securities, documents, contracts, tenancy agreements, deeds, engineering drawings, papers, records, computer records (including computer facilities and access codes) and accounts of every kind relating thereto; and (c) any other records and information of every kind and nature relating to the Property or the business carried on by the Debtor and to provide or permit the Receiver to make, retain and take away copies thereof, and to allow the Receiver immediate, continued and unrestricted access to the Property; and all of the aforesaid persons are hereby restrained and enjoined from disturbing or interfering with the Property or the Receiver and with the exercise by the Receiver of its powers and the performance by the Receiver of its duties hereunder and, to the extent required to effect the provisions hereof, all Affected Persons are hereby relieved of the powers conferred on all Affected Persons by virtue of any office or position they may hold relating to the Debtor.

4. If the Debtor's records relating to the Property are stored in a computer (which term shall include any electronic data processing system, whether in the possession of the Debtor or a third party including, without limitation, internet service providers ("ISP") accessible to any of the persons referred to in paragraph 3 of this Order, such persons shall, at the request of the Receiver, give the Receiver access to and assistance in retrieving such information in such manner as the Receiver, in its discretion, considers reasonable and expedient.

5. Without limiting the generality of paragraphs 2 and 3 above, the Receiver shall be at liberty and is hereby authorized and empowered, but is not obligated, to take such steps on behalf of or in the name of the Debtor as it deems appropriate in respect of the Property, including, without limitation, any or all of the following, without the necessity for any further Order of the Court except in respect of transactions referred to in paragraph (f) hereof:

(a) take possession of all or any part or parts of the Property;

(b) make arrangements with such agents, consultants, assistants and employees as the Receiver may consider necessary or desirable to secure their assistance in the exercise of the Receiver's powers and the performance of the Receiver's duties hereunder;

(c) carry on the business pertaining to the Property, including, without limiting the foregoing, the power to sell, lease, mortgage, manage, develop and operate the Property or any part or parts thereof in the ordinary course of business;

(d) obtain such appraisals of the Property or any part or parts thereof as the Receiver may, in its discretion, deem appropriate;

(e) solicit offers to purchase the Property or any part or parts thereof, whether directly or indirectly through agents, auctioneers or liquidators, whether for cash or on credit, privately or otherwise;

(f) sell, transfer or assign, whether on credit, by private tender, public auction or otherwise, or to lease or mortgage the whole of the Property or any part or parts thereof in the ordinary course of business without Court approval, and out of the ordinary course of business with the approval of this Honourable Court first having been obtained in respect of any sale in which the gross sale price exceeds $1 million and in any case without compliance with the provisions of Part V of the *Personal Property Security Act*, R.S.A. 2000, c.P-7 or any other notice, statutory or otherwise, which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, in respect of which notices the Receiver be and is hereby relieved;

(g) take steps for the preservation and protection of the Property, including, without restricting the generality of the foregoing, to pay any debts, claims, obligations or liabilities, of the Debtor which have priority over the claims of the Bank and to pay such other debts, claims, obligations or liabilities, of the Debtor as the Receiver deems necessary or advisable to protect or properly realize on the Property, provided that all of the aforementioned payments are to

be allowed to the Receiver in passing its accounts and shall form a part of the Receiver's First Charge (as defined below) on the Property;

(h) complete or partially complete such repairs and improvements on the Property as the Receiver may, in its discretion, deem appropriate;

(i) employ and retain such agents, assistants, experts, auditors, advisors, consultants, employees, solicitors and counsel, including legal counsel, as the Receiver may consider necessary or desirable and, in particular, but without limiting the generality of the foregoing, to retain a manager to, among other things carry out the management of some or all of the Property and to the extent that the Receiver employs any of the former employees of the Debtor, paragraph 11 shall apply;

(j) receive, attorn and collect all monies and deposits now or hereafter owing to the Debtor pertaining to the Property;

(k) extend the time for payment of any monies now or hereafter due or owing to the Debtor pertaining to the Property, with or without security, and to settle or compromise any such indebtedness;

(l) apply for any permits, licenses, approvals or permissions as may be required by any governmental authority with respect to the Property;

(m) assume any contracts, licenses, or permits to which the Debtor is a party or refrain from assuming same;

(n) execute, sign, issue, endorse or negotiate in the name of and on behalf of the Debtor, or any of them, all necessary cheques, leases, bills of sale, transfers of land, conveyances, bills of lading, deeds and documents of whatever nature necessary or incidental to the exercise of the powers granted herein;

(o) purchase or lease such machinery, equipment, premises or other assets or supplies as may be necessary or desirable in the opinion of the Receiver to receive, manage, preserve, protect or realize upon the Property or any part or parts thereof;

(p) take such steps as in the opinion of the Receiver are necessary or appropriate to establish and maintain control over the Property or any part or parts thereof, including, but not limited to, the changing of locks and security codes, (including but not limited to computer access and security codes) the engaging of independent security personnel, the taking of physical inventories and the placement of adequate insurance coverage as required;

(q) pay ongoing costs or expenses incurred prior to, on or after the date of this Order which arise out of or in connection with the day to day use of the Property;

(r) take any steps, enter into any agreements or incur any obligations necessary or incidental to the exercise of the aforesaid powers and to disclaim, terminate or otherwise refuse to carry out any agreement of the Debtor in connection therewith;

(s) register notice of this Order against title to the Property in the appropriate registry offices;

(t) vote any shares and exercise any rights which the Debtor may have as a shareholder;

(u) make an assignment of all of the property of the Debtor for the general benefit of its creditors pursuant to the BIA, or to consent to a Receiving Order against the Debtor and to act as Trustee in Bankruptcy of the estate of the Debtor;

(v) file a Notice of Intention to Make a Proposal or a Proposal pursuant to the BIA or initiate reorganization or arrangement proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36. as amended, the Alberta *Business Corporations Act*, R.S.A. 2000, c.B-9, as amended, or any other provincial or federal statute, and to participate fully in any such proceedings, which may include but is not limited to applying for an extension

of any period of time within which the Debtor is required to file a Proposal or plan in any existing reorganization or arrangement initiated by the Debtor whether pursuant to the BIA or otherwise;

(w) to complete any sale which is pending as at the date of this Order, (i) on the basis that any representations and warranties to be given under any agreement of purchase and sale remain representations and warranties of the vendors named therein and shall not be or be deemed to be representations and warranties of the Receiver and (ii) if necessary, with such changes or amendments as are deemed appropriate by the Receiver, without prior approval or further order of the Court, and to do or perform all acts or things necessary for the completion of such transactions; and

(x) abandon or surrender all or any part of the Property, including leased premises, in which case only the pro-rated portion of the occupation costs shall apply;

6. The Receiver may apply, from time to time, upon two (2) days notice to the persons affected for directions and guidance in the exercise of the Receiver's powers and the performance of its duties hereunder.

7. All persons, firms, or corporations, governments, governmental agencies, municipalities, counties and other entities of any kind or nature including without limitation all Affected Persons (collectively, the "Persons" and each a "Person") are each hereby restrained and enjoined until further Order of this Honourable Court from varying, amending, terminating, cancelling or breaching any contracts or agreements with the Debtor in existence as of the date of this Order.

8. Without limiting the generality of the provisions hereof, no Person claiming an interest in the Property or any part or parts thereof shall be at liberty to exercise any rights in respect of such interest, including without limitation a right to possession of such Property or any part or parts thereof, except with the prior written consent of the Receiver or with leave of this Honourable Court being first obtained on at least seven (7) days notice to the Receiver.

9. Absent the consent of the Receiver, until further Order of this Honourable Court, no Proceedings (as hereinafter defined) shall be commenced, taken or proceeded with against the Receiver or the Property. For greater clarity and without limitation:

(a) any and all Proceedings (as hereinafter defined) commenced, taken or proceeded with or that may be commenced, taken or proceeded with by any Person, including, without limitation any of the Debtor's creditors, shareholders, employees, directors, officers, partners, joint ventures, beneficiaries, trustees, customers, clients, purchasers, suppliers, consultants, agents, principals, lessors and lessees (including without limitation, lessors and lessees of real property and equipment), governments of any nation, province, state or municipality or any other entity, exercising the executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, whether federal, provincial, state or municipal, in Canada or elsewhere and any corporation or other entity owned or controlled by or which is the agent of any of the foregoing or any other person, firm, corporation or entity wherever situate or domiciled, against or in respect of the Debtor or any Person who is from and after the date of this Order a director, officer or employee of the Debtor, or in respect of any present or future Property shall be stayed and suspended;

(b) for the purposes of this Order, Proceedings shall mean and include, without limitation, any act or process of or connected to realization, seizure, repossession and/or any suits, actions, extra-judicial proceedings or remedies, enforcement processes or the termination, revocation, suspension or cancellation of any permits or licenses affecting the Debtor, its business, operations, Property or other remedies, and shall specifically include any access to or development of any utility right-of-way affecting the Property or any part thereof;

(c) all Persons having Agreements (as hereinafter defined) with the Debtor, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such Agreements or the supply of goods and services and are also hereby restrained from exercising any right of distress, recission, set-off or consolidation of accounts in relation to any indebtedness or obligation in favour of the Debtor or from retaining goods, without the prior written consent of the Receiver or leave of this Honourable Court on proper notice to the Receiver. Without limiting the generality

of the foregoing, all Persons are restrained until further Order of this Honourable Court from discontinuing or interfering with any utility or required services to or utilized by the Debtor (including telephone, facsimile or other communication services at the present numbers used by the Debtor in respect of any Property), the furnishing of oil, gas water, heat or electricity, the supply of equipment, computer software, hardware support and electronic, internet access, electronic mail and other data services, so long as the Receiver pays (subject to the other provisions of this Order) the normal prices or charges (other than security or other deposits whether by way of cash, letter of credit or guarantee or otherwise, stand-by fees or similar items, which the Receiver shall have no obligation to pay or grant) for such goods and services received after the date of this Order as same become due and payable in accordance with present payment practices, or as may be hereafter agreed by the Receiver from time to time, or as otherwise may be provided for in this Order. Provided that nothing herein shall prohibit any Person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the date hereof, and all Persons shall continue to perform and observe the terms and conditions contained in any Agreements (as hereinafter defined) entered into with the Debtor whether in connection with any of the Property or otherwise;

(d) for the purposes of this Order, Agreement(s), shall mean and include any arrangement or agreement, written or oral, with the Debtor, including, without limitation, agreements or arrangements for the sale, supply, purchase or lease of goods and/or services (inclusive of labour) and/or real property from, by or to the Debtor or with respect to any of the Property, or any service agreement, warranty agreement, transportation agreement, rental agreement, collective bargaining agreement, delivery agreement, consulting agreement, management agreement, insurance contract or agreement and/or any similar contract or agreement;

(e) the right of any Person to commence or continue Proceedings in respect of any encumbrance, security interest, tax, lien, charge, mortgage, hypothec, prior claim or other security held in relation to Property, or to any trust attaching to the Property, including the right of any Person to take any step in asserting or perfecting any right or interest is hereby restrained. Notwithstanding the foregoing or any other term of this Order, the Bank is at liberty to commence and continue any action for the enforcement of its security;

(f) the right of any Person to assert, enforce or exercise any option, remedy or right, including, without limitation, any right of dilution, buy-out, divestiture, repudiation, recission, forced sale, forced purchase, acceleration, termination, suspension, modification, cancellation, or right to revoke any qualifications or registration, howsoever such remedy, option or right arises and whether such remedy, option or right arises under or in respect of any Agreement or by reason of any default under any Agreement, is hereby restrained;

(g) the right of all Persons to make demand upon, send notice to or declare default with respect to the Debtor or the Property is hereby restrained;

(h) any deposit made by the Receiver with any Person from and after the making of this Order, whether in an operating account or otherwise and whether for its own account or for the account of any other entity, shall not be applied by such Person in reduction of or repayment of any amount owing as of the date of this Order or which may become due on or before the date of this Order or in satisfaction of any interest, fees, charges or other amounts accruing in respect thereof, and such Person shall have no right of lien, set-off, counterclaim, consolidation or other right in respect of such deposits, and such deposits shall be remitted to the Receiver.

10. The Receiver is hereby fully authorized and empowered, but not obligated, to initiate, prosecute and continue the prosecution of any and all actions, applications, administrative hearings, arbitrations or proceedings as may in its judgment be necessary or desirable to properly receive, manage, operate, preserve, protect or realize upon the Property and to secure payment of rent and accounts from the Property, to defend all applications, proceedings, actions, administrative hearings or arbitrations now pending or hereafter instituted against the Debtor or the Receiver the prosecution or defence of which wi1*l* in the judgment of the Receiver, be necessary to properly receive, manage, operate, protect, preserve or realize on the Property or to protect the administration by the Receiver of the Property, and to settle or compromise any such actions, applications, proceedings, administrative hearings or arbitrations which in the judgment of the Receiver should

be settled or compromised. The authority hereby bestowed shall extend to such appeals or applications for judicial review as the Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any such application, proceeding or action, administrative hearing or arbitration.

11. The employment of all of the employees of the Debtor, including without limitation, all employees on maternity leave, disability leave, layoff, temporary leave or any other of approved absence is hereby terminated effective 11:59 p.m. on the day before the making of this Order. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the employment by the Receiver of any person formerly employed by the Debtor shall be deemed not to be a continuation of that person's employment and the calculation of any benefits or entitlements arising from that person's employment shall not be computed as though that person's employment continued after 11:59 p.m. on the day before the making of this Order and the Receiver is not and shall not be deemed or considered to be the same employer, a successor employer, related employer, common employer, representative or successor of the employer, deemed employer, sponsor or payer with respect to any of the employees of the Debtor or any of its subsidiaries or any former employees thereof within the meaning of any provincial, federal or municipal legislation or common law governing employment or labour standards, the treatment of persons in their capacities as employees, or labour or employment standards or workplace safety, or any other statute, regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between the Debtor and any of its present or former employees. The Receiver shall not be liable to any of the employees of the Debtor for any unpaid pension or benefit contributions or for any wages (as "wages" are defined in the *Employment Standards Code*, R.S.A. 2000, c.E-9, or any other provincial statute governing labour or employment standards), severance pay, termination pay, vacation pay, holiday pay, or any other employee benefit or accrued incentive or entitlement, or any amount whatsoever arising from any of the employees' employment on the cessation or termination thereof, whether pursuant to statute or common law except for such amounts as the Receiver may specifically agree to pay. If the Receiver deems it necessary or advisable to make payment to the employees of the Debtor of any amounts on account of unpaid wages, severance pay, termination pay, vacation pay or any other employee benefit or accrued incentive and entitlement owing by the Debtor as at the date of this Order, the claims of the employees in respect of such amounts shall be deemed to have been assigned to the Receiver for the purpose only of the Receiver asserting a claim against the estate of the Debtor and, in the event of the bankruptcy of the Debtor, the Receiver shall be entitled to file one or more proofs of claim in respect of such amounts which shall be accepted by the Trustee as valid claims pursuant to subsection 136(1)(d) of the BIA. For greater certainty, such assignment shall not have the effect of granting to the Receiver any claims or rights against the present and former directors and officers of the Debtor. Further, by the granting of this Order, the business of the Debtor has not been and shall not be deemed to have been, nor treated as having been sold, but rather, such business or businesses will continue to be the business(es) of the Debtor until sold, in whole or in part, to a purchaser other than the Receiver and nothing in this order shall or shall be deemed to determine whether such a purchaser is or is not a successor employer of the Debtor's employees and former employees.

12. The Receiver shall pass its accounts from time to time and shall pay the balances in its hands as this Honourable Court may direct.

13. The Receiver's remuneration and any expenses which may be properly made or incurred by the Receiver in connection with the exercise of its powers and the performance of its duties hereunder (including without limitation fees and disbursements of its counsel on a solicitor and its own client basis) shall be allowed to the Receiver in the passing of its accounts and shall form a first and specific, fixed ranking charge on the Property ranking in priority to any and all other charges or claims of the Bank or any other Person and all encumbrances subsequent thereto (the "Receiver's First Charge").

14. The costs of the Bank in the preparation of this motion, and up to and inclusive of the hearing of this motion and the entry of this Order be assessed as between a solicitor and his own client and the Receiver shall pay such costs, which shall be treated as an expense of the Receiver and be satisfied as contemplated herein.

15. The Receiver shall be at liberty, from time to time, to pay, from monies in its hands, costs and other expenses relating to the Property, including its own remuneration and disbursements and that of its legal counsel, whether incurred prior to

or subsequent to the date of this Order. Any amounts so applied against the Receiver's remuneration and expenses shall constitute advances against the amounts allowed on the passing of the Receiver's accounts.

16. The Receiver is hereby indemnified out of the Property from and against all liabilities arising out of the performance of its duties as Receiver pursuant to the terms of this Order, save and except for any gross negligence or willful misconduct on part of the Receiver with respect to such duties, and the Receiver shall have a charge on the Property for such indemnity in priority to all security, charges and encumbrances affecting the Property excepting only the Receiver's First Charge.

17. The Receiver shall be at liberty and is hereby empowered to borrow monies without personal liability from time to time as it may consider necessary, not to exceed $2 million in principal amount in the aggregate, with such fees and at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange, for the purpose of exercising its powers and performing its duties. The monies authorized to be borrowed and interest thereon shall form a first specific, fixed charge on the Property and/or its proceeds ranking in priority to the charge of the Bank or any other Person and all encumbrances subsequent thereto, on the Property and/or its proceeds, but subject to the Receiver's First Charge and the rights of the Receiver to be indemnified out of the Property with respect to its liability, expenses and its own remuneration properly incurred, as contemplated herein.

18. The monies authorized to be borrowed by this Order shall be evidenced by certificates substantially in the form of the draft certificate attached as Schedule "A" to this Order and may be in the nature of a revolving credit or term facility which the Receiver may pay off or re-borrow within the limits of the authority hereby conferred.

19. All monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Honourable Court, and all Receiver's Certificates representing the same or any part thereof, shall rank pari passu.

20. Any security granted by the Receiver in connection with its borrowings shall not be enforced without leave of this Honourable Court first being obtained upon seven (7) days notice to the Receiver.

21. Notwithstanding any other provision contained in this Order, the Receiver shall be protected by the terms and provisions of the BIA including without limitation, section 14.06 of the BIA, as amended.

22. The Receiver is not and shall not be deemed to be an owner, occupier or other person responsible in respect of any of the Property for any purpose including, without limitation, for purposes of Environmental Legislation.

23. The Receiver shall not be liable under Environmental Legislation in respect of any Adverse Environmental Condition (as defined below) with respect to the Property or any part thereof that arose or occurred before the latter of the date of appointment of the Receiver or the date the Receiver goes into possession of the Property, if applicable.

24. The Receiver shall not be liable under Environmental Legislation, in relation to its position as Receiver, in respect of any Adverse Environmental Condition at the Property or any part thereof that arose, occurred or continued after the time of appointment of the Receiver unless such Adverse Environmental Condition has been caused by gross negligence or willful misconduct of the Receiver.

25. Notwithstanding paragraph 24, the Receiver shall not be liable beyond the Net Realized Value of the Property (as defined in Paragraph 29 below) under any Environmental Legislation in respect of any Adverse Environmental Condition with respect to the Property or any part thereof except that which has been caused by the gross negligence or willful misconduct of the Receiver.

26. For purposes of this Order, the term "Environmental Legislation" shall mean any federal, provincial or other jurisdictional legislation, statute, regulation, guideline, standard, or rule of law or equity respecting the protection, conservation, enhancement, remediation or restoration, rehabilitation or assessment of the environment or relating to the disposal of waste or other contamination, which may have application in any province or state in which the Debtor carries on business and any orders or directions made pursuant to any of the foregoing.

27. For purposes of this Order, the term "Adverse Environmental Condition" shall include, without limitation, any injury, harm, damage, impairment or adverse effect to the environmental condition of the Property and the unlawful storage, spillage, discharge, release, deposit or disposal of any substance which may cause an adverse effect including, without limitation, hazardous substances, waste or other contamination on or from the Property.

28. Nothing herein contained shall vest in the Receiver the care, ownership, control, charge, occupation, possession, responsibility or management, nor require the Receiver to take care, ownership, control, charge, occupation, possession, responsibility or management, of any of the Property which may be environmentally polluted or contaminated or where a pollutant or contaminant, is or may become present or from which any spill, discharge, release or deposit of a substance emanates, contrary to any Environmental Legislation or which is the subject of any Adverse Environmental Condition.

29. Any liability of the Receiver whatsoever, including in respect of any form of negligence and willful misconduct, and whether in its personal capacity or in its capacity as Receiver and whether arising out of or from its appointment or the exercise of its powers hereunder, including without limitation, arising in connection with Environmental Legislation, or labour or employment laws, shall be limited in the aggregate to the Net Realized Value of the Assets in the possession of the Receiver and, after distribution thereof, in respect of claims in respect of gross negligence and willful misconduct, only to the total assessed fees of the Receiver. "Net Realized Value of the Assets" shall be the cash proceeds actually received by the Receiver from the operation and disposition of the Assets, after deducting all costs and expenses properly incurred in connection therewith, including the remuneration and expenses of the Receiver and the fees and disbursements of its counsel, on a solicitor and its client basis, and any monies borrowed by or other indebtedness incurred by the Receiver pursuant to this Order and all interest thereon paid out of such proceeds, and any distributions of such proceeds.

30. No person shall commence any proceedings concerning the affairs of the Debtor or the Receiver's performance or alleged failure to perform its duties under this Order without first obtaining leave of this Honourable Court by motion made on not less than seven (7) days notice to the Debtor and the Receiver.

31. The Registrar of Land Titles for the North Alberta Land Registration District is hereby directed, notwithstanding Section 191 of the *Land Titles Act*, R.S.A. 2000, c.L-4, to effect registration of this Order, or any conveyance or Transfer of Land or instrument executed by the Receiver pertaining to land owned by the Debtor.

32. The Receiver is at liberty, and is hereby authorized and empowered to apply, upon such notice as it may consider necessary or desirable, to any other courts or tribunals in any other jurisdictions, both foreign and domestic, including any Province in Canada, the Federal Court and any foreign court, tribunal or administrative body, for orders aiding, assisting or recognizing the appointment of the Receiver and confirming the powers of the Receiver in any other jurisdiction or jurisdictions, and all courts of all such jurisdictions, both foreign and domestic, are hereby respectfully requested to make such orders and provide such other aid, assistance and recognition to the Receiver, as an officer of this Honourable Court, as they may deem necessary or appropriate in furtherance of this Order or any subsequent Order in this proceeding. For the purposes of s.304 of the U.S. Bankruptcy Code, the Receiver is the foreign representative of the Debtor.

33. *This order expires on Friday, June 7, 2002 at noon unless it is renewed in chambers, and it is now put over to Friday, June 7/02, at 10:00 am chambers.*

[Smith, J. deleted the draft paragraph 33, which read: Any person affected by this Order may move on seven (7) days notice to the Receiver and the parties affected to amend any provision of this Order provided that the moving party brings such motion forthwith after the matter at issue becomes known to that moving party.]

34. The Bank is hereby given leave to file the Motion and Affidavit in connection with the application which has resulted in the granting of this Order, and proof of service thereof, after the time prescribed by Rule 13 of the General Rules of the BIA.

"L.P.L. J. Smith"

JUSTICE OF THE COURT OF QUEEN'S BENCH

OF ALBERTA IN BANKRUPTCY AND INSOLVENCY

ENTERED this 3rd day of

June, 2002.

"W. Breitkreuz"

REGISTRAR IN BANKRUPTCY

SCHEDULE "A"

AMOUNT $ RECEIVER CERTIFICATE NO.

1. THIS IS TO CERTIFY that KPMG Inc., the Interim Receiver (the "Receiver") over the assets, property and undertaking of _____ (the "Property"), appointed by an Order of the Court of Queen's Bench of Alberta dated the _____ day of _____, 20_____ made in an action having court file number _____ (the "Order"), acknowledges that as Receiver it is indebted to _____ (the "Lender") on account of this certificate in the maximum principal sum of $_____, which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum which may from time to time be outstanding on account of this certificate is payable on demand with interest thereon calculated and payable monthly on the _____ day of each and every month at the rate of _____ per annum (both after as well as before demand) to the date of payment. The first payment of interest shall be calculated for the period commencing _____ and shall be payable on the _____ of _____.

3. The principal sum with interest thereon is by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, together with all other assets and property which are now or may hereafter be in the custody and control of the Receiver (the "Charge"), in priority to the security interests of HSBC BANK CANADA and all subsequent encumbrances thereto, but subject to the right of the Receiver to indemnity out of the Property in respect of its remuneration and its expenses and legal costs properly incurred.

4. Until the Lender delivers or issues a written notice to the Receiver pursuant to paragraph 2 above, the Receiver may borrow, repay and reborrow, and the Lender may advance on account of this certificate such principal sums as the Receiver may require; provided that the principal outstanding shall at no time exceed $ MACROBUTTON NoMacro l.

5. From time to time and at any time, the Receiver may make such payments on account of principal sum outstanding as it considers appropriate or desirable without any penalty.

6. All sums payable in respect of principal and interest under this certificate are payable at _____.

7. Until all liability in respect of this certificate shall have been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the Lender, without the prior written consent of the Lender.

8. All liability in respect of the whole or any part of the principal sum for which this certificate is issued and interest thereon shall at any time or from time to time be terminated on tender to the Lender of the outstanding balance of the principal sum together with interest accrued thereon to the date of tender.

9. The Charge shall operate so as to permit the Receiver to deal with the Property and all other assets and property coming under the control of the Receiver as authorized by the Order and as authorized by any further or other order of the Court.

10. Notwithstanding any other provisions hereof, the Charge created hereby shall not cease to operate or be or be deemed to be void by reason of the principal sum outstanding hereunder becoming or being zero at any time or from time to time.

11. The Receiver does not undertake and it is not under any personal liability to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____.

KPMG Inc., as Receiver of the assets, property

and undertaking of

By:_____

Name:

Title:

Most Negative Treatment: Check subsequent history and related treatments.

