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COURT FILE NUMBER	1801-09188
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	THIRD EYE CAPITAL CORPORATION
RESPONDENTS	RANCH ENERGY CORPORATION, OPSMOBIL 1734163 ALBERTA INC., 1859821 ALBERTA INC., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC., AIR DALLAIRE LTD., AND K.L. CAPITAL CORP.

**BRIEF OF THE BRITISH COLUMBIA OIL AND GAS COMMISSION
BEFORE THE HONOURABLE JUSTICE K.M. HORNER
TO BE HEARD IN JUSTICE CHAMBERS OCTOBER 18, 2018, at 1:30 P.M.**

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I. INTRODUCTION, FACTS, AND SUMMARY OF THE BCOGC'S POSITION

1. By application filed October 17, 2018 and amended on November 2, 2018 (collectively, the "**Application**"), Predator Oil BC Ltd. ("**Predator**") applied to the Court seeking relief relating to certain petroleum and natural gas assets located in British Columbia (the "**Assets**") currently operated by Ernst & Young Inc. as receiver and manager (the "**Receiver**") of the insolvent debtor, Ranch Energy Corporation ("**Ranch**").

2. Predator, the Receiver, and Third Eye Capital Corporation ("**Third Eye**"), have each filed Briefs of Argument and Predator has filed a Reply Brief. The Receiver and Third Eye have both raised procedural issues in respect of the Application, including that Predator lacks standing to bring the Application, ought to have applied to lift the stay in advance of bringing the Application, and may not seek advice and directions (the "**Procedural Issues**"). The BCOGC takes no position in these proceedings as to the Procedural Issues.

3. The BCOGC is a regulatory agency which oversees the safe, efficient, orderly, and environmentally responsible exploration, development, and management of energy resources in British Columbia ("**B.C.**").[1] It does so through legislation and regulations, including the *Oil and Gas Activities Act* ("**OGAA**").[2]

4. In ordinary circumstances, only a person who has been issued a permit by the BCOGC pursuant to the OGAA (a "**Permitee**"), or a person deriving its rights through a Permittee (an "**Authorized Operator**"), may operate oil and gas assets.[3]

5. As part of its mandate, the BCOGC issues permits to oil and gas operators or potential oil and gas operators in B.C. under the OGAA. Permitees are responsible for abandoning, plugging, and restoring wells and associated sites.[4] The BCOGC only authorizes one Permittee to conduct an oil and gas activity, and each well, facility, and pipeline has a

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[1] O'Hanley Affidavit, at paras 4-7.
[2] *Oil and Gas Activities Act*, SBC 2008, c 36 [OGAA] [**TAB 1**].
[3] *Oil and Gas Activities Act*, SBC 2008, c 36, at s. 21, 25 and 29 [OGAA] [**TAB 1**]; Affidavit of James O'Hanley, sworn November 2, 2018, at para 17 [O'Hanley Affidavit].
[4] O'Hanley Affidavit, at para 9.

unique identifier with one authorized Permittee.[5] Thus, while the BCOGC allows Permittees to reach private agreements with other individuals and entities, it interacts with and recognizes only the actual Permittee. Each permit must be issued or transferred pursuant to the OGAA.

6. In addition, Permittees and Authorized Operators must operate oil and gas assets in accordance with the OGAA. Section 34 of the OGAA specifies that a Permittee cannot begin or carry out oil and gas activities unless it owns the subsurface rights or has an agreement with the owner of the subsurface.[6] If a Permittee does not have the required interest, it is required to "immediately suspend all oil and gas activities and related activities being carried out on that land, unless the commission approves the continuation of those activities" under limited circumstances.[7]

7. The BCOGC has the power to order, at its discretion, that oil and gas related activities cease, require that wells and facilities be shut-in, to take over the operations of a site itself, or to cancel or transfer the Permits in accordance with the OGAA.[8]

8. The regulatory permits required to operate the Assets (the "**Permits**") are in Predator's name. On May 8, 2017, it would appear that Predator and Ranch entered into an asset purchase and sale agreement (the "**APA**"), through which Ranch purchased the Assets from Predator.[9] The sale of the Assets apparently closed on July 10, 2017.[10] It would appear that Predator was to hold the Permits in trust for Ranch pursuant to the terms of the Trust Agreement,[11] until the Permits could be transferred to Ranch pursuant to the OGAA.[12]

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[5] O'Hanley Affidavit, at para 17.
[6] OGAA, s. 34 [**TAB 1**].
[7] OGAA, s. 39 [**TAB 1**].
[8] O'Hanley Affidavit, at para 20.
[9] Affidavit of Ryan Tobber, sworn October 16, 2018, at para 4 [Tobber Affidavit].
[10] Tobber Affidavit, at para 5.
[11] Tobber Affidavit, at paras 6-7.
[12] Third Report of the Receiver, dated October 17, 2018, at para 8.

