ALBERTA TEMPLATE RECEIVERSHIP ORDER EXPLANATORY NOTES

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INTRODUCTION

In February of 2006, the Alberta Template Orders Committee (the "**Alberta Committee**") finalized a template receivership order for Alberta and explanatory notes to be read in conjunction therewith.

The Alberta Template Receivership Order used the model receivership order (the "**Ontario Order**") and explanatory notes (the "**Ontario Explanatory Notes**") developed by the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "**Ontario Committee**") as a starting point for developing the Alberta Template Receivership Order (the "**Receivership Order**"), focusing on those areas where the Alberta practice or legislation diverged from that in Ontario. In this fashion, the Alberta Committee hoped that the form of template Order would be as similar as practicable to the Ontario Order, while appropriately addressing Alberta-specific concerns. The Alberta Committee recognizes that updates to the Receivership Order and these Explanatory Notes are appropriate and necessary to keep current with changes in law and practice.

The Receivership Order presented by the Alberta Committee is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, the Receivership Order is meant to serve as a starting point from which any additions, amendments or deletions can be highlighted and brought to the attention of the Justice from whom the Order is sought. The Court is not bound by the Receivership Order but must craft an order that meets the particular circumstances of the receivership (*RBC v Reid-Built Homes,* 2018 ABQB 124, at para 57).

The assistance of members of the judiciary to the Alberta Committee, notably the Honourable Justices K. M. Horner, K.M. Eidsvik, and K.G. Nielsen, does not mean that there is any "arrangement" with the Court that a Receivership Order will be granted in all instances where the proposed Order approximates the Receivership Order, or at all. The input of the judiciary is appreciated, but in each application the discretion of the presiding Justice will be completely unfettered by the use or non use of the Receivership Order.

RECEIVER

The Receivership Order appoints the court officer as a Receiver under s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and as Receiver and Manager pursuant to s. 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2 (the "**JA**") and s. 99(a) of the *Business Corporations Act*, R.S.A. 2000, c. B-9 (the "**ABCA**"). In those cases, where the applying creditor holds a security agreement charging the debtor company's personal property, the Order could also reference an appointment under s. 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 (the "**PPSA**").

The Receivership Order assumes the applying creditor maintains security over all of the debtor company's property, business and undertaking, and it is not the recommended form to be used in land foreclosure actions, where appointments are made pursuant to s. 49 of the *Law of Property Act*, R.S.A. 2000, c. L-7.

The dual appointment of a Receiver pursuant to s. 243(1) of the BIA and a Receiver and Manager pursuant to one or more of s. 13(2) of the JA and s. 99(a) of the ABCA has both benefits and burdens that the applying party should consider in determining what to include and what, if anything, to exclude. **In this regard, it should be noted that dual appointments raise distinct procedural and other issues with varying consequences which counsel must be cognizant of, including, for example, differing appeal periods between Queen's Bench civil and bankruptcy actions.**

Since the Receivership Order meets the definition of "Receiver" as set out in s. 243(2) of the BIA, and also constitutes an appointment under s. 13(2) of JA and s. 99(a) of the ABCA, the Alberta Committee is of the view that:

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

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

3. The required reporting to the office of the Superintendent in Bankruptcy must be maintained.

The Alberta Committee considers the Receivership Order to be neutral and inclusive in respect of the interests of all stakeholders.

CLAUSE BY CLAUSE REVIEW PARTIES, RECITALS AND SERVICE

The Receivership Order is to be sought on an application in an action to be commenced either by Statement of Claim, by Originating Notice (in the event s. 70 of the PPSA applies), or as may be directed by the Court in Part 3, Division 2, Subdivision 1 of the *Alberta Rules of Court* (since no statutory procedure is set out in s. 243(1) of the BIA, s. 13(2) of the JA, or s. 99(a) of the ABCA).[1]

The parties consist of the applying creditor and the debtor company, respectively named as either the Plaintiff and the Defendant (in the event the action is commenced by way of Statement of Claim), or as Applicant and Respondent (in the event the action is commenced by Originating Application or by Order granted under Part 3, Division 2, Subdivision 1of the *Alberta Rules of Court*).

