BRITISH COLUMBIA MODEL RECEIVERSHIP ORDER - EXPLANATORY NOTES

B.C. Model Insolvency Order Committee, Vancouver, British Columbia

These Notes are to be read together with the most recent version of the model receivership order developed by the B.C. Model Insolvency Order Committee.

INTRODUCTION

In Ontario, the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "**Ontario Committee**") approved the adoption of a Standard Form Template Receivership Order dated September 14, 2004 (the "**Ontario Order**"), and Explanatory Notes to be read in conjunction with the template order (the "**Ontario Explanatory Notes**"). The Ontario Order has been updated as of January 15, 2010 in light of the 2009 amendments to the *Bankruptcy and Insolvency Act* ("**BIA**"). These Ontario documents (along with other template orders) can be found at http://www.ontariocourts.on.ca/scj/en/commerciallist/forms/form.doc and http://www.ontariocourts.on.ca/scj/en/commerciallist/notes.pdf.

The reasoning behind the project was described by the Ontario Committee as follows:

> "Receivership orders have grown in length and complexity over the past several years. This is partly due to the evolution of the role of court appointed receivers but also due to the simple expediency of counsel utilizing precedents from one case to the next. Rather than considering the ongoing applicability of specific provisions of orders that were made to deal with the circumstances of a particular case (and might therefore be unnecessary in the next case) it has been the tendency of the bar to simply continue to engraft customizations onto the last available precedent. The result has been orders that are very long, often barely understandable, contain redundant or inconsistent terms, and may even be ill suited to the particular case before the Court. In addition, there has been an evolution in the practice concerning the appointment of receivers

> whereby the initial appointment order used in Toronto is somewhat more substantive and involves broader incursions into the sphere of third party rights than some say is appropriate at least upon an *ex parte* first hearing."

In addition, members of the Bar and the Bench across Canada have expressed concerns from time to time regarding the practice of bringing on applications with little or no notice to obtain comprehensive, complex and lengthy receivership orders:[1]

In 2005, on the initiative of former Chief Justice Brenner of the British Columbia Supreme Court, a committee (the "**B.C. Model Insolvency Order Committee**" or "**BCMIOC**") was established with a mandate to prepare certain model insolvency orders, being an Initial Order in *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") proceedings and a Model Receivership Order and accompanying Explanatory Notes.

Similar template or model insolvency orders have been developed in Alberta, Saskatchewan, Manitoba and Quebec.

For reasons of commonality, practicality and efficiency, BCMIOC considered it appropriate to use the Ontario Order as a starting point for the B.C. Model Receivership Order, making changes where the B.C. practice or legislation diverged from that in Ontario, and identifying other issues, where appropriate, through these notes. BCMIOC expects that the form of Model Receivership Order to be circulated for comment to practitioners in B.C. will be as similar as practicable to the Ontario Order, while appropriately identifying and/or addressing B.C.-specific concerns.

The B.C. Model Receivership Order does not depart substantially from the substantive provisions of orders made in recent years by judges in this province. There are decisions of some Courts (including the B.C. Supreme Court) that have raised questions as to the propriety of the broad scope of relief frequently sought and obtained in Ontario and elsewhere, and which is reflected in the Ontario template or model order.

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[1] See for example *Re Big Sky Living Inc.* (2002), 37 C.B.R. (4th) 42 (Alta. Q.B.) ("Big Sky") and *GMAC Commercial Credit Corporation v. T.C.T. Logistics Inc.* (2004), 48 C.B.R. (4th) 256 (Ont. C.A.) rev'd 2006 SCC 35 ("**TCT**").

For example, the Ontario Order is very wide in the sense of providing for a complete replacement of management and ousting of the board of directors of the Debtor in favour of complete control of the Debtor's business by the Receiver. BCMIOC is cognizant that there are issues as to the propriety of affecting third party rights, especially in orders made at hearings that are brought in haste and with typically little or no notice to anyone other than the most senior creditors. Accordingly, it may be that in many cases the powers contained in the Model Receivership Order will not be required or are not appropriate.