9. After closing of the APA, the Permits, as well as the regulatory obligations associated with them, remained (and continue to be held) in Predator's name.

10. From the perspective of the BCOGC:

(a) Ranch derived through Predator (as holder of the Permits), any rights it had to operate the Assets (the "**Ranch Authority**"). Upon the granting of the Receivership Order, the Receiver's authority to operate the Assets was pursuant to the Ranch Authority;

(b) At paragraph 16 of its Brief, Third Eye has quoted section 4(a) of the original Receivership Order granted July 19, 2018 (the "**Prior Receivership Order**"), which was amended on August 7, 2018 with the consent, *inter alia*, of Third Eye (the "**Receivership Order**"), rather than quoting from section 4(a) of the operative Receivership Order. Section 4(a) of the Receivership Order actually states that the Receiver may:

> ...take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include, without limiting the foregoing, any right the Receiver may have, including pursuant to section 14.06(4) of the BIA, to abandon, dispose of or otherwise release any interest in any of the Debtor's real property, or any right in any immovable, in compliance with applicable laws;

(c) The BCOGC contests any assertion that that the Receivership Order authorizes the Receiver to operate the Assets unlawfully, as more particularly discussed below. For the Receiver to lawfully operate, it must be an Authorized Operator or become a Permittee via the BCOGC's permit transfer process in accordance with the OGAA;[13]

[13] OGAA, at s. 21 and 25; See also O'Hanley Affidavit at para 18 [**TAB 1**].

(d) The BCOGC further contests that this Court has the authority to make any Order which would allow the Assets to be operated by any party in contravention of the law, including the OGAA;[14] and

(e) Predator and Ranch (and therefore now the Receiver) appear to be entangled in a co-dependent relationship with respect to operation of the Assets (the "**Codependency**"). Since Predator is the Permittee, in order for the Receiver or any third party to lawfully operate the Assets, it would need to be an Authorized Operator. Similarly, although Predator does not seek to operate the Assets itself, Predator or any third party seeking to become operator of the Assets would need permission from the Receiver to produce from the subsurface tenure held by Ranch. Given that the Court cannot make an order that contravenes the law, if the Receiver is not found to be an Authorized Operator, the Codependency necessitates that Predator and the Receiver cooperate if they wish the Assets to continue to be operated and not potentially ordered to be shut-in.

11. On October 2, 2018, the Receiver issued a Notice of Disclaimer in respect of an agreement dated June 16, 2017, between Predator and Ranch (the "**Trust Disclaimer**"), which Predator argues provided Ranch with a beneficial interest in the Permits (the "**Trust Agreement**").[15] Thereafter, Predator took the position that Ranch and the Receiver were no longer legally entitled to operate the Assets. Predator argues that Ranch's disclaimer of the Trust Agreement means, *inter alia*, that it no longer holds any beneficial interest in the Permits, and is therefore no longer entitled to operate the Assets.

12. The Receiver and Third Eye argue, *inter alia*, that the Receiver continues to have a right to operate which arises through agreements between Ranch and Predator other than the Trust Agreement. They also assert that Predator is not entitled to operate the Assets itself, to which Predator responds that it does not seek to operate the Assets but

[14] *Re Big Sky Living Inc.,* 2002 ABQB 659, at para 46 [*Big Sky*] [**TAB 2**].
[15] O'Hanley Affidavit, at para 13.

wishes that they be operated according to law. Third Eye also appears to argue in paragraphs 16 and 17 of its Brief (after quoting the superseded Prior Receivership Order), that the Receivership Order alone operates to confer upon the Receiver the authority to operate the Assets.

