THE SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

EXPLANATORY NOTES:

DECEMBER 6, 2017

TEMPLATE RECEIVERSHIP ORDER COMMITTEE

SASKATOON/REGINA, SASKATCHEWAN

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Template Receivership Order Committee,
Saskatoon/Regina, Saskatchewan.

These notes are to be read in conjunction with the *, 2017 Template Receivership Order (the "**Template Order**") developed by the subcommittee (the "**Committee**") of the Canadian Bar Association, Saskatchewan Branch, Bankruptcy & Insolvency Section in consultation with the Bankruptcy and Insolvency Panel of the Court of Queen's Bench (Saskatchewan) (the "**Court**"), (the "**Insolvency Panel**").

I. INTRODUCTION

1. In 2006, a committee including several insolvency practitioners and the Insolvency Panel developed a template Receivership Order (the "**2006 Template Receivership Order**") that was based largely on a template Receivership Order under development for Alberta. Explanatory notes were published in conjunction with the 2006 Template Receivership Order, which were endorsed by the Court for use in Court-appointed receiverships in Saskatchewan.

2. Following amendments to the *Bankruptcy and Insolvency Act*,[1] an updated template Receivership Order was developed in 2010 (the "**2010 Template Receivership Order**"), and was endorsed by the Court. No new explanatory notes were published at that time.

3. In 2010 and 2013, Chief Justices R.D. Laing and M.D. Popescul, respectively, issued Notices concerning the use of the 2010 Template Receivership Order, directing any counsel applying for a receivership order to use the 2010 Template Receivership Order and advise the presiding judge of any additions or changes to the order by way of highlighting in bold letters or black-lining.

4. The use of template orders was adopted to reflect the increased activity in insolvency matters before the Court, and to facilitate more efficient review by the Court of draft orders.

5. In his Administrative Notice dated June 20, 2013, Chief Justice Popescul instructed that, while the discretion of any presiding judge is unfettered by the use of template orders, it is expected that any draft orders presented by counsel in an application will be substantially in compliance with the template orders.

6. Practice in receivership matters has evolved somewhat since 2006 when the last explanatory notes were published, and there has also been some evolution in certain provisions of receivership orders commonly approved by judges. As such, it was

[1] RSC 1985, c B-3 [*BIA*].

considered appropriate to further update the 2010 Template Receivership Order and to consolidate and update the explanatory notes. A Committee was struck to update the Template Receivership Order, consisting of the following lawyers:

Jeff Lee, Q.C., MLT Aikins LLP (Chair)

Wayne Pederson, KMP Law

Michael Milani, Q.C., McDougall Gauley LLP

Joel Hesje, Q.C., McKercher LLP

Kim Anderson, Q.C., Robertson Stromberg LLP

David Gerecke, Miller Thomson LLP

Janine Lavoie-Harding, McKercher LLP

Clayton Barry, McDougall Gauley LLP

Mike Russell, McDougall Gauley LLP

Paul Olfert, MLT Aikins LLP

7. The updated Template Receivership Order does not depart substantially from the substantive provisions of orders made in recent years by judges in this province.

8. Similar to the views expressed by the committees that developed model receivership orders in Ontario, Alberta and British Columbia, the Committee notes that the Template Order is intended to be neutral and inclusive in respect to the interests of all stakeholders. However, it is not intended to determine the relief to be granted by the Court in any particular case. Even where a provision appears in the Template Order, it may be necessary to justify the inclusion of such provision to the presiding judge. For instance, it may be that a proposed provision would unduly impact the rights of third parties, particularly if minimal notice has been given to parties other than senior creditors. There may also be instances where the appointment of an interim receiver will suffice.

9. At the same time, the Template Order is not meant to be exhaustive as to the terms of an order that will be considered by the Court. Nor is it intended to preclude further evolution of receivership orders to reflect situations that may become common in the future. It would be expected, however, that in circumstances where changes from the Template Order are proposed, all such changes would be clearly marked (by use of a "redline" document or otherwise) in the draft Order presented to the Court, and satisfactory evidence or information provided to the Court as to why the additional provisions or changes are required.

10. In developing the Template Order, consideration has been given to the current model receivership orders currently approved for British Columbia (the "**B.C. Model Receivership Order**"), Alberta (the "**Alberta Template Order**") and Ontario (the

"**Ontario Template Order**"[2]), along with current or past commentary developed in respect of those model orders. References to explanatory notes from other province shall refer to the following:

(a) **Ontario Explanatory Notes**: The explanatory notes that were prepared in 2004 by the Ontario Committee (the "**Ontario Committee**") and that accompanied the final draft of the Ontario Template Order in 2004;

(b) **Alberta Explanatory Notes**: The Alberta Template Receivership Order Explanatory Notes dated December 2012, prepared by the Alberta Template Orders Committee (the "**Alberta Committee**"); and

(c) **B.C. Explanatory Notes**: The explanatory notes of the B.C. Model Order Insolvency Committee (the "**B.C. Committee**") which appear to have been prepared in approximately 2006 and which accompanied the initial B.C. Model Receivership Order.

II. RECEIVER OR INTERIM RECEIVER

11. The Template Order appoints a licensed trustee as a Receiver under s. 243 of the BIA (a "**Receiver**"), as well as pursuant to s. 65(1) of *The Queen's Bench Act*, 1998 (the "***QB Act***"), over the property of a debtor (the "**Debtor**").[3] Where the applying creditor holds a security agreement charging the Debtor's personal property, the Order may also provide for an appointment under s. 64(8) of *The Personal Property Security Act*, 1993[4] (the "**PPSA**"). Practitioners should note that the BIA requires that the person appointed as Receiver be a licensed insolvency trustee within the meaning of the BIA. On the issuance of the Receivership Order, the trustee becomes an officer of the Court (the "**Court Officer**"), and is subject to the direction and control of the Court.

12. *The Business Corporations Act* (the "***SBCA***") previously provided for the appointment of Receivers and Managers in ss. 89 through 96.[5] Those sections were repealed in 1993, other than s. 91 which states:

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

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

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

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[2] Revised January 21, 2014.
[3] *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01.
[4] *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2.
[5] *The Business Corporations Act*, R.S.S. 1978, c. B-10.

14. There are also provisions in the *SBCA* and in *The Non-Profit Corporations Act, 1995*[6] (the "***NPCA***") that allow for a complainant to apply to the Court for an Order appointing a Receiver or Receiver-Manager.[7] Further, the *NPCA* contains provisions as to the duties, functions and powers of Receivers or Receiver-Managers. [8]

15. Other Acts under which Receivers or Receiver-Managers may be appointed include *The New Generation Co-operatives Act*, and *The Co-operatives Act, 1996*.[9]

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

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

17. The Template Order assumes the applying creditor maintains security over all of the Debtor's property, business and undertaking. It is not the recommended form of order to be used in land foreclosure actions.