Another example is with respect to receiver powers. There will continue to be cases where it may be sufficient to appoint a receiver with powers limited to preserving and protecting the debtor's assets or to supervising management's use of cash and realization of receivables, consistent with the more traditional view of the purpose of an interim receivership under the BIA (and now consistent with the 2009 amendments to those provisions) or a protective receiver under the *Law and Equity Act* R.S.B.C. 1996, c. 253 ("**LEA**"). Conversely, it may be that in any given case, a party may claim that the evidence justifies more sweeping orders affecting third party rights or interests.

The B.C. Model Receivership Order does not seek to resolve these or other issues that may arise, or to prevent counsel from seeking to include in their draft orders any provisions that appear to be appropriate in any given case. It is to serve only as a starting point for the receivership Order in any particular case.

Where counsel choose to adopt provisions that depart from the B.C. Model Receivership Order, it will be incumbent upon counsel to bring any changes sought to the attention of the Court, and be prepared to justify the substantive basis for the relief sought in addition to the usual burden to obtain any receivership order at all. The approach of BCMIOC has been that all substantive issues ought to be heard and decided by the Court. As a result, even in cases where the order sought tracks the B.C. Model Receivership Order, there may potentially be issues that need to be addressed.

It is important to keep in mind the underlying rationale and intended use for Model Orders, including the B.C. Model Receivership Order:

1. the intention is to create a standard order to assist the Court and the Bar in streamlining the process of dealing with what were previously cumbersome receivership orders. It was not the goal to prejudge any substantive issues of law or to approve or disapprove of any particular strategy. By requiring counsel to start from the same model order for each new case, the hope is to avoid the difficulties that have arisen under prior orders;

2. the intention was to create a new standard form of order to serve as a common starting point or template/model for counsel seeking receivership relief on behalf of clients. Counsel and their clients are free to alter or depart from the template or model order as they see fit, with any changes blacklined (including using "strikethrough" notations for deletions) and specifically drawn to the attention of the Court in order to focus the argument and to deal with particular issues that may require specific attention in each case;

3. the assistance of members of the judiciary to BCMIOC does not mean that there is any "arrangement" or understanding with the Court that a Receivership Order will be granted in any or all instances where the proposed Order approximates the B.C. Model Receivership Order, or at all. The input of the judiciary has been appreciated, but on each application the discretion of the presiding Justice will be completely unfettered by the use or non-use of the B.C. Model Receivership Order;

4. the process of developing a template or model receivership order itself is intended to be a dynamic one. The present B.C. Model Receivership Order will be reviewed by BCMIOC on a periodic basis in order to ensure that it keeps pace with developments in practice and the law and continues to be a useful tool that promotes convenience. The profession should feel free to provide input to BCMIOC as appropriate.

In an effort to assist the profession, BCMIOC felt it would be useful to identify some of the issues that were raised during the process of creating the template or model receivership order that has now been developed, as follows:

CLAUSE-BY-CLAUSE REVIEW OF THE B.C. MODEL RECEIVERSHIP ORDER

APPOINTMENT OF RECEIVER OR RECEIVER MANAGER

The B.C. Model Receivership Order allows for appointment of a "Receiver" under Section 243(1) of the BIA and as Receiver or Receiver Manager pursuant to the LEA.[2] It should also be noted that Section 66 of the *Personal Property Security Act*, R.S.B.C. 1996 c. 359 ("**PPSA**") also authorizes the appointment of a Receiver by the Court.

The dual appointment of a Receiver pursuant to Section 243(1) of the BIA and a Receiver or Receiver Manager pursuant to Section 39 of the LEA may be supportable, in particular cases, including on the following arguments (referenced in the Ontario Explanatory Notes and paraphrased below):

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

2. An Receiver under the BIA bases its jurisdiction federally and may be better protected against certain provincial liabilities and inconsistencies that may flow from the application of different provincial regimes to the Debtor's property which may be located in different provinces; and

3. Both a BIA Receiver and a Receiver or Receiver Manager under the LEA can be provided with a priority charge[3] in respect of its fees and disbursements and thereby avoid issues concerning the limits on the authority of the court to grant a priority charge.

Counsel must be cognizant of the fact that dual appointments may raise distinct jurisdictional, procedural, practical and other issues with varying consequences.