13. In light of the dispute, the BCOGC requires that the Assets be lawfully operated in accordance with OGAA. In light of the dispute that has arisen between the Receiver and Third Eye on the one hand and Predator on the other, the BCOGC made inquires of, *inter alia*, the Receiver as to the basis upon which it asserts that it has authority to operate the Assets (the "**Inquiries**") and was provided with a response which is Exhibit "B" to the Affidavit of James O'Hanley, filed November 2 (the "**O'Hanley Affidavit**"). In connection with the Inquires, without limiting or constraining the BCOGC's rights and obligations to act under its statutory mandate as it may determine to be appropriate, the BCOGC will consider the Court's determinations respecting whether the Receiver is an Authorized Operator.

14. From the BCOGC's perspective, it is also theoretically possible that a third party could operate the Assets. Given the Codependency noted above, such an arrangement would also require the agreement of both Predator and Ranch, however. On November 2, 2018, Tidewater Midstream and Infrastructure Ltd. ("**Tidewater**") filed an Affidavit in these proceedings which contained a proposal that Predator and the Receiver retain Tidewater to operate the Assets under Predator's Permits.[16]

15. For the record and the avoidance of any doubt, the BCOGC contests a receiver's entitlement to disclaim oil and gas and related assets on grounds including those addressed in the *Orphan Well Association v Grant Thornton Limited* decision ("***Redwater***"),[17] and as such, reserves all of its rights in connection with the Purported

[16] Affidavit of Reed McDonnell, sworn November 2, 2018, at para 4 [McDonnell Affidavit].
[17] *Orphan Well Association v Grant Thornton Limited,* 2017 ABCA 124 [*Redwater*].

Disclaimer (as defined in the O'Hanely Affidavit), the Trust Disclaimer, or any potential future attempts by the Receiver to disclaim any of the Assets or related assets.[18]

16. If the Court were to find that the Receiver is not an Authorized Operator and the parties are unable to reach agreement with respect to the Assets' operation (either by Predator, the Receiver, or a third party such as Tidewater), the BCOGC may determine, in accordance with its statutory mandate, to order that the Assets be shut-in.[19]

17. The BCOGC recognizes that ordering that the Assets be shut-in could very possibly make the Receivership untenable, as it would likely negatively affect the current sales process being administered by the Receiver.[20] It also recognizes that both Predator and the Receiver have communicated that they do not wish for the Assets to be shut-in.[21] From the BCOGC's perspective it is imperative that if the Receiver is not an Authorized Operator to the extent there are risks of such a finding by the Court, the Receiver and Predator work together to reach an agreement, so that the unusual contractual arrangement they created does not potentially result in the Assets being shut-in.

II. ISSUES

18. This Brief is not intended to address the Procedural Issues raised by the Receive and Third Eye. The following issues are addressed in this Brief:

    (a) What courses of action are available to the BCOGC if the Receiver is not found to be an Authorized Operator?

    (b) Can this Court make orders, including the Receivership Order, which contravene the OGAA or allow the Receiver or a third party to act unlawfully?

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[18] O'Hanley Affidavit, at paras 13 and 23.
[19] O'Hanley Affidavit, at para 23.
[20] O'Hanley Affidavit, at para 22.
[21] O'Hanley Affidavit, at para 20.

III. THE BCOGC'S AVAILABLE COURSES OF ACTION

19. As noted above, the BCOGC recognizes that an Authorized Operator may operate oil and gas assets and, without limiting or constraining the BCOGC's rights and obligations to act under its statutory mandate as it may determine to be appropriate, looks to the Court to determine the narrow legal issue of whether the Receiver is an Authorized Operator (i.e. whether a trust or agency agreement, or some other agreement entitling Ranch to operate the Assets, exists at law between Predator and Ranch).

20. If the Receiver is held to be an Authorized Operator by the Court, then in the BCOGC's view the Receiver is entitled to operate the Assets pursuant to section 21 of the OGAA, and may continue to do so.

21. If the Receiver is found not to be an Authorized Operator, then in BCOGC's view it is not authorized to continue operating the Assets under the OGAA without Predator's consent or receipt of a transfer of the Permits from the BCOGC. Predator and the Receiver may also together each provide the consents required for Tidewater or another third party operator to access and operate the Assets.