18. The dual appointment of a Receiver pursuant to s. 243 of the *BIA* and pursuant to s. 65(1) of the *QB Act* is recommended by the Committee for the reasons referenced in the Ontario Explanatory Notes and paraphrased below:

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

    (b) A Receiver appointed under the *BIA* bases its jurisdiction federally and may be better protected against certain provincial liabilities that may flow from the application of different provincial regimes to the same Debtor's property as may be located in different provinces.

19. Dual appointments raise distinct procedural and other issues with varying consequences of which counsel must be cognizant, including, for example, differing appeal periods between Queen's Bench civil and bankruptcy actions. Further, counsel should be aware that different statutes may confer different powers on receivers, and unanticipated

[6] *The Non-Profit Corporations Act*, 1995, SS 1995, c N-4.2.
[7] See ss. 234 of the *BCA* and 225 of the *NPCA*.
[8] See ss. 81 to 87.
[9] SS 1999, c N-4.001; SS 1996, c C-37.3.

consequences may result if the Court is asked to grant a particular power under a statute for which the Court has no authority.[10]

20. As the Template Order meets the definition of "Receiver" as set out in s. 243(2) of the *BIA*, and also constitutes an appointment under s. 65(1) of the *QB Act*, counsel should be aware of the view of the Saskatchewan Committee, which echoes that of the Ontario, Alberta, and B.C. Committees, that:

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

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

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

21. On the other hand, the applying creditor may choose to apply for an appointment of the Court Officer as only an interim receiver under s. 47 of the *BIA* (an "**Interim Receiver**"). Such an application may be made in cases where the required s. 244(1) *BIA* Notice is about to be served, or has been served but the 10 day notice has not terminated, or to gain the benefit of other provisions applicable to an Interim Receiver appointed solely under s. 47 of the *BIA*. Also, depending upon the circumstances, the applying creditor may prefer to apply for appointment of the Interim Receiver under s. 46 of the *BIA*, after filing an Application for a Bankruptcy Order under the *BIA*. Further, if a Notice of Intention to File a Proposal has been filed, or a Proposal has been filed under the *BIA*, consideration may be given to simply applying for an appointment for an Interim Receiver under s. 47.1 of the *BIA*.

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

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

23. In order to maintain the integrity of the paragraph cross-references within the Template Order, the Committee recommends that, if a new paragraph is added or deleted, the numbering scheme from the template be maintained. For instance, if a paragraph is added after paragraph 25, it could be numbered "25A"; if paragraph 25 is deleted, the number should be maintained and the text replaced with something like "[Intentionally deleted]".

[10] See *Canadian Western Bank v 702348 Alberta Ltd.*, 2009 ABQB 271 at para 25, [2009] 9 WWR 305.

A. PARTIES, RECITALS AND SERVICE

24. As discussed in the previous section of this commentary, the appointment of a Receiver can be sought under several different pieces of legislation.[11] The Template Order is to be sought by Originating Application or as may be directed by the Court under s. 27 of the *QB Act*.[12]

25. Where a Statement of Claim has not been issued, the parties consist of the applying creditor and the Debtor, respectively named as Applicant and Respondent. The Template Order is drafted on the assumption that it is being sought under s. 65 of the *QB Act*, s. 243(1) of the *BIA* and s.64(8) of the *PPSA*. The Template Order is to be sought by an Originating Application pursuant to Rule 3-49(e), or as may be directed by the Court under s. 27 of the *QB Act*.[13]

26. The Committee recommends having a descriptive title for the application itself; for instance, under the heading Originating Application, the words (Receivership Order) could be added.

27. At the end of the Originating Application, the Committee recommends adding "TO:" lines for each of the responding parties.[14] Those parties that are not served with materials in support of the application but are nonetheless affected by the Order will likely be treated by the Court as parties subject to an *ex parte* order, subject to the usual principles applicable in that context.

28. In cases where facts are in dispute between the appointing creditor and the Debtor, but the Court finds it just and convenient to appoint a Receiver to preserve and maintain the status quo while outstanding issues are determined, a number of the powers and authorities of the Receiver granted under the Template Order may not be appropriate and may have to be modified, depending upon the applicable facts and the interests of the parties and other affected creditors.

29. It is more likely that interested persons will have greater success in a future application to vary or amend the Template Order under the "comeback" clause in paragraph 31, if such interested person were not served with notice of the application to obtain the Order. Potentially affected persons, should, therefore, be served with notice of the application where circumstances permit. Further, the preamble in the Order should identify the parties that appear.

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

[12] The Template Order is drafted with a single style of cause, reflecting a Saskatchewan Court of Queen's Bench civil matter. Our discussions with the Registrar in Bankruptcy indicated that it was not necessary to start a separate bankruptcy action.

[13] The Saskatchewan Committee has taken the position that applications for a receiver should be made by Originating Application in insolvency matters. Readers making an application for a receiver in other matters should review the decision of the Honourable Mr. Justice Klebuc in *Pelican Lake First Nation v Bill* [2004] 6 WWR 314; 244 Sask R 182.

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

30. As stated in the Ontario Explanatory Notes:

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

31. Finally, it is recommended that the Originating Application be made before a member of the Insolvency Panel.

B. PARAGRAPH 3 – THE RECEIVER'S POWERS

32. The Committee considers the powers to be given to a Receiver in the Ontario and Alberta Template Orders to be appropriate for the Template Order, and adopts the Ontario and Alberta Committees' rationale expressed in their respective explanatory notes, as follows:

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

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

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

(d) Normal powers to litigate are included;

(e) In paragraph 3(g), Counsel may wish to consider seeking an order allowing the Receiver to pay pre-receivership wages and benefits (similar to the relief which may be granted in accordance with paragraph 6(a) of the Saskatchewan Template CCAA Initial Order). In addition, it may be appropriate for counsel to seek authorization to pay secured claims (including that of the Debtor) where prompt payment will preserve equity for junior stakeholders and where the validity and enforceability of the secured claim(s) are not in issue.

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

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

(h) Counsel should consider inserting the legal description of any real property which may be included in the Property in paragraph 3(o) so as to assist with registration of the Order at the Land Titles Office;

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

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

33. The Saskatchewan Committee agrees with the Alberta Committee and has adopted paragraph 3(j) of the Alberta Template Order which makes it clear that, despite the fact that the Receiver is empowered to defend all actions involving the Debtor, the Receiver is not expected to exercise that authority with respect to the very action in which the Receiver is appointed. This follows *Toronto-Dominion Bank v Fortin et al.*[15]

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

34. Paragraphs 4 to 6 essentially require the Debtor and other Persons to deliver to the Receiver the property and records of the Debtor in their possession and to grant the Receiver access to any such property. The Saskatchewan Committee considers paragraphs 4-6 of the Alberta Template Order to be appropriate for inclusion in the Template Order and adopts the Alberta Explanatory Notes in relation to paragraphs 4-6 which are as follows:

(a) Paragraph 4 of the Template Order requires the Debtor (including the Debtor's management, advisors, and shareholders), those affiliated with the Debtor and

[15] *Toronto-Dominion Bank v Fortin et al.* (1978), 85 DLR (3d) 111, 26 CBR (NS) 168 (BC SC).

everyone with notice of the Order, to advise the Receiver of the existence of any of the Debtor's property in their possession or control and to deliver to the Receiver such of the Debtor's property that the Receiver requires.