In urgent situations (imminent risk of asset dissipation, or immediate need to appoint the Receiver to preserve and maintain the value, including the going concern value of the debtor company's assets in the best interest of all stakeholders) the application could be made *ex-parte* supported by affidavit evidence of the urgency. The Receivership Order contemplates, however, that it would be granted either with the consent of or on notice to the debtor company, and on notice to other potential interested persons that may be affected by the granting of the Order (for example, other secured creditors, statutory or otherwise). Since Rule 6.4 permits *ex parte* applications in circumstances where no notice is necessary or where the delay caused by proceeding with notice of the application might entail serious mischief, if an *ex parte* order is granted, the preamble should be amended to delete reference to service and to establish why it is appropriate to proceed *ex parte*. Also, in the event of an *ex parte* order paragraph 1 should be deleted.

If the appointing creditor proceeds by application under Part 3, Division 2, Subdivision 1 of the *Alberta Rules of Court*, the appointing creditor must follow the service directed by the Court. To address concerns of asset dissipation or preservation and maintenance of the going concern value of the debtor's assets, the applying creditor may apply to the Court on short notice and seek an abridgement of time for the debtor's response to the originating document as authorized pursuant to Rule 13.5 of the *Alberta Rules of Court*.

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[1] The Receivership Order may be drafted with a dual style of cause, reflecting a Court of Queen's Bench of Alberta civil action and an associated bankruptcy action to reflect the possible dual appointment under the BIA and the JA. In that scenario, materials would be filed in both actions. Paragraph 34 of the Order references the issuing and filing of the Order in both actions, indicating they are not consolidated but will be heard together unless otherwise ordered.

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

It is more likely that the debtor company or other interested persons would have greater success in a future application to vary or amend the Receivership Order under the “comeback” clause in paragraph 33, if the debtor company or any such interested person was not served with notice of the application to obtain the Order. The debtor company and other potentially affected persons should therefore be served with notice of the application where circumstances permit. Further, the preamble should identify all of those served, and note the appearance or non-appearance of the parties and persons served.

As stated in the Ontario Explanatory Notes:

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

Unless the Order is being consented to by the debtor company, it is recommended that the application be made before a Justice in Chambers, rather than before a Master in Chambers. It is unlikely, unless the Order is consented to by the debtor company, that a Master has the jurisdiction to grant the injunctive relief contained within the Receivership Order.

PARAGRAPH 3—THE RECEIVER’S POWERS

The Alberta Committee considers the recitation of powers to be given to a Receiver in the Ontario Order to be appropriate for the Receivership Order, and adopts the Ontario Committee’s rationale expressed in the Ontario Explanatory Notes:

1. 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;

2. Among the powers specifically enumerated are the standard powers to take possession of and protect and preserve the debtor’s property, particularly liquid assets. Included in paragraph 3(a) is the Receiver’s ability to abandon, dispose of, or otherwise release any interest in the Debtor’s real property and oil and gas assets without incurring liability, which reflects the decision in *Orphan Well Association v Grant Thornton Limited,* 2017 ABCA 124 (“*Redwater*”). It is noted that an appeal in *Redwater* was heard by the Supreme Court of Canada on February 15, 2018 and the Supreme Court reserved its decision;

3. It is assumed the Receiver will manage the business, hire consultants as required, enter into transactions and compromise claims owing to the debtor;

4. Normal powers to litigate are included;

5. It is assumed the Receiver will market and sell assets with no specific approval of the marketing process required. However, a Receiver is well advised in a significant case to seek prior approval to avoid subsequent questioning of the efficacy of the process

itself. There is a materiality level established for assets sold beyond which prior approval of the Court should be sought;

6. Paragraph 3(n) empowers the Receiver to report to, meet and discuss with affected persons. It is expected that as an officer of the Court, the Receiver will engage in meaningful communications with stakeholders. This process can cause extra costs and therefore requires the Receiver to exercise reasonable discretion. The case law is clear that 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;

7. 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

8. There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy 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.

The Alberta Committee has added a phrase to paragraph 3(j) of the Receivership Order that makes it clear that, despite the Receiver being empowered to defend all actions involving the debtor, the Receiver does not have that authority with respect to the very action in which the Receiver is appointed. This follows *Toronto-Dominion Bank v. Fortin et al* (1978), 26 C.B.R. (N.S.) 168 (B.C.S.C.).