One example of a procedural consequence is that there are differing appeal periods between Supreme Court civil and bankruptcy actions. Another is that, if the receiver meets

[2] Note that Section 243(1) of the BIA requires that the applicant/creditor be a "secured creditor". It is not the recommended form to be used in land foreclosure proceedings.

[3] See discussion of priorities, below.

the definition of "Receiver" as set out in Section 243(2) of the BIA, and also constitutes an appointment under Section 39 of the LEA, then:

(a) The applicant secured creditor must serve the mandatory Section 244(1) BIA Notice prior to the appointment;

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

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

As a practical matter, the applicant creditor may choose to apply only for the appointment of a Receiver under Section 243 of the BIA to potentially gain other arguable advantages that such a Receiver may give the applicant creditor rather than a dual appointment. Also, depending upon the circumstances, the applicant creditor may prefer to apply for the appointment of an Interim Receiver under Section 46 of the BIA (after filing of an Application for a Bankruptcy Order), Section 47(1) (a Section 244 notice has or is about to be sent) or Section 47.1 (a Notice of Intention to File a Proposal ("**NOI**") or Proposal has been filed).

In any event, the applicant creditor should also consider whether the proposed appointment should be solely as Receiver to preserve and possibly liquidate assets, or as an Receiver and/or Receiver 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 person appointed as Receiver and/or Receiver Manager to carry on the Debtor company's business risks potential additional responsibilities and liabilities over those of a Receiver appointed solely to preserve and possibly liquidate the assets.

PARAGRAPH 1 - PARTIES, RECITALS AND SERVICE

In British Columbia, unless the order is by consent (BCSC Rule 17-1), a receivership application may be commenced by an "application" (BIA s. 243(1)) brought in proceedings commenced either by "petition" or brought by application within a proceeding commenced by "notice of civil claim" (BCSC Rule 2-1). If the proceeding was commenced by notice of civil claim in the BCSC, the parties consist of the applicant/creditor and

the Debtor company (the "**Debtor**"), respectively named as the Plaintiff and the Defendant and, upon the application being made under section 243 of the BIA, the BCSC Bankruptcy Court jurisdiction should also be invoked by adding the additional bankruptcy style of cause.

The B.C. Model Receivership Order contemplates that it will be granted either with the consent of or on notice to the Debtor, 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). However, 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's assets in the best interest of all stakeholders) the application could be made *ex parte* supported by appropriate affidavit evidence as to the urgency. To address concerns of asset dissipation or preservation and maintenance of the going concern value of the Debtors' assets, the applicant/creditor may also apply to the Court for short leave and seek short leave for the Debtor's response to the originating document as authorized by Rule 22-4 of the New BCSC Rules or alternatively, may seek to shorten time limits in accordance with Rule 6 of the *Bankruptcy and Insolvency General Rules* C.R.C. c. 368, as amended). In that event, the B.C. Model Receivership Order should be amended to reflect any shortened notice or lack of notice.

In those cases where there are facts in dispute between the applicant creditor and the Debtor, but the Court finds it just and convenient to appoint a Receiver to preserve and maintain the status quo while outstanding issues are determined, a number of the powers and authorities of the Receiver granted under the B.C. Model 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. For example, as discussed below, the provisions relating to sales of assets (paragraph 2(l)), issuance of vesting orders (paragraph 2(m)) and priority of the Receiver's Borrowing Charge (paragraph 19) may be more appropriately granted, if at all, after notice to affected parties. Note Section 243(6) which provides that a priority charge in respect of the receiver's fees and disbursements under a Receiver's Charge (paragraph 16) must be followed by notice to any secured creditors who would be materially affected.

It should be noted that the Debtor and/or other interested persons may make an application to vary or amend the B.C. Model Receivership Order granted under the "comeback" clause in paragraph 29, if the Debtor or any such interested person was not initially served with notice of the application to obtain the Order. The Debtor and other potentially affected persons, including governmental bodies, should therefore be served with advance notice of the application where circumstances permit.

