THE NEW ALBERTA TEMPLATE RECEIVERSHIP ORDER

EXPLANATORY NOTES FOR VERSION NO. 1, FEBRUARY 2006

Template Receivership Order Committee,
Calgary/Edmonton, Alberta

INTRODUCTION

From time to time concerns have been expressed by members of the Alberta Bar and Bench concerning the practice of attending on little or no notice in regular Chambers or by appointment with Justices to obtain comprehensive, complex and lengthy Receivership Orders. There are even some judicial pronouncements on the subject; see for example *Re Big Sky Living Inc.* (2002), 37 C.B.R. (4th) 42 (Alta. Q.B.) ("*Big Sky*") and *Re T.C.T. Logistics Inc.* (2004), 48 C.B.R. (4th) 256 (Ont. C.A.) ("*TCT*").

In Ontario, the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "Ontario Committee") developed what it described as "the new standard form template Receivership Order" dated September 14, 2004 ("Ontario Order"), and explanatory notes to be read in conjunction with the template ("Ontario Explanatory Notes").

A "Town Hall" meeting was held by video conference at the Law Courts in both Edmonton and Calgary on November 9, 2004. A list of the attendees is attached as Appendix "A". Discussion ensued concerning the Ontario Order and the utility of having a similar order available for use in Alberta to ensure the Bench and Bar are acquainted with typical terms of an initial Receivership Order and so departures from such terms can be speedily identified and considered. It was resolved to pursue development of a template Receivership Order for use in Alberta. A committee consisting of the following persons (the "Alberta Committee") was established to prepare the template Receivership Order and accompanying Exploratory Notes:

Calgary	**Edmonton**
Patrick McCarthy, Q.C.	Rick Reeson, Q.C.
Robert Anderson, Q.C.	Jeremy Hockin
David Mann	Douglas Shell
Jodi Mason	

The Alberta Committee would like to acknowledge the encouragement of and valuable input from the Honourable Madam Justice M.B. Bielby, the Honourable Mr. Justice S.J. LoVecchio, the Honourable Madam Justice K.M. Horner and the Honourable Madam Justice J.E. Topolniski.

For reasons of commonality, practicality and efficiency, the Alberta Committee considered it appropriate to use the Ontario Order as a starting point, 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 to be circulated for comment to practitioners

in Alberta would be as similar as practicable to the Ontario Order, while appropriately addressing Alberta-specific concerns.

The template Receivership Order presented by the Alberta Committee (the "Alberta Template Receivership Order") is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, consistent with the philosophy adopted by the Ontario Committee, the Alberta Template 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 assistance of members of the judiciary to the Alberta Committee 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 Alberta Template Receivership Order, or at all. The input of the judiciary has been appreciated, but in each application the discretion of the presiding Justice will be completely unfettered by the use or non use of the Alberta Template Receivership Order.

RECEIVER OR INTERIM RECEIVER

The Alberta Template Receivership Order appoints the Court Officer as an Interim Receiver under s. 47 of the *Bankruptcy 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 ("PPSA").

The Alberta Template 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 an Interim Receiver pursuant to s. 47 of the BIA and a Receiver and Manager pursuant to s. 13(2) of the JA and s. 99(a) of the ABCA is recommended by the Alberta Committee for the reasons referenced in the Ontario Explanatory Notes, as paraphrased below:

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

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

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

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 Alberta Template Receivership Order meets the definition of "Receiver" as set out in s. 243(2) of the BIA, and also constitutes an appointment under s. 13(1) 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.

Similar to the views of the Ontario Committee regarding the Ontario Order, the Alberta Committee considers the Alberta Template Receivership Order to be neutral and inclusive in respect of the interests of all stakeholders. On the other hand, the applying creditor may choose to apply for appointment of the Court Officer only as Interim Receiver under s. 47 of the BIA in cases where the required s. 244(1) BIA Notice is about to be served, or has been served but the 10 day notice has not terminated, and/or to potentially gain other arguable advantages that an Interim Receiver appointed solely under s. 47 of the BIA may give the applying creditor in lieu of a dual appointment. Also, depending upon the circumstances, the applying creditor may prefer to apply for appointment of the Interim Receiver under s. 46 of the BIA, after filing a Petition for Receiving Order under the BIA, or, if a Notice of Intention to File a Proposal has been filed or a Proposal has been filed under the BIA, consideration may be given to simply applying for an appointment of an Interim Receiver under s. 47.1 of the BIA.