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

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

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.

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.

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.

PARAGRAPHS 7 TO 11 – THE STAY

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.

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 it the opportunity 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 stakeholders with less expense. Some Alberta authority has cast doubt, however, on the Court's ability to issue what is essentially an injunction restraining suits against debtors in Receivership (see, for example, *Toronto-Dominion Bank v. W-32 Corporation Limited* (1983), 50 C.B.R. (N.S) 78 (Alta. Q.B)).

The jurisdiction to issue a stay of proceedings is contained in ss. 17 and 18 of the JA. Frank Bennett, Bennett on *Receiverships*, 2nd ed (Scarborough: Carswell, 1999) argues persuasively for the existence of an inherent jurisdiction to grant relief to give effect to a Receivership Order, including staying actions against the debtor (at pages 200 — 222):

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

Of particular concern to the Alberta Committee was the possibility that a party having a claim against a debtor 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. The Alberta Committee therefore continues to recommend a provision in paragraph 8 that the general stay be subject to a proviso that any party facing the expiry of a limitation period would be entitled to commence whatever proceedings are necessary to preserve that party's rights, without further Order.

The Alberta Committee has included a provision in paragraph 8 that allows regulatory bodies to continue investigations or proceedings against a 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 an exemption from the automatic stay of proceedings that arises where a Notice of Intention to File a Proposal has been filed.

Paragraph 9 of the Receivership Order specifically applies the stay to any rights or remedies that purport to effect a cessation of operatorship in any joint operating agreement or similar agreement to which the debtor is a party. Such rights and remedies have particular significance for oil and gas producers and their creditors.

Section 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 s. 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**"), the Order may contain a general stay enjoining termination of contracts with the debtor. Section 65.1(7) of the BIA excepts from the statutory stay, any right a counterparty has to terminate an eligible financial contract ("**EFC**"). Sections 34 of the CCAA and 22.1 of the *Winding Up and Restructuring Act*, R.S.C. 1985, c. W-11 contain analogous provisions excluding the stay from applying to prevent termination of EFCs. However, in many receiverships there are no applicable statutory provisions to except an EFC from the application of a general stay Order.

In *Re Enron Canada Corp.* (2001), 31 C.B.R. (4th) 15, Hart J. considered an application by Enron Canada Corp. for a general stay in arrangement proceedings it brought under the *Canada Business Corporations Act.*, R.S.C. 1985, c. C-44. Although that Act contained no express statutory exception for EFCs, Hart J. found that just as there is good reason for statutory exceptions for 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.

Although there do not appear to be any cases that have ruled on 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. In *Alberta Health Services v. Networc Health Inc,* 2010 ABQB 373, the Court held that (para 51):

> It is noteworthy that recent amendments to the BIA now exempt eligible financial contracts from a stay in bankruptcy and provide for certain special rules with respect to their termination… [w]hile the revisions to the legislation do not address eligible financial contracts in receiverships, it may be that the same policy reasons would apply to the lifting of the stay with respect to these specialized types of contract.

Although an exception for EFCs has been added to the stays contained in paragraphs 9 and 11 of the Receivership Order, the Alberta Committee notes that the court will decide whether or not to make EFCs an exception to the general stay.

As stated in the Ontario Explanatory Notes:

> There have also been many attempts to deal with circumstances where the suppliers to the debtor seek to secure or obtain preferential payment of pre-insolvency claims by using post-proceeding pricing practices. Suppliers have been known to seek security deposits or to enforce price increases to seek to disguise their efforts to re-coup pre-proceeding claims.