The preamble to the B.C. Model Receivership Order should identify the parties or persons served, and note the appearance or non-appearance of those 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.[4]

It may be necessary that the application be made before a Supreme Court Justice in Chambers, rather that before a Master in Chambers. Even if the Order is consented to by the Debtor, a Master may lack the jurisdiction to grant the injunctive relief contained within the B.C. Model Receivership Order. Also, it is often possible that a Justice with insolvency experience can be arranged to hear the matter, by contacting Trial Division.

PARAGRAPH 2 – THE RECEIVER'S POWERS

The recitation of powers that may be granted to a Receiver under the B.C. Model Receivership Order are similar to those in the Ontario Order. The Ontario Committee's rationale for granting those powers is expressed in the Ontario Explanatory Notes, paraphrased as follows:

(a) While it is tempting to give the Receiver a broadly worded simple power to take all reasonable steps to conduct the Receivership, it is very helpful and often essential for the Receiver to be able to point to a

[4] For example, see *Re: Halcyon Health Spa Ltd. (Receiver-Manager of)* 2006 BCCA 458.

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 have been identified and included. It is open to counsel to seek to reduce or enlarge upon the listed powers by highlighting the change and bringing it to the Court's attention;

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

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

(d) Normal powers to litigate are included;

(e) In paragraph 2(g), Counsel may wish to consider seeking an order allowing the Receiver to pay pre-receivership wages and benefits (similar to the relief which may be granted in accordance with paragraph 6(a) of the Model CCAA Initial Order). In addition, it may be appropriate for counsel to seek authorization to pay secured claims (including that of the Plaintiff/Applicant) where prompt payment will preserve equity for junior stakeholders and where the validity and enforceability of the secured claim(s) are not in issue.

(f) It is assumed the Receiver will market and sell assets with no specific approval of the marketing process required. (Note, however, that in British Columbia, the appropriateness of this type of provision may be an issue at the time of the initial appointment of the Receiver and will depend on the facts of each case.[5])

(g) The PPSA provides in Section 59(17)(f) that a court may dispense with the notice requirements under Section 59(10) which are ordinarily required before a disposition of collateral by a Receiver.

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[5] For example, there is case authority in British Columbia to the effect that no sales of assets should normally occur until such time as the secured creditor obtains judgment: *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145 (B.C.C.A.). In addition, there is case authority that where the assets being realized upon mainly comprise land, a redemption period may be ordered by the Court: *Royal Bank of Canada v. Camex Canada Corp.* [1985] B.C.J. No. 43, 63 B.C.L.R. 125 (S.C.) and *Royal Bank of Canada v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252 (C.A.).

(h) If the power to sell is contained in the Order, a Receiver may be well advised in a significant case to seek prior approval of the sale process itself to avoid subsequent questioning of the efficacy of that process. There is a materiality level established for assets sold beyond which prior approval of the Court should be sought;

(i) Paragraph 2(n) empowers the Receiver to report to, meet and discuss certain matters 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 the use of the Court-appointed Receiver is not the private preserve of the senior creditors and the process must have some degree of transparency and accountability to all stakeholders. Expensive appearances and last minute challenges may be avoided by timely communications among the appropriate parties;

(j) Counsel should insert the legal description of any real property which may be included in the Property in paragraph 2(o) so as to allow registration of the Order at the Land Title Office;

(k) The concluding words of paragraph 2 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;[6] and

(l) 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

[6] See, for example, *Lang Michener v. American Bullion Minerals Ltd.* 2006 BCSC 504.

the Debtor, it should be expressly brought to the Court’s attention.

PARAGRAPHS 3 TO 5 – INJUNCTIONS, POSSESSION AND ACCESS TO PROPERTY

Paragraph 3 of the B.C. Model 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 3 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 4 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 where privilege attaches to records which are the subject of a solicitor and client communication.

PARAGRAPHS 6 TO 10 – 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 (as those terms are defined in the B.C. Model Receivership Order).