22. If the Receiver is not an Authorized Operator, and Predator and the Receiver cannot come to an agreement regarding operation of the Assets by a third party operator, the BCOGC has the power to order that the Assets be shut-in, take over operation of the Assets itself, or take such other steps or make such other decisions that it considers necessary or appropriate in the circumstances.

IV. THE COURT CANNOT MAKE ORDERS WHICH ALLOW THE RECEIVER OR THIRD PARTIES TO ACT UNLAWFULLY

23. The Receivership Order requires that the Receiver must continue to comply with federal and provincial laws and regulations is explicitly recognized in the Receivership Order, and is also acknowledged in Canadian case law.[22]

24. Although the Receivership Order empowers the Receiver to "manage, operate, and carry on the business of the debtors",[23] it does not provide the Receiver with the right to operate the Assets in contravention of the OGAA, or in contravention of other laws and regulations.

25. Paragraph 4 of the Receivership Order, which sets out the Receiver's powers, explicitly recognizes that the Receiver continues to be bound by federal and provincial law. Paragraph 4(p) empowers the Receiver:

> (p) to apply for any permits, licenses, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of, and if thought desirable by the Receiver, in the name of the Debtors.

26. Similarly, paragraph 4(s) of the Receivership Order empowers the Receiver to "take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations". The Receiver is still bound by all applicable laws and statutory regulations, including the BCOGC's rules and regulations.

27. These paragraphs plainly recognize that the Receiver is still obligated to apply to obtain permits, licenses, approvals or permissions from governmental authorities when required to do so.

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[22] *Strathcona County v PriceWaterhouseCoopers Inc.,* 2005 ABQB 559, at paras 43-46 [**TAB 3**].
[23] Amended Receivership Order, granted August 7, 2018, at para 4(c).

28. Paragraph 10 of the Receivership Order also supports this notion. It grants a stay over "all rights and remedies ... against the Debtors, the Receiver, or affecting the Property", but also explicitly states that:

> ...nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment...

29. As such, paragraph 10 of the Receivership Order makes it clear that the Receiver must still comply with legislation and regulations relating to health, safety, and the environment, and is not entitled to carry on any business that the Debtor was not entitled to.

30. To summarize, nothing in the Receivership Order confers authority upon the Receiver to operate the Assets if it would otherwise be unlawful to do so. If it is determined that this is not an available option, the Receiver is not entitled by virtue of the Receivership Order to operate the Assets without the required Permits or consent of the Permittee.

31. The provisions of the Receivership Order echo the common law in Alberta and Canada generally: that receivers and managers are still required to comply with the law, whether federal or provincial.

32. They also comply with the general rule that the Court is not authorized to grant exemptions from statutes. As the Alberta Court of Queen's Bench explained in *Re Big Sky Living Inc.*:

> ...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 [*Environmental Protection and Enhancement Act*, which is not applicable in the present case] itself. As was held in

Lindsay, the Court has no general jurisdiction to grant exemptions from statutes.[24]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ~~2nd~~ 5th CN day of November, 2018.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: ______________________________
Christa Nicholson
Counsel for the British Columbia Oil and Gas Commission

[24] *Big Sky*, at para 46 [**TAB 2**].

I. TABLE OF AUTHORITIES

1. *Oil and Gas Activities Act*, SBC 2008, c 36
2. *Re Big Sky Living Inc.,* 2002 ABQB 659
3. *Strathcona County v PriceWaterhouseCoopers Inc.*, 2005 ABQB 559

B.C. Statutes
Oil and Gas Activities Act
Part 3 — Oil and Gas Activities (ss. 21-43)
Division 1 — Permits

Most Recently Cited in: Jorgensen and British Columbia (Oil and Gas Commission), Re , 2017 CarswellBC 3699 | (B.C. Oil & Gas App. Trib., Aug 8, 2017)

S.B.C. 2008, c. 36, s. 21

s 21. Permit required

Currency

21.Permit required
Subject to section 23, a person must not carry out an oil and gas activity unless

(a) either

(i) the person holds a permit that gives the person permission to carry out that oil and gas activity, or

(ii) the person is required to carry out that oil and gas activity by an order issued under section 49, and

(b) the person carries out the oil and gas activity in compliance with

(i) this Act and the regulations,

(ii) a permit issued to the person, if any, and

(iii) an order issued to the person, if any.