2015 SCC 53, 2015 CSC 53
Supreme Court of Canada

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

2015 CarswellSask 680, 2015 CarswellSask 681, 2015 SCC 53, 2015 CSC 53, [2015] 3 S.C.R. 419, [2016] 1 W.W.R. 423, 259 A.C.W.S. (3d) 215, 31 C.B.R. (6th) 1, 391 D.L.R. (4th) 383, 467 Sask. R. 1, 477 N.R. 26, 651 W.A.C. 1

Attorney General for Saskatchewan, Appellant and Lemare Lake Logging Ltd., Respondent and Attorney General of Ontario and Attorney General of British Columbia, Interveners

Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: May 21, 2015
Judgment: November 13, 2015
Docket: 35923

Proceedings: reversing *Lemare Lake Logging Ltd. v. 3L Cattle Co.* (2014), 3 P.P.S.A.C. (4th) 1, 371 D.L.R. (4th) 663, 602 W.A.C. 266, 433 Sask. R. 266, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 2014 SKCA 35, 2014 CarswellSask 179, Ottenbreit J.A., Richards C.J.S., Whitmore J.A. (Sask. C.A.); affirming *Lemare Lake Logging Ltd. v. 3L Cattle Co.* (2014), 3 P.P.S.A.C. (4th) 1, 371 D.L.R. (4th) 663, 602 W.A.C. 266, 433 Sask. R. 266, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 2014 SKCA 35, 2014 CarswellSask 179, Ottenbreit J.A., Richards C.J.S., Whitmore J.A. (Sask. C.A.)

Counsel: Thomson Irvine, Katherine Roy, for Appellant
No one for Respondent
Michael S. Dunn, Daniel Huffaker, for Intervener, the Attorney General of Ontario
R. Richard M. Butler, Jean M. Walters (written) for Intervener, the Attorney General of British Columbia.
Jeffrey M. Lee, Q.C., Kristen MacDonald — Amicus curiae

Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation

Headnote
Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation
Secured creditor applied pursuant to s. 243(1) of Bankruptcy and Insolvency Act (BIA) for appointment of receiver over substantially all assets of debtor — Debtor was "farmer" within meaning of Saskatchewan Farm Security Act (FSA), and contested appointment — Debtor argued that creditor was required to submit notice of intention, wait 150-day notice period and engage in mandatory review and mediation process under Part II of FSA — Chambers judge held that s. 243(1) BIA and Part II FSA were not in conflict — Court of Appeal held that in circumstances where application was made to appoint receiver, Part II FSA frustrated purpose of s. 243(1) BIA and was therefore inoperative — Attorney General for Saskatchewan appealed — Appeal allowed — Under doctrine of federal paramountcy, federal law prevails when there is genuine inconsistency between federal and provincial legislation — Conflict arises when there is operational conflict or where operation of provincial law frustrates purpose of federal enactment — Paramountcy was to be narrowly construed, favouring harmonious interpretations — No operational conflict existed as it was possible to comply with both statutes — Section 243 of BIA had simple and narrow purpose of establishing regime for appointment of national receiver — Under BIA, appointment of national receiver could not

be made before expiry of 10 day notice provision — Part II FSA afforded protection to farmers against loss of farm land by imposing compulsory and non-waivable 150-day waiting period during which mandatory review and mediation process occurs — Conflict only arises if interference frustrates purpose of federal regime — Words and discretionary nature of s. 243 BIA support narrow reading of provision's purpose — Section 243 of BIA did not suggest it was comprehensive remedy exclusive of provincial law — BIA also explicitly recognized continued operation of provincial law, except where inconsistent with BIA — Evidence did not support argument that 150-day delay or other conditions of FSA frustrated effectiveness or timeliness concerns — Part II FSA was not constitutionally inoperative where application was made to appoint receiver pursuant to s. 243(1) BIA.
Droit autochtone --- Divers
Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale
Créancier garanti a déposé une requête en vertu de l'art. 243(1) de la Loi sur la faillite et l'insolvabilité (LFI) afin de faire nommer un séquestre pour s'occuper de la majeure partie des biens de son débiteur — Débiteur, un « fermier » au sens de la Saskatchewan Farm Security Act (FSA), a contesté la nomination — Débiteur a fait valoir que le créancier était tenu de déposer un avis d'intention, attendre l'expiration du délai d'avis de 150 jours et participer au processus obligatoire d'examen et de médiation prévu à la partie II de la FSA — Juge siégeant en son cabinet a estimé que l'art. 243(1) de la LFI et la partie II de la FSA ne se contredisaient pas — Cour d'appel a estimé que dans le cas où une demande est faite en vue de faire nommer un séquestre, la partie II de la FSA va à l'encontre du but poursuivi par l'art. 243(1) de la LFI, ce qui la rendait du coup inopérante — Procureur général de la Saskatchewan a formé un pourvoi — Pourvoi accueilli — En vertu de la doctrine de la prépondérance fédérale, la loi fédérale prévaut lorsqu'il y a une véritable contradiction entre la législation fédérale et la législation provinciale — Il y aura un conflit lorsqu'il y a conflit d'application parce qu'il est impossible de se conformer aux deux lois ou lorsque l'application de la loi provinciale va à l'encontre du but poursuivi lors de l'adoption de la loi fédérale — On doit interpréter la prépondérance fédérale de manière stricte et favoriser une interprétation harmonieuse — Il n'y avait pas de conflit d'application puisqu'il était possible de conformer aux deux lois — Article 243 de la LFI poursuit un objectif simple et strict qui est l'établissement d'un régime permettant la nomination d'un séquestre à l'échelle nationale — En vertu de la LFI, la nomination d'un séquestre à l'échelle nationale ne peut se faire avant l'expiration d'un délai de dix jours — Partie II de la FSA accorde une protection spécifique aux fermiers contre la perte de leur ferme en prévoyant qu'un créancier hypothécaire doive attendre l'expiration d'un délai d'attente obligatoire de 150 jours auquel le débiteur ne peut renoncer et au cours duquel survient un processus obligatoire d'examen et de médiation — Conflit ne surviendra que si une interférence ne permet pas d'atteindre le but poursuivi par le régime fédéral — Libellé et la nature discrétionnaire de l'art. 243 de la LFI favorisent une interprétation stricte du but poursuivi par cette disposition — Article 243 ne laisse aucunement croire qu'il prévoit une mesure de réparation complète qui exclut l'application des lois provinciales — LFI reconnaît explicitement l'application continue de la loi provinciale dans le contexte d'une faillite ou d'une insolvabilité, sauf dans la mesure où elle contredit la LFI — Rien dans la preuve ne permettait d'affirmer que le délai de 150 jours ou que les autres conditions mentionnées à la FSA faisaient échec à toute préoccupation en matière d'efficacité ou de possibilité d'agir en temps opportun — Partie II de la FSA n'était pas constitutionnellement inopérante dans le cas où une demande est faite en vertu de l'art. 243(1) de la LFI en vue de la nomination d'un séquestre.
A secured creditor applied pursuant to s. 243(1) of the Bankruptcy and Insolvency Act (BIA) for the appointment of a receiver over substantially all of the assets of its debtor. The debtor, a "farmer" within the meaning of The Saskatchewan Farm Security Act (FSA), contested the appointment. The debtor argued that the creditor was required to submit a notice of intention, wait the 150-day notice period, and engage in a mandatory review and mediation process under Part II of the FSA.
The chambers judge held that s. 243(1) of the BIA and Part II of the FSA were not in conflict. The Court of Appeal held that in circumstances where an application is made to appoint a receiver, Part II of the FSA frustrates the purpose of s. 243(1) of the BIA, thus rendering it inoperative.
The Attorney General for Saskatchewan appealed.
Held: The appeal was allowed.
Per Abella and Gascon JJ. (Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring): Under the doctrine of federal paramountcy, the federal law prevails when there is a genuine inconsistency between federal and provincial legislation. A conflict will arise when there is an operational conflict because it is impossible to comply with both laws or where the operation of the provincial law frustrates the purpose of the federal enactment. Paramountcy must be narrowly construed, favouring harmonious interpretations of federal and provincial legislation.

There was no operational conflict since it was possible to comply with both statutes. The issue was whether the FSA frustrated the purpose of the federal legislation.

Section 243 of the BIA has a simple and narrow purpose, which is the establishment of a regime allowing for the appointment of a national receiver. It authorizes the appointment of a receiver where it is "just and convenient". A secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a debtor that was acquired for, or used in relation to, a business carried on by the debtor, must send a notice pursuant to s. 244(1) of the BIA. The appointment of a national receiver cannot be made before the expiry of 10 days after the creditor sends the notice.

Part II of the FSA affords protection specifically to farmers against loss of their farm land. A mortgagee is prohibited from commencing any "action" with respect to farm land until a number of preconditions are met, including a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. After the waiting period, the mortgagee may apply for an order granting leave to commence the action.

The concurrent operation of s. 243(1) of the BIA and Part II of the FSA requires a secured creditor wishing to enforce its security interest against farm land to wait 150 days and comply with the various additional requirements of the FSA, rather than the 10 days required under the federal legislation. That interference, however, does not, itself, create a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime.

The words and discretionary nature of s. 243 of the BIA support a narrow reading of the provision's purpose. Interference with a discretion granted under federal law is not sufficient to establish frustration of federal purpose. The text of s. 243 does not suggest that it is meant to be a comprehensive remedy exclusive of provincial law. Section 72(1) of the BIA also explicitly recognizes the continued operation of provincial law in the bankruptcy and insolvency context, except where inconsistent with the BIA. Parliament did not intend to preclude notice periods longer than the 10-day period nor to oust legislation which is intended to favour mediation between creditors and farmers.

There was no evidence to support the argument that the 150-day delay or other conditions of the FSA frustrated any effectiveness or timeliness concerns. Part II of the FSA is not constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the BIA.

Per Côté J. (dissenting): With s. 243(1) of the BIA, Parliament intended to establish a timely process for appointing national receivers. To the extent that the FSA is incompatible with that purpose, there is a frustration of purpose. The notice period in the FSA is far longer and is absolute. The FSA establishes a series of evidentiary hurdles incompatible with Parliament's purpose to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. The FSA hinders the timely appointment of a receiver, thereby triggering the application of the doctrine of federal paramountcy.

Un créancier garanti a déposé une requête en vertu de l'art. 243(1) de la Loi sur la faillite et l'insolvabilité (LFI) afin de faire nommer un séquestre pour s'occuper de la majeure partie des biens de son débiteur. Le débiteur, un « fermier » au sens de la Saskatchewan Farm Security Act (FSA), a contesté la nomination. Le débiteur a fait valoir que le créancier était tenu de déposer un avis d'intention, attendre l'expiration du délai d'avis de 150 jours et participer au processus obligatoire d'examen et de médiation prévu à la partie II de la FSA.

Le juge siégeant en son cabinet a estimé que l'art. 243(1) de la LFI et la partie II de la FSA ne se contredisaient pas. La Cour d'appel a estimé que dans le cas où une demande est faite en vue de faire nommer un séquestre, la partie II de la FSA va à l'encontre du but poursuivi par l'art. 243(1) de la LFI, ce qui la rendait du coup inopérante.

Le procureur général de la Saskatchewan a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Abella et Gascon, JJ. (Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à leur opinion) : En vertu de la doctrine de la prépondérance fédérale, la loi fédérale prévaut lorsqu'il y a une véritable contradiction entre la législation fédérale et la législation provinciale. Il y aura un conflit lorsqu'il y a conflit d'application parce qu'il est impossible de se conformer aux deux lois ou lorsque l'application de la loi provinciale va à l'encontre du but poursuivi lors de l'adoption de la loi fédérale. On doit interpréter la prépondérance fédérale de manière stricte et favoriser une interprétation harmonieuse de la législation fédérale et provinciale.

Il n'y avait pas de conflit d'application puisqu'il était possible de conformer aux deux lois. La question était de savoir si la FSA allait à l'encontre du but poursuivi par la législation fédérale.

L'article 243 de la LFI poursuit un objectif simple et strict qui est l'établissement d'un régime permettant la nomination d'un séquestre à l'échelle nationale. Il autorise la nomination d'un séquestre lorsque cela est « juste ou opportun ». Un créancier garanti ayant l'intention d'exécuter une sûreté sur l'ensemble ou une partie importante de l'inventaire, des comptes recevables ou des autres biens du débiteur qui ont été acquis ou utilisés en relation avec les activités commerciales du débiteur doit envoyer un avis suivant l'art. 244(1) de la LFI. La nomination d'un séquestre à l'échelle nationale ne peut se faire avant l'expiration d'un délai de dix jours après que le créancier ait envoyé l'avis.

La partie II de la FSA accorde une protection spécifique aux fermiers contre la perte de leur ferme. Un créancier hypothécaire ne peut entamer une [TRADUCTION] « action » concernant une ferme à moins que certaines conditions ne soient respectées, y compris l'expiration d'un délai d'attente obligatoire de 150 jours auquel le débiteur ne peut renoncer et au cours duquel survient un processus obligatoire d'examen et de médiation. Une fois le délai expiré, le créancier hypothécaire peut s'adresser aux tribunaux afin d'obtenir l'autorisation d'entamer une action.

L'application concurrente de l'art. 243(1) de la LFI et de la partie II de la FSA exige d'un créancier garanti ayant l'intention d'exécuter sa sûreté à l'encontre d'une ferme qu'il attende l'expiration d'un délai de 150 jours, plutôt que le délai de 10 jours exigé en vertu de la loi fédérale, et se conforme aux différentes exigences de la FSA. Toutefois, cette interférence, ne crée pas, en soi, un conflit. Un conflit ne surviendra que si une telle interférence ne permet pas d'atteindre le but poursuivi par le régime fédéral. Le libellé et la nature discrétionnaire de l'art. 243 de la LFI favorisent une interprétation stricte du but poursuivi par cette disposition. L'existence d'une interférence avec une discrétion accordée en vertu de la loi fédérale ne suffit pas à établir que l'objectif de la disposition fédérale ne pourra être atteint. Le libellé de l'art. 243 ne laisse aucunement croire qu'il prévoit une mesure de réparation complète qui exclut l'application des lois provinciales. L'article 72(1) de la LFI reconnaît explicitement l'application continue de la loi provinciale dans le contexte d'une faillite ou d'une insolvabilité, sauf dans la mesure où elle contredit la LFI. Le législateur fédéral n'avait pas l'intention d'écarter l'application de délais d'avis plus longs que la période de 10 jours ni de faire obstacle à toute loi ayant pour but de favoriser la médiation entre les créanciers et les fermiers.

Rien dans la preuve ne permettait d'affirmer que le délai de 150 jours ou que les autres conditions mentionnées à la FSA faisaient échec à toute préoccupation en matière d'efficacité ou de possibilité d'agir en temps opportun.

Côté, J. (dissidente) : En adoptant l'art. 243(1) de la LFI, le législateur fédéral avait l'intention d'établir un processus permettant la nomination d'un séquestre à l'échelle nationale à l'intérieur d'un délai raisonnable. Dans la mesure où la FSA est incompatible avec cet objectif, ce dernier ne peut être atteint. Le délai d'avis est beaucoup plus long et est obligatoire. La FSA établit en matière de preuve une série d'obstacles incompatibles avec l'intention du législateur fédéral de mettre en place un processus de nomination d'un séquestre à l'échelle nationale à l'intérieur d'un délai raisonnable, qui puisse s'adapter à un cas d'urgence et répondre à l'ensemble des circonstances. La FSA ne permet la nomination d'un séquestre à l'intérieur d'un délai raisonnable, de sorte qu'il fallait appliquer la doctrine de la prépondérance fédérale.

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Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — referred to

s. 92 ¶ 13 — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21

Generally — referred to

s. 5(1)(a) — referred to

ss. 5-14 — referred to

s. 7(1)(b) — referred to

s. 12 — referred to

s. 13(1) — referred to

s. 21 — referred to

Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1

Generally — referred to

Pt. II — referred to

s. 3(a) "action" (ii) — considered

s. 3(c) "farmer" — referred to

s. 9(1)(d) — considered

ss. 9-22 — referred to

s. 11(1)(a) — considered

s. 11(2) — referred to

s. 11(3) — referred to

ss. 11-21 — referred to

s. 12 — referred to

s. 12(1) — referred to

s. 12(2)-12(5) — referred to

s. 12(12) — referred to

s. 12(13) — referred to

s. 13(a) — referred to

s. 13(b) — referred to

s. 18(1) — referred to

s. 19 — referred to

s. 20 — referred to

Supreme Court Act, R.S.C. 1985, c. S-26

s. 40 — considered

Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, Act to establish the, S.C. 2005, c. 47

Generally — referred to

s. 141 — referred to

Statutes considered by *Côté J.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Pt. XI — referred to

s. 47 — considered

s. 47(1)(c) — referred to

s. 48 — considered

s. 72(1) — considered

s. 243 — considered

s. 243(1) — referred to

s. 243(1)(c) — considered

s. 243(1.1) [en. 2007, c. 36, s. 58(1)] — considered

s. 243(1.1)(a) [en. 2007, c. 36, s. 58(1)] — considered

s. 243(1.1)(b) [en. 2007, c. 36, s. 58(1)] — considered

s. 243(2) — referred to

s. 244 — referred to

s. 244(2) — considered

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36

Generally — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21

Generally — referred to

s. 5(1)(a) — referred to

s. 13 — referred to

s. 13(1) — referred to

s. 14 — referred to

s. 14(2) — referred to

s. 16 — referred to

s. 20(1) — referred to

s. 21 — referred to

Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1

Generally — referred to

Pt. II — referred to

s. 4 — considered

s. 9 — referred to

s. 11 — referred to

s. 12(1) — referred to

s. 12(5)-12(10) — referred to

s. 12(12) — referred to

s. 18(1) — referred to

s. 19 — referred to

s. 20 — referred to
Tobacco Act, S.C. 1997, c. 13
s. 30 — referred to
Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to
Regulations considered by *Côté J.* (dissenting):
Farm Debt Mediation Act, S.C. 1997, c. 21
Farm Debt Mediation Regulations, SOR/98-168

s. 3 — referred to

***Abella, Gascon JJ.* (Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 Prior to 2005, receivership proceedings involving assets in more than one province were complicated by the simultaneous appointment of different receivers in different jurisdictions. Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver. This appeal involves a constitutional challenge to provincial farm legislation on the grounds that it conflicts with this national receivership regime. For the reasons that follow, we see no such conflict.

Background

2 Lemare Lake Logging Ltd., a secured creditor, brought an application pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*), for the appointment of a receiver over substantially all of the assets except livestock of its debtor, 3L Cattle Company Ltd, a "farmer" within the meaning of *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1 (*SFSA*). 3L Cattle contested the appointment and argued that Lemare Lake had to comply with Part II of the *SFSA* before seeking the appointment of a receiver under s. 243(1).

3 Part II of the *SFSA* provides that, before starting an action with respect to farm land, a creditor must serve a "notice of intention", engage in mandatory mediation, and prove that the debtor has no reasonable possibility of meeting its obligations or is not making a sincere and reasonable effort to meet its obligations. This includes an action for a receivership order pursuant to s. 243(1) of the *BIA*.

4 Lemare Lake argued that the doctrine of paramountcy rendered certain provisions of the *SFSA* constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*.

5 Lemare Lake and 3L Cattle were incorporated by David Dutcyvich in the 1980s. As a result of disagreements beginning in January 2010 between Mr. Dutcyvich and his two sons, the businesses were restructured, with Mr. Dutcyvich retaining the sole interest in 3L Cattle, and his two sons retaining the sole interest in Lemare Lake.

6 In connection with the restructuring, 3L Cattle assumed the primary obligation to repay a loan of $10 million to Concentra Financial Services Association. Lemare Lake, however, remained contingently liable for the debt. By written agreement dated December 21, 2010, 3L Cattle indemnified Lemare Lake from any liability in respect of the Concentra loan.

7 To secure the payment and performance of its obligations to Lemare Lake, 3L Cattle gave Lemare Lake a mortgage dated January 21, 2011 in respect of its interest in 120 parcels of land in Saskatchewan, and a security interest in all non-inventory goods and equipment of 3L Cattle, including machinery, fixtures and tools, by means of a security agreement dated January 19, 2011.

8 When 3L Cattle failed to repay the Concentra loan when it became due on January 29, 2013, Concentra sought repayment from both 3L Cattle and Lemare Lake. In turn, Lemare Lake, which was experiencing its own financial problems and had secured a protection order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, attempted to realize on its

security over 3L Cattle's assets. It accordingly applied to the Saskatchewan Court of Queen's Bench for the appointment of a national receiver pursuant to s. 243(1) of the *BIA* over substantially all of the assets of 3L Cattle, except livestock.

9 3L Cattle argued that because it was a "farmer" within the meaning of the *SFSA*, Lemare Lake had to comply with Part II of the *SFSA* before applying for the appointment of a national receiver. Part II requires, in part, that before commencing an action with respect to farm land, a person must submit a notice of intention, await the expiry of a 150-day notice period, and engage in a mandatory review and mediation process.

10 The chambers judge found that the provisions in Part II of the *SFSA* did not conflict with s. 243(1) of the *BIA* and dismissed Lemare Lake's application. She found no operational conflict between the federal and provincial legislation, because a secured creditor can comply with both the federal and provincial legislation by obtaining a court order under the *SFSA* permitting it to commence an action before applying for the appointment of a receiver under s. 243(1) of the *BIA*. Nor did she find any conflict in purpose. In her view, the purpose of s. 243(1) was to allow for the appointment of a national receiver, a purpose that was not frustrated by compliance with Part II of the *SFSA*. This means that a secured creditor must comply with the provisions of Part II of the *SFSA* before making an application pursuant to s. 243(1) of the *BIA*, which Lemare Lake had failed to do. The chambers judge's alternative view was that even if she had found Part II of the *SFSA* to be inoperative, she would not have appointed a receiver.

11 The Court of Appeal dismissed Lemare Lake's appeal, agreeing with the chambers judge that a receiver should not be appointed. Nevertheless, although it was not necessary to do so in view of its conclusions on the merits of appointing a receiver, the Court of Appeal addressed the constitutional argument, not only because it had been fully argued, but because it would likely arise in the future.

12 The Court of Appeal agreed with the chambers judge that there was no operational conflict between the federal and provincial statutes: a creditor could comply with both statutes by obtaining an order pursuant to the *SFSA* before asking to have a national receiver appointed under the *BIA*. It disagreed, however, about whether Part II of the *SFSA* frustrated the purpose of s. 243(1) of the *BIA*, stating:

> ... Part II of the *SFSA* would undermine or frustrate the purpose of s. 243 of the *BIA* in at least two significant ways. First, Part II would dramatically displace the ten-day delay contemplated by the *BIA* by obliging a creditor like Lemare Lake to wait *at least* 150 days before applying for a receivership order....
>
> Second, Part II of the *SFSA* would effectively layer on new criteria for the granting of a receivership order under the *BIA*. [Emphasis added in original; paras. 55-56.]

In the Court of Appeal's view, the purpose of s. 243 was not only to authorize the appointment of national receivers, it was to ensure that such receivers be able to act effectively in the context in which they are appointed — insolvency — where events move quickly and proceedings are time-sensitive. It accordingly concluded that "Part II of the *SFSA* is inoperative in circumstances where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*" (para. 67).

13 The Attorney General for Saskatchewan was granted leave to appeal to this Court. Subsequent to the decision of the Court of Appeal, however, Lemare Lake and 3L Cattle settled their dispute. The Court appointed former counsel for Lemare Lake as *amicus curiae* to respond to the submissions of the Attorney General. *Amicus* was content to have the matter heard by this Court despite its mootness. In our view, the ongoing importance of resolving this issue in Saskatchewan supports our deciding this appeal: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), at pp. 353 and 358-63; *Québec (Procureur général) v. Canada (Procureur général)*, [1982] 2 S.C.R. 793 (S.C.C.), at p. 806. Moreover, it is worth noting that this is an appeal from the reasons, not the disposition, of the Court of Appeal, which is fully authorized by s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26: see *R. v. Laba*, [1994] 3 S.C.R. 965 (S.C.C.). Neither the Attorney General of Canada nor the Superintendent of Bankruptcy intervened.

14 Before this Court, the submissions were focussed on whether ss. 9 to 22 in Part II of the *SFSA* are constitutionally inoperative when an application is made to appoint a national receiver under s. 243(1) of the *BIA* by reason of the doctrine of

paramountcy. For the following reasons, we agree with the chambers judge that there is no conflict, and therefore that ss. 9 to 22 of the *SFSA* are not constitutionally inoperable.

Analysis

15 The guiding mantra of the paramountcy analysis is that "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency": *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (S.C.C.), at para. 11; see also *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 98; Luanne A. Walton, "Paramountcy: A Distinctly Canadian Solution" (2003-2004), 15 *N.J.C.L.* 335, at p. 335.

16 The first step in the analysis is to determine whether the federal and provincial laws are validly enacted. This requires looking at the pith and substance of the legislation to determine whether the matter comes within the jurisdiction of the enacting legislature. Assuming both laws are validly enacted, the second step requires consideration of whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative. A provincial law will be deemed to be inoperative to the extent that it conflicts with or is inconsistent with the federal law: see *Xeni Gwet'in First Nations v. British Columbia*, [2014] 2 S.C.R. 257 (S.C.C.), at paras. 128-30; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 25-26 and 32.

17 Two kinds of conflict are at play: (1) an *operational conflict*, where compliance with both the federal and provincial law is impossible; and (2) *frustration of purpose*, where the provincial law thwarts the purpose of the federal law (*Laferrière c. Québec (Juge de la Cour du Québec)*, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at para. 64; *Rothmans, Benson & Hedges Inc.*, at paras. 11-12; *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, [2011] 3 S.C.R. 635 (S.C.C.), at para. 17; *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, [2013] 3 S.C.R. 53 (S.C.C.), at paras. 68-69; *Marcotte c. Banque de Montréal*, [2014] 2 S.C.R. 725 (S.C.C.), at para. 80).

18 The operational conflict branch of the paramountcy doctrine requires that there be "actual conflict" between the federal and provincial legislation, that is, "the same citizens are being told to do inconsistent things": *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at p. 191. Stated otherwise, operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'": *COPA*, at para. 64, citing *Multiple Access Ltd.*, at p. 191; see also *Ryan Estate*, at para. 68; *Rothmans, Benson & Hedges Inc.*, at para. 11. In *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.), for example, an order granting leave to commence foreclosure proceedings under provincial legislation in circumstances where a stay had been granted under a federal statute, was found to be operationally inconsistent because the order made under the provincial statute purported to authorize the very litigation that the federal stay prohibited: paras. 39-42.

19 Under the second branch of the paramountcy analysis, provincial legislation will be found to be inoperative when it frustrates the purpose of a federal law: *Canadian Western Bank*, at para. 73. In *Law Society (British Columbia) v. Mangat*, [2001] 3 S.C.R. 113 (S.C.C.), for example, this Court held that provincial legislation prohibiting non-lawyers from practising law for a fee before a tribunal, conflicted with federal legislation providing that a non-lawyer could represent a party before the Immigration and Refugee Board, even for a fee. Acknowledging that dual compliance was not strictly impossible because a person could either join the Law Society or not charge a fee, the Court nonetheless found the provincial law to be "contrary to Parliament's purpose": para. 72.