At law, a Court-appointed Receiver is a separate person from that of the debtor company, and as such is entitled to enter into new supply contracts with any supplier. In particular, a Court- appointed Receiver is entitled to obtain the supply of water, gas and electricity without the payment of any outstanding arrears, pursuant to ss. 22, 23, and 25 of the *Water, Gas and Electric Companies Act*, R.S.A. 2000 c.W-4 ("**WGECA**") and *Canadian Commercial Bank v. Universal Tank Ltd and Universal Industries Ltd.* (1983), 49 C.B.R. (N.S.) 226 (Alta. Q.B.).

The Alberta Committee is also mindful of the competing decisions of *Alberta Treasury Branches v. Invictus Financial Corp.* (1985), 55 C.B.R. (N.S.) 176 (Alta. Q.B.) and *BC Credit Union v. Metro Co-Operative* (1982), 43 C.B.R. (N.S.) 97 (B.C.C.A.). These decisions reached opposite conclusions to a certain extent on whether a supplier of a telephone service can compel payment of arrears before a Court-appointed Receiver is entitled to utilize a debtor's telephone number, or at the very least, before a Court-appointed Receiver is entitled to transfer the right to use the telephone number to a purchaser of the debtor company's business.

The Receiver has the right under the WGECA to acquire the supply of water, gas and electricity without the necessity of paying the outstanding arrears payable in respect to such utilities by the debtor. The Receiver, under its power as a separate entity to enter into new contracts for the supply of services, is otherwise left to negotiate new arrangements with suppliers of essential services to the debtor, and hopefully to do so in a manner which does not give any preference for the recovery of unsecured claims against the debtor that arose prior to the Receivership.

The "continuation of services" paragraph included in the Ontario Order is also included in paragraph 12 of the Receivership Order. The Alberta Committee concluded that in order to preserve the business and undertaking of the debtor in the best interests of all stakeholders, it would be preferable at the outset

to enjoin the discontinuance, alteration, interference or termination of the supply of goods and services to the debtor company (including computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services). In return, the Receiver is obliged to pay the "normal prices or charges for all such goods and services received as and from the date of the Order ... in accordance with normal payment practice of the debtor, or such other practices as may be agreed upon by the supplier or the service provider and the Receiver, or as may be ordered by the Court".

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.

Furthermore, if any supplier believes that it has been unduly affected by paragraph 12 of the Receivership Order, the supplier can also re-apply pursuant to the "comeback clause" in paragraph 33 to vary this provision of the Order.

PARAGRAPH 14 – EMPLOYMENT

Paragraph 14 of the Receivership Order deals with the employment of employees by the Receiver, permits the Receiver to terminate employees of the debtor, and further provides that the Receiver is not liable for employee-related liabilities.

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, as provided 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.

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.

Subsection 14.06(1.2) of the BIA was amended in 2009 and is widely believed to address certain of the perceived risks arising from the decision of the Supreme Court of Canada in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35 ("***TCT***"), which held that a bankruptcy court had no jurisdiction to determine whether the Receiver was a successor employer, and that counsel must look to provincial legislation when determining whether the Receiver can be deemed a successor employer.

There is little jurisprudence considering the amended subsection 14.06(1.2). The Court in *TCT* held that the BIA does not abrogate rights of employees in the absence of explicit statutory language. Subsection 14.06(1.2) has been interpreted by the Ontario Labour Relations Board as providing immunity to the Receiver from certain liabilities in respect of the debtor's employees which flow from a finding that the Receiver is a successor employer. However, the Ontario Labour Relations Board further interpreted subsection 14.06(1.2) as not having explicit statutory language to preclude a finding that the Receiver is a successor employer for other claims such as for recognition of bargaining rights and the negotiation of a collective agreement (*UFCW, Local 175 v Rose of Sharon (Ontario) Community,* 2018 CarswellOnt 6065 (OLRB)).

Paragraph 14 of the Receivership Order also addresses the provisions of the BIA dealing with employee and pension plan liabilities and the implementation of the *Wage Earner Program*

Protection Act, S.C. 2005, c. 47 (the "**WEPPA**"). Paragraph 14 provides that the Receiver is not liable for any employee-related liabilities including successor employer liabilities as provided for in s. 14.06(1.2) of the BIA. That section provides that a trustee is not liable for any employee liabilities or in respect of any pension plan for the benefit of those employees that exist before the trustee is appointed or are calculated in reference to a period before the appointment.