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

End of Document

B.C. Statutes
Oil and Gas Activities Act
Part 3 — Oil and Gas Activities (ss. 21-43)
Division 1 — Permits

Most Recently Cited in: Penalty Ranch Ltd. and British Columbia (Oil and Gas Commission), Re , 2018 CarswellBC 1707 | (B.C. Oil & Gas App. Trib., Jun 22, 2018)

S.B.C. 2008, c. 36, s. 25

s 25. Permits and authorizations issued by commission

Currency

25.Permits and authorizations issued by commission
25(1) Subject to subsection (1.1), on application by a person under section 24 and after considering

(a) written submissions made under section 22(5), if any, and

(b) the government's environmental objectives, if any have been prescribed for the purposes of this section,

the commission may issue a permit to the person if the person meets the requirements prescribed for the purposes of this section.

25(1.1) The Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the commission's power under section 8 or subsection (1) of this section, and the commission must comply with the direction despite any other provision of

(a) this Act, the regulations or an order made under this Act, or

(b) a specified enactment.

25(2) In issuing a permit under subsection (1), the commission

(a) must specify the oil and gas activities the person is permitted to carry out, and

(b) may impose any conditions on the permit that the commission considers necessary.

25(3) A permit and any authorizations granted to the applicant for the permit may be issued as a single document.

25(4) If the commission issues a permit under subsection (1), the commission must provide notice, in accordance with subsection (5), to the land owner of the land on which an operating area is located.

25(5) A notice under subsection (4) must

(a) advise the land owner of the issuance of the permit and of the location of the proposed site of an oil and gas activity on the land owner's land, and

(b) state that the land owner may appeal under section 72 the decision to issue the permit, and include an address to which an appeal may be sent.

25(6) A permit holder must not begin an oil and gas activity on a land owner's land before the expiry of 15 days from the day the permit was issued, unless the land owner consents in writing to the activity beginning before the expiry of that period.

Amendment History
2010, c. 9, s. 19; 2014, c. 10, s. 4; 2015, c. 40, s. 6

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

End of Document

B.C. Statutes
Oil and Gas Activities Act
Part 3 — Oil and Gas Activities (ss. 21-43)
Division 1 — Permits

Most Recently Cited in: ARC Resources Ltd. and British Columbia (Oil and Gas Commission), Re , 2018 CarswellBC 1708 | (B.C. Oil & Gas App. Trib., Jun 26, 2018)

S.B.C. 2008, c. 36, s. 26

s 26. Actions by commission respecting permit

Currency

26.Actions by commission respecting permit

26(0.1) In this section, **"associate"**, in relation to a permit holder or applicant, means any of the following, as applicable:

(a) an agent of the applicant or permit holder;

(b) a director, officer or shareholder of the applicant or permit holder;

(c) a person who, in the opinion of the commission,

(i) may have influence over the applicant or permit holder, or

(ii) may be able to affect the activities permitted by the permit.

26(1) The commission may

(a) refuse to issue a permit,

(b) suspend a permit or a permission specified in a permit,

(c) cancel a permit or a permission specified in a permit, or

(d) amend a permit.

26(2) Without limiting the authority of the commission under subsection (1), the commission may make a decision under subsection (1) if the applicant or permit holder, or an associate of the applicant or permit holder, does any of the following:

(a) contravenes or has contravened

(i) this Act, the regulations, a permit, an authorization or an order issued under this Act, or

(ii) the *Petroleum and Natural Gas Act* or regulations made under that Act;

(b) fails to meet or no longer meets any of the conditions of section 24(4);

(c) fails to meet or no longer meets the requirements prescribed for the purposes of section 25(1), if any;

(d) begins an oil and gas activity permitted by a permit but then fails to carry out or continue that oil and gas activity;

(e) engages in or has engaged in a pattern of conduct that shows, in the commissioner's opinion, that the person is unfit to have a permit;

(f) is or has been convicted of an offence under

(i) this Act or any other enactment, or

(ii) a law enacted by the government of Canada, another province of Canada or a foreign jurisdiction

for conduct that shows, in the commissioner's opinion, that the person is unfit to have a permit.

26(3) Without limiting the authority of the commission under subsection (1), the commission may make a decision under subsection (1) with respect to an applicant or permit holder if the applicant or permit holder is an employer, employee, officer, director or agent of a

(a) permit holder against whom the commission has made a decision under subsection (1), or

(b) permit holder that has an employee, officer, director or agent against whom the commission has made a decision under subsection (1).