20 Significantly, against the background of the two paramountcy paradigms of operational conflict and frustration of purpose, this Court cautioned in *Canadian Western Bank* that "[t]he fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject": para. 74. The fundamental rule of constitutional interpretation is, instead, that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Canadian Western Bank*, at para. 75, citing *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356; see also *Ryan Estate*, at para. 69.

21 Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a "restrained approach", and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility: *Reference re Securities Act (Canada)*, [2011] 3 S.C.R. 837 (S.C.C.), at paras. 59-60, citing *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at p. 18 per Dickson C.J. (concurring); see also *Canadian Western Bank*, at paras. 37 and 75.

22 Constitutional doctrine should give due weight to the principle of cooperative federalism: *Canadian Western Bank*, at para. 24. This principle allows for some interplay, and indeed overlap, between both federal and provincial legislation: see *OPSEU*, at p. 18; see also *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641 (S.C.C.), at p. 669; *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134 (S.C.C.), at para. 18. Cooperative federalism accordingly "normally favours — except where there is an actual conflict — the application of valid rules adopted by governments at both levels as opposed to favouring a principle of relative inapplicability designed to protect powers assigned exclusively to the federal government or to the provinces": *Sacré-Coeur (Municipalité) c. Lacombe*, [2010] 2 S.C.R. 453 (S.C.C.), at para. 118, per Deschamps J. (dissenting).

23 While the principle of cooperative federalism cannot be seen as imposing limits on the otherwise valid exercise of legislative competence, it may be invoked to "facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action": *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] 1 S.C.R. 693 (S.C.C.), at paras. 17-19. In line with this principle, absent clear evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation. As this Court said in *Marcotte*, "care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose": para. 72; see also *Canadian Western Bank*, at para. 74. This means that the purpose of federal legislation should not be artificially broadened beyond its intended scope. To improperly broaden the intended purpose of a federal enactment is inconsistent with the principle of cooperative federalism. At some point in the future, it may be argued that the two branches of the paramountcy test are no longer analytically necessary or useful, but that is a question for another day.

24 The litigation in this case proceeded on the assumption that s. 243 of the *BIA* and Part II of the *SFSA* were validly enacted. Section 243 of the *BIA* falls within Parliament's exclusive power to enact laws in relation to bankruptcy and insolvency, while Part II of the *SFSA* falls within Saskatchewan's power to enact laws in relation to property and civil rights: *Constitution Act, 1867*, ss. 91(21) and 92(13).

25 The parties essentially accepted the conclusion of the chambers judge and the Court of Appeal about the absence of operational conflict because it is possible to comply with both statutes by obtaining an order under the *SFSA* before seeking the appointment of a receiver under s. 243 of the *BIA*. The creditor can comply with both laws by observing the longer periods required by provincial law. In that regard, the federal law is permissive and the provincial law, more restrictive. This has been regularly considered not to constitute an operational conflict: *Ryan Estate*, at para. 76; *COPA*, at paras. 65; *Canadian Western Bank*, at para. 100; *Rothmans, Benson & Hedges Inc.*, at paras. 22-24; *114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 S.C.R. 241 (S.C.C.), at para. 35; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 964. The issue before this Court therefore centres on whether the Court of Appeal was right to conclude that the provincial legislation frustrates the purpose of the federal legislation.

26 To prove that provincial legislation frustrates the purpose of a federal enactment, the party relying on the doctrine "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose": *COPA*, at para. 66; *Marcotte*, at para. 73; see also *Canadian Western Bank*, at para. 75; *Burrardview Neighbourhood Assn. v. Vancouver (City)*, [2007] 2 S.C.R. 86 (S.C.C.), at para. 77. Clear proof of purpose is required: *COPA*, at para. 68. The burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of permissive federal legislation is insufficient on its own: *COPA*, at para. 66; see also *Ryan Estate*, at para. 69.

27 And, as previously noted, paramountcy must be applied with restraint. In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject: *Canadian Western Bank*, at para. 74, citing *Rothmans, Benson & Hedges Inc.*, at para. 21. As this Court explained in advocating a similar restrained approach to interjurisdictional immunity in *Canadian Western Bank*, at para. 37:

> The "dominant tide" [of allowing for a fair amount of interplay and indeed overlap between federal and provincial powers] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that
>
> > the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.
> >
> > ("The Supreme Court and the Law of Canadian Federalism" (1973), 23 *U.T.L.J.* 307, at p. 308) [Emphasis in original.]

28 It is in light of the above principles that we turn to the federal and provincial provisions at issue.

29 Section 243(1) is found in Part XI of the *BIA*, dealing with secured creditors and receivers. It authorizes a court, upon the application of a secured creditor, to appoint a receiver where such appointment is "just or convenient":

> **243.** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> >
> > (c) take any other action that the court considers advisable.

30 In s. 243, courts are given the authority to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to courts in multiple jurisdictions for the appointment of a receiver.

31 Under s. 244(1), a secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor that was acquired for, or used in relation to, a business carried on by the insolvent person, is generally required to send a notice of that intention to the insolvent person. Section 243(1.1) states that, where notice is to be sent under s. 244(1), the appointment of a national receiver cannot be made before the expiry of 10 days after the day on which the secured creditor sends the notice:

> (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> > (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
> >
> > (b) the court considers it appropriate to appoint a receiver before then.

32 The national receivership regime does not oust a secured creditor's power to have a receiver appointed privately, or by court order under provincial law or any other federal law. Where, however, that receiver takes possession or control of all or substantially all of the inventory, accounts receivable or other property of the insolvent debtor or bankrupt, he or she is a "receiver" for purposes of Part XI of the *BIA* and must comply with the provisions in that part: see s. 243(2).

33 The provincial scheme at issue, the *SFSA*, was enacted in 1988, with roots in legislation governing Saskatchewan farm land dating back several decades: see Donald H. Layh, *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary & Case Law* (2009), at pp. 54-57.

34 Part II of the *SFSA* is entitled "Farm Land Security". Its purpose is "to afford protection to farmers against loss of their farm land": s. 4.

35 Subject to ss. 11 to 21, s. 9(1)(d) of the *SFSA* prohibits commencement of any "action" with respect to farm land. "[A]ction" is defined in s. 3 to include an action in court by a mortgagee with respect to farm land for the sale or possession of mortgaged farm land: s. 3(a)(ii). It includes an application for the appointment of a receiver under s. 243(1) of the *BIA*. Section 11(1)(a) states that, where a mortgagee makes an application with respect to a mortgage on farm land, the court may, on any terms and conditions that it considers just and equitable, order that s. 9(1)(d) does not apply. Where such an order is made, the mortgagee may then commence or continue an action with respect to that mortgage: s. 11(2). Failure to seek an order pursuant to s. 11 renders any action commenced without an order a nullity: s. 11(3).

36 Before a mortgagee can bring an application under s. 11, however, s. 12 sets out a number of preconditions. Most notably, the mortgagee must serve a notice of intention on the Farm Land Security Board and on the farmer: s. 12(1). There is then a compulsory and non-waivable 150-day waiting period required before an application can be made: s. 12(1). This notice triggers a mandatory review and mediation process between the mortgagee and the farmer, conducted with the assistance of the board: s. 12(2) to (5). Prior to the expiry of the 150-day waiting period, the board must prepare a report to consider as part of the mortgagee's application to begin the action: ss. 12(12), (13) and 13(*b*). Once the 150-day waiting period is over, the mortgagee may then make an application for an order granting leave to commence the action: see s. 12(1).

37 On hearing the application, the court must presume that the farmer has a reasonable possibility of meeting his or her obligations under the mortgage, and that he or she is making a sincere and reasonable effort to meet those obligations: s. 13(a). The mortgagee, in turn, has the statutory burden of proving that either the farmer has no reasonable possibility of meeting these obligations or that he or she is not making a sincere and reasonable effort to do so: s. 18(1). Ultimately, the court must dismiss the application if it is satisfied that it is not "just and equitable" according to the purpose and spirit of the *SFSA* to make the order: s. 19. If the application is dismissed, no further application pursuant to s. 11 or notice pursuant to s. 12 may be made with respect to the mortgage on that farm land for one year: s. 20.

38 As a result of the concurrent operation of s. 243(1) of the *BIA* and Part II of the *SFSA*, a secured creditor wishing to enforce its security interest against farm land must wait 150 days, rather than the 10 days imposed under federal law. The creditor must also comply with the various additional requirements of the *SFSA*, such as the statutory presumptions described above. That interference with s. 243(1), however, does not, in and of itself, constitute a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime. This requires inquiring into the purpose of s. 243(1).

39 In this case, the parties disagree about the purpose of s. 243 of the *BIA* and whether it is frustrated by the *SFSA*. According to the Attorney General for Saskatchewan, the main purpose of the receivership power under s. 243 is to allow for a national receiver. In its view, the purpose of Part XI of the *BIA* is to provide for the appointment of a single receiver with authority to act throughout the country, rather than requiring a creditor to apply for a receiver in each province, and to provide a uniform set of standards for all receivers of an insolvent, regardless of the authority for the appointment.

40 *Amicus*, on the other hand, submits that the appointment of a national receiver is only part of s. 243's broader purpose. According to *amicus*, effective insolvency law requires flexibility and prompt and timely access to remedies such as a receivership, without regard to the idiosyncrasies of provincial law. Section 243 was intended to provide secured creditors

with an entitlement to apply for the appointment of a receiver within a certain period of time, and to obtain such appointment exclusively in accordance with the substantive requirements found in the federal law.

41 Citing no parliamentary debates or reports concerning the amendments to s. 243 which created the national receivership remedy in 2005, *amicus* relies instead on case law and secondary sources about the importance of timeliness in insolvency proceedings more generally to support his contention that Parliament must have intended to grant secured creditors the right to apply to a court for an order appointing a national receiver subject *only* to a 10-day notice period, a right which provincial legislatures should not be allowed to qualify or restrict: e.g., *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.), at para. 58; *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div. [Commercial List]), at para. 7; Hon. Justice J. M. Farley, "A Judicial Perspective on International Cooperation in Insolvency Cases" (March 1998), 17 *Am. Bankr. Inst. J.* 12; Fred Myers, "Justice Farley in Real Time", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 19; United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (2005), at p. 12. We note that these cases and sources for the most part relate to restructurings conducted under the *Companies' Creditors Arrangement Act*. The restructuring proceedings under this Act, *not* proceedings under Canadian bankruptcy and insolvency law in general, have been referred to as the "hothouse of real-time litigation": see Richard B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484. "Real-time litigation" is a judicially developed phrase used primarily in restructuring cases: *Edgewater Casino Inc., Re* (2009), 265 B.C.A.C. 274 (B.C. C.A.), at para. 21; *Transglobal Communications Group Inc., Re* (2009), 4 Alta. L.R. (5th) 157 (Alta. Q.B.), at para. 48. A judicially coined expression, however magnetically phrased, that describes judicial practices in the context of restructurings, can hardly be said to be evidence of the legislative purpose of a national receivership regime.

42 *Amicus* also relies on a 1986 report from the Advisory Committee on Bankruptcy and Insolvency which emphasized the need for prompt access to courts as part of its analysis of specific recommendations stemming from a more general proposal to amend Canada's bankruptcy legislation at that time for the purpose of controlling the appointment and conduct of a receiver of an insolvent debtor: *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986), at pp. 40 and 43-44. This report was issued some 20 years before the 2005 amendments to s. 243 and did not deal with the national receiver.

43 Finally, *amicus* asserts that timeliness is critical to achieving the particular objectives of receivership in general, which include not only enforcement of the secured party's security interest, but also replacing inefficient management and facilitating the sale of the business as a going concern: see Roderick J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 467-69. In his book, however, Professor Wood does not mention timeliness as one of the purposes of s. 243, either in his discussion of the foundations of receivership law generally (ch. 17) or in his specific comments on the 2005 and 2007 legislative reforms that led to the amendments to s. 243 (pp. 466-67).

44 It is against this backdrop that *amicus* submits that s. 243 must be read. According to *amicus*, this evidence proves that the purpose of s. 243 is to establish an effective national receivership remedy, one which is timely and flexible, and applies uniformly across the country.

45 This is, in our respectful view, insufficient evidence for casting s. 243's purpose so widely. As the Court explained in *COPA*, at para. 68, "clear proof of purpose" is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose. The totality of the evidence presented by *amicus* does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by *amicus* merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting *amicus*'s claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

46 Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner.

The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.

47 In fact, the discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Provincial interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose:*COPA*, at para. 66; see also *114957 Canada Ltée*.

48 This case is thus easily distinguishable from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.), where the Court held that a security interest created pursuant to federal law could not, constitutionally, be subjected to the procedures for enforcement of security interests prescribed by provincial legislation. Unlike the self-executing remedy at issue in that case, where the bank could seize the chattel upon default without the need to go to court, the appointment of a s. 243 receiver is not mandatory. More importantly, in contrast with *Hall*, the s. 243 receivership remedy cannot be said to create a "complete code": p. 155. Nothing in the text of the provision or the *BIA* more generally suggests that s. 243 is meant to be a comprehensive remedy, exclusive of provincial law. The provision itself recognizes that a receiver may still be appointed under a security agreement or other provincial or federal laws, and creates no right to the appointment of a national receiver: s. 243(2)(*b*). As this Court observed in *COPA*, at para. 66, "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission".

49 Any uncertainty about whether s. 243 was meant to displace provincial legislation like the *SFSA* is further mitigated by s. 72(1) of the *BIA*, which states:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

This too demonstrates that Parliament has explicitly recognized the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the *BIA*: see *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.), at paras. 46-47.

50 Other provisions of the *BIA* further support a more narrow reading of s. 243's purpose. Notably, s. 47 of the *BIA* empowers a court to appoint an interim receiver where a notice of intention to enforce a security was sent or is about to be sent under s. 244(1). Where there is an urgent need for the appointment of a receiver, the *BIA* thus provides a mechanism for the appointment of an interim receiver. As Bennett has observed:

> In practice, a secured creditor may apply for an interim receiver under subsection 47(1) for a short term, and then apply under section 243 for a full receivership and, before the appointment of the interim receiver expires or, alternatively, apply for an extension under subsection 47(1)(c).
>
> (Frank Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 883)

While s. 48 of the *BIA* provides that ss. 43 to 46 do not apply to individuals whose principal occupation is farming, the provision does not exempt farmers from the operation of s. 47. This shows that Parliament thinks farmers generally warrant special consideration, but not in cases where an interim receiver under s. 47 is found to be warranted. Promptness and timeliness is a concern that Parliament appears to have addressed precisely through the interim receivership regime. The potential conflict, if any, between s. 47 of the *BIA* and Part II of the *SFSA* is not, however, at issue in this appeal.

51 The legislative history of s. 243 of the *BIA* further supports a narrow construction of the provision's purpose focussed on the establishment of a national receivership regime. The purpose of a court-appointed receiver, generally, "is to preserve and

protect the property in question pending resolution of the issues between the parties": Bennett, at p. 6, citing *Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada)* (1995), 169 A.R. 138 (Alta. C.A.). While historically receivership law was primarily a remedy for secured creditors, the legislative regulation of receiverships has resulted in many significant rights also being given to the debtor and other interested parties as well: Wood, at p. 459.

52 Part XI of the *BIA* was added to the Act in 1992, bringing under federal law various aspects of receivership law that had previously applied to insolvent debtors at common law or under provincial legislation: S.C. 1992, c. 27, s. 89. In discussing the rationale for Part XI's adoption, Pierre Blais, the then-Minister of Consumer and Corporate Affairs and Minister of State (Agriculture), suggested that Part XI was enacted "to impose duties of disclosure and good faith on secured creditors and receivers and to require that a secured creditor give a debtor notice before enforcing its security": *House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., October 29, 1991, at pp. 4177-78. He further noted, in the context of a discussion about the legislation more generally, that he had "made a point of consulting closely with [his] provincial counterparts to ensure [the federal] regime meshes smoothly with existing or planned provincial ones": p. 4180.

53 Although the 1992 legislation did not create a national receivership remedy, it amended the *BIA* in two ways that are particularly relevant to this appeal. First, it codified a 10-day notice period under s. 244 for secured creditors seeking to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a business debtor. As Professor Wood explains, the requirement of a notice period developed initially at common law as a way to protect against the potential abuse of power by secured creditors: p. 474. The introduction in 1992 of a statutory notice period largely eliminated uncertainty associated with the common law rule: Wood, at p. 476. The purpose of the s. 244 notice requirement is "to provide an insolvent person with an opportunity to negotiate and reorganize financial affairs":, Janis P. Sarra, Geoffrey B. Morawetz and L. W. Houlden, *The 2015 Annotated Bankruptcy and Insolvency Act* (2015), at p. 1054; see also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, No. 7, 3rd Sess., 34th Parl., September 4, 1991, at p. 12, Ron MacDonald (Vice-chairman of the Committee). Second, the 1992 amendments gave the courts expanded authority when appointing interim receivers under the *BIA*: Wood, at p. 461-62; Bennett, at pp. 841-42. This new regime was intended "to prevent the prejudice that might otherwise be caused by the imposition of [the] new statutory notice period": Wood, at p. 461.

54 The 1992 legislation provided for parliamentary review of the *BIA* in three years' time: s. 92. In 1993, an advisory committee was established to identify further necessary amendments: Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (2007), at p. 3. Although s. 243 remained unchanged when Parliament enacted legislation amending the *BIA* in 1997, the 1997 amendments called for further parliamentary review in five years' time: S.C. 1997, c. 12, s. 114.

55 In anticipation of this review, Industry Canada engaged in a consultation process with stakeholders, culminating in a report published in 2002 summarizing many issues that stakeholders identified as concerns with regard to the operation and administration of the *BIA*: Marketplace Framework Policy Branch, Policy Sector, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.* In its report, Industry Canada noted that Part XI of the *BIA* had not been effective and had not been used as intended in many areas of the country: p. 20.

56 For its part, the Standing Senate Committee on Banking, Trade and Commerce, which was ultimately charged with examining and reporting to Parliament on the administration and operation of the *BIA*, [1] identified problems with the operation of the interim receivership regime in the legislation: *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 144-45. The Committee observed that in many jurisdictions, courts had extended the powers of interim receivers to such an extent that they closely resembled those of court-appointed receivers. The problem was that, while exercising similar powers, interim receivers were not bound by the duties and responsibilities of court-appointed receivers. The Committee therefore recommended that the role and powers of interim receivers as well as the duration of their appointment be clarified, suggesting that interim receivers be the "temporary watchdog[s]" that they were initially intended to be: pp. 144-45.

57 Professor Wood, at p. 462, discussed what impelled the expansive approach to interim receivership in some jurisdictions:

> One of the reasons for conferring such wide powers on interim receivers was that it effectively gave rise to a national receivership. Prior to this, receivers were appointed pursuant to provincial law and it was necessary to seek the assistance of courts of other provinces to give effect to the order there. The availability of a national receivership [through the interim receivership regime] meant that an order had full force and effect in every Canadian province and territory.

58 In 2005, Parliament responded by passing Bill C-55: S.C. 2005, c. 47. Bill C-55 not only clarified the scope and powers of interim receivers, but also amended Part XI of the *BIA* and introduced a national receivership remedy: ss. 30 to 33 and 115.

59 In describing the rationale for the 2005 amendments, Industry Canada explained that courts in some jurisdictions had undermined the original intention of the interim receivership remedy by granting interim receivers wide-ranging powers for indefinite periods. The purpose of the reforms to s. 47 was to limit the period of an interim receiver appointment and the powers that may be granted to interim receivers, while s. 243(1) was intended to "allow the bankruptcy court to appoint a receiver with the power to act nationally", thereby "eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver": Industry Canada, *Bill C-55: clause by clause analysis* (online), at Bill Clause Nos. 30 and 115.

60 There is little in the legislative debate surrounding Bill C-55's adoption. While not decisive in itself, Don Boudria, a member of Parliament, commented that the national receivership remedy was aimed at "cover[ing] the gap" caused by changes to the interim receivership regime and that a national receiver "would be able to operate in any province": *House of Commons Debates*, vol. 140, No. 128, 1st Sess., 38th Parl., September 29, 2005, at p. 8215. Professor Wood echoes this view and explains:

> Instead of using an interim receiver as a means of appointing a receiver who can operate nationally, the amendments give the bankruptcy courts the power to appoint a national receiver. The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. A court is directed not to appoint a receiver in respect of a debtor who has been given a notice of intention to enforce until the ten-day notice period has expired, unless the debtor consents to an earlier appointment or the court considers it appropriate to do so. If the secured creditor is concerned that the debtor may dissipate the assets, the secured creditor may seek the appointment of an interim receiver. [Emphasis added; footnotes omitted; at p. 466.] (See also Bennett, at p. 886.)

61 Andrew Kent, then a director of the Insolvency Institute of Canada, explained to members of a committee studying the Bill that creation of a national receivership remedy would be "more efficient" given that "many ... businesses now are on a national scale": Standing Committee on Industry, Natural Resources, Science and Technology, *Evidence*, No. 064, 1st Sess., 38th Parl., November 17, 2005, at p. 7. Similarly, Jerry Pickard, the then-Parliamentary Secretary to the Minister of Industry, emphasized that the "creation of a national receiver, with the power to act across the country", would "greatly streamline" the bankruptcy process: *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 19, 1st Sess., 38th Parl., November 23, 2005, at p. 55.

62 Although Bill C-55 received royal assent on November 25, 2005, it was not immediately proclaimed in force: s. 141; see also Marcia Jones, Legislative Summary LS-584E, *Bill C-12: An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada, 2005* (2007), at p. 2. In the interim, Parliament passed Bill C-12, which further amended the *BIA*: S.C. 2007, c. 36.

63 During the legislative debate on Bill C-12, Colin Carrie, a member of Parliament and then-Parliamentary Secretary to the Minister of Industry, explained that the further amendments to s. 243 were aimed in part at addressing shortfalls identified with the national receivership remedy, whose "goal was to improve efficiency in the insolvency system by allowing one person to deal with all of the debtor's property, wherever the property is located in Canada": *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 2, 2nd Sess., 39th Parl., November 29, 2007, at p. 25.

64 The Legislative Summary of the Bill states that a receiver appointed under s. 243 has "the authority to act throughout Canada" and confirms that a "court may not appoint a receiver until 10 days after the date the notice is sent — unless the debtor consents to an earlier enforcement of the security, or the court considers it appropriate to appoint a receiver before then": p. 43. In its analysis of the legislation, Industry Canada further explains that the national receivership remedy is aimed at increasing efficiency while the purpose of the notice period more specifically is to give time to the debtor to repay the liability:

> Section 243 sets out the rules related to the appointment of a receiver. Chapter 47 created the ability to appoint a receiver under the Act. This differs from current practice, in which receivers are appointed under provincial law. The new BIA receiver will be entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. Creditors will still be entitled to have a provincially appointed receiver act on their behalf under the Act.
>
> . . . . .
>
> Subsection (1.1) mandates that a notice of an intention to enforce security (a section 244 notice) must be provided before a receiver may be appointed. The intention of the section 244 notice is to provide the debtor with an opportunity to repay the liability that underlies the security being enforced. The waiting period is not necessary where the debtor consents or the court determines that it is appropriate to appoint a receiver.
>
> [Emphasis added.]
>
> (*Bill C-12: Clause by Clause Analysis* (online), Bill Clause No. 58)

65 In its summary of the key legislative changes under both Bill C-12 and Bill C-55, Industry Canada highlighted s. 243:

> Judges exercising their powers under the BIA may, on application of a secured creditor, appoint a "national" receiver under section 243 of the BIA if it is "just or convenient to do so". A receiver appointed under section 243 of the BIA will have the authority to act throughout Canada. Such an appointment eliminates the need to obtain separate appointments in every province/territory where the debtor has assets.
>
> . . . . .
>
> If a notice to enforce security is to be sent under section 244(1) of the BIA, the court may not appoint a receiver until the 10-day notice period has expired unless the debtor consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.
>
> [Emphasis added.]
>
> (*Summary of Legislative Changes: Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007* (online), at Part B)

66 Bill C-12 received royal assent on December 14, 2007. The amendments to s. 243 under both Bill C-12 and Bill C-55 came into force on September 18, 2009: SI/2009-68. There have been no further amendments to s. 243 since that time.

67 The preceding review confirms that s. 243's purpose is simply the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions: see Wood, pp. 466-67. The 2005 and 2007 amendments to the *BIA* made clear that interim receivers were to be temporary in nature and have more limited powers, as originally intended, but gave courts the power to appoint a receiver with authority to act nationally, thereby increasing efficiency and removing the need to seek the appointment of a receiver in each jurisdiction where the debtor has assets. Sarra, Morawetz and Houlden have explained:

> Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA*, to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver. The national receiver under the *BIA* is entitled to act across the country, increasing

efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. [Emphasis added; p. 1037.]

68 Section 243 was thus aimed at the establishment of a national receivership regime. Its purpose was to avoid a multiplicity of proceedings and the inefficiency resulting from them. There is no evidentiary basis for concluding that it was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought. General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly in the absence of clear evidence that Parliament intended a broader statutory purpose, is inconsistent with the requisite restrained approach to paramountcy and with the fundamental rule of constitutional interpretation referred to earlier in our reasons (paras. 20-21). Vague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws like the *SFSA*.

69 Our conclusion is further bolstered by the operation of the federal *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"), legislation which allows an insolvent farmer to bring an application to stay proceedings by the farmer's creditors in order to engage in mediation and a review of the farmer's financial affairs: ss. 5 to 14. Under the *FDMA*, a security holder must give a farmer at least 15 business days' notice before seeking either to enforce any remedy against the property of a farmer or to commence any proceedings or any action, execution or other proceedings for the recovery of a debt, the realization of any security or the taking of any property of a farmer: s. 21. Before or after receiving such notice, the farmer may apply for a 30-day stay of proceedings against all creditors, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement: ss. 5(1)(*a*) and 7(1)(*b*); see also Bennett, at p. 135. Where extension of the 30-day period is essential to the formulation of an arrangement between the farmer and the farmer's creditors, the stay can be extended for up to an additional 90 days: s. 13(1). When the stay is in effect, no creditor can enforce any remedy against the property of a farmer or commence or continue any proceedings or any action, execution or other proceedings for the recovery of a debt, the realization of any security or the taking of any property of a farmer, notwithstanding any other law: s. 12.