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

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

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

D. PARAGRAPHS 7 TO 11 – THE STAY

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

36. There has been minimal, if any, controversy over the Court's ability to protect its officer, the Court-appointed Receiver, from suit without leave, and it has always been a logical extension of that protection to include the assets of the Debtor. The underlying philosophy that has routinely been accepted by the Courts is the need to protect its Officer in the performance of the duties it has been authorized to perform; to permit him or her to gather in all assets of the Debtor free from interference by creditors attacking individual assets; and to facilitate administration of the entire estate for the benefit of all stake holders with less expense.

37. The prior version of these explanatory notes observed that the Alberta Queen's Bench decision in *Toronto-Dominion Bank v W-32 Corporation Limited* cast doubt on the Court's ability to issue what is essentially an injunction restraining suits against Debtors in receivership.[16] That question was further considered in *Canadian Western Bank v 702348 Alberta Ltd.*, where the court considered both the legislation under which receivers were generally appointed and the policy considerations, and determined that the court not only had authority to prohibit actions by third parties against the Debtor absent the court's approval, but that it was "essential" to do so from a policy perspective.[17]

[16] *Toronto-Dominion Bank v W-32 Corporation Limited*, [1983] 5 WWR 476, 50 CBR (NS) 78.
[17] *Supra* note 10 at paras 30 and 40.

38. In Saskatchewan, section 37(1) of the *QB Act* allows a judge to direct "a stay of proceedings in any action or matter before the Court if the judge considers it appropriate," and s. 63 of the *PPSA* implies that a stay of proceedings is within the range of relief that the Court may grant when dealing with disputes over collateral. The wording of the *QB Act* suggests that a stay would be issued on a case by case basis but the *PPSA* contains no such inference. Section 63(2)(d) of the *PPSA* specifies that an Order staying enforcement of certain rights may be granted, and s. 63(2)(e) allows for the Court to grant "any order that is necessary to ensure protection of the interest of any person in the collateral". Therefore, it is expected that a Court would consider itself to have both authority and reason to include provisions in a receivership order to ensure an orderly process and to protect its officer.

(i) Limitation of Actions

39. One concern arising from the broad stay is that a party having a claim against a corporation in receivership might face the possibility of a limitation period expiring before that party could apply to set aside the stay of proceedings to permit its claim to be advanced. In situations to which *The Limitations Act* applies, s. 26 of that *Act* provides that the limitation period established in that *Act* is suspended for the time during which a stay of proceedings is in effect under the *BIA*, *Companies' Creditors Arrangement Act* (Canada) (the "***CCAA***"), or the *Farm Debt Mediation Act* (Canada) (the "***FDMA***").[18]

40. In addition, notice periods under *The Saskatchewan Farm Security Act* (the "***SFSA***") are not to be counted with respect to the running of a limitation period in Saskatchewan.[19] Even so, other situations raising limitations issues may exist. The Template Order therefore provides, in paragraph 8, that any party facing the expiry of a limitation period would be entitled to issue and/or file such claims, applications, lien notices or documents as may be necessary to preserve that party's rights, without further Order.

(ii) Regulatory Proceedings

41. Following the lead of the Alberta Committee, the Saskatchewan Committee has included a provision in paragraph 8 of the Template Order which allows regulatory bodies to continue investigations or proceedings against the Debtor so long as the investigation or proceeding is not for the enforcement of a payment order. This provision is consistent with s. 69.6(2) of the BIA which provides regulatory bodies with an exemption from the automatic stay of proceedings that arises where a Notice of Intention to File a Proposal has been filed. The B.C. Model Receivership Order specifically references s. 69.6(2). Where appropriate and where the Court would have jurisdiction, counsel may wish to apply to extend the stay of proceedings to specific regulatory bodies under section 69.6(3) of the BIA, other applicable statutes or the inherent jurisdiction of the Court.

[18] SS 2004, c L-16.1; *Companies' Creditors Arrangement Act*, RSC 1985, c C-36; *Farm Debt Mediation Act*, SC 1997, c 21.
[19] *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1.

(iii) Termination of Agreements

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

43. Where there is no *CCAA* proceeding, Proposal or Notice of Intention to File a Proposal under the *BIA* or winding-up proceeding under the *Winding Up and Restructuring Act* (Canada),[20] there are no statutory provisions governing EFCs. As such, in most receiverships there will be no applicable statutory provision to except an EFC from the application of a general stay Order.

44. In *Re Enron Canada Corp.*,[21] Hart J. considered an application by Enron Canada Corp. for a general stay in arrangement proceedings it brought under the *Canada Business Corporations Act* ("***CBCA***").[22] Although the CBCA contained no express statutory exception for EFCs, Hart J. found that just as there is good reason for statutory exceptions of EFCs in insolvency legislation, there is equally good reason to honour the underlying public policy considerations in cases involving solvent applications. Accordingly, Hart J. declined to grant the general stay applied for against termination of EFCs.

45. Although there do not appear to be any cases dealing with the propriety of an exception for EFCs from the general stay provisions of a Receivership Order, the Courts may generally support an exception for EFCs from the general stay. Accordingly, an exception for EFCs has been included in paragraph 10 of the Template Order but it will remain in the Court's discretion as to whether such exception is appropriate for a given order.

46. One could question the appropriateness of a stay provision that requires a third party to apply to Court to terminate an agreement that contains a termination date. For example, in the case of a lease or other agreement that would end during the receivership period, there may be no case law addressing whether the agreement is automatically extended for the duration of the receivership. Nonetheless, for consistency, the Template Order provides that anyone seeking to enforce a remedy to terminate an agreement or exercise a remedy will require leave of the Court.

47. Paragraph 10 specifically references "insurance coverage" as falling within the types of agreements that cannot be terminated without leave of the Court. The Saskatchewan Committee is aware of several instances where this issue has arisen. While there is

[20] *Winding Up and Restructuring Act*, RSC 1985, c W -11.
[21] *Re Enron Canada Corp.* (2001), 310 AR 386, 31 CBR (4th) 15.
[22] *Canada Business Corporations Act*, RSC 1985, c C-44.

limited case law on the question of whether insurers are obligated to continue to provide coverage, the view of the Committee is that insurers should be in no different position than any counterparty to a contract with the Debtor in having to justify to the Court why they should be entitled to terminate their contract(s) with the Debtor. While Receivers will generally carry their own blanket insurance, there may be cost and other implications for stakeholders if insurers are permitted to unilaterally discontinue coverage.