26(4) Without limiting the authority of the commission under subsection (1), the commission may make a decision under subsection (1) with respect to a permit holder who holds more than one permit for any contravention by the permit holder of

(a) any of the permit holder's permits, or

(b) any order issued to the permit holder with respect to oil and gas activities permitted under any of the permit holder's permits.

26(5) If the commission suspends or cancels a permit or a permission under subsection (1)(b) or (c), the commission may also suspend or cancel an authorization issued to the permit holder for a related activity of an oil and gas activity permitted by the permit, whether or not a specified enactment prohibits the suspension or cancellation of the authorization or requires the commission to make a finding other than the suspension or cancellation of a permit before suspending or cancelling an authorization.

26(6) The commission must give a permit holder an opportunity to be heard before making a decision under subsection (1)(b), (c) or (d) or (5) and must notify the permit holder of its decision under any of those provisions.

26(7) If the commission refuses under subsection (1) to issue a permit, the commission must provide notice, in accordance with subsection (8), to the land owner of the land notified by the applicant under section 22(2).

26(8) A notice under subsection (7) must advise the land owner

(a) that the commission has refused to issue a permit,

(b) that the applicant for the permit may, in relation to the refusal, request a review under section 70 or appeal under section 72, and

(c) that the land owner may, on request, be a party to an appeal referred to in paragraph (b).

Amendment History
2014, c. 10, s. 5; 2018, c. 15, s. 3

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

B.C. Statutes
Oil and Gas Activities Act
Part 3 — Oil and Gas Activities (ss. 21-43)
Division 1 — Permits

S.B.C. 2008, c. 36, s. 29

s 29. Transfer of permit and authorizations

Currency

29.Transfer of permit and authorizations

29(1) On application in writing signed by both a permit holder and a person who wants to acquire the permit, the commission

(a) may transfer the permit to that person, subject to any conditions the commission considers necessary, and

(b) if the commission transfers the permit under paragraph (a), must transfer, despite anything in a specified enactment prohibiting the transfer, all authorizations issued to the permit holder for related activities of an oil and gas activity permitted by the permit.

29(1.1) On application in writing signed by both an authorization holder and a person who wants to acquire the authorization, the commission may transfer, despite anything in a specified enactment prohibiting the transfer, the authorization to that person, subject to any conditions the commission considers necessary.

29(1.2) Despite subsection (1), an application under that subsection is not required to be signed by the permit holder if

(a) the permit is cancelled under section 26 or 33,

Proposed Amendment — 29(1.2)(a)

(a) the permit is cancelled under section 26, 33 or 43.3,

2018, c. 15, s. 5 [Not in force at date of publication.]

(b) the permit is declared to be spent under section 27,

(c) the permit relates to an orphan site under section 45, or

(d) the commission is satisfied that the permit holder no longer exists or cannot be located.

29(2) In deciding whether to grant an application under subsection (1), the commission may consider

(a) any of the matters referred to in section 26(2) to (4), and

(b) any other matter that may be considered under a specified enactment,

as though the person to whom the permit holder wants the permit to be transferred were an applicant for the permit and an authorization referred to in subsection (1)(b) of this section.

29(2.1) Subsection (2) applies to a transfer under subsection (1.1).

29(2.2) If the commission decides to grant an application under subsection (1) in relation to a permit described in subsection (1.2)(a) or (b), the permit is reinstated.

29(2.3) If the commission decides to grant an application under subsection (1) in relation to a permit described in subsection (1.2)(c), the orphan site designation is cancelled.

29(3) A person to whom a permit or authorization is transferred under subsection (1) or (1.1) has the same rights and obligations as if the permit or authorization had been issued to that person.