70 In describing the *FDMA*'s predecessor legislation in *M & D Farm*, this Court explained that the legislation was "intended to create a standstill period or moratorium of short duration" to give a farmer "a breathing space in which to attempt to reorganize his or her financial affairs" with "the assistance of a neutral panel to mediate with creditors": para. 18.

71 While the federal *FDMA* and the provincial *SFSA* have different substantive and procedural requirements, they have similar purposes, and are aimed at the protection of farmer debtors. It is notable that Parliament has recognized that the receivership provision under s. 243 can be subordinated to similar delays in other legislation (including a 120-day stay under the *FDMA*, in comparison with 150 days under the *SFSA*), to allow for mediation and review of a farmer's financial situation. Given the presumption that Parliament does not enact related statutes that are inconsistent with one another, courts should avoid an interpretation of a federal statute which does not accommodate similar limitations imposed under a provincial statute: *Ryan Estate*, at paras. 80-81. In light of the *FDMA*, it follows that Parliament intended neither to preclude all notice periods longer than the 10-day notice period provided in the *BIA* nor to oust legislation which is intended to favour mediation between creditors and farmers regarding the enforcement of a security.

72 Given these considerations and this analysis, we do not agree with the Court of Appeal's finding that the purpose of s. 243 was to afford a timely remedy to secured creditors. What seemed "self-evident" to the Court of Appeal (at paras. 51-52), and led to its conclusion that the 10-day waiting period under s. 243(1.1) was a ceiling, is, with respect, neither supported by the evidence, nor compatible with a restrained approach to paramountcy. Furthermore, on this record, there is simply no evidence to support *amicus*'s argument that the 150-day delay or the other conditions in the *SFSA* frustrate any effectiveness or timeliness concerns. It is the burden of *amicus* to not only establish that these are, in fact, the purposes of s. 243, but also that the evidence supports a finding that the provincial law frustrates them in some way. The record is silent in that regard. That a recourse may take longer, or may have additional requirements, does not render it automatically ineffective or untimely, particularly when the assets at stake are farm lands.

Conclusion

73 *Amicus* has, with respect, been unable to satisfy his burden to prove that ss. 9 to 22 of the *SFSA* conflict with the purpose of s. 243 of the *BIA*. Parliament's purpose of providing bankruptcy courts with the power to appoint a national receiver is not frustrated by the procedural and substantive conditions set out in the provincial legislation. While these conditions require a secured creditor to seek leave before bringing an application for the appointment of a receiver under s. 243 — a process which takes at least 150 days and imposes other procedural and substantive requirements — they do not hinder the purpose of allowing for the appointment of a national receiver. The purpose of permissive federal legislation is not frustrated simply because provincial legislation restricts the scope of that permission: *COPA*, at para. 66; *Ryan Estate*, at para. 69; see also *Rothmans, Benson & Hedges Inc.* The "high standard" for applying the paramountcy doctrine on the basis of frustration of federal purpose has accordingly not been met: *Ryan Estate*, at para. 84.

74 The Court of Appeal's conclusion that Part II of the *SFSA* is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*, is accordingly set aside. In view of the agreement of the parties, there will be no further order with respect to costs.

***Côté J.* (dissenting):**

75 It may be an old cliché, but in Canadian bankruptcy and insolvency law, its wisdom is unavoidable: time is of the essence. In the past, this Court has acknowledged that restructuring proceedings are a "hothouse of real-time litigation": *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 58, quoting R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484. Timeliness is no less important for the appointment of a receiver — whether interim or full — as the receiver at once preserves and manages property while enforcing a secured creditor's rights.

76 In light of this, I am of the view that a balance has been struck by Parliament in s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), between the competing interests of secured creditors and insolvent debtors in the often dramatic circumstances surrounding a debtor's insolvency. While I agree with the majority's conclusion that Parliament's intention in enacting s. 243 *BIA* was to enable a secured creditor to apply for the appointment of an effective *national* receiver, I must dissent, because I do not believe that a full purposive account of s. 243 can end there. I am of the mind that Parliament also intended to establish a process for appointing national receivers that is timely, sensitive to the totality of circumstances and capable of responding to the emergencies that are known to occur in practice. In my view, these purposes are clearly on display in s. 243 *BIA*. To the extent that the operation of Part II of *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1 ("*SFSA*"), is incompatible with these purposes and with the federally calibrated balance that s. 243 represents, I see a frustration of purpose.

I. Doctrine of Federal Paramountcy

77 It is now well established that one of the ways in which the doctrine of federal paramountcy is triggered is when the operation of validly enacted provincial legislation frustrates the purpose of federal legislation: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 73. The party invoking the doctrine must provide clear proof of the federal purpose and must then establish that "the provincial legislation is incompatible with this purpose": *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at para. 66; see also para. 68. The burden of proving this frustration is high.

78 My colleagues, following the clarion call of co-operative federalism, stress the need to take a "restrained approach" in frustration of purpose analysis. But while co-operative federalism is undoubtedly an important principle, a yearning for a harmonious interpretation of both federal and provincial legislation cannot lead this Court to disregard obvious purposes that are pursued in federal legislation and that are, by this Court's jurisprudence, paramount. Gonthier J., for the Court, stressed the following in *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.), at para. 66:

... I consider irrelevant the principle of statutory interpretation whereby a statute should be read in a manner that will uphold the constitutionality of the relevant legislative provisions. This principle only applies when both competing interpretations are reasonably open to the court: *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771. In this case, to adopt the interpretation consistent with the constitutional norms would be repugnant to the text and context of the federal legislation.

79 It is also worth noting this Court's own warning in *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.), at paras. 61-62:

While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. ...

... The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

See also *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 (S.C.C.), at para. 19.

80 With this said, I will now discuss what I believe to be the purpose of s. 243 *BIA*.

II. Federal Purpose Underlying Section 243 BIA

A. Balance Struck by Parliament: A Timely and Flexible Remedy for Secured Creditors

81 I will begin by reproducing the relevant portions of s. 243:

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(a) is appointed under subsection (1); or

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

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

82 For the reasons that I elaborate below, I believe that through s. 243 Parliament intended to establish a process for appointing national receivers that would be effective, timely, capable of responding to emergencies (or, in a word, flexible) and sensitive to the totality of circumstances. In part, this reflects a balance struck by Parliament between the interest of secured creditors in obtaining a timely remedy and that of insolvent debtors in being afforded enough time either to commence restructuring proceedings or to arrange their financial affairs and pay their creditors. I believe these federal purposes are plainly evident in s. 243, understood in light of the realities and demands of real-time insolvency practice, its statutory context and legislative history.

83 To begin, the *BIA* prescribes a 10-day notice period between the time a secured creditor issues a notice of intention to enforce a security and the time a court may appoint a national receiver: s. 243(1.1). This period coincides with the 10-day period after notice is given during which s. 244(2) prevents the creditor from enforcing the security.

84 The majority sees s. 243's 10-day notice period as a mere minimum, designed to work in concert with longer provincial waiting periods. Respectfully, I do not believe this reading is supported by the context of insolvency practice into which the 10-day period was initially introduced. Such a reading would upset the balance that Parliament intended to strike.

85 In my view, implicit in this short, 10-day notice period is the very notion of urgency, connected to the need for receivership law to operate effectively in real time. Secured creditors will often have an acute need to have a receiver appointed promptly. In the often frenzied rush of insolvency proceedings, court-appointed receivers perform the important functions of taking over control of the insolvent debtor's assets, assuming management of the debtor's business and enforcing rights for the recovery of money through the sale of the debtor's property: F. Bennett, *Bennett on Receiverships* (3rd ed. 2011), at pp. 1 and 6. It is important that this be done quickly. Secured creditors are often rightly concerned that the insolvent debtor may dissipate its assets: R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 461. Time will also be of the essence if the current managers of the insolvent debtor are incompetent, are acting fraudulently or are prone to take senseless risks, or if a part or the whole of the business needs to be sold as a going concern: Wood, at pp. 467-69. As Richards C.J. stated in the judgment on appeal, the insolvency context "is self-evidently one where events move quickly and where, by their nature, proceedings are time sensitive": 2014 SKCA 35, 433 Sask. R. 266 (Sask. C.A.), at para. 51.

86 Such is the importance of time for creditors that, before the 10-day standstill for enforcing a security on all or substantially all of the debtor's assets under s. 244 was introduced into the *BIA*, secured creditors would often move to appoint a receiver mere hours after making a demand for payment: Wood, at p. 474. In order to prevent secured creditors from riding roughshod over the interests of insolvent debtors in this way, Canadian courts developed the reasonable notice doctrine, later replaced by the *BIA*'s 10-day statutory notice requirement.

87 Timeliness is so critical that s. 47 of the *BIA* allows secured creditors to apply for the immediate appointment of an interim receiver in order to preserve the debtor's property. And instead of demonstrating any intention that this statutory notice period could be extended pursuant to provincial law, Parliament permits secured creditors to apply for receivership *before* the expiry of the 10-day period in certain circumstances. Section 243(1.1)(*b*) *BIA* provides that a court may appoint a receiver before the expiry of the notice period if it considers it appropriate. Furthermore, an insolvent debtor can consent to an earlier appointment of a receiver under s. 243(1.1)(*a*). These provisions evidence Parliament's intention to provide secured creditors with a remedy capable of adapting to the often dramatic circumstances of insolvency.

88 This federal purpose of timeliness can also be discerned from the legislative history of the statutory notice provision. As my colleagues explain, this statutory notice period was introduced into the *BIA* in s. 244 in 1992, and applied to secured creditors seeking to enforce their security under provincial legislation on all or substantially all of an insolvent debtor's assets. Because this 10-day notice requirement has since been incorporated into the federal receivership regime, in which it serves a similar purpose, I am of the view that a full purposive analysis of that scheme must account for the federal objectives that were originally given effect in s. 244.

89 Finally, Parliament appears to have intended that a court, in assessing an application, consider the totality of the circumstances and make an equitable judgment sensitive to the full factual matrix. This is clear from s. 243(1) *BIA*, which provides that a court may appoint a receiver "if it considers it to be just or convenient to do so". The secured creditor is not required to surmount massive evidentiary hurdles. The court's discretion is not restrained in any meaningful way. It must be borne in mind that, historically, receivership was an equitable remedy designed to protect the rights of implicated parties and to preserve property, and this remedy was applied expansively wherever it was deemed necessary: Bennett, at p. 2. The standard provided for in s. 243(1) *BIA* flows from this origin and purpose, and is commensurate with the demands and realities of real-time litigation.

90 In sum, s. 243 *BIA* is a typical bankruptcy and insolvency provision designed to operate in real time. It seeks to balance the interests of secured creditors and debtors through a process for applying for a national receiver that is adaptable and sensitive to the circumstances, and that can be launched quickly if need be.

B. Narrow Construction of the Federal Purpose Endorsed by the Majority

91 The majority sees in s. 243 only one purpose: to enable secured creditors to apply for the appointment of a national receiver, thereby eliminating the need to undertake the lengthy and cumbersome process of applying for a receiver in multiple jurisdictions. Respectfully, I cannot subscribe to so narrow a reading.

92 I agree with my colleagues' assessment of the problem that *prompted* Parliament to introduce the national receivership scheme in what is now s. 243 *BIA*. Before that section was introduced, many had expressed concerns that the absence of a national receivership regime required secured creditors to undertake the cumbersome process of applying for a receiver in each province. In addition, a practice had emerged in some provinces of appointing interim receivers under s. 47 *BIA* and conferring broad nation-wide powers on them for indefinite periods, often lasting through to the final liquidation of a debtor's assets and displacing the intended role of a receiver appointed under the auspices of provincial law: J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2015 Annotated Bankruptcy and Insolvency Act* (2015), at p. 174; *Railside Developments Ltd., Re*, 2010 NSSC 13, 62 C.B.R. (5th) 193 (N.S. S.C.), at paras. 50-51. Indeed, in 2006 this Court waded into the controversy. Abella J., for a majority of the Court, cautioned against an "open-ended" reading of s. 47 based on "jurisdictional largesse" in regard to unilateral declarations regarding third party rights: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.), at paras. 45-46.

93 The amendments passed in 2005 (c. 47) and 2007 (c. 36), both brought into force in 2009, aimed to bring clarity and consistency to the system of receivership under the *BIA*. First, the amendments limited the powers of interim receivers appointed under s. 47 *BIA* as well as the duration of their appointments, which clearly became "interim" in nature. Second, Parliament reworked Part XI of the *BIA* so that s. 243 provided for the appointment of a national receiver over all or substantially all of an insolvent debtor's assets. This receivership regime is not exclusive; s. 243(2) *BIA* makes it clear that a national receiver may also be appointed by private agreement or under another Act, whether provincial or federal.

94 I do not dispute that s. 243 *BIA*'s introduction was *prompted* by a need for a national full receiver, which would ensure that a secured creditor did not have to undertake the process of applying for a receiver in every province and would limit the need to have recourse to an interim receiver over indefinite periods. I also agree that receivers appointed under Part XI are subject to a uniform set of standards and duties.

95 However, my colleagues have, in construing the federal purpose, focused principally on the specific mischief that prompted Parliament to amend Part XI of the *BIA* in 2005 and 2007, while largely overlooking the federal purposes related to receivership law that were given effect when Part XI was introduced in 1992 and that have carried through to modern day s. 243. It must be remembered that s. 243 is the product of an incremental evolution. The prescribed 10-day notice period for secured creditors seeking to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a business debtor was among the first rules codified in Part XI of the *BIA* in 1992. It was designed to apply to receivers governed by the common law or by provincial legislation. In my view, it was then that Parliament struck a balance between the interest of secured

creditors in a timely remedy and that of insolvent debtors in being afforded enough time to arrange their financial affairs. The 2005 and 2007 amendments — the latest steps in this legislative evolution — were specifically intended to provide secured creditors with access to a national receivership. However, I am convinced that the foundational purposes that have animated federal receivership law since 1992 must form part of any credible account of the federal purpose underlying today's s. 243. I fear that if this Court disregards these foundational purposes in its frustration of purpose analysis, the provinces will be left free to mangle the receivership scheme such that it no longer functions as Parliament intended it to.

96 I will now attempt to address more specifically a number of arguments raised by my colleagues. In short, they argue that a narrow construction of s. 243's purpose is supported by the text of the *BIA*, by extrinsic evidence regarding its legislative history and by the purpose and operation of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"). Respectfully, I do not agree.

(1) Interim Receivership

97 It is argued that, to the extent that timeliness is an important concern, it has been addressed through the interim receivership regime under s. 47 *BIA*, and that any constitutional conflict between Part II of the *SFSA* and that section should be left for another day.

98 If anything, the *BIA*'s current interim receivership regime confirms the vital importance of timeliness for the full, national receivership. It is generally accepted that interim receivership was "created to protect the interests of secured creditors during the brief period between the time when a secured creditor delivers a notice that it intends to exercise its rights under a security agreement and the time when it can exercise that right under s. 244": Sarra, Morawetz and Houlden, at p. 174. However, as my colleagues document in their reasons, following the 2005 and 2007 amendments the interim receivership was intended to be time-limited. The interim receivership now expires after 30 days unless another period is specified by the court: s. 47(1)(*c*) *BIA*. If the interim receivership is meant to preserve debtors' property until a full, national receiver is appointed, this 30-day expiration date suggests that Parliament intended a receiver to be appointed promptly.

99 Furthermore, the interim receiver does not possess all the powers that a national receiver does. For instance, s. 243(1)(*c*) provides that a court may appoint a receiver to "take any other action that the court considers advisable", which may include disposing of the debtor's property and distributing the proceeds. While it will often be important that this be done quickly, the *BIA* does not permit courts to grant that power to interim receivers: Wood, at pp. 477-78. Moreover, interim receivers appointed under Part II of the *BIA* are not subject to all the rules imposed by Part XI. As a result, I do not share the majority's view that the existence of the interim receivership regime negates the importance of timeliness for the appointment of a receiver under Part XI.

100 Lastly, I am concerned that the majority's reading of s. 243(1.1) risks undermining the intended effect of the 2005 and 2007 amendments to the *BIA*. As the majority thoroughly documents, the amendments were designed in part to return the interim receivership to its appropriate role, limited in both power and time. The majority's interpretation of s. 243 *BIA* has the potential to once again open the door to periods of indefinite interim receivership, since under the majority's understanding the appointment of receivers under s. 243 may be stalled for extended periods of time by excessive notice periods imposed by provincial laws.

(2) Discretionary Nature of the National Receivership Regime

101 My colleagues find support in the fact that the s. 243 remedy is discretionary. As I explained above, the section does not compel courts to appoint a receiver, but instead recognizes courts' discretion to do so if it is "just or convenient". In my colleagues' view, this means that a secured creditor is not entitled to a full, national receiver. If secured creditors are not so entitled, they argue, there can be no frustration of federal purpose when the *SFSA* adds additional requirements before secured creditors are permitted to have recourse to the s. 243 remedy.

102 However, this interpretation seems to misrepresent what Parliament intended to provide secured creditors in the circumstance of debtor insolvency. It is clear that, under the *BIA*, secured creditors are not, *per se*, entitled as of right to a receiver. Rather, Parliament intended to confer on them the right to *apply* for the appointment of a national, full receiver on very short notice. I fail to see how this residual discretion undermines Parliament's evident intention to enable timely access to

receivership. Rather, the significant discretion vested in the courts suggests that Parliament wished courts to respond to each application on a case-by-case basis in light of the full factual matrix before them.

(3) The Special Case of Farmers

103 It is argued that the special treatment afforded to farmers by the *BIA* must be included in any purposive analysis of s. 243 *BIA*. Specifically, s. 48 *BIA* excludes farmers from involuntary bankruptcy proceedings. On this argument, I share the view articulated by Richards C.J. in the Court of Appeal's reasons (para. 63). Given that Parliament expressly excluded farmers from involuntary bankruptcy proceedings, one would expect that Parliament would have enacted a similar provision to exclude farmers from s. 243 *BIA* if it intended to extend special treatment to farmers with regard to the appointment of a national receiver. However, there is no such provision in Part XI.

104 My colleagues also argue that the federal *FDMA* amounts to parliamentary recognition that the receivership regime in Part XI of the *BIA* can be subjected to additional provincial delays in the context of a farmer's insolvency. Unfortunately, I can read no such implication into the *FDMA*. For one, there are stark differences between the *FDMA* and the *SFSA*, both in their operation and the policy preferences they embody. As a result, the existence of the former cannot be taken as evidence that Parliament intended the *BIA* to coexist with the latter.

105 For instance, the *FDMA* provides that a security holder is only required to give a farmer-debtor 15 business days' notice before attempting to obtain any remedy or institute any proceeding to recover its debt or to take any property of the farmer: s. 21. And while it is true that a farmer may apply for a 30-day stay of proceedings (s. 5(1)(*a*)) and that the stay may be renewed up to three times, those renewals are subject to strict conditions. A renewal of the stay is only to be granted where it is essential to the formulation of an arrangement between the farmer and his or her creditors: s. 13(1). Otherwise, a stay will only be renewed where it will neither diminish the value of the farmer's assets nor unduly prejudice the farmer's creditors, and where there is no indication of bad faith on the farmer's part: *Farm Debt Mediation Regulations*, SOR/98-168, at s. 3. Furthermore, an administrator may terminate the stay of proceedings at any time for any of a wide variety of reasons, including that mediation will not lead to an arrangement between the parties or that the farmer has jeopardized his or her assets: s. 14(2).

106 Unlike the *SFSA*, the *FDMA* does not impose an automatic and absolute 150-day moratorium on an application for the appointment of a receiver. Moreover, the *FDMA* does not entitle every insolvent farmer to apply for a stay of proceedings: s. 20(1). In addition, where a stay has been issued, an administrator must appoint a guardian of the farmer's assets (s. 16), and the stay does not preclude the appointment of an interim receiver under the *BIA*: *Jacob's Hold Inc. v. Canadian Imperial Bank of Commerce* (2000), 52 O.R. (3d) 776 (Ont. S.C.J. [Commercial List]). That protection is not extended to secured creditors under the *SFSA*. Also, as I mentioned above, the stay under the *FDMA* can be terminated by the administrator whenever it has become evident that mediation will not result in an arrangement between the farmer-debtor and the majority of the creditors: s. 14(2). And once the stay has been terminated or has expired, the *FDMA* does not require an application for leave or impose a high burden of proof on secured creditors.

107 In my view, the special treatment for farmers prescribed by the *FDMA* displays many of the same qualities — timeliness, adaptability and sensitivity to the totality of circumstances — that are shared by s. 243 *BIA*. Briefly stated, the *FDMA* is still highly time-sensitive: only 15 business days' notice is required and the stay lasts but 30 days and can be renewed only if strict conditions are met. The *FDMA* also demonstrates a remarkable degree of oversight and adaptability to circumstances, given that the stay of proceedings can be terminated or extended where necessary. From the standpoint of efficacy, a stay can be extended only for the purpose of fostering an arrangement between the parties, and may be suspended if an arrangement is not possible, if the value of the farmer's assets is threatened or if bad faith is evident.

108 The scheme of the *FDMA* is thus quite compatible with the balance struck in s. 243 *BIA*, providing a prompt and circumstance-sensitive remedy that is tailored to the commercial realities of farming. As a result, if the provincial legislation had mirrored the *FDMA*, my conclusion as to frustration of federal purpose would have been different.

(4) Exhaustiveness

109 I agree with my colleagues that Part XI of the *BIA* contemplates some degree of interaction and overlap with provincial legislation. This is made clear in s. 243(2), which includes all receivers of an insolvent debtor in the definition of "receiver". More broadly, s. 72(1) states that the provisions of the *BIA* "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act".

110 This conclusion is consonant not only with the evidence concerning the legislative context, but also with this Court's jurisprudence. Parliament should not be presumed to intend to occupy or cover the field simply because it has legislated in regard to a particular matter: *Canadian Western Bank*, at para. 74.

111 However, my colleagues appear to have concluded that since the federal regime is not exhaustive, it necessarily contemplates the possibility of being supplemented by Part II of the *SFSA*. In this vein, Abella and Gascon JJ. distinguish the instant case from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.), by noting that, unlike in *Hall*, the receivership regime of the *BIA* is not a complete or exhaustive code that necessarily excludes provincial legislation. Respectfully, their argument would benefit from a more nuanced approach.

112 The essential question in this appeal is not whether Parliament intended to be exhaustive or not. It is whether the operation of Part II of the *SFSA* undermines to a sufficient extent the federal purposes underlying s. 243 *BIA*.

113 It is worth noting that the federal purpose given effect through s. 243 does not impose an absolute bright line over which provinces may not tread. I do not believe that Parliament intended that the right of secured creditors to apply for a national receiver would be subject *only* to a 10-day notice period and that *any* provincial qualification or restriction, no matter how minor, would frustrate the federal purpose. This would assume that Parliament intended to cover the field, a proposition I would not adopt.

114 Instead, I see a federal purpose drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime — which, by this Court's jurisprudence, is paramount in cases of conflict — then it must do so in a manner consistent with that purpose. If the province does so, its regime will dovetail seamlessly with the federal regime and produce no frustration.

115 This has happened before. In *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.), federal legislation regarding maritime liability provided a right of action for workplace injury for dependants of a deceased. The language used in the legislation was not exhaustive, and the question was whether a provincial regime, which denied the right of action but established a no-fault compensation system, frustrated the federal purpose. LeBel and Karakatsanis JJ., for the Court, ruled that the federal legislation "was enacted to expand the range of claimants who could start an action in maritime negligence law" and that, since the provincial legislation simply provided a "different regime" of compensation, it did not frustrate the federal purpose: para. 84. Thus, the province had respected the federal purpose while fashioning its own scheme, and in doing so had avoided triggering the doctrine of federal paramountcy.

116 In the case at bar, the federal purpose I outlined above leaves a wide legislative space open to the provinces. For instance, I have already mentioned that, were the provincial legislation to mirror the *FDMA*, there would be no frustration of purpose. This is because the *FDMA* largely embodies the *BIA*'s purpose of providing creditors with a timely, effective and adaptable remedy in the specific context of a farmer's insolvency.

117 As a province strays from this federal purpose, however, there will come a point where frustration simply cannot be ignored. This is in keeping with this Court's insistence that the burden to be discharged by a party asserting frustration of a federal purpose is high:*COPA*, at para. 66. Where federal legislation is non-exclusive, the frustration of federal purpose must be particularly stark to dispense of that burden.

118 This may be where my approach departs from that of my colleagues. In the name of co-operative federalism, they have opted for a very narrow construction of the federal purpose. My colleagues may understandably be concerned that, if the

federal purpose is construed as specifically providing secured creditors with a right to apply for a receiver that is subject *only* to a 10-day notice period, any provincial qualification or restriction of that right *would* amount to frustration. However, if the federal purpose is understood in more general terms (as I believe I am doing), then it will be difficult for any party to meet the high burden of proving frustration unless the provincial legislation deviates significantly from the purposes of the overlapping federal legislation.

119 For the reasons that I outline below, I believe that this high burden of proof has been discharged in the instant case: the federal purpose of providing a timely, flexible and context-sensitive remedy for secured creditors has been frustrated by the important obstacles the province has deliberately placed in the way of secured creditors.

(5) Role of Extrinsic Evidence in Establishing the Federal Purpose

120 Before embarking on the final frustration analysis, it is worth commenting on my colleagues' reliance on extrinsic evidence, including the remarks of individual members of Parliament, in support of their narrow construction of s. 243's purpose. Resorting to extrinsic evidence is certainly not necessary. Indeed, as far as I can tell, this Court has generally not done so in seeking to discern federal purpose in its frustration jurisprudence. In *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.), Major J., for the Court, construed the federal purpose of s. 30 of the *Tobacco Act*, S.C. 1997, c. 13, with reference simply to the "the context of the *Tobacco Act* as a whole", including the legislation's own statement of purpose: para. 17; see also paras. 18-21. Nor was extrinsic evidence relied on in *Mangat*, widely accepted as a foundational decision regarding the frustration of federal purpose branch of paramountcy analysis.

121 In certain circumstances, a judicious use of extrinsic evidence of this sort may prove useful. In other cases it may risk yielding an incomplete picture. The matter before us may serve as a case in point. While the remarks cited at length by my colleagues explain what served as an impetus for legislative amendments in 2005 and 2007, they do not explain what destiny Parliament intended for the Part XI receivership remedy more generally. Even my colleagues acknowledge, with regard to Bill C-55 (i.e. the 2005 amendments), that "[t]here is little in the legislative debate surrounding [its] adoption": para. 60.