(iv) Set-Off

48. Paragraph 9 of the Template Order provides for a stay of set-off rights, which would preclude a person from setting off pre-receivership claims against the Debtor against post-receivership claims by the Receiver. Counsel should note that the effect of the law of set-off may differ depending on the precise nature of the cross-obligations which may arise in a particular case, and a stay of set-off rights may or may not be appropriate.

(v) Crown Corporations and Other Suppliers

49. At law, a Court-appointed Receiver is a separate person from the Debtor, and as such is entitled to enter into new supply contracts with any supplier. In particular, a Court-appointed Receiver, as a "new" customer, is entitled to obtain a supply of water, gas and electricity without the payment of any outstanding arrears, pursuant to the relevant sections of *The Cities Act*; *The SaskEnergy Regulations*; and *Regulations Regarding Electrical and Gas Distribution Systems Belonging to Saskatchewan Power Corporation, The Rendering and Payment of the Corporation's Bills for Service and Other Matters*.[23]

50. The Saskatchewan Committee is mindful of the decision of *Saskatchewan v Royal Bank of Canada et al.*[24] This decision dealt with whether a Crown corporation, as an agent of the Crown in right of Saskatchewan, was subject to a Receivership Order that enjoined all persons, firms and corporations from disturbing or interfering with the furnishing of telephones (including the use of present telephone numbers) or any other utility and further enjoined them from disconnecting such services used by the Receiver Manager without further order of the Court. Noble J. determined that SaskTel was an agent of the Crown, and, thus, subject to protection under s. 17(2) of *The Proceedings Against the Crown Act*[25] which provides that any relief equivalent to an injunction or specific performance order cannot be issued against the Crown or an agent of the Crown.

51. However, s. 4.1 of the *BIA* provides that the *BIA* is binding on both the Federal and Provincial Crown, and s. 243(1)(b) authorizes the Court to determine the degree of control a Receiver will have over the business and property of the Debtor. It is the Saskatchewan Committee's conclusion that the decision does not prevent the Court from issuing an Order setting terms for use of the Debtor's assets, including uninterrupted use of utility services.

[23] SS 2002 c C-11.1; RRS c S-35.1, Reg. 1; S Reg 318/1967.
[24] *Saskatchewan v Royal Bank of Canada et al.* (sub nom. Re 238842 Alberta Ltd.) (1981), 129 DLR (3d) 665, 12 Sask R 151 (QB).
[25] *The Proceedings Against the Crown Act*, SS 1978 c P-27.

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

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

54. Furthermore, if any supplier believes that they have been unduly affected by paragraph 11 of the Template Order, the supplier can also re-apply pursuant to the "comeback clause" in paragraph 31 to vary this provision of the Order.

E. PARAGRAPH 13 - EMPLOYMENT

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

56. In Saskatchewan, provisions deeming the Receiver not to be a successor employer have been common in Receivership Orders so as to avoid any liability that may arise due to provisions in *The Saskatchewan Employment Act*[26] (the "***SEA***"), and formerly section 37 of the repealed *Trade Union Act* and section 83 of the repealed *Labour Standards Act*. The relevant provisions of the *SEA* provide as follows:

> **Employment deemed continuous**
> **2-10** For the purposes of this Part, if a business or part of a business is sold, leased, transferred or otherwise disposed of and an employee continues to be employed at the business after the sale, lease, transfer or disposition, the employee's employment is deemed to be continuous.

[26] *The Saskatchewan Employment Act*, SS 2013, c S-15.1.

Transfer of obligations
6-18(1) In this Division, "disposal" means a sale, lease, transfer or other disposition.

(2) Unless the board orders otherwise, if a business or part of a business is disposed of:

(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and

(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.

(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:

(a) if before the disposal a union was determined by a board order to be the bargaining agent of any of the employees affected by the disposal, the board order is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person; and

(b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.

57. Although Ontario legislation contains provisions similar to section 2-18 and section 6-18 of the *SEA*, a provision deeming a Receiver not to be a successor employer was not included in the Ontario Template Order essentially due to the Ontario Court of Appeal decision in *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.*[27] In that case, the Court of Appeal noted that ss. 69(12) and 114(1) of *The Labour Relations Act*, 1995 (Ontario) (the "***OLRA***") provide the Ontario Labour Relations Board (the "**OLRB**") with the "unequivocal, exclusive jurisdiction" to decide the issue of successor employer for labour relations purposes.[28]

58. On appeal, the Supreme Court of Canada upheld the ruling of the Ontario Court of Appeal that a bankruptcy court does not have jurisdiction to decide whether a receiver is a successor employer within meaning of the labour relations legislation, as powers granted to the receiver do not explicitly or implicitly confer authority on the court to

[27] (2004), 238 DLR (4th) 677, 71 OR (3d) 54 [*TCT Logistics*].
[28] *The Labour Relations Act, 1995*, SO 1995, c 1, Sch A.

make unilateral declarations about the rights of third parties affected by other statutory schemes.[29]

59. The difference, therefore, between the situation in Ontario and the situation in Saskatchewan is that the *SEA* does not specifically provide the Labour Relations Board with the unequivocal and exclusive jurisdiction to decide whether or not a person acquiring a business was a successor employer. This appears to be the situation in Alberta as well. Nevertheless, in the interests of national uniformity, the Alberta Committee preferred to adopt the Ontario provision. The Saskatchewan Committee also takes this position and adopts paragraph 13 of the Alberta Template Order.

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

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

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

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

[29] *GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 SCR 123.

(d) The Supreme Court of Canada's decision in *TCT Logistics* has now effectively prohibited, at least in Ontario, the previous practice of routinely deeming a Receiver not to be a successor employer in Receivership Orders. The background is that Receivers who continue to operate businesses in receivership can be held to be successor employers under labour legislation, and become responsible for termination, wage, pension and other obligations.

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

> ...when a business or undertaking or part of it is sold, leased, transferred or merged with another business or undertaking or part of it, or otherwise disposed of so that the control, management or supervision of it passes to the purchaser, lessee, transferee or person acquiring it..., and:
>
> (a) if a trade union is certified, the certification remains in effect and applies to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and
>
> (b) if a collective agreement is in force, the collective agreement binds the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it as if the collective agreement had been signed by that person.[30]

(f) Similarly, s. 5 of the Alberta *Employment Standards Code* provides that for the purposes of that Act, "...the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged or if it continues to operate under a Receiver or Receiver-Manager."[31]

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

(h) In *TCT Logistics* the Receiver, acting under the normal Receivership Order of the time, purported to effect a sale of the assets of one of TCT's businesses, and to allow the purchaser to hire only certain of the employees of that business,

[30] *Labour Relations Code*, RSA 2000, c L-1.
[31] *Employment Standards Code*, RSA 2000, c E-9.