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 usually been thought practicable to extend that protection to include the assets

of the Debtor under the Receiver's administration.[7] The underlying philosophy is the need to protect the Court's 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.[8] However, issues may arise with respect to the source and extent of the Court's jurisdiction to impose a comprehensive stay, particularly a stay of *in personam* suits against the Debtor which would not result in specific action being taken against the Debtor's Property.[9]

In several recent cases, especially under the CCAA, the provincial government has sought to clarify that the stay of proceedings and other provisions in Initial Orders should not prevent regulators from carrying on with normal regulatory activities, or otherwise affect the normal operation of provincial laws. The recent amendments to the BIA and CCAA have clarified these issues to some extent. It is the usual practice in B.C. for negotiations with the government to ensue, and for appropriate modifications to be made to those Orders, or for any potential issues to be deferred unless and until the facts of the case require a particular problem to be addressed. It has not yet been necessary to litigate any of those issues in British Columbia.[10]

Concerns have been raised 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. Therefore, the B.C. Model Receivership Order provides that the general stay is subject to a proviso that any party facing the expiry of a limitation period is

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7 See, however, *Toronto-Dominion Bank v. W-32 Corporation Limited* (1983), 50 C.B.R. (N.S.) 78 (Alta. Q.B.) which casts doubt on the Court's ability to issue what is essentially an injunction restraining suits against debtors in receivership.

8 See *Bennett on Receiverships*, 2d ed. (Toronto, Carswell, 1999), at page 222.

9 It may be argued that the jurisdiction to issue a stay is found in the BIA, Section 8 of the LEA and Section 63(2) of the PPSA. However, if or to the extent the Court must rely on its inherent jurisdiction to impose a stay, it may also be argued that the stay cannot override express statutory provisions: see *Baxter Student Housing v College Housing Co-operative* [1976] 2 S.C.R. 475; *United Auto & Truck Parts Ltd. v Aziz* 2000 BCCA 146, at para. 18.

10 See BIA Section 69.6 and CCAA Section 11.1. See also *Re Abitibibowater Inc*. et al, No. 500-11-036133-094 (March 31, 2010, Gascon, J.S.C. - Quebec). With respect to stays against the federal and provincial governments, see the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, Section 22 and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, Section 11(2)(a) respectively.

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 NOI is filed, an automatic general stay applies to prevent termination of agreements based on the Debtor's insolvency. Similarly, the CCAA provides in Section 11 that the Initial Order may contain a general stay enjoining termination of contracts with the Debtor.

Both the BIA (Section 65.1(7)) and the CCAA (Section 11.1(2)) exempt from the general stay, however, any right a counterparty has to terminate an eligible financial contract ("**EFC**"). Where there is no CCAA proceeding or Proposal or NOI under the BIA, there are no statutory provisions governing EFCs. As such, in most receiverships, there will be no applicable statutory provision to exempt an EFC from the application of a general stay Order. However, there may be good arguments, by analogy with statutory insolvencies and on grounds of public policy, for doing so in receiverships as well.[11] Accordingly, an exception for EFCs has been added to the general stay contained in paragraph 8 of the B.C. Model Receivership Order.

In paragraph 8 of the B.C. Model Receivership Order, there is a specific stay of any person's right to set off pre-receivership claims against the Debtor in response to post-receivership claims by the Receiver. However, counsel should note that the effect of the law of set-off may differ depending on the precise nature of the cross-obligations which may arise in a particular case, and a stay of set-off rights may or may not be appropriate.

In addition, the B.C. Model Receivership Order permits the filing of notice of security interests and the registration of claims for liens under the provisions of provincial personal property regimes. Allowing these steps prior to enforcement would not seem to interfere with the Receiver's administration nor require the Receiver to take any action or to spend money resulting in the diminution of the Debtor's property. However, lien claimants continue to require the consent of the Receiver or leave of the Court in order to

[11] 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 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 corporations. Accordingly, Hart J. declined to extend the general stay with respect to the termination of EFCs.

commence actions to enforce lien rights (but with no ability to continue such actions). It remains open to counsel to seek to prohibit registration of security or claims for lien in appropriate circumstances.