III. Operation of Part II of the *SFSA* and Frustration of the Federal Purpose

122 I will now turn to examine how the operation of Part II of the *SFSA* frustrates the underlying federal purpose of s. 243. In *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary & Case Law* (2009), Donald H. Layh (now a justice of the Saskatchewan Court of Queen's Bench) writes at p. 43 that

> Part II of the SFSA, borrowing the basic premise of *The Farm Land Security Act* enacted four years earlier, made pre-action proceedings upon mortgage default so time-exhaustive, and the burden of seeking a court order prior to commencing an action so burdensome, that mortgagees would be forced to seek alternatives to court proceeding[s] to resolve mortgage defaults respecting farm land. And Part II rather handily provided the alternative to court proceedings: mandatory mediation with penalties for not participating in good faith.

123 Part II of the *SFSA* operates so as to prevent a mortgagee from taking any "action", broadly defined, in regard to a mortgaged farm before receiving leave from the court: ss. 9 and 11. Before applying for leave, the mortgagee must first serve a notice of intention on the debtor and on the Farm Land Security Board and wait, without exception, for the expiry of a 150-day period (s. 12(1)) during which time the parties are required to participate in mandatory mediation in good faith (s. 12(5) to (10)). Following mediation, the Board will prepare a report in which it will assess, among other things, whether there is a reasonable possibility that the farmer will meet his or her obligations and whether the farmer is making a sincere and reasonable effort to do so (s. 12(12)). Once the mortgagee is allowed to apply for leave, he or she bears the statutory burden of proving either that there is no reasonable possibility that the farmer will meet those obligations or that the farmer is not making a sincere and reasonable effort to meet them; the court must dismiss the application if this burden is not discharged (s. 18(1)). Even if the burden is discharged, the court must dismiss the application if it finds that it is not just and equitable according to the purpose and spirit of the *SFSA* to make an order (s. 19). This purpose is specified in s. 4 as being "to afford protection to farmers against

loss of their farm land". Finally, if the application is dismissed, the mortgagee is prohibited from serving a further notice of intention for one year: s. 20.

124 On the subject of the operation of Part II of the *SFSA*, I do not think the *amicus curiae* is indulging in hyperbole when he describes the provisions as "unapologetically pro-debtor": factum, at para. 59. Although the purpose of the provincial legislation is not usually considered in a frustration of federal purpose analysis, in the case of the *SFSA*, its purpose — to protect farmers — is raised to the level of a substantive standard by ss. 4 and 19. In other words, the provincial legislation imposes a very different balance between the interests of debtors and creditors than the one struck by the *BIA*, even if the special considerations for farmers that are incorporated into federal law by the *FDMA* are taken into account. The question is whether the province's legislative balance can operate swiftly in real time, in a manner consistent with the federal purpose, and thus dovetail with the federal regime. Ultimately, I conclude that it cannot.

125 When I consider the operation of Part II of the *SFSA* alongside the purpose of s. 243 *BIA* to provide secured creditors with receivership proceedings that are timely, flexible in an emergency and sensitive to the totality of the circumstances, I cannot disregard what in my view is a patent frustration of the federal purpose. Keeping in mind that s. 243 is not exhaustive, leaving a fairly wide range of legislative action open to the provinces, I nonetheless think the disparity between the two schemes is so stark that the *SFSA* must be found to frustrate Parliament's purpose. First, the 150-day notice period provided for in Part II of the *SFSA* far outstrips the brief 10-day period provided for in s. 243 *BIA*, or even the notice period of 15 business days in favour of farmers under s. 21 *FDMA*. Given the frenzied rush that typically characterizes insolvency proceedings, the difference between a few weeks and five months is galactic. The federal purpose of providing secured creditors with prompt recourse to a national receiver is therefore frustrated.

126 Second, the 150-day notice period provided for in Part II of the *SFSA* is absolute, as it cannot be waived or judicially terminated in any circumstances. In eliminating any possible flexibility or oversight for such a long period, Part II of the *SFSA* frustrates the federal purpose of providing a recourse that can adapt to the emergencies that are known to occur, from time to time, in insolvency cases. By contrast, s. 243 *BIA* allows for the appointment of a receiver before the expiry of the notice period if that is appropriate, and the stay of proceedings provided for in the *FDMA* can be terminated at any time or extended as necessary under ss. 13 and 14.

127 Finally, Part II of the *SFSA* establishes a series of evidentiary hurdles that are incompatible with Parliament's intention of making the federal receivership regime an equitable, circumstance-sensitive remedy. The most problematic of these hurdles, in my view, is the burden the mortgagee must discharge of proving either that there is no reasonable possibility that the farmer will meet his or her obligations or that the farmer is not making a sincere and reasonable effort to meet those obligations: s. 18(1) *SFSA*. Given the historical roots of receivership as an equitable remedy, imposing a high burden of proof on a creditor is far from compatible with the purposes and the effective operation of s. 243 *BIA*. Additionally, even if this burden is discharged, a judge must still be satisfied that granting a receivership order will be "just and equitable according to the purpose and spirit" of the *SFSA*: s. 19. It is specified in the *SFSA* that this purpose is to protect against the loss of farmland: s. 4. I would add that there are no such hurdles in the *FDMA*. The net effect is clearly to frustrate Parliament's purpose, namely that an application by a mortgagee for a national receiver be decided by a court on an equitable basis, in a manner that is sensitive to the circumstances.

128 I stress that in my view none of these factors is, on its own, determinative of the issue. Taking the operation of Part II of the *SFSA* as a whole, however, it is clear to me that the provincial legislation cannot operate in real time, and is in fact intended to hinder the timely appointment of a receiver over mortgaged farmland. It is therefore clear that Part II of the *SFSA* frustrates the purpose of s. 243 *BIA*, thereby triggering the application of the doctrine of federal paramountcy.

IV. Disposition

129 I thus conclude that the operation of Part II of the *SFSA* frustrates the purpose of s. 243 *BIA*. I would therefore declare that Part II of the *SFSA* is inoperative to the extent of its conflict with the federal receivership scheme.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 Canada, Senate, *Journals of the Senate, No. 12*, 2nd Sess., 37th Parl., October 29, 2002, at p. 122, and No. 57, May 15, 2003, at p. 841.

Most Negative Treatment: Check subsequent history and related treatments.

2014 ONSC 2781
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. 6711162 Canada Inc.

2014 CarswellOnt 5836, 2014 ONSC 2781, [2014] O.J. No. 2146, 13 C.B.R. (6th) 136, 240 A.C.W.S. (3d) 646, 2 P.P.S.A.C. (4th) 332, 35 C.L.R. (4th) 167

Romspen Investment Corporation, Applicant and 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of 6711162 Canada Inc., and Those Other Companies Listed in Schedule "A" Hereto

D.M. Brown J.

Heard: May 2, 2014
Judgment: May 5, 2014 *
Docket: CV-14-10470-00CL, CV-14-10529-00CL

Proceedings: additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 CarswellOnt 7939, 2014 ONSC 3480, D.M. Brown J. (Ont. S.C.J. [Commercial List])

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E. Tingley for Pezzack Financial Services Inc.

Related Abridgment Classifications
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Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of

construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.

Construction law --- Construction and builders' liens — Trust fund — Miscellaneous

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Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application

Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.

Table of Authorities

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — considered

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s. 11.02 [en. 2005, c. 47, s. 128] — referred to

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Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

***D.M. Brown J.*:**

I. Competing applications for the appointment of a receiver and the making of an initial order under the Companies' Creditors Arrangement Act

1 Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

2 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

3 The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario — a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

4 For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

II. Evidence about the debt and secured assets

5 Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

6 By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

> The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

7 The funds were to be used "for general corporate purposes...to retire existing mortgage indebtedness [on two properties]...to pay fees and transaction costs, to set up an interest reserve, and up to $10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

8 The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was $28.1 million. The Loan was also secured by general security agreements.

9 A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of $470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

10 However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

> I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnessess' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

11 Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional $470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

12 After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedalled from his forgery allegation, now contending that:

> I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the *CCAA* application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the *CCAA* application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

13 Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear — there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

14 To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender) (approximately $7,000,000) and to pay further fee and transaction costs."

15 Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

16 The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

17 The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

18 According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the budgeted $7 million and that a funding gap of about $3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*. (emphasis added)

19 Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

20 The Borrowers did not invest the $3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further $270,000 on June 20, 2013 and paid a supplier's $89,383 invoice on June 14, 2013.

21 Rompsen stopped making any further advances under the Loan in October, 2013.

22 In December, 2013, suppliers to the Midland Condo Project registered liens totaling about $2.248 million.

23 On January 3, 2014, Romspen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of $11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

24 On March 28, 2014, Romspen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was $12.284 million.

25 On March 4, 2014 Romspen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Romspen's receivership application was set by the Court on April 11, 2014.

26 Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the "CCAA Applicants"), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the CCAA Applicants

27 Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

28 The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

29 The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts acquiring the already-started project in power of sale proceedings in June, 2012 for $4 million, with a mortgage back for $3.1 million.

30 Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

31 There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 "short narrative appraisal" prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at $18 million (the "RE Appraisal"). That appraisal consisted of an "as is" appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs to complete from an appraised "as if complete" sellout value for the 53 condo units. The RE Appraisal also contained "as if" appraisals of the other two Midland parcels assuming "all approvals for the proposed development are in place and the subdivisions registered" (Vindon and Victoria Streets).

32 The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner — i.e. Hugel Lofts:

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> . . .
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.*
>
> (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

33 The RE Appraisal used a "cost to complete" for the Midland Condo Project of $6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra's schedule recorded a total value for its construction contract of $7.452 million, with the value of work done to that date of $1.145 million.

34 Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

35 Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

36 The CCAA Applicants contended that the four Ramara Properties — 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road — were worth about $27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a "hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development" as of October 6, 2012 of $27.1 million.

37 The Schaufler Appraisal noted that the four properties had been acquired for $4.4 million.

38 A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

39 Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

40 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are "brown-field" lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding $300,000 in first mortgages on those properties.

III. Evidence about the owners' approach should the Court grant a CCAA initial order

41 Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be "sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal":

> The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

> ... I believe that Zoran and I should have the opportunity to restructure the Applicants' affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants' assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

42 As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of $8 million. He deposed that Harbour Mortgage had "agreed to increase the loan amount to $11,250,000, thereby providing 1026517 Ontario Limited with an additional $3,250,000. I intend to use these funds to finish the construction at the Midland Property".

43 The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The "loan amount" of $11.25 million was "not to exceed 65% of the appraised value and/or value as determined by the Lender" of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the "use of funds" as follows:

> The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

44 Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for $4.8 million: "I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario."

45 Cocov attached to his affidavit an April 11, 2014 "Discussion Paper" from National Bank which stated: "This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter; nor (ii) an agreement to provide financing". The Discussion Paper only referenced the Oshawa property, and it described the "purpose of proposed loan" as "refinancing", with the "type of facility" as "first rank conventional mortgage financing". The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

46 Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

47 The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

48 Soorty deposed that the CCAA Applicants would require $250,000 to complete four model suites, together with $50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to $300,000 in "drip" financing, provided their financing was given a DIP Priority Charge.

49 The filed CCAA Cash Flow statement contemplated using $150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

50 Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about $254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

51 As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project's general contractor, Sierra Construction (Woodstock) Limited:

> [I]s prepared to complete the Condo Project for $5.5 million plus H.S.T. (the "Project Completion Costs"). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty's assertion. Sierra Construction did write that "the all in number to complete should be $5,500,000.00 (HST is not included)". However, it continued:

> Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

52 In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.
>
> Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

53 The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at $6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of $5.5 million.

54 Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

55 Romspen filed its own internal calculations which placed all of the costs to complete — both "hard" and "soft" — several million dollars higher than the $5.5 million referred to by Sierra.

C. Summary

56 In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of $17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

57 Soorty also deposed that the CCAA Applicants proposed "...leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at $15.98 million, consisting of $12 million due to Romspen, $958,000 due to lien claimants, and $3 million due to unsecured creditors, including related parties. Soorty deposed:

> The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

58 Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

59 Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the

circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [1]

60 The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. [2]

61 Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, the British Columbia Court of Appeal stated:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing. [3]

62 More recently, C. Campbell J., in *Dondeb Inc., Re*, after quoting the above passage from *Cliffs Over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.
>
> A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.

In *Edgeworth*, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

. . .

[In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

. . .

Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity. [4]

B. Applying the legal principles to the evidence

63 The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan — the Midland Condo Project — the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

64 In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order on two main grounds. First, they argued that by its conduct Rompsen had caused the Borrowers to default under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

65 First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants

argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

66 While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations, [5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

67 The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*.

68 In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

69 The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014 email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly...the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

> Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever*. (emphasis added)

70 The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan — internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. $3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his *CCAA* initial affidavit when he deposed: "As a sign of our good faith, I was prepared to put $2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

71 Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

72 At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose

a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses — they want to carry on just as they have in the past.

73 I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

74 Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

75 Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

76 Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

77 Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

78 For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

79 Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties — 6711162 Canada Inc. and 1794247 Ontario Inc. — the companies which own the Cambridge Properties — 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. — and the company which owns the Midland Properties - Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

80 One of the Ramara Properties — 4271-4275 Hopkins Bay Road, Rama — is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen's counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

81 Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its *PPSA* registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

82 Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

83 Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

84 A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

V. Costs

85 I would encourage the parties to try to settle the costs of these applications. If they cannot, Rompsen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

86 Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air". [6]

Application for appointments granted; application for initial order dismissed.

Footnotes

* Additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 ONSC 3480, 35 C.L.R. (4th) 193, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]).

1 (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), paras. 10 and 12.

2 [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services Inc. v. Canada (Attorney General)], para. 14.

3 2008 BCCA 327 (B.C. C.A.), para. 36.

4 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), paras. 19-21, 25, 26 and 31.

5 *Royal Bank v. Chongsim Investments Ltd.* (1997), 46 C.B.R. (3d) 267 (Ont. Gen. Div.)

6 (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States v. Yemec*, [2007] O.J. No. 2066 (Ont. Div. Ct.), para. 54.

2017 SKQB 228
Saskatchewan Court of Queen's Bench

Affinity Credit Union 2013 v. Vortex Drilling Ltd.

2017 CarswellSask 399, 2017 SKQB 228, 282 A.C.W.S. (3d) 773, 50 C.B.R. (6th) 220, 7 P.P.S.A.C. (4th) 195

AFFINITY CREDIT UNION 2013 (PLAINTIFF) and VORTEX DRILLING LTD. (DEFENDANT)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, AS AMENDED

IN THE MATTER OF THE SASKATCHEWAN BUSINESS CORPORATIONS ACT, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

B. Scherman J.

Judgment: July 24, 2017
Docket: Saskatoon QBG 783/17, 1030/17

Counsel: Jeffrey M. Lee, Q.C., Paul D. Olfert, for Affinity Credit Union and Radius Credit Union
Mary I.A. Buttery, Jared Enns, for Vortex Drilling
Ian A. Sutherland, Jordan F. Richards, for Receiver
Brent Warga, for Interim Receiver
P. Koliaskis, for Proposed Monitor

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.E Miscellaneous

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Defendant company (V Ltd.) was in business of drilling oil wells and was hit hard by price drop of oil — In 2013, plaintiff financial institution (A Co.) advanced V Ltd. nearly $15 million to refinance two drilling rigs and to purchase third — While loan facilities were repayable on demand, prior to demand there was schedule of combined monthly interest and principal payments — Credit agreement also provided that any material change in risk or adverse change in financial condition of V Ltd. would constitute default — After oil prices collapsed, V Ltd. could not make its scheduled payments and A Co. agreed on several occasions to allow V Ltd. to defer principal payments — V Ltd. then failed to make negotiated balloon principal

payments and in January 2017 failed to resume regular monthly principal and interest payments as V Ltd. had undertaken to do — A Co. demanded payment in May 2017, allowing V Ltd. 30 days to pay in full — A Co. applied for appointment of receiver; V Ltd. applied for adjournment of A Co.'s application to allow time to respond to A Co.'s affidavits and to apply for relief, including stay of proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Interim receiver was appointed for short period under which interim receiver could investigate, monitor and facilitate V Ltd.'s continuing operation so as to give V Ltd. time to file responses and to make its CCAA application — A Co.'s application granted; V Ltd.'s application dismissed — It was evident that V Ltd. heavily relied on affidavit evidence from self-described Administrative Director and her evidence was based on information and belief that had no basis or establishment and would not be admissible on final order — Significant weight could not be placed on Administrative Director's evidence because reliability could not be assessed — A Co. provided significant relief from contractual terms over two-year period and in practical sense, had effectively provided V Ltd. with much of remedial opportunity contemplated by CCAA — V Ltd. had two-year benefit of debt repayment accommodations and forbearance and opportunity to seek alternate financing.

Bankruptcy and insolvency --- Receivers — Appointment

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Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Miscellaneous

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Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 ABQB 242, 2010 CarswellAlta 641, 67 C.B.R. (5th) 88 (Alta. Q.B.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 ABCA 191, 2010 CarswellAlta 1049, 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 487 A.R. 262, 495 W.A.C. 262 (Alta. C.A.) — referred to

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

Verlaan v. Lang Estate (2004), 2004 SKQB 376, 2004 CarswellSask 615 (Sask. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 243 — considered

s. 244(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.02(1)(a) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3)(a) [en. 2005, c. 47, s. 128] — considered

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2

s. 64 — considered

***B. Scherman J.*:**

Introduction

1 Affinity Credit Union 2013 [Affinity], a secured lender to Vortex Drilling Ltd. [Vortex], is owed in excess of $8,350,000 and has applied for the appointment of a Receiver of all of the assets and properties of Vortex under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and s. 64 of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*].

2 Vortex has applied under s. 11.02(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], for an initial order granting various relief including a stay of all proceedings against Vortex for a period of time to permit it to pursue a successful arrangement or reorganization.

3 Vortex is insolvent. The other statutory requirements to permit Affinity to pursue the appointment of a Receiver under the *BIA* and for Vortex to seek an initial order and stay under the *CCAA* have been met or established.

4 Affinity has since early 2015 accommodated financial difficulties being faced by Vortex and agreed, under the terms of various agreements, to interest only payments for periods of time in return for various undertakings of Vortex. It says Vortex has breached those undertakings, has ceased making even interest payments and since April of 2017 has been in default under the terms of its credit agreements. Affinity has demanded payment in full of the indebtedness owed to it, and Vortex has failed to pay what it is contractually obligated to pay.

5 Vortex is in the business of drilling oil wells. It says that its financial difficulties are the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. This has caused a related reduction in the demand for drilling rigs to drill new wells. Oil prices peaked well in excess of $100 U.S. per barrel and since 2014 have fallen to $50 U.S. or less per barrel.

6 Vortex argues the economic climate in the Western Canadian oil industry is improving, it is expecting a substantial improvement in its cash flow, Affinity is fully secured for the indebtedness owed and the initial *CCAA* order it seeks should be granted so as to give it an opportunity to seek refinancing from other lenders or to facilitate the making of a compromise or arrangements with its existing creditors so as to permit it to be able to continue in business.

7 The issue to be decided in the context of the competing applications is whether the appropriate order to make is to grant an initial order and stay of proceedings under the *CCAA* or to grant Affinity's application for the appointment of a Receiver.

Background Facts

8 Vortex was created in November of 2010 and subsequently purchased and/or constructed three drilling rigs largely utilizing borrowed funds. Under the terms of an August 12, 2013 Offer to Finance from Affinity [Credit Agreement] accepted and agreed to by Vortex, Affinity advanced Vortex, under three separate loan facilities, a total of $14,910,711 to pay out existing loans in respect of two rigs and to finance the construction of a third drilling rig. The individual loan facilities were each payable on demand, but before demand were to be paid by combined monthly principal and interest payments totalling $325,257. The Credit Agreement expressly provided that any material change in risk or adverse change in the financial condition of Vortex or failure to comply with any condition of the Offer to Finance would constitute an event of default entitling Affinity to demand payment of all sums owing and to realize on the security taken for the loan.

9 As required by the Credit Agreement, Vortex granted to Affinity, under the terms of a general security agreement registered in the personal property registries of each of Manitoba, Saskatchewan and Alberta [GSA], a security interest in all of its present and after acquired property. The terms of the GSA included the right of Affinity, upon the occurrence of an event of default as therein defined, to seize and sell any of Vortex's property or to appoint a Receiver (see paragraphs 9 to 13 of the GSA). Events of default were widely defined and include the insolvency of Vortex.

10 With the collapse of oil prices and the resulting downturn in the oil industry Vortex was unable to make the monthly payments contemplated by the Credit Agreement and sought accommodations from Affinity. By a series of agreements Affinity provided principal repayment deferrals to Vortex, which resulted in Vortex paying only interest for most of the months of 2016. Vortex failed to fulfil its commitments to make balloon principal payments and to resume principal and interest payments by dates and in amounts contemplated by these accommodations or deferral agreements.

11 As of January 2017 regular monthly principal and interest payments of $325,257 were again to resume but Vortex failed to make such payments. In March of 2017 Vortex informed Affinity that it could only afford to make monthly payments of $100,000 rather than the $325,257 per month then required by the Credit Agreement. Affinity prepared an amendment to the Credit Agreement which would have permitted such reduced payments on condition that Vortex approach its shareholders to obtain an injection of equity capital to finance its business operations and reduce the indebtedness owing to Affinity. Vortex did

not sign that amending agreement, has not made the required monthly payments, nor remedied the defaults that have occurred under the Credit Agreement, as amended from time to time.

12 By letter of May 1, 2017 Affinity gave Vortex notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded that the full outstanding obligations (stated to be $8,422,061.01 as at April 28, 2017) be repaid within 30 days, failing which Affinity would proceed to avail itself of its legal remedies including enforcing its security. On June 6, 2017 Affinity filed with this Court its notice of application, returnable June 9, 2017, seeking the appointment of a receiver. By agreement between counsel for Affinity and Vortex this application was adjourned to June 23, 2017.

13 During this adjournment negotiations continued between the parties with Vortex seeking continuing accommodations or forbearance on the part of Affinity. Vortex was representing it had prospects to refinance the indebtedness with other lenders.

14 Affinity takes that position that these negotiations resulted in a concluded agreement under which Affinity was to provide an additional two-week period of forbearance so as to give Vortex additional time to pursue refinancing and would fund current payroll obligations of Vortex, in return for which Vortex would consent to the appointment of a receiver should its refinancing efforts fail. Vortex takes the position that no such agreement was ever concluded.

15 Affinity's application for the appointment of a receiver came before me on June 23, 2017. Vortex sought an adjournment of that application, advancing the position that it needed time to respond to the affidavits filed by Affinity and to bring its own application for *CCAA* relief. In the circumstances I ordered the appointment of an interim receiver for a period ending July 23, 2017 under which the interim receiver could investigate, monitor and facilitate Vortex's continuing operation so as to give Vortex an opportunity to file opposition affidavits and make its *CCAA* application.

16 That application and the affidavit evidence of both Vortex and Affinity on both applications are before me. As stated above, Vortex is insolvent, in the sense of being unable to pay its debts as they become due. The issue to be decided is whether in the circumstances the appointment of a Receiver or an initial order under the *CCAA* is most appropriate in the circumstances.

The Law Respecting CCAA Applications

17 Jurisprudence establishes that the following principles are applicable to *CCAA* applications:

a. The legislative purpose of the *CCAA* is to permit qualifying debtors to carry on business and where possible avoid the social and economic costs of liquidating its assets: See *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15, [2010] 3 S.C.R. 379 (S.C.C.) [*Century*].

b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).

c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.

d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70

e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate...

18 I proceed on the basis that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence.

The Law Respecting Receivership Applications

19 In a previous unreported decision in *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.* [2016 CarswellSask 607 (Sask. Q.B.)]. (25 February 2016) Saskatoon, QB 1639 of 2015, I summarized jurisprudence with respect to applications to appoint a receiver under s. 243 of the *BIA*. I repeat here that summary, which I view as remaining accurate:

> 5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd*. 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*. 2013 ABQB 63.
>
> 6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:
>
> > In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
> >
> > > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd*. (1992), 9 C.P.C. (3d) 399*; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd*. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*. (1995), 30 C.B.R. (3d) 49.
>
> 7. In *Kasten* the court said the following:
>
> > 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:
> >
> > > a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
> > >
> > > b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> > >
> > > c) the nature of the property;
> > >
> > > d) the apprehended or actual waste of the debtor's assets;
> > >
> > > e) the preservation and protection of the property pending judicial resolution;
> > >
> > > f) the balance of convenience to the parties;
> > >
> > > g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

20 Consistent with my view that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence, I am of the view that an applicant under s. 243 of the *BIA* bears the burden of satisfying the Court that it would be just and convenient to appoint a receiver in the circumstances.

The Parties' Positions in Brief

21 Vortex's position is that on a proper application of the legislative and remedial purposes of the *CCAA* it is appropriate to issue an initial order and grant a stay. It argues that putting Vortex into receivership is going to result in liquidation of its assets and the end of its business with the resulting loss of employment for many individuals as well as the loss of the other economic activity that Vortex generates in its home community.

22 Vortex says that the economic climate in the Western Canadian oil industry is improving and it is expecting a substantial improvement in its cash flow. It says it expects to soon secure additional business and that it is actively pursuing promising refinancing opportunities. Thus it says it is appropriate that it be given an opportunity to pursue such refinancing or a compromise with its creditors so as to avoid the social and economic costs of liquidation. It says that the security that Affinity holds has a value significantly beyond the debt owed by it, and there will be no real prejudice to Affinity by granting an initial order and granting a stay.

23 Affinity says the proper and appropriate order in the circumstances is the receivership order it seeks. It says that Vortex is insolvent, it has the contractual right to appoint a receiver or seize and sell the rigs upon an event of default (which both insolvency and failure to pay the debt owed are), it has already provided Vortex with lengthy and significant accommodations and for good and sufficient cause it has lost trust in Vortex. Affinity says Vortex has repeatedly failed to honour contractual commitments made to Affinity in return for the deferrals granted and that the evidence demonstrates that Vortex has not acted in good faith.

24 Beyond these factors Affinity's position is that, given the realities of the oil industry and Vortex's financial position, the business is unviable now and into the foreseeable future. Over nearly 2 $^{1}/_{2}$ years Affinity has accepted deferral in payments totalling some $4,500,000, but notwithstanding this accommodation Vortex has been unable to generate cash flow that permitted

it to cover its variable operating costs, much less make a contribution to fixed costs. The application made by Vortex does not contain even the germ of a reorganization plan that has any prospect of succeeding. It relies on purported, but unverified, refinancing possibilities. Vortex has had many months' opportunity to obtain refinancing and has not been able to do so.