Amendment History
2010, c. 9, s. 21; 2015, c. 40, s. 8; 2018, c. 15, s. 4

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

End of Document

B.C. Statutes
Oil and Gas Activities Act
Part 3 — Oil and Gas Activities (ss. 21-43)
Division 2 — Rights and Obligations

Most Recently Cited in: Dilworth and British Columbia (Oil and Gas Commission), Re , 2016 CarswellBC 4006 | (B.C. Oil & Gas App. Trib., Jun 7, 2016)

S.B.C. 2008, c. 36, s. 34

s 34. Required ownership, interest or authorization

Currency

34.Required ownership, interest or authorization
34(1) In this section:

"entry agreement" means an agreement

(a) that is between

(i) a specified permit holder, and

(ii) a land owner of an area of land, and

(b) that authorizes the specified permit holder to enter, occupy or use the land owner's area of land for the purposes of constructing and operating a pipeline other than a flow line;

"specified permit holder" means a pipeline permit holder who holds a permit respecting a pipeline other than a flow line.

34(2) Subject to sections 23 and 39 and subsection (3) of this section, a permit holder must not begin or carry out an oil and gas activity on or under an area of land unless the permit holder,

(a) if the area of land is not a highway, either is the owner in fee simple of the area of land or has acquired the area of land or the necessary interests in the area of land in accordance with

(i) the *Land Act*,

(ii) Part 16 or 17 of the *Petroleum and Natural Gas Act*, or

(iii) subsection (3) of this section, or

(b) if the area of land is a highway, has obtained an authorization required under an enactment to enter, occupy or use the area of land.

34(3) Subject to subsection (4), if a specified permit holder has failed to obtain an entry agreement, the specified permit holder may expropriate, in accordance with the *Expropriation Act*, as much of the land or interests in it of any person as may be necessary for constructing and operating the pipeline authorized by the permit.

34(4) The land that may be expropriated under subsection (3) must not exceed 18 m in breadth.

34(5) On application by a specified permit holder, the commission may authorize, on any conditions the commission considers appropriate, an expropriation, in accordance with the *Expropriation Act*, that exceeds the breadth specified in subsection (4).

Amendment History
2010, c. 9, s. 24

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

B.C. Statutes
Oil and Gas Activities Act
Part 3 — Oil and Gas Activities (ss. 21-43)
Division 2 — Rights and Obligations

Most Recently Cited in: FortisBC Energy Inc. v. Surrey (City), 2013 BCSC 2382, 2013 CarswellBC 3919, 19 M.P.L.R. (5th) 178, [2014] B.C.W.L.D. 2098, [2014] B.C.W.L.D. 2099, [2014] B.C.W.L.D. 2124, 237 A.C.W.S. (3d) 519, 112 L.C.R. 89 | (B.C. S.C., Dec 31, 2013)

S.B.C. 2008, c. 36, s. 39

s 39. Suspension of activity

Currency

39.Suspension of activity

39(1) If a permit holder begins an oil and gas activity but ceases to have the interests in land or authorization referred to in section 34 necessary to carry out that activity, the permit holder must immediately suspend all oil and gas activities and related activities being carried out on that land, unless the commission approves the continuation of those activities under subsection (2).

39(2) The commission, on application by a permit holder referred to in subsection (1), may

(a) approve the continuation of the permit holder's oil and gas activities and related activities, and

(b) on granting an approval under paragraph (a), impose additional conditions on the permit holder's permit and authorizations, if any.

39(3) A permit holder with permission to drill or operate a well must immediately suspend its drilling and operations if

(a) the permit holder ceases

(i) to be the owner of the petroleum and natural gas rights or the holder of the location in respect of the well,

(ii) to have a valid agreement with the owner of the rights or the holder of the location referred to in subparagraph (i) authorizing the drilling or operation, as applicable, or

(iii) to hold a storage reservoir lease issued under section 130 of the *Petroleum and Natural Gas Act*, or

(b) the minister rescinds a declaration made under section 24(5) with respect to the permit holder and those activities.

39(4) A permit holder who suspends activities under subsection (1) or (3) must

(a) immediately notify the commission of the suspension,

(b) comply with the prescribed requirements, and

(c) carry out any actions as directed by the commission.

Amendment History

2010, c. 9, s. 27

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

End of Document

2002 ABQB 659
Alberta Court of Queen's Bench

Big Sky Living Inc., Re

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

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

Slatter J.