In some CCAA orders, specific clauses provide for the suspension in respect of the running of time under Section 81.1 of the BIA to preserve the ability of suppliers of goods to enforce their rights to repossess their goods at the end of the CCAA process. Some question the usefulness of this provision because, in most cases, either the suppliers' rights are compromised in the proceeding or the goods are sold or consumed before the proceeding ends. In other cases, elaborate clauses have been developed to seek to extend limitation periods that might expire during a Court-ordered stay. Fairness may dictate that a party facing the expiry of a limitation, contractual or statutory, who is prevented by a stay from taking the steps required to perfect its rights, should be given an opportunity to take those steps once the stay is lifted. This rationale may not fit well with every time period that may be affected by a stay. For example, there is no case law suggesting that a lease of land ought to be automatically extended if it were otherwise to expire during the course of a stay. However, anyone seeking to enforce a remedy subject to the lapse of time will continue to require leave of the Court as is the case with all other stakeholders. Accordingly, paragraph 8 of the B.C. Model Receivership Order simply continues to enjoin the exercise of rights and "suspends" all rights and remedies. The specific effect of any suspension will remain to be dealt with in individual cases, either by departing from the B.C. Model Receivership Order or by subsequent proceedings.

There has also been some controversy in the development of stay orders concerning the appropriateness and the jurisdiction of the Court to order counter- parties to renew contracts with the Debtor. For the purpose of the B.C. Model Receivership Order, paragraph 9 prohibits third parties from failing to honour "renewal rights". To the extent that counsel wishes to force a renewal in the absence of a contractual renewal right, the matter will have to be brought to the attention of the Court.

There have also been many attempts to deal with circumstances where 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 as a means to disguise their efforts to recoup pre-proceeding claims. BCMIOC was of the view that simple words entitling the Receiver to continue to pay "normal prices and charges" in paragraph 10 should be sufficient to address the issue. This wording is not intended to require any further advance of money or credit. BCMIOC recognized that the current drafting leaves open the possibility that if the Receiver wishes to open new accounts with suppliers in the Receiver's own name, as is often the case in practice, suppliers may wish to try to engage in preferential practices. As with the Ontario Committee, BCMIOC is confident that this matter can be left to the Receiver's business judgment with resort to the Court remaining available to all stakeholders if the exercise of communication, courtesy and common sense does not resolve any particular problem. While all counsel remain free to depart from the B.C. Model Receivership Order in appropriate circumstances, BCMIOC does not believe it appropriate to include, as a starting point, an *ex parte* provision binding third parties beyond the degree to which they were already bound to deal with the Debtor.

PARAGRAPH 12 - EMPLOYMENT

Provisions dealing with employment issues have been among the most controversial aspects of recent receivership orders.

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 by reason of newly amended Section 14.06(1.2) of the BIA. Such counsel 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 contrary to the reality of the Receiver's role in most cases.

This continues to be a live topic throughout Canada. While reasonable counsel can differ on the degree of protection available under differing receivership structures, paragraph 12 of the B.C. Model Receivership Order was, like the Ontario Order, drafted to minimize the disruption to the existing legal relationship, while providing as much protection as can be given, having regard to newly amended Section 14.06(1.2) of the BIA and the *TCT* decision,[12] and leaving it open to counsel to seek a wider order in any particular case.

PARAGRAPH 13 – PIPEDA and PIPA

The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (**"PIPEDA"**) impacts the ability of creditors to realize upon a business. In British Columbia, the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (**"PIPA"**) applies to organizations (other than federal organizations) in respect of the collection, use and disclosure of personal information that occurs within the province.

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 and PIPA contain 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 customer before disclosing information needed to keep a business open or to allow for an expeditious realization. The reasonableness of limiting the need to obtain express

[12] The 2006 decision of the Supreme Court of Canada in *TCT* prohibited the previous practice of routinely deeming a Received not to be a successor employer in receivership orders. Accordingly, subject to the newly amended Section 14.06(1.2) of the BIA, it remains open to unions to seek leave of the bankruptcy Court (under Section 215 of the BIA) and if leave is granted, to make an application before the Labour Relations Board under Section 35 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 to have the Receiver held to be a successor employer and therefore responsible for pre-receivership termination, wage, pension and other similar obligations of the Debtor.

consent in urgent circumstances in order to keep a business from failing may often be self-evident, since it maintains the jobs and the business to which individuals have provided their personal information (presumably because they either want their jobs or they want to continue to do business with the Debtor). PIPEDA and PIPA also allow for Court orders limiting the need to obtain express consent in appropriate circumstances.

The B.C. Model Receivership Order contains a limitation in that regard.[13] The Receiver will be entitled to disclose personal information to prospective purchasers under the terms of appropriate confidentiality orders 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.