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

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

(j) Since one of the key benefits to appointing a Receiver under s. 243(1) of the *BIA* is the national reach of the Order, there are obvious benefits to using language familiar to an Ontario audience where a Receivership Order may have effect in Ontario. The Template Order therefore uses the same language as the Ontario Template Order. Counsel in Saskatchewan should, however, be aware that the possibility of "deeming" a Receiver not to be a successor employer in Saskatchewan exists. This should probably be done in specific cases on appropriate supporting evidence, with specific reference to Saskatchewan and for a limited time, rather than as a general matter in each Receivership Order.

61. Like other jurisdictions, the Saskatchewan Committee has revised paragraph 13 of the Receivership Order to address the implementation of the *Wage Earner Program Protection Act* ("***WEPPA***").[32]

[32] SC 2005, c 47.

62. *WEPPA* provides that an employee is entitled to apply to the Ministry of Labour for payment of wages owing for the six months prior to the date of bankruptcy or receivership. Pursuant to s. 7(1) of *WEPPA*, the maximum amount that the employee is entitled to receive is $3,000 or the equivalent of four times the maximum weekly insurable earnings under the *SEA*, less any applicable deductions under federal or provincial law. The combined effect of s. 36 of *WEPPA* and s. 81.4 of the *BIA* is that the Minister will have a subrogated priority claim for a maximum of $2,000 per employee over the assets of the Debtor employer that is subject to the receivership order.

F. PARAGRAPH 14 – PIPEDA

63. The following commentary is adopted largely from the work of both the Ontario Committee and the Alberta Committee, and explains paragraph 14 of the Template Order. *The Personal Information Protection and Electronic Documents Act (Canada)* ("***PIPEDA***") seems to impact upon the ability of creditors to realize upon their security interests in business assets.[33] Personal information concerning employees, customers and possibly suppliers could very well be important components of either a Receiver's ability to run the business or to sell it.

64. *PIPEDA* contains a reasonableness standard that is one of the overriding principles guiding the use and dissemination of personal information. A Receiver has little time or ability to seek a consent of every employee or every customer before disclosing information needed, for instance, to keep a plant open or to permit an expeditious realization. As such, the reasonableness of limiting the need to obtain express consent from every employee and every customer in urgent circumstances in order to keep a business from failing is self-evident. This course of action serves to preserve the employment of the employees and the business to which individuals have provided their information, and the desire of the employees or business contacts that this occur can, in general, be reasonably presumed. *PIPEDA* also allows for court orders limiting the needs to obtain express consent in appropriate circumstances regarding the sharing of personal information.

65. The Ontario, Alberta, and Saskatchewan Template Orders contain a limitation on the requirement to obtain express consent drawn from the *Re PSINET Limited* proceedings under the *CCAA*.[34] In effect, the Order permits the Receiver to disclose personal information to prospective purchasers under the terms of appropriate confidentiality orders and provided that the purchaser, by agreement and Court order, will make no further use of the Debtor's data than was available to the Debtor itself.[35]

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[33] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

[34] *Re PSINET Limited* (2002), 33 CBR (4th) 284, [2002] OJ No 1156 (QL) (Ont SCJ).

[35] *The Privacy Act*, RSS 1978, c. P-24 is not nearly as specific or broad in scope as *PIPEDA*. *The Privacy Act* states that it is a tort for an individual to willfully, and without claim of right, violate the privacy of another person. Although *The Privacy Act* provides some examples regarding what constitutes a violation of privacy, for the most part, it is quite vague. Consequently, compliance with the more specific and onerous *PIPEDA* will in all likelihood prevent any violations under *The Privacy Act*.

G. PARAGRAPHS 15 AND 16 - RECEIVER'S LIABILITY

66. The Saskatchewan Committee agrees with the comments of the Alberta Committee that the Receiver, as an officer of the Court, should be protected from liability arising out of environmental matters, unless the environmental condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct. Some receivership orders have gone further and have limited damage awards against a Receiver to the value of the assets of the estate or the amount of the Receiver's fees, even in the event of the gross negligence or wilful misconduct by the Receiver. The Alberta Committee stated that it was not aware of any jurisprudence or statutory provision which would support the inclusion of such a provision. Nor is the Saskatchewan Committee aware of any such jurisprudence or statutory provision.

(i) Limitation on Environmental Liabilities

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

68. The combined effect of s. 14.06(1.1) to (4) is to limit the personal liability of Interim Receivers and receivers as defined in s. 243(2) of the *BIA* from claims for damage to the environment unless caused by the Receiver's gross negligence or wilful misconduct. It is doubtful that such a limitation can be found in Saskatchewan, and, in particular under in *The Environmental Management Protection Act, 2010* ("***EMPA***").[36] The Saskatchewan Committee is not aware of any provincial law limiting a Receiver from liability for simple negligence or, in any case, to the value of the assets administered by the Receiver.

69. The Alberta Committee noted:

> In *Big Sky*,[37] Slatter J. reviewed the proper scope of the terms of an Order appointing a Receiver and concluded (at paragraph 46):
>
> > There is no basis for holding that a receiver in Alberta has any immunity for environmental damage beyond what is found in Section 14.06, or the *E.P.E. Act* itself. As was held in Lindsay, the court has no general jurisdiction to grant exemptions from statutes.
>
> Slatter J. went on to permit the inclusion of a clause which essentially paralleled the provisions of s. 14.06(2) of the *BIA*. He acknowledged that such a provision might be redundant in legal terms, but believed it would be helpful to note these provisions in the Order.

[36] SS 2010, c E-10.22.
[37] *Re Big Sky Living Inc.*, 2002 ABQB 659, 37 CBR (4th) 42 [*Big Sky*].

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

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

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

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

72. There have been instances where receivership orders issued in Saskatchewan have deemed a Receiver to not have taken possession of property, whether as a blanket provision or to permit the Receiver to determine that it has elected not to take possession of specific property. On this question, the Alberta Committee observed as follows in the Alberta Explanatory Notes:

> Paragraph 15 of the Ontario Order contains a provision that nothing shall require the Receiver to occupy or take control, care, charge or possession of any property of the debtor subject to the Receivership Order. Further, the Receiver shall not, as a result of the Receivership Order, or anything done in pursuance of the Receivership Order, be deemed to be in possession of any of the property, unless the Receiver is in actual possession of the property. Slatter J. in *Big Sky* commented on a similar provision in the proposed Order before him (at paragraph 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 properly 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 the properly or not. Sections 14.06(4)(c) and 14.06(6) contemplate the abandonment of contaminated properly by the Receiver, which is the process that should be followed if this latter becomes necessary.

Section 240(3) of the *Alberta Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("EPEA") provides:

> Where an environmental protection order is directed to a person who is acting in the capacity of executor, administrator, Receiver, Receiver/Manager or trustee, that person's liability is limited to the value of the assets that person is administering unless the situation identified in the order resulted from or was aggravated by the gross negligence or wilful misconduct of the executor, administrator, Receiver, Receiver/Manager or trustee.