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

CLAUSE BY CLAUSE REVIEW OF THE ALBERTA TEMPLATE RECEIVERSHIP ORDER

PARTIES, RECITALS AND SERVICE

The Alberta Template Receivership Order is to be sought on motion 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 30 of the *Alberta Rules of Court* (since no statutory procedure is set out in s. 47 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 Notice or by Order granted under Part 30 of 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 Alberta Template Receivership Order contemplates, however, that it would be granted either with the consent of or on notice to the debtor company, and on notice to other potential interested persons that may be affected by the granting of the Order (for example, other secured creditors, statutory or otherwise). Since Rule 387(1) permits *ex parte* applications in circumstances where no notice is necessary or where the delay caused by proceeding by notice of motion 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 30 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 548 of the *Alberta Rules of Court*.

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 Alberta Template 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 Alberta Template Receivership Order under the "comeback" clause in paragraph 29, if the debtor company or any such interested person was not served with notice of the application to obtain the Order. The debtor company and other potentially affected persons should therefore be served with notice of the application where

[1] The Alberta Template Receivership Order is drafted with a dual style of cause including a Court of Queen's Bench of Alberta civil action and an associated bankruptcy action to reflect the commonly sought dual appointment under the BIA and the JA. In that scenario, materials would be filed in both actions. Paragraph 30 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. It should be noted that the future proclamation into force of Bill C-55 may impact the ability to obtain dual appointments and other provisions of the Order.

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 that before a Master in Chambers. It is unlikely, unless the Order is consented to by the debtor company, that the Master has the jurisdiction to grant the injunctive relief contained within the Alberta Template 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 Alberta Template Receivership Order, and adopts the Ontario Committee's rationale expressed in the Ontario Explanatory Notes, paraphrased as follows:

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;

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 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.

The Alberta Committee has added a phrase to paragraph 3(j) of the Alberta Template Receivership Order that makes it clear that, despite the Receiver being 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* (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 Alberta Template Receivership Order requires the debtor (including the debtor's management, advisors, and shareholders), those affiliated with the debtor and everyone with notice of the Order, to advise the Receiver of the existence of any of the debtor's property in their possession or control and to deliver to the Receiver such of the debtor's property that the Receiver requires.

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 stake holders 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 in involved in as many actions as are commenced by creditors against the debtor. If no priority is claimed, the effect of a Judgment is unenforceable until the Receiver is discharged. The Court must be able to control its own judicial process and allow the Receiver sufficient opportunity to perform the powers and duties. Such a condition is not contained in any legislation, but rather it is a condition rooted in the inherent jurisdiction of the Court to control its own process and protect its officers.

Of particular concern to the Alberta Committee was the possibility 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. The Alberta Committee is therefore recommending 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.

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 the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA"), pursuant to s. 11(3)(a) the initial Order may contain a general stay enjoining termination of contracts with the debtor. Both the

BIA (s. 65.1(7)) and the CCAA (s. 11.1(2)) except from the general stay, any right a counterparty has to terminate an eligible financial contract ("EFC").

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*, R.S.C. 1985, c. W-11, there are no statutory provisions governing EFCs. As such, in most receiverships there may be no applicable statutory provision to except an EFC from the application of a general stay Order.

In *Re Enron Canada Corp.* (2001), 31 C.B.R. (4th) 15, Justice Hart 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 dealing with the propriety of an exception for EFCs from the general stay provisions of a Receivership Order, the Courts may generally support an exception for EFCs from the general stay. Accordingly, an exception for EFCs has been added to the general stay contained in paragraph 10 of the Alberta Template Receivership Order.

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 Central 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 11 of the Alberta Template 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 11 of the Alberta Template Receivership Order, the supplier can also re-apply pursuant to the "comeback clause" in paragraph 29 to vary this provision of the Order.

PARAGRAPH 13 - EMPLOYMENT

Among the most controversial aspects of recent Receivership Orders in Ontario has been the paragraph dealing with employment of employees by the Receiver.

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.

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.