If the power of sale is not granted to the Receiver in accordance with paragraph 2(k) - (m), this provision would not be necessary.

PARAGRAPH 14 - ENVIRONMENTAL LIABILITY

With respect to environmental liabilities, the B.C. Model Receivership Order also provides that the act of becoming a receiver does not, in itself, oblige the Receiver to expose itself to the risk of personal liability. However, to the extent that the Receiver takes actual steps to take control of or occupy contaminated property, the B.C. Model Receivership Order assumes that the Receiver will have to deal with its liabilities under provincial law, subject always to the protections of that law and also as set out in Section 14.06 of the BIA.

Further, an exception to the stay was built into paragraph 8 to clarify the Receiver’s obligation to comply with statutory and the regulatory provisions set forth in section 69.6(2) of the BIA. Similarly, paragraph 14 provides that nothing in the B.C. Model Receivership Order exempts the Receiver from any duty to report or to make a disclosure that is imposed by any environmental law.

[13] See the CCAA proceedings in *Re PSINet Limited* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.)

PARAGRAPH 15 - RECEIVER'S LIABILITY

The B.C. Model Receivership Order contemplates a level of limited liability for the Receiver beyond new statutory liabilities under the BIA and the *Wage Earner Protection Program Act*. As noted previously, the Receiver as an officer of the Court is not a legitimate target for competing creditors. The B.C. Model Receivership Order provides protection for the Receiver to ensure that the Receiver can only be made personally liable in certain circumstances. The B.C. Model Receivership Order sets gross negligence as the standard of culpability before the Receiver can be personally liable, in order to limit the ability of creditors or the Debtor from seeking to mount a challenge to the reasonableness of every exercise of the Receiver's discretion.

The Court may decide, however, that ordinary negligence is the appropriate standard of culpability depending on the circumstances.

Some receivership orders have limited damage awards against the Receiver to the value of the assets of the estate or to the amount of the Receiver's fees even in the event of gross neglect or willful misconduct by the Receiver. BCMIOC is unaware of any case law to support the position that a Receiver who has been found to have committed deliberate misconduct or to have been grossly negligent ought to be protected from an award of the damages that reasonably flow from its actions.

The B.C. Model Receivership Order proceeds from the assumption that, if the circumstances call for exceptional levels of immunity beyond the protection of the gross negligence standard, this should be brought to the attention of the Court.

PARAGRAPHS 16 TO 22 - RECEIVER'S ACCOUNTS AND FUNDING

Pursuant to paragraph 16 of the B.C. Model Receivership Order, the Receiver is granted a Receiver's Charge as a first charge on the Property in priority to all security interests.[14] Pursuant to paragraph 19, the Receiver's Borrowing Charge ranks behind the Receiver's Charge and in priority to all security interests.

[14] See *CIBC v Wildflower Productions Inc.* [2001] B.C.J. No. 386 (C.A.) with respect to priority of receivership costs in relation to a statutory lien in favour of the Director of Employment Standards.

The priority afforded by the Receiver's Charge is specifically authorized by Section 243(6) of the BIA on notice to secured creditors who may be affected. Further, this provision and the provision for the Receiver's Borrowing Charge may be 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 (as defined in the Order).[15] The priority may also be 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.[16]

If a Receiver has not been appointed at the request or with the consent or approval of a secured creditor, and if that secured creditor does not fall within one of the other exceptions (referred to above) in *Kowal*[17], then consideration should be given as to whether or not paragraphs 16 and 19 should be modified so as not to provide for priority over such a secured creditor. A typical provision would then provide that the Receiver's Charge and the Receiver's Borrowing Charge rank in priority to the charges of the applicant secured creditor and any charges ranking subsequent thereto. In that case, the vesting order provisions in paragraph 2(m) should also be modified to address that prior ranking charges will not be vested off.

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 may 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.

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15 See *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d), 84 at page 88 (C.A.)

16 See *Kowal* at pages 89 and 91, respectively

17 Or if the Court does not have jurisdiction to grant priority over a particular statutory lien – see footnote 14 above. See also footnote 4 where the receiver's charge did not have priority when a prior secured creditor was not a party and was not served with the pleadings.