In addition, EPEA defines a "person responsible" for a substance or thing containing a substance, as someone who has or has had ownership, charge, management or control over a substance, or that person's Receiver. This would clearly override the provisions in paragraph 15 of the Ontario Order, as under the EPEA, a Receiver is a "person responsible" regardless of the Receiver's actual possession of property.

As a result, in the Alberta Committee's view the wording in paragraph 15 of the Receivership Order is consistent with the existing statutory provisions and jurisprudence in the Province of Alberta, and is therefore supportable. If some additional protection is required, then an applicant would be expected to satisfy the Court that it is warranted by the facts and is supported by some judicial authority.

73. There are substantial differences between the Alberta *EPEA* and *EMPA*. *EMPA* contains no specific reference to receivers, so there is no specific Saskatchewan legislation that would be overridden if the Ontario language were to be included. However, the Saskatchewan Committee is mindful of the discussion in *Big Sky* concerning the uncertainty with respect to what properties are under the control of the Receiver. Therefore, the Saskatchewan Committee has elected not to adopt the Ontario language.

74. Nonetheless, the Saskatchewan Committee is alert to the fact that, in some circumstances, receivers may be reluctant to take possession of property before having the opportunity to evaluate the risks. In the event that a specific situation exists that warrants conditional exclusion of property in respect of which a Receiver would take control, the following language might be considered, although it may be most appropriately used in the context of an interim receivership:

> Nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act 1999*, *The Environmental Management and Protection Act, 2010* (Saskatchewan), *The Agricultural Operations Act* (Saskatchewan), *The Dangerous Goods Transportation Act* (Saskatchewan), *The Saskatchewan Employment Act*, *The Emergency Planning Act* (Saskatchewan), *The Water*

Security Agency Act (Saskatchewan), and regulations thereunder (the "**Environmental Legislation**"), provided however that:

> (a) within ninety (90) days of the date of this Order, the Receiver shall file an Receiver's Certificate listing any of the property (the "**Excluded Property**") of which the Receiver has determined it will not take Possession in accordance with the terms of this paragraph;
>
> (b) upon filing by the Receiver of the Receiver's Certificate listing the Excluded Property, any interested party may apply for, or this Honourable Court upon its own application may direct, a hearing as to whether it is just and appropriate that the Receiver shall not take possession of the Excluded Property. Any such application shall be brought within thirty (30) days of the filing of the Receiver's Certificate or such further time as this Court shall order; and
>
> (c) unless ordered otherwise, the Receiver shall not be required to occupy or take Possession of any such Excluded Property, provided however that nothing herein shall exempt the Receiver from any duty to report or to make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any Property within the meaning of any Environmental Legislation, unless it is actually in possession thereof.

Counsel attempting to use such language, or a variation of it, should be expected to support the request with the requisite facts and judicial or statutory authority.

(ii) Limitation on the Receiver's Liability

75. The Saskatchewan Committee recommends the addition of paragraph 16 to the Template Order, which effectively caps the personal liability of a Receiver at the amount for which the Receiver can obtain full indemnity from the Debtor's Property.

76. The Saskatchewan Committee has reviewed template receivership orders from other jurisdictions across Canada and has determined that the template receivership orders that have been approved for use in British Columbia, Alberta, and Ontario all contain protections that cap the personal liability of a Receiver.

77. The limitation of liability contained in the Template Order is not as broad as the protection provided for in the Ontario Template Receivership Order and the British Columbia Receivership Order, which bar liability absent gross negligence or wilful misconduct. In contrast, the Saskatchewan and Alberta Receivership Orders simply contain a cap on liability. That is, the Receiver's liability shall not, absent gross negligence or wilful misconduct, exceed an amount for which it may obtain full indemnity from the Debtor's Property. Because of the similarities between Saskatchewan and Alberta insolvency law and practice, the Saskatchewan Template Receivership Committee recommends following Alberta in this regard.

78. There is a strong policy and legal basis for providing such protection to court appointed insolvency professionals. From a policy perspective, a Receiver as an officer of the court is not a legitimate target for competing creditors, and protections are needed to encourage qualified insolvency professionals to accept court appointed mandates involving industry and property of all nature and variety.

79. In addition, it is important for reasons of comity that insolvency professionals carrying out a court appointed mandate in Saskatchewan, and potentially operating across multiple provincial boundaries as a national receiver appointed pursuant to section 243 of the BIA, be provided with similar protections that courts in other jurisdictions have recommended and routinely grant. The scope of protections provided to a court appointed receiver ought not to depend on the jurisdiction of the court granting the initial order, or forum shopping may ensue.

80. The issue of the liability of a receiver has recently been the subject of considerable judicial consideration, which is noteworthy and which has emphasized the importance of liability protection for court appointed receivers.

81. In *Newfoundland and Labrador v AbitibiBowater Inc.* the Supreme Court of Canada commented on the decision of the Alberta Court of Appeal's decision in *Panamericana de Bienes y Servicios S.A. v Northern Badger Oil & Gas Ltd.*, which held a receiver personally liable for work under a remediation order. The Court commented that *Panamericana* is no longer good law and that the purpose of the 1992 and 1997 amendments to the BIA were to provide additional protection to trustees and monitors and to balance the creditor's need for fairness against the debtor's need to make a fresh start:

> [47] The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's need for fairness against the debtor's need to make a fresh start.[38]

[38] 2012 SCC 67, [2012] 3 SCR 443, citing (1991) 81 DLR (4th) 280; [1991] 5 WWR 577.

82. The Alberta Court of Queen's Bench in *Redwater Energy Corporation (Re)* dealt with the constitutional question of whether section 14.06 of the BIA permitted a court appointed receiver under section 14.06 of the *BIA* to renounce and disclaim non-producing and abandoned "shut-in" wells, while selling the valuable producing wells in the face of provincial legislation and regulation which sought to prevent such renunciation.[39]

83. Wittmann J. commented at the outset of his decision that "considering the current uncertainty of the economy in this province, the law needs to be clarified regarding the protection of trustees and receivers where environmental concerns arise, . . ."