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

The decision of the Ontario Court of Appeal in *TCT* 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.

Section 46(1) of the *Alberta Labour Relations Code,* R.S.A. 2000, c. L-1 (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.

Similarly, s. 5 of the *Employment Standards Code*, R.S.A. 2000, c. E-9 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."

The Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A (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 Ontario Labour Relations Board (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.

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

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 ss. 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*, *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.

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

PARAGRAPH 14 – PIPEDA

The following commentary of the Ontario Committee, paraphrased slightly, explains paragraph 14 of the Alberta Template Receivership Order.

The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA") seems to impact on 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 Alberta Template Receivership Order contain such a limitation drawn from the CCAA proceedings in *Re PSINet Limited* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.). 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 15 - RECEIVER'S LIABILITY

The Alberta Template Receivership Order adopts the operative provisions of s. 14.06 of the BIA dealing with limitations on the liability of Receivers 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*, Justice Slatter 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 s. 14.06, or the *E.P.E. Act* itself. As was held in *Lindsay*, the court has no general jurisdiction to grant exemptions from statutes.

Justice Slatter 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.

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.

Justice Slatter 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 property which "may be" environmentally polluted. This latter clause is unacceptable, because at best it creates great uncertainty as to which properties are under the control of the Interim Receiver, and at worst it gives the Interim Receiver some sort of *ex post facto* right to elect whether it has been in control of the property or not. Sections 14.06(4)(c) and 14.06(6) contemplate the abandonment of contaminated property by the receiver, which is the process that should be followed if this 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 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, the Alberta Committee is of the opinion that the proposed wording in paragraph 15 of the Alberta Template 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 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.

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

PARAGRAPHS 16 TO 23 - THE FUNDING OF THE RECEIVERSHIP

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

The priority afforded by these provisions 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 O.R. (2d), 84, 88 (C.A.)) *("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).

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 16 and 19 should be modified so that they do not provide for priority over such a security interest holder.

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

The Alberta Template Receivership Order does not specify how the Receiver's Charge and Receiver's Borrowing Charge should be allocated amongst the various assets. Pursuant to an application under paragraph 23, Receivership costs and borrowings should be allocated among the 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 C.B.R. (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 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 29 – THE COMEBACK CLAUSE

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

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.

CONCLUDING NOTES

The Alberta Committee hopes that the Alberta Template 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 Alberta Template Receivership Order should enable them to expeditiously address changes needed to appropriately tailor the Order to the circumstances.

The Alberta Template 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 Alberta Template Receivership Order.

Federal Wage Earner Protection Program Bill C-55 passed third reading in the Senate in late November, 2005. Apparently Bill C-55 will not be proclaimed into force prior to June 30, 2006 and may be substantially amended before then. Bill C-55 will significantly impact bankruptcy and insolvency law and practice including receiverships. The Alberta Committee anticipates making further amendments to the Alberta Template Receivership Order once Bill C-55 as amended is proclaimed into force.

The Template Receivership Order Committee

APPENDIX "A"

Commercial Practice Group – November 9th, 2004

Calgary Bench	Edmonton Bench
LoVecchio J., Co-Chair	Bielby J., Chair
Cairns J.	Topolniski J.
Rooke J.	Wilson J.
Hart J.	Slatter J.
Wilkins J.	Burrows J.
Kent J.	Agrios J.
Hawco J.	Veit J.
Romaine J.	
Park J.	Master L. Smart, Q.C.
Horner J.	Master W. Breitkreuz, Q.C.
Master R.B. Waller Q.C.	Master R. Wacowich, Q.C.

Calgary Bar	Edmonton Bar
Howard Gorman	Jeremy Hockin
Brian O'Leary, Q.C.	Darren Bieganek
Pat McCarthy, Q.C.	Gordon McKenzie, Q.C.
Frank Dearlove	James MacLean
Larry Robinson, Q.C.	Mike McCabe, Q.C.
Quincy Smith, Q.C.	Ray Rutman
David Mann	Darcy Readman
Robert Anderson	Rick Reeson, Q.C.
Scott Watson	Brian Summers
Peter Pastewka, Q.C.	Kent Rowan
	Charles Russell, Q.C.
	Doug Shell
	Michael Lema
	Bryan Maruyama
	Blair Falconer