25 Affinity says that continuing to operate the rigs without generating revenue sufficient to cover the fixed costs (which includes repayment of the loans) means the rigs will continue to depreciate and Affinity's security position will be eroded.

26 For all of these reasons it says to issue an initial order and grant a stay of proceedings under the *CCAA* would be inappropriate and that is just and convenient to appoint a receiver.

Analysis of Vortex's Position that CCAA Relief is Appropriate

i. Evidentiary Concerns

27 At paragraphs 20 to 22 of the Vortex Brief of Law counsel argues as follows:

> 20. A stay of proceedings would fulfill the legislative objective of the CCAA by permitting Vortex to carry on its business operations during the reorganization process. The evidence in support of this application clearly demonstrates that such an order is appropriate in these circumstances:
>
> (a) the industry within which Vortex operates is seasonal, and Vortex's Rigs are generally deployed from the month of June onwards (Twietmeyer Affidavit, at para 18);
>
> (b) as the industry itself is seasonal, so too is Vortex's cash flow (Twietmeyer Affidavit, at para 18);
>
> (c) Vortex's assets are worth significantly more than its debts (Twietmeyer Affidavit, at paras 2 and 17);
>
> (d) two of Vortex's three Rigs are currently deployed and operational for the 2017 season, one for Crescent Point Energy Cop. (sic), which is one of Canada's largest light and medium oil producers, and the second Rig is currently in operation for Aldon Oil Ltd. (Twietmeyer Affidavit, at para 19);
>
> (e) Vortex's general manager and sales consultant are currently deploying significant efforts in order to secure a contract in respect of its third Rig. The evidence before this court is that these efforts have successfully generated new business for Vortex, including its most recent contract with Aldon Oil Ltd. Accordingly, and through these ongoing efforts, it is believed that it is highly likely that Vortex will secure a contract for its third Rig (Twietmeyer Affidavit, at para 20); and
>
> (f) assuming all of the relief sought in this application is granted, Vortex's cash-flow projections indicate that, if DIP Financing is approved, Vortex will have enough liquidity to meet its cash flow needs through to the end of the 13-week forecast period (Twietmeyer Affidavit, at para 61).

28 It should be noted that for each of the points in paragraph 20 (a) to (f) counsel references supporting evidence from affidavits of one Tina Twietmeyer. I have concluded that it is not appropriate for me to rely on much of the affidavit evidence of Tina Twietmeyer for the reasons that follow:

> a. In paragraph 1 of her affidavit she describes herself as the Administrative Director of Vortex without providing any information or details as to what that job function involves and how it would give her the personal knowledge she claims to have. The evidence establishes she is not and has never been a corporate director of Vortex.
>
> b. Notwithstanding her statement that she has personal knowledge of matters in question, on a close read of her affidavits it is apparent much of her evidence is based on information and belief without the basis for her information and belief being provided.

c. Rule 13-30 of *The Queen's Bench Rules* requires that an affidavit must be confined to facts within the personal knowledge of the person swearing the affidavit except that on an interlocutory application affidavit evidence based on information and belief is permissible provided the basis for the claimed information and belief is disclosed.

d. Applying the test in *Verlaan v. Lang Estate*, 2004 SKQB 376 (Sask. Q.B.), that an application is interlocutory where the decision in respect of it given in one way would finally dispose of the matter but if given in another way would allow the action to go on, I am of the opinion that an application for an initial order and stay of proceedings under the *CCAA* is not an interlocutory application. I fully appreciate that if the initial order is granted a further application approving a restructuring plan would be required. While the current application may lie close to the tipping point between what is a final application and an interlocutory application, it is my conclusion that Vortex's *CCAA* application has more of the characteristics of a final application than of an interlocutory application and thus I find the application to not be an interlocutory application. The result is that affidavit evidence based on information and belief is not admissible and should not be considered.

e. If I am wrong in my conclusion that the application is not interlocutory, then nonetheless, in various instances where Ms. Twietmeyer is giving evidence based upon information and belief for which the basis is not provided, the weight and reliability to be given to much of her evidence cannot be assessed.

f. Beyond these concerns, the Rules applicable to affidavit evidence do not permit opinion, argument, irrelevant matters or hearsay on either an interlocutory or final application. Much of Ms. Twietmeyer's affidavit evidence consists of opinion, argument and hearsay or irrelevant matters and thus should not be considered on those grounds.

g. An example of this is her evidence at paragraph 3 of her referenced affidavit that "the economic climate in the Western Canadian oil industry is improving. As a result, Vortex is experiencing significant growth in its business and is expecting a substantial improvement in its cash flow". This evidence includes inadmissible opinion, speculation and argument.

h. On the basis of all of the evidence, I conclude it is wrong to say that Vortex is experiencing significant growth. Rather it is limping along drilling wells on a "one-off" basis as and when such contracts come available. This work is done at depressed prices that cover the variable costs of operation, if that, and the bulk of its capacity is unused.

i. Ms. Twietmeyer is in no position to provide opinion evidence that the economic climate in the Western Canadian oil industry is improving, and her statement that Vortex is expecting a substantial improvement in its cash flow can at best be viewed as her hope, but in the context of affidavit evidence is inadmissible speculation.

29 With reference to the points made in paragraph 20 of the Vortex Brief of Law above:

i. The facts stated in paragraphs 20 (a) and (b) that the industry in which Vortex operates and thus its cash flow is seasonal is of no or little relevance. The fact that the oil well drilling industry cash flow is seasonal is simply a fact of the business that should be accommodated in the budgeting. The evidence establishes that over a continuous $2\ ^{1}/_{2}$ years this business has been unviable.

ii. The statement at paragraph 20 (c) that Vortex's assets are worth significantly more that its debts is either or both inadmissible hearsay evidence or inadmissible opinion evidence. Paragraph 17 of Ms. Twietmeyer's affidavit indicated that an appraisal of the equipment had been obtained valuing it at $17,146,000, but Vortex has not filed this appraisal claiming confidentiality. This is not an acceptable reason for not filing an appraisal relied upon. Where appropriate, evidence with confidentiality concerns can be filed on a basis that protects the confidentiality.

iii. Opinion evidence can only be given by an individual found to be qualified to give such opinion evidence. To attempt to bootstrap opinion evidence of value into the record in this way is an attempt to introduce hearsay evidence. It denies Affinity any ability to test the opinion evidence or respond. Opinion evidence of value should be provided directly by the person expressing the opinion accompanied by the details of qualifications and the opinion so as to give the party opposite and this Court an opportunity to assess its reliability.

iv. Given no evidence that establishes the expertise of the provider of such appraisal and other evidence that the daily rates for drilling rigs have declined from in excess of $16,000 per day to under $7,000 per day and that only one out of three of Vortex's rigs has been operating on any regular basis gives significant basis to be concerned about the reliability of such evidence.

v. Paragraph 20 (d) of the Vortex brief argues, based on paragraph 19 of the Twietmeyer affidavit, that two of Vortex's three rigs are operational for the 2017 season. This is misleading as to the true state of affairs. The current evidence, as of the date this matter was heard, was that the second rig had drilled one well for Aldon, over a period of approximately one week, and has since been idle. While there may be two rigs which are in operating condition, the relevant fact is that these two rigs are far from fully engaged.

vi. The argument advanced at paragraph 20(e) of the Vortex brief that "it is believed that it is highly likely that Vortex will secure a contract for its third Rig" is based on an expressed "belief" in paragraph 20 of the Twietmeyer affidavit without Twietmeyer having provided any basis for such belief other than reference to efforts on the part of a Messrs. Geysen and Rae. If there is relevant evidence on efforts and prospects for future work it should be given by these individuals rather than in the second-hand, hearsay manner here attempted. Reduced to its essence this is speculation and argument, not evidence.

30 An applicant seeking relief under the *CCAA* should be placing before the Court the best evidence available. Section 11.02(3) of the *CCAA* requires the applicant to satisfy the Court that circumstances exist that make the order sought appropriate. It is a concern to me that I have a number of affidavits from Ms. Twietmeyer but no affidavit on this application from Mr. Geysen, who is the President and General Manager of Vortex, and thus presumably the responsible person within the company who has the requisite personal knowledge.

31 Counsel for Vortex argues that I should have similar or enhanced concerns with respect to the affidavit evidence filed on behalf of Affinity and says I need to consider Ms. Spencer's affidavits with great care. I do not find reason for overall concern. While Ms. Spencer has expressed opinions or beliefs with regard to the impact on the viability of Vortex given Mr. Big Eagle is no longer on the Board or the Chief Executive Officer of Vortex, I have not relied on that evidence for the decisions I have made.

32 Ms. Spencer's affidavits make it clear that she has had day-to-day responsibility for administration of Affinity's account relating to Vortex and that she has conducted a detailed review of the books, records, files and correspondence of Affinity relating to that account. To the extent to which she provides factual evidence based upon the knowledge of the books, records, files and correspondence of Affinity, I find the factual evidence provided by Ms. Spencer in her affidavits to be appropriate and reliable. To the extent to which she engaged in measures of speculation, argument or providing evidence that she did not have personal knowledge of, I have not relied on such evidence.

ii. Good Faith Considerations in CCAA Applications

33 I find on the basis of the evidence before me that there have been elements of bad faith in Vortex's dealings with Affinity. Vortex had, arising from both the nature of their relationship and by virtue of express contractual provisions, an obligation to provide complete and accurate financial information to Affinity and to not hide or misrepresent matters relevant to their relationship. Good faith of the applicant is a baseline consideration for a Court when considering *CCAA* applications.

34 As of June 20, 2017, with Affinity's receivership application before this Court, but adjourned while the parties were negotiating a potential forbearance agreement, Vortex represented to Radius Credit Union (a member of the Affinity lending syndicate and independently providing an operating line of credit to Vortex) it had no accounts payable. This it did by writing cheques purporting to pay various accounts payable, but then holding those cheques totalling some $235,548 and not delivering them to the payees. This accounting fiction that accounts payable had been paid was used by Vortex to access, under the Radius margining formula, some $121,000 in operating credits that would not have been available had the facts been accurately disclosed. I find this to be a breach of Vortex's contractual covenants to Affinity to provide honest and accurate financial information to Affinity notwithstanding that the misrepresentation was made to Radius in the first instance. Given the

circumstances and Affinity's concerns with respect to Vortex's financial position, this action was a failure to act in good faith. It only came to light by reason of investigations by the Interim Receiver.

35 In a June 30, 2016 revision to the Credit Agreement, which allowed Vortex's request to pay interest only from July through November, Vortex agreed that any financial settlement with one Harvey Turcotte would be funded from outside sources and not from Vortex's cash flow. Notwithstanding this agreement, in February of 2017 Vortex made a payment of $525,000 to Harvey Turcotte from its cash flow in breach of this agreement. This fact was not disclosed by Vortex to Affinity and only came to light by reason of investigations by the Interim Receiver. This I find to be a failure on the part of Vortex to act in good faith.

iii. Is CCAA Relief Appropriate or the Appointment of a Receiver Just and Convenient?

36 On the basis of the totality of the evidence before me, I have concluded that it is not appropriate to make an initial order nor grant a stay of proceedings as requested by Vortex in its *CCAA* application. For reasons that overlap, I find it is just and convenient that a Receiver be appointed. I am assisted in these findings by the information provided in the Interim Receiver's reports. In particular I note the Interim Receiver's statements in his July 18, 2017 report, that:

a. Vortex is not contemplating any debt payment to be made to Affinity during the period July 17, 2017 to September 24, 2017 (para. 39); and

b. "Vortex would not have been able to manage its cash flow needs from ongoing operations without the injection of the July 7, 2017 payroll funded by the Interim Receiver." (para. 41).

37 Vortex bears the burden of satisfying me that the relief they seek is appropriate in the circumstances. I am fully alive to the consequences that appointing a receiver may have upon Vortex's employees, unsecured creditors, shareholders and business associates. However, the evidence satisfies me that:

a. The prospect of Vortex finding a lender to refinance it, at the level required to satisfy all of the indebtedness to Affinity and other creditors without significant equity injections by the shareholders, is remote or non-existent.

b. The shareholders of Vortex have demonstrated over the last 2 $^{1}/_{2}$ years that they are not prepared to invest further monies in Vortex. While Vortex says it has interest from other lenders in refinancing it, Vortex has chosen not to share with Affinity and the Court the details of such refinancing proposals. In the circumstances I am unable to give weight to suggestions that there are real prospects of refinancing that do not involve either substantial write-off of current indebtedness or the injection of significant additional equity.

c. Vortex has long known that Affinity wanted additional capital injection to the company. Vortex has, given the accommodations Affinity provided over the last two years, had ample opportunity to pursue alternate financing. At a minimum they have since May 1, 2017 had the knowledge that the need for alternate financing was immediate.

d. Two years of financial statements of Vortex establishes that, given the day rates for drilling rigs and the work available, it is unviable at its current debt levels. To the extent Vortex has been able to generate revenue, that revenue has barely covered, and during some periods not covered, the variable costs of operating those rigs, much less making a contribution to fixed costs. Vortex is currently in breach of its statutory obligation to pay employee withholdings to Canada Revenue Agency.

e. While Vortex argues that the economic prospects are improving, there is no credible evidence provided to support that argument. Rather the evidence is that since 2014 the day rate paid for drilling rigs has been reduced to less than one half of their previous levels and even at these rates Vortex is unable to find work that does more than partially utilize its rigs.

f. Oil prices remain below $50.00 per barrel, and Vortex has provided no evidence to support a conclusion that drill utilization rates or daily charges can or will improve beyond the rates experienced over the last 2 $^{1}/_{2}$ years. No statistical evidence has been provided that establishes the number of rigs available in Western Canada and their current utilization

rates nor economic forecasts or analysis that demonstrates that those utilization rates or the presently available day rates for such rigs will increase.

g. If alternate or takeout financing is not available, then the only other justification for an initial order and stay would be to provide time to Vortex to negotiate a compromise agreement between Vortex and its creditors, secured and unsecured. Affinity is the only secured creditor, and it has made it clear that it is not prepared to compromise its debts. Affinity cannot be criticized for such a position. Indeed the members of Affinity would have good reason to criticize Affinity management were they to compromise a debt which it has reasonable prospects to fully recover.

h. Affinity's position is that they have lost confidence in and no longer trust Vortex. This position is reasonable given that Vortex has repeatedly over the last two years failed to meet its commitments to make balloon payments or to resume regular payments coupled with the concerns with respect to Vortex's good faith discussed above.

i. While Vortex argues Affinity is not only fully secured, but has a significant cushion of security such that Affinity would suffer no prejudice by permitting Vortex to pursue *CCAA* relief, that argument is but one of many considerations to weigh. It does not weigh heavily given the absence of admissible and credible evidence as to the value of Affinity's security and my common sense conclusion, given the utilization rates and day rates available to Vortex, that the present value of these rigs is a matter of significant uncertainty.

j. Continued operation of the rigs carries with it the consequence that to some greater or lesser extent the value of the rigs will continue to physically depreciate independent from market forces related to the depressed state of the Western Canadian oil industry or that may result from the introduction of new technologies in drilling rigs and practices.

k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

38 The contractual agreement between Affinity and Vortex clearly contemplated loans payable on demand, with specified principal and interest payments before demand. Affinity has provided significant relief from the contractual terms over a two-year period. In a practical sense, Affinity has already effectively provided Vortex with much of the remedial opportunity contemplated by the *CCAA*. Vortex has had the benefit of two years of debt repayment accommodations and forbearance and the opportunity to seek alternate financing. During this period Vortex has failed to honour undertakings it gave in exchange of the deferral relief provided. Affinity is contractually entitled, following its demand, to either seize and sell the rigs or to have a Receiver appointed. Having regard to the relevant factors I outlined in paragraph 19 above, I conclude that it is just and convenient to appoint a Receiver as sought by Affinity.

iv. Other Considerations

39 Affinity argued that there was a concluded agreement in which Vortex had agreed to consent to the appointment of a Receiver. Vortex disputes that such an agreement was concluded and took exception to evidence Affinity wished to rely on as being without prejudice communications. In light of the conclusions I have reached above, I do not find it necessary to address these arguments and the related argument relating to settlement privilege. My decision is made without regard to the evidence and argument submitted surrounding these issues.

Conclusion

40 For the reasons set forth above:

a. I dismiss Vortex's application for relief under the *CCAA*.

b. I order that Deloitte Restructuring Inc. be appointed Receiver of Vortex effective immediately.

c. I contemplate that the form of that order will be substantially in the form of the draft order filed by counsel for Affinity on July 6, 2017. However, at the hearing of the applications counsel for Affinity and Vortex asked that the final form of the order not be settled until after counsel had reviewed my decision and had discussion on the final form of order. I ask counsel to consult promptly. If they are able to agree on the form of order they shall file same for my approval. If they cannot agree on the form of the order, a conference call with me shall be arranged to settle this matter.

c. I approve the actions of the Interim Receiver since the date of appointment as Interim Receiver to the termination of that order.

Plaintiff's application granted; defendant's application dismissed.

2014 ABQB 65
Alberta Court of Queen's Bench

Alexis Paragon Limited Partnership, Re

2014 CarswellAlta 165, 2014 ABQB 65, [2014] A.W.L.D. 1428, 237 A.C.W.S. (3d) 300, 9 C.B.R. (6th) 43

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA")

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA")

In the Matter of a Plan of Compromise or Arrangement and reorganization of Alexis Paragon Limited Partnership and the Petitioners Listed in Appendix "A" (Collectively the "Company")

In the Matter of applications by the Company for, inter alia, a continuation of proceedings under the CCAA, a stay and the addition of Alexis Casino LP as an applicant

Silver Point Finance, LLP Applicant (Respondent) and Paragon Canada Alexis, ULC; Alexis Paragon Limited Partnership; Paragon Tamarack Alexis General Partnership; and Paragon Alexis Holdings, Inc., Respondents (Applicants) and Alexis Trustee Corporation, Alexis Nakoda Sioux Nation and Alexis Casino Limited Partnership Respondents (Interveners)

D.R.G. Thomas J.

Heard: January 24, 2014
Judgment: January 31, 2014
Docket: Edmonton 24-1823083, 24-1823084, 24-1823085, 24-1823086

Counsel: Mr. Michael J. McCabe, Q.C. for Paragon Group
Mr. Darren R. Bieganek, Q.C. for Alexis Group
Mr. Charles P. Russell, Mr. Logan Willis for Silver Point
Mr. Kent Rowan, Q.C., Ms Stephanie Wanke for PWC

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
Casino was located on First Nations reserve — P Group of companies borrowed money from creditor SP to construct and provide for ongoing operation of casino — SP said that indebtedness now amounted to approximately $82 million — P Group operated casino — Revenues had never met projections prepared by P Group, with result being that there had never been enough money generated in casino to pay rents — It was common ground that P Group had been default on its debt obligation to SP for some time — SP wanted its money back and commenced proceedings to have receiver manager appointed to take over operation of casino and restructure debt — P Group resisted and claimed that it had injected up to $20 million dollars into operation of casino to keep it running and should be granted stay to prepare plan of arrangement under Companies' Creditors Arrangement Act — Application granted — P Group failed to satisfy court that it would be able to restructure complex set of entities and operations, some of which were limited partnerships, and still be able to carry on viable business in casino — P Group had not

been acting with due diligence in addressing various issues which it faced with SP, and in dealing with operational issues which had apparently constrained revenues available to meet its debt obligations and profits — It was appropriate to appoint receiver manager — SP had contractual right to appointment of receiver and it would be at risk of serious harm if one were not appointed.

Table of Authorities

Cases considered by *D.R.G. Thomas J.*:

Alberta Treasury Branches v. Tallgrass Energy Corp (2013), 2013 ABQB 432, 2013 CarswellAlta 1496 (Alta. Q.B.) — followed

Callidus Capital Corp. v. Carcap Inc. (2012), 2012 CarswellOnt 480, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — considered

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Pt. III — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 57.1 [en. 1997, c. 12, s. 34] — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 243 — considered

s. 243(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — considered

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 65(7) — considered

***D.R.G. Thomas J.*:**

I. Introduction

1 These are my decisions on the applications described in Schedule "A" argued in a common hearing on January 24, 2014 Terms used in this decision including 'Alberta Gaming Regulator', 'Alexis Group', 'Paragon Group' and 'Silver Point' are defined in Schedule "B". Relationships between Silver Point, the Paragon Group and the Alexis Group are shown in Schedule "C".

2 The essence of the Paragon Group applications are for a stay pursuant to s. 11.02(3) of the *CCAA*, for a period of 30 days, to give it an opportunity to develop and file a plan of arrangement under the *CCAA*. Silver Point opposes the Paragon Group applications for a stay and continuation under the *CCAA* and ask instead, for a receiver/manager to be appointed. The Alexis Group also responds to the *CCAA* applications by the Paragon Group and intervenes to support Silver Point in its receivership application. The Paragon Group opposes the appointment of a receiver.

3 The applications of the Paragon Group are dismissed and a receiver manager is appointed.

II. Background

4 The Eagle River Casino and Travel Plaza (the "Casino") is located on a portion of the Alexis First Nation Reserve, near Whitecourt, Alberta. The Casino has been located on those lands to take advantage of policies established by the Government of Alberta in 2001 to facilitate development of gaming facilities on First Nations Reserves and to access grants made available from senior levels of Government through the FNDF.

5 The portion of the Reserve land on which the Casino is built and operated is subject to a head lease from Her Majesty the Queen in Right of Canada and a number of sub-leases between corporate entities which are part of the Alexis Group.

6 The license to operate the Casino is issued by the Alberta Gaming Regulator and is held by the Alexis Casino LLP, a limited partnership composed of Alexis Trustee Corporation and Alexis Casino Corporation. This structure appears to have been dictated by the Alberta Gaming Regulator so that the Casino operation will qualify under Alberta policies and regulations governing gaming on First Nations Reserves.

7 Paragon borrowed money from Silver Point to construct and provide for ongoing operation of the Casino. The creditor Silver Point says that the indebtedness now amounts to approximately 82 million dollars. This debt was to be serviced by rents and profits from the gambling operation carried on in the Casino, and to a lesser extent from the related service station operation. By agreement between the Alexis Group and the Paragon Group, the latter is mandated as the manager of the Casino and as such, has day-to-day responsibility for running the gaming operation in the Casino.

8 The Casino has struggled financially since it opened and on a number of occasions, various third parties have determined and declared the operation to be either insolvent, e.g. Grant Thornton, or noncompliant, e.g. audit by Alberta Aboriginal Relations.

9 Revenues have never met the projections prepared by the operator, Paragon Group, with the result being that there has never been enough money generated in the Casino to pay rents. Some share of revenues have been passed back to a charity controlled by the Alexis First Nation. It is common ground that the Paragon Group has been default on its debt obligation to Silver Point for some time. Silver Point wants its money back and has commenced proceedings to have a receiver manager appointed to take over the operation of the Casino and restructure the debt. Paragon resists and claims that it has injected up to $20 million dollars into the operation of the Casino to keep it running and should be granted a stay to prepare a plan of arrangement under the CCAA.

10 Over the years disagreements between the Alexis Group and the Paragon Group have escalated. There have been several attempts to work out solutions, but dialogue has come to an end and these legal proceedings have resulted.

11 What is clear is that there are immense losses which are going to be incurred here, probably over $55 million dollars on the part of Silver Point and $20 million dollars on the part of the Paragon Group and an individual related thereto who has made secured advances but stands second to Silver Point.

III. Issues

12 Briefly stated, the issues are:

> (1) Should a stay be granted to allow the Paragon Group an opportunity to file a plan of arrangement under the *CCAA*? and
>
> (2) If a stay is not granted, should a receiver be appointed?

IV. Jurisdiction of this Court under the CCAA and to appoint a receiver

13 There is no disagreement among the various participants in these hearings that the Paragon Group has met the technical requirements of the *CCAA*. The Paragon Group is indebted for more than $5 million dollars to Silver Point and the members of the Paragon Group appear to be affiliated under the relevant provisions of the *BIA*. The Casino is operated in Alberta and the

Casino is the core business of the Paragon Group. This Court has jurisdiction to hear and decide the Paragon Group application for a stay and continuation under the *CCAA*.

14 The participants accept that the Paragon Group and Paragon Canada, Alexis, ULC in particular, is in default under its financial arrangements with Silver Point and that the amount of the debt accrued is in the range of $82 million dollars. There is no dispute that the secured lender, Silver Point, is entitled to apply for a receivership order and the question is whether it should be granted given the allegations of breach of fiduciary duty and conspiracy which are made by Paragon Group against Silver Point and the Alexis Group.

V. Analysis — CCAA Application by Paragon Group

15 Section 11.02 (3) of the *CCAA* prescribes that:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that the circumstances exist that make the order appropriate; and
>
> (b) In the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Clearly, the burden of proof lies on Paragon Group, as the applicant.

16 At para. 13 of *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.), Romaine, J. stated the test for granting such an order under s. 11.02(3) of the *CCAA*. I adopt and restate the test as being that I must be satisfied:

> (a) the circumstances exist that make the order, i.e. the continuation under the *CCAA*, appropriate;
>
> (b) the applicant has acted and is acting in good faith; and
>
> (c) the applicant has acted and is acting with due diligence.

17 In considering whether this test has been met, I have considered the Supplemental Pre Filing Report prepared by the proposed Monitor PricewaterhouseCoopers Inc. ("PWC") which confirms the evidence in the affidavits of the parties that this is a financial mess.

(A) Appropriateness

18 The Paragon Group must satisfy me that it will be able to restructure this complex set of entities and operations, some of which are limited partnerships, and still be able to carry on a viable business in the Casino (including the related service station).

19 At para. 14 of *Tallgrass Energy Corp*, *supra*, Romaine, J. stated:

> ... there should be **a germ of a reasonable and realistic plan**, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring...
>
> [Emphasis added.]

20 The question here is whether the Paragon Group have presented *a germ of a reasonable and realistic plan* given the very strong opposition to its proposal from the Alexis Group and Silver Point. This 'germ' of a plan must be found in the evidence before the Court.

21 The Paragon Group argues that there is a 'germ' of a plan found in the Lavelle Affidavit filed in support of the Silver Point application. Specific reference is made to paras. 118 to 122 inclusive, which describes the 'Proposed Transaction', (the "Proposed Transaction") which is a conditional deal between a future nominee of the Alexis Group and Silver Point. The essence of the

Proposed Transaction would see a reduction in the outstanding indebtedness currently owed by the Paragon Group to Silver Point achieved through a combination of write-downs of debt by Silver Point and a reduction in debt charges, the assumption of a reduced amount of debt by the Alexis Group and the further purchase of a portion of the existing debt by the Alexis Group or its nominee from Silver Point.