84. The receivership order granted by the court in *Redwater* upon initial application was modeled after the Alberta Template Receivership Order. Sections 15 and 16 of that order concerning receiver's liability are nearly identical to the Template Order. Wittmann J. in the written reasons of the court quoted in full section 15 of Alberta Template Receivership Order, including the explanatory notes adopted by the Alberta Template Receivership Order Committee.[40]

85. Wittmann J. went on to hold that the abandonment orders issued by the Alberta Energy Regulator and the related legislation were unconstitutional as they frustrated the purpose of the paramount section 14.06 of the BIA. In so finding, the court undertook an extensive historical review of section 14.06. The following passages are of note:

> [128] One purpose of section 14.06 of the BIA is to limit the liability of insolvency professionals, so that they will accept mandates despite environmental issues. Another related purpose is to reduce the number of abandoned sites in the country. For instance Jacques Hains, Director of Corporate Law Policy Directorate at the Department of Industry Canada stated:
>
> > The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
> >
> > House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 16 (11 June 1996) at 1549-1555.
>
> [129] I agree with the Trustee that a plain reading of section 14.06 of the BIA leads to the conclusion that another purpose of section 14.06 is to permit receivers and trustees to make rational economic assessments of the

[39] 2016 ABQB 278 [*Redwater*].
[40] *Ibid* at paras 18 and 48.

costs of remedying environmental conditions, and gives receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions. Under section 14.06(5), a court may exercise its discretion to grant a stay for the very purpose of assessing economic viability which clearly goes beyond personal liability:

> (5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

[130] Although section 14.06 specifically addresses the issue of personal liability, this type of liability is not, in my opinion, a condition precedent to the right to disclaim. The Trustee rightly mentions subparagraph (4)(c) where Parliament, concerned with the receiver's or trustee's right to disclaim, removed any doubt of possible *ex post facto* liability where environmental orders are subsequently issued.

86. The appeal of the decision of the Alberta Court of Queen's Bench in *Redwater* to the Alberta Court of Appeal was recently dismissed.[41]

87. The Committee is of the view that the *Redwater* decision supports the continued use and implementation of paragraph 15 of the Template Order and the addition of paragraph 16 capping liability of a receiver and limiting same to the value of the assets.

88. While there is an ongoing debate concerning the question of whether, and to what extent, creditors or the public should bear the burden of environmental clean-up costs of insolvent entities, Canadian courts have found that court appointed officials should not be personally liable for such costs except in the case of gross negligence, willful disregard, or in the limited circumstances prescribed in section 14.06 of the *BIA*.[42]

H. PARAGRAPHS 17 TO 24 - THE FUNDING OF THE RECEIVERSHIP

89. The Saskatchewan Committee adopts the Alberta Explanatory Notes as they relate to paragraphs 17-24 of the Template Order:

(a) Pursuant to paragraph 17 of the Template Order, the Receiver is granted a Receiver's Charge as a first charge on the property in priority to all security interests. Pursuant to paragraph 20, the Receiver's Borrowing Charge ranks just behind the Receiver's Charge and in priority to all security interests.

(b) The priority afforded by these provisions is appropriate where the Receiver has been appointed at the request, or with the consent approval of the holders of all

[41] 2017 ABCA 124.
[42] See *Nortel Networks Corp.*, 2013 ONCA 599, and *Northstar Aerospace, Inc.*, 2013 ONCA 600.

security interests in the property.[43] The priority is also appropriate where the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, or where the Receiver has expended money for the necessary preservation or improvement of the property.[44]

(c) If a Receiver has not been appointed at the request or with the consent of approval of the holder of a security interest, and if that security interest holder does not fall within one of the other exceptions (referred to above) in *Kowal*, then paragraphs 17 and 20 should be modified so that they do not provide for priority over such a security interest holder.

(d) There may be cases with multiple Secured Creditors with differing priorities over the various assets that comprise the Property. The fees and expenses of the Receiver may benefit some assets, but not others. If the Receiver carries on the business of the Debtor, doing so may benefit or potentially benefit some of the assets, but not others. In such circumstances, receivership costs should be appropriately allocated among the various assets comprising the Property. Paragraph 24 contemplates that any interested party may apply for allocation of both the Receiver's Charge (for its fees and expenses) and the Receiver's Borrowing Charge among the various assets comprising the Property.

(e) The Template Order does not specify how the Receiver's Charge and Receiver's Borrowing Charge should be allocated amongst the various assets. Pursuant to an application under paragraph 24, receivership costs and borrowings should be allocated among the assets equitably (not necessarily equally) having regard, *inter alia*, to the relative benefit or potential benefit to the various assets involved. See, for example, *Re Hunters Trailer & Marine Ltd.* which involved allocation of DIP financing and the monitor's charge amongst secured creditors with priority over differing assets in a *CCAA* proceeding.[45] See also *Re Western Express Airlines Inc.*, where aircraft lessors who received no benefit from a *CCAA* restructuring were not required to bear any of the costs of the restructuring.[46]

(f) In *Re New Skeena Forests Products Inc.*, the British Columbia Court of Appeal reversed an order of the Supreme Court allocating DIP financing and restructuring costs in a *CCAA* proceeding.[47] The chambers judge had allocated those costs based on relative value of the assets as previously appraised. The Court of Appeal allocated costs on the basis of the actual value at the time the assets were realized but with the proviso that the secured creditor could not be required to pay costs in an amount exceeding the value of the property subject to its security.

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[43] See *Robert F. Kowal Investments Ltd. et al. v Deeder Electric Ltd.*, (1975) 59 DLR (3d) 492, (1976) 9 OR (2d) 84 (Ont CA) [*Kowal* cited to OR].
[44] *Kowal*, *ibid* at 89 and 91.
[45] *Re Hunters Trailer & Marine Ltd.*, 2001 ABQB 1094, 305 AR 175,.
[46] *Re Western Express Airlines Inc.*, 2005 BCSC 53, 10 CBR (5th) 154.
[47] *Re New Skeena Forests Products Inc.*, 2005 BCCA 192, 39 BCLR (4th) 338.

I. PARAGRAPH 27 – REPORTING BY RECEIVER

90. The Committee is of the view that the current practice of accepting Receiver's reports as evidence should be continued.

J. PARAGRAPH 31 – THE COMEBACK CLAUSE

91. After considering whether paragraph 31, the "comeback clause", should include a deadline for applying to vary the Order (e.g., a set number of days—perhaps 20—after service of the Order), the Committee concluded that it was best not to include such a deadline because:

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

(b) the inclusion of a deadline in the comeback clause could result in various interested parties filing *pro forma* applications to vary and then adjourning *sine die* such applications, simply to preserve their right to apply in the event their rights were affected in the future.

K. PARAGRAPHS 32-38 — NOTICE AND SERVICE

92. The service and notice provisions in the Template Order have been significantly modified in order to streamline the ability of all of the participants in the receivership proceedings to serve reports, notices and applications.

93. Paragraphs 32-36 in the Template Order, together with Schedule "B" (which outlines the wording of a covering letter which is to be sent to the Debtor and its creditors, along with a true copy of the Order), provide that a Demand for Notice is to be by electronic mail except in the case where a person does not have the ability to receive electronic mail, in which case, such person is eligible to demand notice by facsimile.