Paragraph 14 of the Receivership Order has also been amended to reference the Receiver's obligations under ss. 81.4(5) and 81.6(3) of the BIA and under the WEPPA. Section 81.4(1) of the BIA provides that the claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages by a debtor for services rendered in the six months preceding the receivership is secured to the extent of $2,000 on the current assets in the possession or under control of the Receiver. Section 81.4(3) also provides security to the extent of $1,000 for the disbursements of a travelling salesperson incurred in the six months preceding the receivership on the current assets in the possession or under control of the Receiver. Section 81.4(5) of the BIA provides that if the Receiver takes possession or in any way disposes of current assets covered by the security, the Receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the Receiver.

Section 81.6(1) of the BIA provides that if a debtor is an employer who participated or participates in a prescribed pension plan for the benefit of employees, certain enumerated amounts that are unpaid as of the date of the receivership order are secured by security on all of the debtor's assets. Section 81.6(3) provides that if the Receiver disposes of assets covered by the security, the Receiver is liable for the unpaid pension amounts to the extent of the amount realized on the disposition of the assets and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

The 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 a bankruptcy or receivership. The maximum amount that the employee will receive is $3,000 or the equivalent of four times the maximum weekly insurable earnings under the *Employment Insurance Act*, less any applicable deductions under federal or provincial law. Section 36 of the WEPPA and s. 81.4 of the BIA together provide that the Minister will have a subrogated priority claim for a maximum of $2,000 per employee over the current assets of the debtor employer under receivership.

PARAGRAPH 15 – PIPEDA

The following commentary of the Ontario Committee, paraphrased slightly, explains paragraph 15 of the Receivership Order.

The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("**PIPEDA**") seems to impact the ability of creditors to realize upon a business. Personal information concerning employees, customers and possibly suppliers could well be very important components of either a Receiver's ability to run the business or to sell it.

PIPEDA contains a reasonableness standard that is one of the overriding principles guiding the use and dissemination of personal information. A Receiver has little time and ability to seek the consent of every employee or every customer before disclosing information needed to keep a plant open or to allow an expeditious realization. The reasonableness of limiting the need to obtain express consent in urgent circumstances in order to keep a business from failing is self- evident. It maintains the jobs and the business to which individuals have provided their information presumably because they either want their jobs or they want to do business with the debtor. PIPEDA also allows for Court Orders limiting the need to obtain express consent in appropriate circumstances.

The Ontario Order and in turn the Receivership Order contain such a limitation drawn from the *Re PSINet Limited* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.) CCAA proceeding. In effect, the Receiver will be

entitled to disclose personal information to prospective purchasers under the terms of appropriate confidentiality orders and provided that the purchaser, by agreement and Court Order, can make no further use of the debtor's data than was available to the debtor itself.

PARAGRAPH 16 - RECEIVER'S LIABILITY FOR ENVIRONMENTAL MATTERS

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 is not aware of any jurisprudence or statutory provision which would support the inclusion of such a provision.

In *Big Sky,* 2002 ABQB 659, 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.

In *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 ("***Redwater***"), the Court of Appeal of Alberta interpreted section 14.06 of the BIA and confirmed the right of a Receiver to disclaim certain oil & gas assets notwithstanding the applicable provisions of the *Oil and Gas Conservation Act,* RSA 2000, c O-6, *Mines and Minerals Act*, RSA 2000, c M-17 and the *Pipeline Act*, RSA 2000, c P-15. An appeal in *Redwater* was heard by the Supreme Court of Canada on February 15, 2018, and the Supreme Court reserved its decision.

Paragraph 16 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 uncertainly 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*, R.S.A. 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 16 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 16 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.

A Receiver should 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, to avoid risking loss of the protection afforded under s. 14.06(2) of the BIA.

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 (for example, where 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.