In considering the appropriate allocation between assets, regard should be had as to the relative benefit or potential benefit to the various assets involved.[18]

In paragraph 17, the B.C. Model Receivership Order requires that the Receiver's accounts and those of its counsel be taxed. The taxation is to be referred to a Judge of the B.C. Supreme Court in order to maintain consistency in this specialized area and will typically be heard on a summary basis. Certain receivership and CCAA orders have dispensed with the requirement for an assessment of receiver and counsel's fees or provide for only the consent of the major secured creditor. Nevertheless, BCMIOC is of the view that assessment ought to be the standard. Any counsel wishing to avoid the requirement of assessment may bring this matter to the attention of the Court by blacklining the standard provision.

PARAGRAPH 28 – COSTS

If the security documents provide for a secured creditor to recover costs of such an application, then the provision in the B.C. Model Receivership Order providing for the applicant/creditor to recover such costs may be unnecessary. The overall circumstances, including whether such an application is for the benefit of other stakeholders, may factor into any award of costs.

Where the applicant/creditor does not have a proven right to receive its costs in priority to other creditors, the issue of the timing and priority of the costs related to the motion to appoint the Receiver may be deferred until a later order of the Court. This prevents subordinate creditors or other interested parties from seeking to bring proceedings on a "cost-free" basis where the proceedings may be adverse in interest to creditors with superior interests who may later prove that they are entitled to the limited funds of the estate.

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[18] See, for example, *Re Hunters Trailer & Marine Ltd.* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) which involved allocation of Debtor in Possession ("DIP") financing and the Monitor's charge amongst secured creditors with priority over differing assets in a CCAA proceeding; *Re 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; and *New Skeena Forests Products Inc. (Re)* (2005), 9 C.B.R. (5th) 278, where 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 appraised assets. On appeal, costs were allocated 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.

SERVICE ON GOVERNMENTS

In some instances, where it is anticipated that issues may arise in respect of the federal and/or provincial governments, it may be appropriate to provide for service of the pleadings and the Receivership Order on the Crown. The *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 8 provides for service on the British Columbia Crown, as follows:

"A document to be served on the government

(a) must be served on the Attorney General at the Ministry of the Attorney General in the City of Victoria, and

(b) is sufficiently served if

(i) left there during office hours with a solicitor on the staff of the Attorney General at Victoria, or

(ii) mailed by registered mail to the Deputy Attorney General at Victoria.

A similar provision relating to the federal Crown is found at s. 23(2) of the *Crown Liability and Proceeding Act*, R.S. 1985, c. C-50, which provides for service on the Deputy Attorney General of Canada or the chief executive officer of the agency in whose name the proceedings are taken, as the case may be. The Federal Crown requests that service of documents be by delivery to Department of Justice, 900 - 840 Howe Street, Vancouver, B.C. V6Z 2S9.

CONCLUDING NOTES

BCMIOC hopes that the B.C. Model Receivership Order will be a useful tool to both the Bar and Bench by providing a familiar and well-understood starting point for considering appropriate Order terms and identifying potential recurring issues. As counsel and the Court consider an appropriate order for a given case, blacklining to the B.C. Model Receivership Order should enable them to expeditiously address changes needed to appropriately tailor the terms of the B.C. Model Receivership Order to the circumstances of each case. It is also hoped that these notes will identify some of the issues and arguments which may arise.

In that regard, BCMIOC received extensive input into the process from its members who are representatives of the provincial and federal governments. BCMIOC was of the view

that, consistent with the overall supervision by the Court of the process being carried on under the auspices of the Court's officer, governments too ought to be part of the process and be involved in the proceeding, whether to seek leave or otherwise to have input as a stakeholder.

The B.C. Model Receivership Order is therefore designed to apply to governmental bodies, but subject always to such modifications as may be appropriate or necessary to address any governmental issues that may arise.

In closing, the B.C. Model 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 Model Order. Rather, it is intended as a practical guide to the Bench and Bar to ensure that both are acquainted with typical terms of an initial receivership order, so that departures from such terms can be readily and easily highlighted for consideration by simply blacklining any changes made to the Model Order.