22 The Paragon Group also suggests that as part of its plan, it would obtain accommodations from the Alberta Gaming Regulator and the Government of Alberta to somehow unblock funds held by the FNDF for the operation of the Casino and the payment of arrears of rent.

23 Presumably these funds, if they could be made to flow, would be directed to pay down a portion of the indebtedness owing by the Paragon Group to Silver Point.

24 The Paragon Group proposes to flesh out this concept, which it says is an example of the germ of a plan, if 30 more days can be allowed for the delivery of a full blown plan.

25 The Paragon Group argues further that there is also a 'germ' of a restructuring proposal set out in the Affidavit of Scott Menke, made on January 13. It appears that this is a reference to para. 47 of that deposition, which reads:

> In order to make the Project viable, it will be necessary to address the use of FNDF funds with Alberta, address the allocation of overheads to the Casino with Alberta and restructure the lease payment for the Casino space. At this time I have only a general idea as to the structure of the proposed Plan of Arrangement. I contemplate
>
> a. taking every reasonable step to reduce overhead;
>
> b. entering into discussions with Alberta to amend the structure of the Project to maximize the availability of FNDF Funds and the allocation of overheads;
>
> c. determining the amount of debt the operation can handle;
>
> d. making a proposition to the secured creditors for a rearrangement of the Applicants' obligations to those creditors to something the Applicants can support;
>
> e. obtaining a third party assessment as to fair market rent;
>
> f. amending the lease to reflect the restructured obligations to the secured creditors;
>
> g. entering into discussions with Alexis for an orderly transition of management duties from PCA to Alexis.

26 In respect to the 'germ' of a plan represented by the 'Proposed Transaction' outlined in the Lavelle Affidavit, it is trite to observe that none of the entities making up the Paragon Group have been invited to participate in this restructuring scenario. While the scenario described in the 'Proposed Transaction' may provide a realistic template for a restructuring, it does not appear that there is any role for the Paragon Group, because the relationship between the Paragon Group and Silver Point and the Alexis Group is irretrievably broken. The parties involved appear to have agreed to go their separate ways some time ago and the opposition by the Alexis Group, in particular, to any ongoing role for the Paragon Group is to put it mildly "fierce".

27 In the result, this particular template is neither a reasonable nor realistic 'germ' of a plan.

28 In respect to the 'germ' of a plan said to be found in para. 47 of the Menke Affidavit, it is cast in terms of a 'contemplation' of a number of steps which might be taken to address issues such as the use of FNDF funds, the allocation of overheads etc. It does provide a logical catalogue of many of the business and regulatory issues which must be addressed.

29 That said, I agree with counsel for the Alexis Group that this is more of a process to finalize a plan than an outline of a plan that contains details such as sources of new funding available on some limited conditional basis, specific examples of

overheads which could be reduced, etc. Even in the second Menke Affidavit, made January 21, 2014, at para. 8 there are no specific overhead reductions provided.

30 While the Court has the power under the CCAA to impose a stay and ultimately to approve a plan, it is my view that it is unrealistic to think that a plan which involves the ongoing involvement of the Paragon Group in the operation of the Casino facility will be acceptable to the Alexis Group and Silver Point. Both of these parties have expressed strenuous opposition, particularly based on a concern about the effect the continued involvement by the Paragon Group may have on the gaming license issued by the Alberta Gaming Regulator, which in turn has expressed discomfort with the ongoing failure of the Paragon Group to reduce overheads in the Casino operation. That said, I note this Regulator remains resolutely neutral in this dispute (see January 21, 2014 letter).

31 However, I am not satisfied on the evidence before me that the Paragon Group can come up with a plan which will involve the ultimate endorsement by the Alberta Gaming Regulator of a scheme whereby the Paragon Group remains involved in the day-to-day operations of the Casino facility. In particular, it is not realistic to assume that this will happen in 30 days. I also note that while this Court may have the power to continue the gaming license under the CCAA this Court does not have the power to renew licenses if they expire on their own terms. I observe that the gaming worker supplier registrations enabling the Paragon Canada Alexis, ULC to provide workers to the Casino will expire on February 7, 2014.

32 Before coming to a final conclusion on whether there is a 'germ of a reasonable and realistic plan' presented here, I consider at this stage of the analysis the appropriateness of the inclusion of the Alexis Casino Limited Partnership in the proposed plan of arrangement. This entity must be included in this restructuring because it is the holder of the critical gaming license granted by the Alberta Gaming Regulator. The asset represented by this license is at the very core of this dispute and any restructuring must preserve and continue that fundamentally important authorization.

33 I find that the Paragon Group does not have any direct ownership interest of a legal nature in the Alexis Casino Limited Partnership, or the gaming license.

34 There are relationships between the Paragon Group and some of the entities making up the Alexis Group, such as the limited partnership known as the Alexis Paragon Limited Partnership. There are also two operating agreements, including the Casino Management Agreement and the Alexis Paragon Limited Partnership Agreement. While the approval of a plan under the *CCAA* could perhaps preserve the limited partnership arrangements and the management agreement, I am still not convinced that Paragon has met the burden of demonstrating that the *CCAA* should be used to draw in the Alexis Casino Limited Partnership. It is neither an affiliated company, nor a subsidiary of the Paragon Group. It is a live issue as to whether the Alexis Casino LP is a 'related party' within the definition of that term found in the *BIA* but I do not decide this aspect of the application on that point. I mention it only because it was raised in the course of argument by the Paragon Group.

35 The Paragon Group points out that Romaine, J. had considered a complex set of limited partnerships in *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153 (Alta. Q.B.) and therefore partnerships can be captured by the *CCAA* legislation. I note that *Calpine Canada Energy Ltd., Re* was a completely different type of business and had many different types of relationships through complex limited partnership arrangements. These businesses were very different from this gaming operation located on First Nations Lands.

36 In the result, given the serious questions about whether the Alexis Casino LP qualifies as a debtor under the CCAA in these circumstances and given the discretionary nature of my powers under this section of the CCAA, I am disinclined to force the heretofore independent Alexis Casino LP into a forced marriage with the Paragon Group. It would not be appropriate in these circumstances and for all these reasons the first limb of the *Tallgrass* test has not been met.

(B) Good Faith

37 The second part of the *Tallgrass*, *supra*, test requires that the Paragon Group, as applicant, establish that it has acted in good faith in the past and is acting currently acting in good faith. The Alexis Group takes particular issue with the conduct of the Paragon Group and its failure to move, in a timely way, to reduce overheads in the Casino operation and to address issues raised

by the Alberta Gaming Regulator, despite many requests that it do so over the last several years. Further, the Alexis Group complains of the failure of the Paragon Group to maintain its debt obligations with Silver Point in good standing. The Alexis Group assert that the relief sought under the *CCAA* by the Paragon Group is more of a defensive tactic than a bona fide effort to restructure, as referred to in the case of *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163 (Ont. S.C.J. [Commercial List]), at para. 58.

38 I am not prepared to find that the Paragon Group is not acting in good faith here. There is evidence the Paragon Group and its principals have continued to inject capital into the operation of the Casino to keep it afloat and that is not disputed. The applications by the Paragon Group appears to be acts of desperation akin to 'Hail Mary' passes, rather than a series of activities demonstrating bad faith. I accept that the Paragon Group has established that it is acting in good faith in making these applications.

(C) Due Diligence

39 Under the third limb of the *Tallgrass* test, the Paragon Group must show that it has acted at all times with due diligence. I take this to mean that the Applicants must have taken steps in a timely way to deal with the financial problems arising from its defaults under the borrowing arrangements with Silver Point and in addressing operational problems in the Casino, such as the continuing high overheads which have apparently upset the Alberta Gaming Regulator.

40 The evidence shows that the problems of high overheads and the defaults on the Silver Point debt have been of longstanding. The Paragon Group has not been duly diligent in addressing and resolving the issues which have been raised by the Alexis Group, including the failure to reduce the overall indebtedness to a level which could be supported by revenues from the Casino operation, the making of satisfactory standstill arrangements with Silver Point and reducing, in a significant way, the overhead and operating costs in the Casino to levels consistent with other Alberta rural casinos and also in maintaining a robust relationship with the all-important Alberta Gaming Regulator and the departments of the Alberta Government responsible for aboriginal relations. I make no observation or comment in respect to the alleged failure by the Paragon Group to construct a hotel.

41 In conclusion on the third limb of the test, I am not satisfied that the Paragon Group has been acting with due diligence in addressing the various issues which it faced with its major creditor, Silver Point, and in dealing with the operational issues which have apparently constrained the revenues available to meet its debt obligations and profits which could go to the Alexis Group.

42 For all these reasons, I find that the Paragon Group has not satisfied all aspects of the test outlined in s. 11.02(3) of the CCAA, a test which must be met before this Court can make the order applied for. The application for a stay is denied and all other applications by the Paragon Group are dismissed.

VI. Decision on the Receivership Application by Silver Point

43 Silver Point is the first-ranking secured creditor of the Paragon Group and as of December 31, 2013 the Paragon Group and each of the entities making up that group jointly and severally owed Silver Point approximately $82 million dollars. It is indicated that these amounts are owed pursuant to a first-ranking secured loan which matured over 15 months ago and remains unpaid.

44 Under s. 243 of the *BIA* and s. 13(2) of the *Judicature Act*, this Court may appoint a receiver or a receiver and manager where it is just and convenient to do so on such terms as it may consider just. Under s. 65(7) of the *PPSA*, the Court may, on the application of an interested person, appoint a receiver and give directions on any matter relating to the duties of a receiver. I will deal with the objections by the Paragon Group to the appointment of the receiver/manager before dealing with the Silver Point application on the merits.

45 In response to the Silver Point receivership application the Paragon Group raises an alleged breach of a fiduciary duty owed by the Alexis Group to the Paragon Group through the Alexis Paragon Limited Partnership and the contractual arrangements such as the Casino Management Agreement. This breach is said to be constituted by the involvement of the Alexis Group in developing the Proposed Transaction with Silver Point.

46 It is not clear whether there is a fiduciary duty owed by any of the Alexis Group entities to the Paragon Group. The wording in the various agreements indicates that he parties did not intend to create partnerships so no duty could arise on that traditional basis. Further, it appears that the Paragon Canada Alexis, ULC entity is an agent of the Alexis Casino LP for the purposes of management. The Alexis Group argues that it is the subservient participant in these various arrangements and owes no fiduciary duty to the Paragon Group.

47 Even if there is a fiduciary duty and the Proposed Transaction constitutes a breach thereof the Alexis Group is not the applicant on the receivership application which is made by Silver Point. The Alexis Group merely intervenes to support that application.

48 The Paragon Group attempts to fill this gap by alleging a conspiracy between the Alexis Group and Silver Point which is the applicant for the appointment of a receiver/manager.

49 While a theoretical tort of conspiracy may exist, it is not a cause of action which I am prepared to deal with and make findings on in this type of chambers application. A full trial would be needed to determine that type of claim.

50 Further, the Paragon Group has been aware for some time that their relationship with the Alexis Group has come to an end. All participants were seeking solutions to their badly damaged business arrangements. I do not see anything illegal or improper on the part of Silver Point and Alexis Group in discussing ways to cut their losses and preserve the Casino operation and move on. I see no misconduct on their part which would create an equity in favour of the Paragon Group which in turn would block the granting of the equitable remedy of imposing a receivership structure on this failed business arrangement. Accordingly, I reject this set of arguments from the Paragon Group and move on to deal with the merits of the Silver Point receivership application.

51 The factors which I must consider to determine whether it is appropriate to appoint a receiver pursuant to either s. 243(1) of the *BIA*, or s. 13(2) of the *Judicature Act* include, *inter alia*, the following as customized to this case:

> (a) Silver Point has a contractual right to appoint a receiver - the Paragon Group have committed contractually in the loan agreement to the appointment of a receiver on the application of Silver Point.
>
> (b) Risk of harm to Silver Point if a receiver is not appointed — the preservation of the gaming license is critical and the renewal of the license to provide workers to the Casino is also on a short fuse. It is appropriate to appoint a receiver to preserve these critical assets of this business.
>
> (c) Risk to Silver Point from a sizeable deficiency - Silver Point is prepared to accept a $48 million dollar loss as part of the Proposed Transaction referred to above. There is a sizeable deficiency and it is growing.
>
> (d) The nature of the property — the Casino is located on the Alexis Reserve and the First Nation is prepared to allow a receiver to enter to manage the Casino and take possession of related property. There is evidence that the proposed receiver manager Alvarez & Marsal is in discussions with the Alberta Gaming Regulator and that it will be able to preserve the all important gaming licenses.
>
> (e) Length of the receivership process — the operation of the Casino should be stabilized and the jobs of the 80+-employees must be preserved. It appears that the 'Proposed Transaction' can be closed within a very short timeframe following the appointment of a receiver manager and the operations can be put on a more stable footing and the 80+-jobs can be saved.
>
> (f) Costs to the parties minimized if a receiver is appointed — the appointment of a receiver, as with the appointment of a monitor under the *CCAA*, can involve expending significant amounts on professional fees. Silver Point is prepared to absorb these costs and it appears the appointment of a receiver/manager and the closing of the Proposed Transaction will keep these types of expenses to a minimum.

52 In the result and for these reasons, I am satisfied on the materials put before me that the appointment of Alvarez & Marsal as the receiver manager is just and convenient and meets the requirements of s. 243 (1) of the *BIA* and s. 13(2) of the *Judicature Act*. Accordingly, all stays are lifted and Alvarez and Marsal shall be appointed as the receiver/manager in accordance with the modified template order provided.

Schedule "A" — Summary of Applications

The applications by the Paragon Group are for:

1. An abridgment of time.

2. A direction that the proceedings commenced by the Paragon Group under Part III of the *BIA* through the filing of Notices of Intention ("NOI") shall be taken up and continued under the *CCAA*.

3. A stay of all proceedings taken or that might be taken against the Paragon Group.

4. Restraining any further proceedings in any action, suit or proceedings against the Paragon Group.

5. Prohibiting the commencement of or proceeding with any other action, suit or proceeding against the Paragon Group.

6. The adding of the Alexis Casino LP as an applicant to this matter or, alternatively, directing that Alexis Casino LP continue its operations in the ordinary course pending further order of this Court or expiry of the stay, if granted.

The applications by Silver Point are for:

1. Termination of the NOI Stay referred to in s. 50.4(8) of the *BIA* in respect of the Paragon Group.

2. Lifting the NOI Stay pursuant to section 69.4 of the BIA, if and to the extent necessary, to permit Silver Point to file a statement of claim and a receivership application.

3. Appointing Alvarez & Marsal Canada Inc. ("*Alvarez & Marsal*") as the receiver and manager (the "*Receiver*") over all of the undertakings, property and assets of some of the entities in the Paragon Group pursuant to section 243(1) of the BIA, section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "*Judicature Act*"), and section 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (the "*PPSA*").

4. Appointing Alvarez & Marsal as trustee of the Paragon Group in lieu of PwC pursuant to s. 57.1 of the *BIA*

Schedule "B" — Defined Terms

1. 'Alberta Gaming Regulator' means the Alberta Gaming and Liquor Commission.

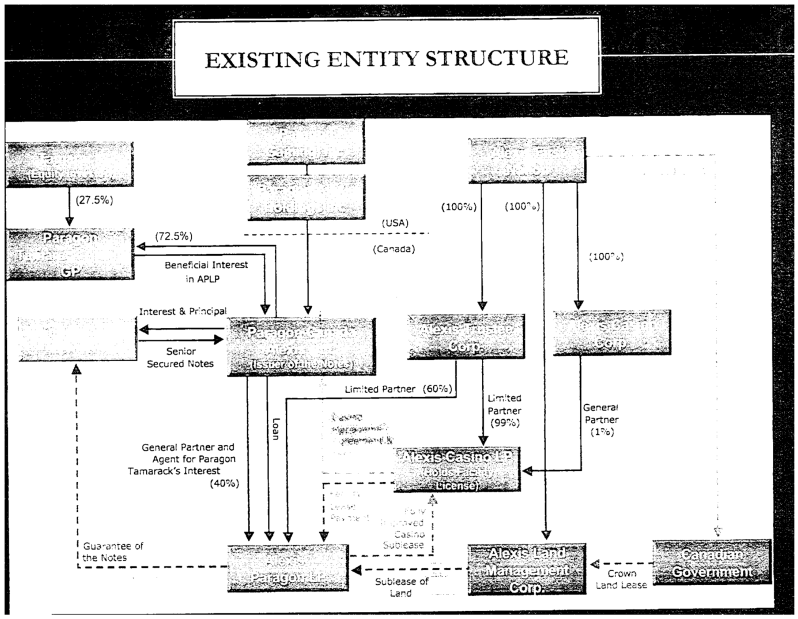
2. 'Alexis Group' means Alexis Trustee Corporation, Alexis Nakota Sioux Nation, Alexis Casino Limited Partnership, Alexis Casino Corporation and Alexis Land Management Corp.

3. 'FNDF' means the First Nation's Development Fund.

4. 'Paragon Group' means Alexis Paragon Limited Partnership, Paragon Canada Alexis, ULC, Paragon Tamarack Alexis General Partnership and Paragon Alexis Holdings, Inc.

5. 'Silver Point' means Silver Point Finance, LLC.

Schedule "C" — Existing Entity Structure



Graphic 1

Order accordingly.

2013 ABQB 432
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Tallgrass Energy Corp

2013 CarswellAlta 1496, 2013 ABQB 432, [2013] A.W.L.D. 4492, [2013] A.W.L.D. 4494, 231 A.C.W.S. (3d) 961, 8 C.B.R. (6th) 161

Alberta Treasury Branches Plaintiff and Tallgrass Energy Corp. Defendant

In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Alberta Business Corporation Act, R.S.A. 2000, c. B-9, as amended and Tallgrass Energy Corp. Defendant

B.E. Romaine J.

Heard: July 24, 2013
Judgment: August 6, 2013
Docket: Calgary 1301-08759, 1301-08497

Counsel: Thomas Cumming, Jeffrey Oliver for Plaintiff, Alberta Treasury Branches
Howard Gorman for Toscana Capital Corporation
Ryan Zahara, Matthew Beavers for Defendant, Tallgrass Energy Corp.

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.c Dismissal of application

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application

Defendant TG applied for initial order under Companies' Creditors Arrangement Act (Can.) (CCAA) — Plaintiff ATB extended $12 million credit facility to TG, payable on demand and secured by first charge on all company's assets — TC granted TG bridge loan credit facility in amount of $6 million secured by second in priority charge against assets — TG defaulted — ATB and TC issued demands to TG — TG sought initial order under CCAA — Prior to TG's application, secured creditors ATB and TC applied for order appointing receiver over property and assets of company — TG currently had assets of $28,829,874 and liabilities of $28,896,371 — Secured lenders were owed about $18 million and it had unsecured accounts payable of $3 million — Property, plant and equipment were valued at approximately $21.6 million — Defendant's application dismissed; plaintiff's application granted — TG met technical requirements for protection under CCAA — TG breached provisions of ATB credit facility and TC bridge loan facility — Secured lenders were entitled to apply for receivership order — TG failed to establish that there was any reasonable possibility that it would be able to restructure its affairs — Restructuring options proposed by TG were not realistic or commercially reasonable — It would likely be liquidating CCAA — Secured lenders objected to TG

management controlling liquidation process under CCAA protection as they had lost faith in management — Secured lenders had not acted precipitously — TG had adequate opportunity to canvas market for refinancing and restructuring options — TG and secured creditors were in adversarial mode, which did not make for efficient and inexpensive CCAA restructuring — CCAA order was not appropriate It followed that application for receivership must succeed.

Bankruptcy and insolvency --- Receivers — Appointment

Defendant TG applied for initial order under Companies' Creditors Arrangement Act (Can.) (CCAA) — Plaintiff ATB extended $12 million credit facility to TG, payable on demand and secured by first charge on all company's assets — TC granted TG bridge loan credit facility in amount of $6 million secured by second in priority charge against assets — TG defaulted — ATB and TC issued demands to TG — TG sought initial order under CCAA — Prior to TG's application, secured creditors ATB and TC applied for order appointing receiver over property and assets of company — TG currently had assets of $28,829,874 and liabilities of $28,896,371 — Secured lenders were owed about $18 million and it had unsecured accounts payable of $3 million — Property, plant and equipment were valued at approximately $21.6 million — Defendant's application dismissed; plaintiff's application granted — TG met technical requirements for protection under CCAA — TG breached provisions of ATB credit facility and TC bridge loan facility — Secured lenders were entitled to apply for receivership order — TG failed to establish that there was any reasonable possibility that it would be able to restructure its affairs — Restructuring options proposed by TG were not realistic or commercially reasonable — It would likely be liquidating CCAA — Secured lenders objected to TG management controlling liquidation process under CCAA protection as they had lost faith in management — Secured lenders had not acted precipitously — TG had adequate opportunity to canvas market for refinancing and restructuring options — TG and secured creditors were in adversarial mode, which did not make for efficient and inexpensive CCAA restructuring — CCAA order was not appropriate It followed that application for receivership must succeed.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

***B.E. Romaine J.*:**

Introduction

1 Tallgrass Energy Corp applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended. That application was opposed by its secured creditors, Alberta Treasury Branches and Toscana Capital Corporation, which prior to Tallgrass' application for CCAA protection had applied for an order appointing a receiver over the property and assets of the company. I dismissed Tallgrass' application for an initial CCAA order and allowed the receivership application. These are my reasons.

Facts

2 In July, 2012, ATB extended a $12 million credit facility to Tallgrass, payable on demand and secured by a first charge on all of the company's assets. At about the same time, Toscana granted Tallgrass a bridge loan credit facility in the amount of $6 million secured by a second in priority charge against the assets. This bridge loan facility matured on April 30, 2013.

3 In July, 2012, John McAdam, the CEO of Tallgrass, began the process of looking for traditional financing to replace the Toscana bridge financing. In early 2013, Mr. McAdam realized that no conventional financing was available, and Tallgrass began to explore the availability of non-traditional forms of financing.

4 Tallgrass management decided to attempt to obtain $100 million of non-traditional financing, as there were no third parties willing to step into the shoes of Toscana's subordinate position. The company retained an advisor in March, 2013 to aid in the search.

5 After the Toscana facility matured on April 30, 2013, Tallgrass acknowledged that the loan was in default. Toscana agreed to forbear enforcement until May 31, 2013 to provide Tallgrass with additional time to finalize certain financing alternatives that were being explored.

6 On June 17, 2013, Toscana issued a demand to Tallgrass, and on June 25, 2013, ATB followed with its demand. There is no issue that Tallgrass is also in default of the ATB credit facility.

7 On June 27, 2013, at the request of the secured lenders, Tallgrass retained Grant Thornton Limited as financial advisor, on the condition that Grant Thornton would provide financial information and reports to the secured lenders. Grant Thornton provided two reports to the lenders, on July 4 and on July 11, 2013. The lenders granted further forbearance during this period and continuing until July 17, 2013.

8 On about July 15, 2013, on the basis of the information and reports received from Grant Thornton, Toscana advised Tallgrass that it would not be prepared to grant further forbearance, and that it intended to bring an application to appoint a receiver on Wednesday, July 24, 2013. On July 16, 2013, ATB advised Tallgrass that it was taking the same position, and that after July 17, 2013, Tallgrass would have no further access to the remaining $100,000 available under the line of credit.

9 Tallgrass sought an initial order under the CCAA on July 17, 2013. The application was put over to July 24, 2013 to be heard at the same time as the receivership application, with a temporary stay to preserve the status quo. ATB agreed to allow Tallgrass access to up to $50,000 of the line of credit to pay certain critical suppliers.

10 In its application, Tallgrass represented that it currently has assets of $28,829,874 and liabilities of $28,896,371. The secured lenders are owed approximately $18 million and Tallgrass has unsecured accounts payable in the amount of roughly $3 million, decommissioning liabilities as of March 31, 2013 in the amount of approximately $7.4 million and a financing contract under which approximately $484,000 is outstanding as of March 31, 2013.

11 The company values its property, plant and equipment, including undeveloped land, at approximately $21.6 million.

Analysis

12 As a preliminary matter, it is clear that Tallgrass meets the technical requirements for protection under the CCAA. It is also clear and uncontested that Tallgrass has breached various provisions of the ATB credit facility and the Toscana bridge loan facility, and that the secured lenders are entitled to apply for a receivership order. In fact, there was no question that, if Tallgrass's application for an initial order under the CCAA did not succeed, a receivership would follow.

13 As I indicated in *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (1 August 2006), Docket No. 060108395, a section 11 order under the CCAA is not granted merely upon the fact of its application. Tallgrass must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence. The CCAA therefore requires that the court hearing the application exercise discretion in making these determinations.

14 A key issue here is whether Tallgrass can establish that there is any reasonable possibility that it will be able to restructure its affairs. The burden placed on an applicant for an initial CCAA order in this regard is not a very onerous one, in that it is not necessary for an applicant company to have a fully-developed plan or the support of its secured creditors, although either or both are desirable and helpful. However, there must be some evidence of what Farley J. in *Inducon Development Corp., Re*, 1991 CarswellOnt 219 (Ont. Gen. Div.) referred to as the outline of a plan, what he called the "germ of a plan": para 14. I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon Development Corp., Re* at para

13, the CCAA is remedial, not preventative, and it should not be the "last gasp of a dying company". Unfortunately, Tallgrass appears to be at that desperate stage.

15 While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

16 The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruitation, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

17 I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;

2. Company management decided in March of this year to pursue $100 million in non-traditional debt rather than merely retiring existing secured debt of $18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately $800,000 and existing assets worth roughly $29 million, which has already encountered difficulties finding sources of funding to take out Toscana's subordinate position, to attempt to obtain $100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;

3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

a) a letter dated July 23, 2013 from a financing broker that purports to be a "commitment letter". This "commitment" to lend $100 million states that the broker will source the finding through an unnamed "top 25 bank". It requires an upfront "bank guarantee fee" of $2 million. The letter provides that the broker shall have no liability to Tallgrass "under any theory of law or equity" for the failure of any transaction contemplated by the loan commitment letter. The secured lenders have pointed out the many unusual provisions of this letter, and ask, reasonably enough, why a "top 25 bank" would contemplate a loan of $100 million to Tallgrass in its present circumstances. Tallgrass management has had no direct discussion with any financial institution and is relying on assurances from the broker that the source of funding would be reputable.