PARAGRAPH 17 – LIMITATION ON THE RECEIVER’S LIABILITY

The Receivership Order provides that except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of the Order, the Receiver shall incur no liability or obligation exceeding the amount for which it may obtain full indemnity from the Property. Paragraph 17 also expressly reserves protections and limitations on liability afforded to the Receiver under any applicable law, including, without limitations, ss. 14.06, 81.4(5), and 81.6(3) of the BIA.

PARAGRAPHS 21 TO 25 – THE FUNDING OF THE RECEIVERSHIP

Pursuant to paragraph 21 of the Receivership Order, the Receiver is granted a Receiver’s Charge as a first charge on the Property, as security for the fees and disbursements incurred by the Receiver and its counsel both before and after making the Order in respect of the receivership proceedings. Pursuant to paragraph 21, the Receiver’s Borrowing Charge ranks just behind the Receiver’s Charge and in priority to all security interests. The priority of the Receiver’s Charge and the Receiver’s Borrowing Charge is subject to ss. 14.06(7), 81.4(4), and 81.6(2) and potentially, s. 88 of the BIA.

Section 14.06(7) of the BIA provides that any claim of Her Majesty in right of Canada or a province against a debtor in receivership for the costs of remedying any environmental condition or damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or damage and on any other real property or immovable that is contiguous thereto or related to the activity that caused the environmental condition or damage. Such security ranks above any other claim, right, charge or security against the property, despite any other provision in the BIA or anything in any other federal or provincial law.

Sections 81.4(1) and (3) and 81.6(1) of the BIA set out the security for unpaid wages and unpaid pension plan contributions, respectively. Sections 81.4(4) and 81.6(2) provide that the security for such amounts rank above every other claim, right, charge or security against the debtor’s current assets – regardless

of when that other claim, right, charge or security arose – except rights under ss. 81.1 (rights of unpaid suppliers to repossess goods) and 81.2 (special rights of farmers, fisherman and aquaculturists).

Section 88 of the BIA provides that in relation to a bankruptcy or proposal, no order may be made that would have the effect of subordinating financial collateral. Financial collateral means (i) cash or cash equivalents including negotiable instruments and demand deposits; (ii) securities, a securities account, a securities entitlement or a right to acquire securities or (iii) a futures agreement or a futures account that are subject to an interest. Although there is no similar provision in the BIA in respect of receiverships, the Courts may support the inclusion of s. 88 in list of interests to which the Receiver's Charge and Receiver's Borrowing Charge are subordinate. The Alberta Committee has included s. 88 in paragraphs 18 and 21 of the Receivership Order but notes that the court will decide whether or not to avoid subordination to financial collateral.

The priority afforded to the Receiver's Charge and the Receiver's Borrowing Charge is appropriate where the Receiver has been appointed at the request, or with the consent or approval of the holders of all security interests in the Property (see *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd* (1976), 9 OR. (2d), 84, 88 (CA.)) ("***Kowal***"). 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 (*Kowal* at pages 89 and 91, respectively).

The Court may not, however, make an Order granting the Receiver's Charge and the Receiver's Borrowing Charge priority unless it is satisfied that the secured creditors who would be materially affected by the Order were given reasonable notice and an opportunity to make representations. As such, if a Receiver has not been appointed at the request or with the consent or 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 18 and 21 should be modified so that they do not provide for priority over such a security interest holder.

In *Canada North Group Inc (Companies' Creditors Arrangement Act),* 2017 ABQB 550 ("***Canada North***"), the Court held that court ordered super-priority charges for a Receiver's Charge may take priority over statutory deemed trust claims owing to the Canada Revenue Agency pursuant to the *Income Tax Act,* RSC 1985, c 1, *Canada Pension Plan Act,* RSC 1985, c C-8, and the *Employment Insurance Act,* SC 1996, c 23. In *RBC v Reid-Built Homes,* 2018 ABQB 124, which cites *Canada North*, the Court recognized that on the appointment of a Receiver under the BIA, or during the receivership, the Court has the jurisdiction to determine the priority of the Receiver's fees and disbursements, including the power to grant a super priority charge for the Receiver's fees and disbursements ahead of secured creditors, including secured creditors with proprietary interests. Notwithstanding the court's jurisdiction to grant priority to the Receiver's charges, notice to affected parties is encouraged to the extent possible, and to the extent it is not possible, affected parties can rely on the comeback clause in paragraph 32 of the Receivership Order. It is noted that the Alberta Court of Appeal granted leave to appeal the decision in *Canada North* on November 3, 2017 (2017 ABCA 363).