94. The Template Order now provides for adoption of the Electronic Case Information and Service Protocol (the "**Protocol**"), and a number of the provisions formerly in the Template Order have been moved into the Protocol. Between the provisions in the Order and the Protocol, each person served with a copy of the Order who requires notice of all further proceedings is required to serve the appropriate request for service on each of the Applicant and the Receiver, by serving the Applicant's legal counsel and the Receiver's legal counsel in the manner specified in the Order, as well as a list of all creditors that have served demands for notice (the "**Service List**"). Each demand for notice is to indicate either a facsimile number or an e-mail address by which that creditor has elected to be served with notice all further proceedings. The Receiver is required to post a copy of the Creditor List and the Service List on a website. Service by any person can be effected on a creditor by serving the documents in the manner contemplated in the request for service received from that creditor.

95. *The Queen's Bench Rules* require notice of all applications to be served and filed at least 14 days in advance of the day named in the notice for the hearing of the application. (See

Sigfusson Northern Ltd. v Signal Energy LLC.)[48] *Sigfusson* will govern the application for the Receivership Order (unless sought without notice), but the Template Order contemplates that subsequent applications may be brought on three days notice. The applicable notice period with respect to any particular proceedings will be within the discretion of the Court at the time of the hearing of the application for the Receivership Order.

IV. APPEALING A RECEIVERSHIP ORDER

96. Although this will not affect the terms of the Receivership Order, Rule 15(1) of The Court of Appeal Rules for Saskatchewan provides that the filing of a Notice of Appeal stays the execution of any other judgment or order pending the disposition of the appeal. Therefore, it should be noted that, if the Debtor files a Notice of Appeal with respect to a Receivership Order, a secured creditor or the Receiver will have to apply for an order to lift the stay of execution of the Receivership Order in order for the Receivership Order to be enforceable.

97. It should also be noted that, pursuant to Rule 31(1) of the *Bankruptcy and Insolvency General Rules*, interested parties have only 10 days to appeal a receivership order granted pursuant to the BIA.

V. UNIQUE SASKATCHEWAN CONSIDERATIONS

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

98. Saskatchewan court proceedings seeking the appointment of a receiver of the property of an agricultural enterprise may potentially attract the application of the *SFSA* or the *FDMA*.

99. The potential application of the *SFSA* and the *FDMA* to Saskatchewan receivership proceedings raises the issues of whether and to what extent a secured creditor seeking to commence Saskatchewan court proceedings for the appointment of a receiver under s. 243 of the *BIA* or for the appointment of an Interim Receiver under section 47 of the *BIA* against a Saskatchewan agricultural enterprise:

    (a) is required to obtain leave of the Court under s. 11 of the *SFSA* prior to commencing such proceedings; and/or

    (b) is prevented from doing so until such time as it has served the s. 21 *FDMA* notice and waited for the required period of fifteen business days specified in s. 21 of the *FDMA*?

[48] 2016 SKQB 46, 88 CPC (7th) 416 [*Sigfusson*]

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

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

101. Is a secured creditor who seeks an Order for the appointment of a section 243 BIA receiver over Saskatchewan farm land required to obtain leave under s. 11 of the *SFSA* prior to commencing such proceedings?

102. In *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*., the Supreme Court of Canada answered this question in the affirmative.[49] In that case, the Saskatchewan Court of Appeal had held that Part II of the *SFSA* was rendered inoperative in the context of a s. 243 *BIA* receivership application against a Saskatchewan farm or ranch, due to the operation of the doctrine of federal paramountcy, on the authority of *Bank of Montreal v Hall*.[50] The Supreme Court of Canada disagreed, holding that the doctrine of federal paramountcy did not apply in such circumstances, with the result that the secured creditor seeking the appointment of the receiver was required first to comply with Part II of the *SFSA* prior to commencing the s. 243 receivership application.

103. Notably, the Supreme Court of Canada decision in *Lemare Lake* left open the question of whether and to what extent Part II of the *SFSA* applied to applications by secured creditors to appoint interim receivers of Saskatchewan farm land pursuant to section 47 of the *BIA*.[51]

104. Accordingly, a secured creditor seeking an Order appointing a receiver of assets of a Saskatchewan agricultural enterprise which includes farm land appears to have four potential options available to it if it concludes that participation in the lengthy Part II *SFSA* mediation process[52] is not practical. These options are as follows.

105. First, the secured creditor could elect to limit the scope of its s. 243 *BIA* receivership application to an Order seeking to appoint a receiver of the farmer's personal property only (not including any farm land). Such an application would not appear to comprise an action for sale or possession of farm land and would therefore not appear to attract the application of Part II of the *SFSA*.

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[49] 2015 SCC 53, [2015] 3 SCR 419 [*Lemare Lake*].
[50] [1990] 1 SCR 121.
[51] *Lemare Lake*, *supra* note 49 at para 50.
[52] The Part II SFSA process typically exceeds six months in duration. It includes (among other things) a mandatory 150-day statutory notice period before the secured creditor can make an application to Court for an Order seeking sale or possession of "farm land" (as defined in the *SFSA*).

106. Second, in emergent circumstances, the secured creditor could seek an Order appointing an interim receiver of the farm land under s. 47 of the *BIA*, on grounds that Part II of the *SFSA* is rendered inoperative in the context of a s. 47 *BIA* interim receivership application, due to the doctrine of federal paramountcy. As noted above, the Supreme Court of Canada expressly left that question open in its decision in *Lemare Lake*.

107. Third, the secured creditor could pursue a "hybrid" approach involving both of the two options identified above and seek the appointment of a s. 243 *BIA* receiver over personal property of the insolvent farmer, combined with a s. 47 *BIA* interim receiver over the insolvent farmer's land and buildings.

108. Fourth, the secured creditor can seek the consent of the Respondent farmer to the s. 243 *BIA* receivership application. In certain cases involving perishable collateral such as livestock, financial distress of the insolvent farmer may put the health of livestock at risk. In such a case, a section 243 *BIA* receivership application may be the most cost-effective method to preserve the health of livestock and may therefore be consented to by the insolvent farmer.

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

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

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

110. This prohibition on action by the secured creditor prior to 15 business days after service of the *FDMA* notice raises a dilemma for secured creditors in certain circumstances. Specifically, if the secured creditor is unable to take any action until fifteen business days after service upon the farmer of the s. 21 *FDMA* notice, how can the secured creditor

move to protect its position in the event of abandonment, deterioration or extraordinary disposition of the collateral?

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

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

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

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

VI. CONCLUDING NOTES

115. Over time, and especially in circumstances where there have been legislative changes to the *BIA*, the wording of the Template Order may be altered in consultation with the Committee, the Insolvency Panel and the practice in other provinces. The Committee wishes to emphasize, once again, that the Template Order is not meant to exhaust the terms of an Order that will be considered by the Court. It would be expected, however, that in circumstances where there are changes to the Template Order, those changes will be highlighted in a draft Order presented to the Court, and evidence would be provided to the Court as to why the additional provisions or changes are required.

THE TEMPLATE RECEIVERSHIP ORDER COMMITTEE