This "commitment letter" lacks credibility. At any rate, Tallgrass is unable in its current financial state even to fund the $2 million bank guarantee fee necessary to take the proposal to a next step. This leads to the next proposal.

b) Tallgrass has obtained a letter from a friend of its CEO that indicates that he has obtained verbal commitments from Chinese investors in the amount of $10 million for the purpose of investing in the company, and that they are willing to fund the $2 million required by the above-noted proposal. The secured lenders note that this potential funding source has no track record or experience with respect to Canadian oil and gas assets, and that, even if the commitment became firm, the amount is insufficient to pay off existing indebtedness.

c) Tallgrass has identified a further option, a potential loan in the process of negotiations with a broker, not a source lender, that would involve the broker earning approximately $16 million in fees to find a source for a $100 million loan. This is an even softer proposal, with no real commitment. Tallgrass' CEO concedes in understatement that this would be "expensive funding".

18 Given that these options are not commercially realistic, I must conclude that the secured lenders are correct in their view that this would likely be a liquidating CCAA. While this does not in itself preclude the use of the statute, the secured lenders object to Tallgrass management controlling the liquidation process under CCAA protection as they have lost faith in such management. The secured lenders have identified concerns about management's estimate of the value of Tallgrass' oil and gas assets, concerns about the effect of abandonment liabilities on realization values, and concerns about discrepancies between the Cost Flow Projections contained in the CCAA application as compared to those prepared by Grant Thornton. The secured lenders also have concerns with respect to how management is executing its alternate financing strategy, particularly its decision to pursue financing from the kind of sources it has identified, and what they feel is a lack of attention from senior management to realistic alternatives and options. They are critical of management's decisions with respect to covering short-term liabilities in the course of these applications.

19 Tallgrass submits that the opinions given by an officer of Toscana, Dean Jensen, on behalf of the secured lenders with respect to the value of its oil and gas assets should be given little weight as Mr. Jensen does not have the proper expertise to comment on the reserve reports. I take Mr. Jensen's comments to be the opinions of a banker experienced with loans in the oil and gas sector and with familiarity with reserve reports. What Mr. Jensen is really questioning is whether Tallgrass would be able to achieve a price for these assets equal to management's projections, and whether such projections are reliable. He thus questions whether the secured lenders are assured of recovery or whether they are at risk.

20 The concern expressed by Mr. Jensen with respect to cost flow projections relates to whether the costs of a CCAA proceeding will be as projected by Tallgrass, and, again, a lack of confidence with respect to management's projections in that regard. While it appears that Mr. Jensen may have misunderstood some of the calculations, there remain unanswered questions about the projections.

21 This is not a case where the secured lenders have acted precipitously, or where the debtor has not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. This process has been ongoing for more than a year under Tallgrass management, which was not able to obtain take-out financing for Toscana's bridge loan, nor obtain sufficient financing to satisfy its licensee liability rating report requirements and provide funding necessary for further development activities. It is also clear that Tallgrass and its major secured stakeholders are in an adversarial mode, which does not bode well for an efficient or relatively inexpensive CCAA restructuring. Tallgrass was most likely a liquidating CCAA, and given the lack of confidence and the adversarial relationship between the company and the secured lenders at risk, I was not satisfied that a CCAA order would be appropriate in the circumstances. I dismissed Tallgrass' application.

22 It thus followed that the secured lenders' application for a receivership order must succeed.

Company's application dismissed; creditors' application granted.

Most Negative Treatment: Check subsequent history and related treatments.

2012 ONSC 163
Ontario Superior Court of Justice [Commercial List]

Callidus Capital Corp. v. Carcap Inc.

2012 CarswellOnt 480, 2012 ONSC 163, [2012] O.J. No. 62, 211 A.C.W.S. (3d) 861, 84 C.B.R. (5th) 300

Callidus Capital Corporation (Applicant / Respondent by cross-application) and Carcap Inc. and Car Equity Loans Corp. (Respondents / Applicants by cross-application)

Application under Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43

Kaptor Financial Inc. and Carcap Auto Financing (Applicants by cross-application) and Callidus Capital Corporation (Respondent by cross-application)

Mesbur J.

Heard: December 14, 2011
Judgment: January 5, 2012
Docket: CV-11-00009498-OOCL

Counsel: Harvey G. Chaiton, George Benchetrit for Applicant / Respondent by cross-application
Mel Solmon, Fred Tayar, Colby Linthwaite for Respondents and applicants by cross-application
Robb English for Toronto Dominion Bank
A. Kaufman for Proposed Receiver, BDO Canada Ltd.
Jennifer Imrie for Third Eye Capital

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Headnote
Debtors and creditors --- Receivers — Appointment — General principles
Applicant was debtors' first secured lender, and bank was their second secured lender — Applicant brought application for appointment of receiver — Application granted on certain terms — Credit facility agreement contemplated appointing receiver — As to likely effect on parties of appointing receiver, from applicant's point of view, it would allow it to protect its security and dispose of it in organized and court-supervised fashion — It proposed to sell businesses as going concern — Debtors conceded possible restructuring plan might be to liquidate, in which case hope would also be going concern sale — In this regard, no difference in outcome if receiver appointed — Applicant had legitimate concerns about businesses continuing as going concern while debtors attempted to restructure — Debtors' difficulties with bank overdraft had arisen in August of last year, and they had been given every opportunity since then to cure their defaults, and had failed to do so — Debtors had been in default with applicant since it demanded payment in October of last year, and delivered notice of intention to enforce its security —

Debtors had failed to honour terms of forbearance agreement — Neither applicant nor bank had faith in debtors' management — Debtors' past conduct gave cause for concern if there was no receiver who could manage businesses and arrange for orderly sale under court's supervision — Applicant's security was declining in value — Both secured creditors' rights in it were being eroded — Given debtors' failure to come up with even rudimentary restructuring plan, it was time for receiver to take control, and manage businesses to extent necessary to result in orderly liquidation to protect interests of all stakeholders — Nothing prevented debtors from continuing efforts to restructure.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Applicant was debtors' first secured lender, and bank was their second secured lender — Applicant brought application for appointment of receiver — Debtors brought cross-application for initial order under Companies' Creditors Arrangement Act — Application granted on certain terms; cross-application dismissed — As regards cross-application, debtors had no operating capital — They were borrowers in default, with two unwilling lenders unprepared to lend more — Under Act these lenders had no obligation to advance more funds — Without further advances, debtors could not continue to operate without further deterioration in certain inventory and resulting deterioration in revenue — Debtors only brought their application after applicant had brought its application for receiver — Cross-application for relief under Act seemed more defensive tactic than bona fide attempt to restructure — Debtors had no restructuring plan — They did not even have "germ of a plan" — Debtors had been attempting to refinance for some time — They had failed to meet every deadline for payment agreed to with applicant as well as with bank — Even when date was delayed for receivership order to take effect in order to give debtors time to complete refinancing, they were unable to do so — Absence of even "germ of a plan" militated against granting relief under Act — Neither of major secured creditors would support plan of arrangement — They represented considerable part of debtors' creditors — No evidence any other creditors would support plan — There was no merit in making initial order and imposing stay in circumstances where plan of arrangement was most likely going to be defeated.

Table of Authorities

Cases considered by *Mesbur J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — referred to

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co. (2011), 81 C.B.R. (5th) 47, 2011 ONSC 3851, 2011 CarswellOnt 5743 (Ont. S.C.J.) — referred to

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 47 — referred to

s. 244 — referred to

s. 244(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.01(b) [en. 2005, c. 47, s. 128] — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 101 — referred to

***Mesbur J.*:**

Introduction:

1 I heard this application for the appointment of a receiver and the debtors' cross application for an initial order under the *Companies' Creditors Arrangement Act*[1] (CCAA) on December 14, 2011. At the end of the hearing I made the following endorsement:

> For reasons to follow, an order will go in the following terms:
>
> a) The debtors' cross application for an initial order under the CCAA is dismissed.
>
> b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.
>
> c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.
>
> d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.
>
> e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.
>
> f) Even if the Receivership Order takes effect on December 20/11 at 5:00 pm nothing prohibits the Debtor from continuing its efforts to refinance.

2 Counsel tell me the debtor was unable to obtain financing to pay the applicant in full by December 20, 2011. Accordingly, the Receivership Order is now in effect, and it is necessary for me to deliver the reasons for my decision to appoint a receiver and decline to make an initial order under the *CCAA*.

3 These are those reasons.

The application and cross-application:

4 The applicant, Callidus, is the respondents' first secured lender. On this application, it sought the appointment of a Receiver under both the *Bankruptcy and Insolvency Act*[2] and section 101 of the *Courts of Justice Act*.[3] The TD Bank, who is the respondents' second secured lender, supported the receivership application. It pointed out none of the respondents' refinancing proposals included sufficient financing to retire the respondents' debt to the TD Bank. Accordingly, the TD Bank took the position that even if the respondents were able to find alternate financing sufficient to pay out Callidus, the TD Bank would bring its own application to appoint a receiver under the terms of its own security.

5 The respondents brought a cross-application for relief under the *CCAA*. Both Callidus and TD Bank opposed the cross-application.

Facts:

6 The respondent CarCap is in the business of sub-prime car lease financing. The respondent Cashland provides sub-prime equity car loans. Both companies are subsidiaries of CarCap Auto Finance Inc., which itself is a subsidiary of Kaptor Financial Inc. Kaptor Financial owns several other companies, either in whole or in part. The parties refer to these companies as the Kaptor Group. An individual named Eric Inspektor controls the entire Kaptor Group, either directly or indirectly.

7 The Kaptor Group, including the respondents, had deposit accounts with the TD Bank. Initially, they did not have any credit facilities with the TD. Both the respondents and the Kaptor Group had financing elsewhere. Before Callidus lent operating

funds to the respondents, the Laurentian Bank provided an operating facility to them. In addition, the Kaptor Group used private investors to finance their businesses through separately incorporated special purpose investment vehicles. They refer to them as "silos". The silos provided funding either through secured term debentures or preference shares.

Callidus provides financing

8 On September 1, 2011 Callidus replaced the Laurentian Bank as the respondents' first secured lender. It did so pursuant to a credit facility agreement, under which it agreed to advance a demand loan of up to $15 million subject to certain margin conditions. The agreement provided that advances were to be used:

a) To pay off the existing indebtedness to the Laurentian Bank;

b) To repay certain silo investors;

c) To provide working capital; and

d) To finance existing and future vehicle lease and vehicle loan transactions.

9 Another term of the agreement required the respondents to establish "blocked" accounts at a bank. The respondents had to deposit all funds they received from all sources into these blocked accounts. The respondents established the blocked accounts at the TD Bank.

10 The Callidus credit facility had other provisions that are relevant to this application. The respondents' representations required them to disclose "all commitments of any lender (other than the Lender) for all debt for borrowed money, and all debt for borrowed money outstanding of the Borrowers or Corporate Guarantors." [4] The respondents did not disclose they owed any money to TD Bank, although at the time they did. In fact, in the schedule where the respondents were required to list their "current debt defaults", they entered "none". This was not true. I will discuss this more fully in the section "Changes to the respondents' arrangements with TD Bank", below.

11 The respondents also represented that all the information they had given Callidus was "true and correct and does not omit any fact necessary in order to make such information not misleading." [5]

12 Callidus made its advances to a disbursement account that the respondents maintained. The disbursement account was also at the TD Bank.

13 The credit facility's terms provided that it was due on demand, and was repayable in full on the earlier of September 1, 2012 or an event of default. Remedies on default include Callidus' right to appoint a receiver and to apply to the court to appoint a receiver.

14 The credit facility is fully secured by general security agreements as well as a first ranking secured interest over the properties, assets and undertakings of the respondents.

Changes to the respondents' arrangements with TD Bank.

15 The respondents and other Kaptor Group companies initially had only deposit accounts with the TD Bank. Their banking arrangements did not include any overdraft or credit facilities. In July and August of 2011 the TD noticed what it characterized as a high rate of unusual activity in the respondents' accounts as well as in those of other Kaptor Group companies.

16 What was unusual is that more than $60 million in cheques passed through various Kaptor Group accounts. On August 18, 2011 about $18 million flowed through in a single day. TD Bank viewed this as unusual since the businesses generally had annual revenue of about $24 million. That day, the TD Bank froze the Kaptor Group accounts. When they froze the accounts, they were in an overdraft position of about $7 million, contrary to their banking arrangements with the TD.

17 TD Bank then entered into an accommodation agreement with the Kaptor Group, including the respondents. The accommodation agreement, which was dated August 23, 2011, provided a secured loan of $5 million to cover the overdraft, and to provide some working capital. The loan was to be repaid in full by August 29, 2011. It was not.

Callidus advances

18 Callidus knew nothing about the Kaptor Group/respondents' overdraft with the TD Bank, the accommodation agreement or their failure to repay the TD loan. On September 1, 2011 Callidus made its first advance into the respondents' disbursement accounts. The advance totalled just over $8.4 million and was used to pay out the Laurentian Bank debt, make payments to silo investors and provide working capital of just under $1 million. Clearly, given the respondents' situation with TD Bank at the time of the advance, the respondents were in breach of their representations to Callidus in the credit facility agreement.

The TD Bank's accommodation agreement is amended, then terminated

19 Since the TD Bank had not been repaid, it entered into an agreement to amend the original accommodation agreement. The amending agreement was dated September 7, 2011, a week after Callidus had advanced. The amending accommodation agreement provided for the Kaptor Group to acknowledge it was in overdraft at that date to the extent of $2.6 million. TD Bank agreed to advance up to $2 million (instead of the original $5 million) to cover the overdraft. TD Bank was to be repaid in full by September 12, 2011. Again, it was not.

20 On September 16, TD Bank entered into an agreement to terminate the accommodation agreement. In the termination agreement TD Bank agreed to extend the financing subject to certain paydowns, and with the requirement that the financing be paid in full by September 30. Once again, Kaptor Group failed to pay off the debt. It remains outstanding. Currently, the respondents owe the TD Bank about $1 million.

21 By this point the respondents had set up the required blocked account and disbursement accounts at TD Bank, and Callidus had advanced. By this point as well, TD Bank was no longer prepared to do business with the respondents. As part of its termination agreement with the respondents, TD Bank required them to transfer the blocked accounts and disbursement accounts within 90 days of September 16, 2011.

22 Before TD Bank made its various accommodation agreements with the respondents and Kaptor Group, there was a three week period in September where the TD Bank returned as NSF many cheques the respondents had written for payroll, investor payments and dealer and supplier payments. The NSF cheques to silo investors also put the respondents in breach of their obligations to Callidus.

Callidus learns of the debt with TD Bank

23 Callidus did not learn of any of the respondents' agreements with TD Bank, or the security they had given the Bank until three weeks after Callidus had made its first advance. It was only around that time that Eric Inspektor, who essentially controls the Kaptor Group, including the respondents, told Callidus that the respondents and other Kaptor Group companies maintained accounts with the TD Bank. He said that their arrangements with the TD Bank permitted the TD Bank to offset overdrafts in one corporate account against deposits in another, including the disbursement accounts into which Callidus deposited its advances to the respondents.

24 Mr. Inspektor explained that because of the overdraft position the Kaptor Group found itself in, the TD Bank had returned as NSF some of the cheques the respondents had written to some silo investors under Callidus' initial advance. It was one of the conditions of the advance that these investors were to be paid from the advance. Until this time, Callidus knew nothing of any debt the respondents owed to TD Bank. Callidus also did not know that one of the conditions of its initial advance had not been fulfilled - that is, paying off some specific silo investors.

25 Matters deteriorated. TD Bank dishonoured various Cashland cheques for things like payroll, dealership payments and business expenses. Dealers were complaining to the Ontario Motor Vehicle Industry Council.

The field audit

26 Under the terms of its security, Callidus was permitted to conduct a field audit of the respondents. When it did, it discovered that some government remittances were made late. It also learned that Mr. Inspector had directed funds in various Kaptor Group accounts to cover overdrafts in other accounts. This might have included diversion of funds from the respondents to cover overdrafts of other Kaptor Group companies. Over $300,000 in September lease and loan payments had been deposited into the disbursement accounts instead of into the blocked accounts. Mr. Inspektor and his wife deposited nearly $700,000 into the disbursement accounts instead of the blocked accounts. Again, this constituted a breach of the terms of the credit facility agreement.

The Callidus demand

27 Needless to say, all of this created significant concern for Callidus. Callidus took the position that the respondents had made misrepresentations and material non-disclosure to it. It viewed the respondents' actions as constituting material breaches of the credit facility agreement. It was not prepared to continue to lend. On October 18, 2011 it demanded payment in full, pursuant to the terms of the credit facility agreement. It also served notice under section 244 of the *BIA* of its intention to enforce its security.

The Callidus forbearance agreement and events following

28 On October 25, 2011 Callidus entered into a forbearance agreement with the respondents. Callidus agreed to forbear from enforcing its rights, but only on a day-to-day basis. The agreement permitted Callidus to terminate it at any time, in its sole and absolute discretion.

29 In the Callidus forbearance agreement the respondents have acknowledged Callidus' *BIA* Notices are valid. They agree not to contest the validity of the demands for payment. They waive the 10-day notice period, and consent to the immediate enforcement of Callidus' security.

30 The forbearance agreement also required the respondents to hire a new interim executive officer to replace Mr. Inspektor, who ceased to have any managerial role, or any cheque signing authority. The respondents also agreed to hire MNP corporate Finance Inc. to find them alternate financing so they could pay out Callidus by April 30, 2012. They were not able to secure alternate financing in this way.

31 The agreement also required the respondents to submit a complete restructuring plan to Callidus by November 30, 2011. First, the plan had to be acceptable to Callidus, and second had to be completed by December 31, 2011. The respondents have been unable to comply with either of these conditions.

32 Although the parties concede the term is not enforceable, the Callidus forbearance agreement also contains a promise from the respondents not to commence any restructuring or reorganization proceedings under either the *BIA* or *CCAA*.

33 Since the forbearance agreement, Callidus says the respondents' financial position has deteriorated more. The loan balance has increased by more than $770,000 while the lease rental stream has dropped by about $225,000. By the end of November, the respondents were in an over advance position of more than $1.2 million.

34 Callidus was not prepared to continue without changes to the arrangement. On November 16, Callidus told the respondents it would continue to fund under the credit facility if and only if there was a minimum cash injection at least $500,000 into the businesses by subordinated debt or equity within two days, and the respondents would also have to fund their 30% of the cost of buying new vehicles for lease. The respondents failed to fulfil either of these conditions.

35 On November 24, Callidus terminated the forbearance agreement, and told the respondents it would apply to court to have a receiver appointed.

36 Even though it has terminated the forbearance agreement, Callidus continues to provide some funding to the respondents. It does so at its discretion, in order to protect its security.

37 The respondents have been looking for alternate financing. They have not been able to secure any.

Discussion:

38 Callidus takes the position that the respondent made material misrepresentations even before the first advance. It says had it known of the respondents' situation with TD Bank it would never have agreed to advance in the first place. Now it sees the respondents' financial position deteriorating. Its demand for payment has not been satisfied. The respondents' revenue stream is declining, meaning it cannot acquire new vehicles to lease. Callidus says this results in a reduction of its security, while the debt increases. As a result, Callidus says it is just and convenient to appoint a receiver in order to protect its security and the interests of other stakeholders.

39 For their part, the respondents accuse Callidus of taking an aggressive and unreasonable position (even though every position Callidus has taken has been supported by the specific terms of either the credit facility or the forbearance agreement.) The respondents point out that they are not actually behind in their payments. They view the interim financial officer who is now in place as being akin to a "soft receivership", and suggested that if they were able to have a *CCAA* stay in place for thirteen weeks, they would be able to restructure. They did not, however, present any restructuring plan, even in very draft form.

Receiver?

40 Callidus brought its receivership application under both section 101 of the *Courts of Justice Act*, and s.47 of the *BIA*. The test to appoint a receiver under the *CJA* requires the court to conclude it would be just and convenient to do so. The court may appoint an interim receiver under s. 47 of the *BIA* if and only if the court is persuaded a receiver is necessary to protect the debtor's estate or the interests of the creditor who sent a notice under s. 244(1) of the *BIA*.

41 The question is whether it is more in the interests of all concerned to have the receiver appointed or not. [6] In order to answer the question the court must consider all the circumstances of the case, particularly:

> a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;
>
> b) The parties' conduct; and
>
> c) The nature of the property and the rights and interests of all parties in relation to it. [7]

42 Receivers are considered an "extraordinary" remedy, much in the same way as granting an injunction is considered an extraordinary remedy. The law is clear, however, that an applicant who wishes the court to appoint a receiver need not show irreparable harm if a receiver is not appointed. [8]

43 Many security instruments will specifically contemplate appointing a receiver. The fact that the creditor has a right to appoint a receiver under its security is therefore an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve of assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets.

44 Here, of course, the credit facility agreement itself specifically contemplated appointing a receiver. Following the reasoning in *Fruere Village*, the "extraordinary" nature of the remedy is therefore less important here than it might otherwise be.

45 This leads me to consider the interests of all concerned, in order to determine whether the test under either the *Courts of Justice Act or Bankruptcy and Insolvency Act*, or both, has been met.

46 What is the likely effect on the parties of appointing a receiver? From Callidus' point of view, it will allow it to protect its security, and dispose of it in an organized and court-supervised fashion. It proposes to sell the businesses as a going concern, in order to maximize value for all stakeholders. The respondents concede that a possible restructuring plan might be to liquidate, in which case the hope would also be a going concern sale. In this regard, I see no difference in outcome if a receiver is appointed.

47 Callidus has legitimate concerns about the businesses continuing as a going concern while the respondents attempt to restructure. The respondents have stopped purchasing vehicles for lease. They have no money to do so. As a result, the value of Callidus' security is declining.

48 The activities in the TD accounts that led to the Bank's freezing them suggest companies that were out of financial control, operating outside of the normal course of business.

49 The respondents' difficulties with the TD Bank overdraft arose in August of last year. They have been given every opportunity since then to cure their defaults, and have failed to do so.

50 Similarly, the respondents have been in default with Callidus since it demanded payment in mid October of last year, and delivered its notice of intention to enforce its security. Even though Callidus had agreed to forbear, the respondents have failed to honour the terms of the forbearance agreement.

51 Neither Callidus nor TD Bank has faith in the respondents' management. This is a factor that supports appointing a receiver.[9] While the interim executive officer Mr. Willis has brought some stability to the businesses, they cannot operate without further borrowing, and none is available. Without further borrowing, the respondents cannot purchase new inventory for lease, and thus its inventory is declining. What this means is that its lease and loan revenues are also declining, while its debt load to Callidus is increasing. All this suggests to me that appointing a receiver is necessary in order to protect Callidus' security from further erosion.

52 The respondents' past conduct also gives cause for concern if there is no receiver who can manage the businesses and arrange for an orderly sale under the court's supervision.

53 As to the nature of the property, I note that Callidus' security is declining in value. Both secured creditors' rights in it are being eroded. The court must put an end to the continued haemorrhaging of money. Given the respondents' failure to come up with even a rudimentary restructuring plan, it is time for a receiver to take control, and manage the businesses to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders.

54 At the hearing of the application and cross-application, the respondents urged me to consider only the current situation with the businesses, and look to the future, rather than to problems in the past. Even doing only this, there is no comfort to Callidus. The respondents have repeatedly sought new financing and failed - even after I made the receivership order, but held it in abeyance so they could refinance. Most importantly, nothing prevents the respondents from continuing their efforts to restructure, even though I have appointed a receiver.

CCAA?

55 The respondents took the position that granting an initial order under the CCAA is the proper way to proceed. They point to the fact that Mr. Willis (the interim executive officer) says the businesses are not out of control, are not a disaster, and are good businesses that will not deteriorate if a stay is granted and the companies are allowed to restructure. I disagree.

56 The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances, the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

57 The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Marine Drive Properties Ltd., Re* [11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Inducon Development Corp., Re*, [12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

58 Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

59 The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

60 The absence of even a "germ of a plan" militates against granting relief under the *CCAA*.

61 Finally, in considering the question of whether to grant relief under the *CCAA*, I must also look at the position of the two major secured creditors. Neither will support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

62 Having considered all these factors, I decline to grant relief under the *CCAA*.

Conclusion:

63 It is for these reasons I made the order I did on December 14, 2011.

Application granted on certain terms; cross-application dismissed.

Footnotes

1 R.S.C. 1985 c. C-36

2 R.S.C. 1985 c. B-3 as amended

3 R.S.O. 1990, c. C-43, as amended

4 Credit facility agreement paragraph 17(k)

5 *Ibid*. paragraph 17(q)

6 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List])

7 *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) (CanLII)

8 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List])

9 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, [2011] O.J. No. 2954 (Ont. S.C.J.)

10 Section 11.01(b) of the *CCAA*

11 (B.C. S.C.)

12 (1991) (Ont. Gen. Div.)

Canada Federal Regulations
Indian Oil and Gas Act
Can. Reg. 2019-196 — Indian Oil and Gas Regulations
General Rules

SOR/2019-196, s. 25

s 25.

Currency

25.

25(1) Approval of assignment

Any assignment of any of the rights or interests conferred by a contract must be approved by the Minister.

25(2)Meeting

Before the application for approval is submitted to the Minister, the assignee must meet with the council unless the council waives the meeting. The meeting must be face to face, unless the parties agree to another mode of meeting.

25(3)Expenses

Any expense relating to the request for, preparation for or attendance at a meeting must be borne by the party that incurs the expense.

25(4)Application for approval

The application for approval must be in the prescribed form and include a statement by the assignee that a meeting with the council took place or that the council waived the meeting. The application must be accompanied by the assignment approval application fee set out in Schedule 1.

25(5) Copy to council

The applicant must send the council a copy of the application for approval on or before the day on which the application is submitted to the Minister.

25(6)Refusal to approve

The Minister must not approve the assignment if

(a) it is conditional;

(b) it would result in more than five persons having a right or interest in the contract;

(c) it assigns an undivided right or interest in the contract that is less than 1%;

(d) it divides the oil and gas rights or interests conferred by the contract;

(e) the assignee is not eligible under section 6;

(f) the assignment was not signed by the assignor and assignee; or

(g) the assignee fails to establish that they have the financial ability to fulfill the assignor's obligations under the Act with respect to remediation and reclamation.

25(7)Minister's decision
If the Minister approves the assignment and signs it, he or she must send a copy to the assignor and assignee and a notice of the approval to the council.

25(8)Effective date
The assignment takes effect on the day on which the Minister approves it unless it provides for a different effective day.

Currency
Federal English Statutes reflect amendments current to December 10, 2020
Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

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