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 26 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.

The Receivership Order does not specify how the Receiver's Charge and Receiver's Borrowing Charge should be allocated amongst the various assets. Pursuant to an application under paragraph 26, 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.* (2001), 30 (4th) 206 (Alta. Q.B.) which involved

allocation of DIP financing and the Monitor's charge amongst secured creditors with priority over differing assets in a CCAA proceeding. See also *R. Western Express Airlines Inc.* (2005), 7 P.P.S.A.C. (3d) 229 (B.C.S.C.), where aircraft lessors who received no benefit from a CCAA restructuring were not required to bear any of the costs of the restructuring.

In *New Skeena Forests Products Inc.* (Re) (2005), 9 C.B.R. (5th) 278, the British Columbia Court of Appeal reversed an order of the British Columbia Supreme Court allocating DIP financing and restructuring costs in a CCAA proceeding. The chambers judge had allocated those costs based on relative value of the assets as previously appraised. The Court of Appeal allocated costs on the basis of the actual value at the time the assets were realized but with the proviso that the secured creditor could not be required to pay costs in an amount exceeding the value of the property subject to its security.

PARAGRAPH 28 – REPORTING TO THE COURT

Rule 6.11 of the *Alberta Rules of Court* set out the evidence that a Court would consider on an application and the enumerated list did not make a provision for the filing of a report by a Receiver. This resulted in some confusion as to whether a Receiver would now be required to file evidence in affidavit form. In light of the practice that has developed of Receiver's filing evidence in report form, the Alberta Committee suggests that the Receivership Order provide that unless otherwise ordered by the Court, Receiver's reports to the Court are not required to be in affidavit form and such reports shall be considered as evidence.

PARAGRAPH 33 – THE COMEBACK CLAUSE

The Alberta Committee, after much discussion about whether the paragraph 32 "comeback clause" should include a deadline for applying to vary the Receivership Order (namely a set number of days (perhaps 20) after the service of the Order), concluded that it was best to leave the comeback clause the same as in the Ontario Order, since:

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

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

PARAGRAPH 35 - MAINTENANCE OF RECEIVER'S WEBSITE

Over the past several years, Receivers have maintained websites for their various receivership files. This has been a very helpful and easily accessible resource to anyone interested in a receivership proceeding. The principal shortcoming arising from this practice is that the websites do not always include substantially all of the materials filed in the receivership proceedings. After discussion and consultation with members of the judiciary, the Alberta Committee has included paragraph 35 in the Receivership Order. This paragraph provides that the Receiver will post as soon as practicable materials filed in the receivership proceedings by the Receiver or served upon it, excluding confidential materials that are the subject of a sealing order or pending application for a sealing order. (This is in addition to whatever the Receiver may be required by statute or regulation to make publically available.)

PARAGRAPH 36 - E-SERVICE

The Alberta Committee is considering whether to recommend the adoption of an e-service guide (the "**Guide**"). In the event the Guide is approved in the future, suggested language for e-service is included in paragraph 36 of the Receivership Order.

CONCLUDING NOTES

The Alberta Committee hopes that the Receivership Order will be a useful tool to both the Bar and Bench by providing a familiar and well-understood starting point. As counsel and the Court consider an appropriate order for a given case, blacklining to the Receivership Order should enable them to expeditiously address changes needed to appropriately tailor the Order to the circumstances.

The Receivership Order is not intended to apply universally to every Receivership, nor is it intended to raise any sort of onus that will require counsel to meet some legal or evidentiary burden in order to depart from the template. Rather, it is intended as a practical help to the Bench and Bar to ensure both are acquainted with typical terms of an initial Receivership Order, so that departures from such terms can be speedily highlighted for consideration by simply blacklining any changes made to the Receivership Order.

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