Judgment: June 3, 2002
Docket: Edmonton 96892

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

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities

Headnote

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

Annotation

In this decision, Slatter J. analyses the scope of an ex parte order appointing an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act* (the "BIA") which permits an interim receiver to be appointed where the court is satisfied that a notice by a secured creditor is about to be sent or has been sent under s. 244(1) of the BIA. Slatter J. is to be commended for his thorough analysis of the scope and breadth of the order sought. Such an analysis is, unfortunately, not a common practice in the case of ex parte orders even though such orders may have very significant impact on the rights of third parties. It is also uncommon to see a similar analysis of the powers granted to a court-appointed receiver. Such an analysis is very long overdue.
As Slatter J. states, s. 47 of the BIA was enacted in 1992 for the purpose of protecting the rights of a secured creditor during the 10-day period that the secured creditor is prevented from enforcing its security. Prior to its amendment in 1992, the BIA provided for the appointment of an interim receiver to take possession of the property of the debtor during the period between the filing of a petition in bankruptcy and the making of a bankruptcy receiving order. Upon the bankruptcy adjudication, the appointment of an interim receiver is terminated and the trustee of the bankrupt estate assumes the powers over the property of the debtor granted by the BIA. Section 47(1) authorizes the appointment of an "interim" receiver. A logical interpretation of the section, taking into account the prior provisions of the BIA authorizing the appointment of an interim receiver when a

petition in bankruptcy is filed, would be to have the appointment of an interim receiver under s. 47(1) terminate when the secured creditor has the right to enforce its security. Slatter J. recognized the interim nature of the appointment but did not make any finding with regard to the period of its efficacy since the debtor had consented to the making of the order.

In this decision, Slatter J. clearly recognized the impact on third parties of many of the provisions of the draft order and considered the various draft sections from that perspective. The difficulty faced by Slatter J. was that there has been no significant debate as to whether or not a s. 47(1) interim receiver should be used for the purpose of assisting a secured creditor in enforcing its security as opposed to protecting the assets in the interval between the appointment of the interim receiver and the time the secured creditor is entitled to enforce its security. That section of the BIA was not enacted with the former purpose in mind and, as a result, no attempt was made in it to determine what rights should be available to a secured creditor and the effect of those rights on other parties.

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

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

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

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

David E. Baird, Q.C.

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

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ss. 69-69.4 — considered

s. 215 — considered

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s. 5 — considered

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

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s. 64(c) — considered

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Alberta Rules of Court, Alta. Reg. 390/68
R. 386 — considered

R. 387(2) — considered

R. 548 — considered

RULING on scope of order appointing interim receiver.

***Slatter J.*:**

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

Facts

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

3 There are other creditors and interested parties. Country Squire 2000 Inc., the previous owner of the lands, has a second mortgage on the title. 416099 Alberta Ltd. claims an interest in the lands and has filed a caveat to protect it. Atco Gas and Pipelines Inc. has a right-of-way across the lands, and proposes to install a high pressure gas pipeline which may require an increased setback between the right-of-way and the development, and which may therefore affect the value of the property.

Eng-Con Holdings Ltd. has been installing utility infrastructure on the lands. On May 23, 2002 Eng-Con filed a builder's lien on the property for $587,887.

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

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

The Statutory Framework

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

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

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

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

Statutory Protection for an Interim Receiver

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

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

> **14.06(1)** No trustee is bound to assume the duties of trustee in matters relating to assignments, receiving orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.
>
> **(1.1)** In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes an interim receiver or a receiver within the meaning of subsection 243(2).
>
> **(1.2)** Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.
>
> . . .
>
> **(2)** Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment; or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.
>
> **(3)** Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.
>
> . . .
>
> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

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

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

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

13 A further problem with the Order in question is that it is in some respects "legislative" in nature. Not only does it purport to give the Interim Receiver certain powers, and to cut off the rights of others, it then goes on to provide sweeping definitions and descriptions of what those rights and immunities encompass. In many cases the provisions of the Order go far beyond the statutes that are in place. It is generally inappropriate for the Court to define what Parliament has chosen not to define, and to expand at large on what particular statutory provisions mean. These parts of the Order are declaratory in nature. The Court has always been careful about issuing declaratory judgments, and will not issue them when the issues are moot, where the issues are overly abstract or academic, or where there is no necessity on the facts of the particular case to issue a declaration. There are good reasons for these rules, relating to the constitutional division of powers and relating to the role of a common law court in developing the law. Some clauses in the tendered Order are objectionable on this basis.

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

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

Solicitor-Client Notice Requirements

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

Exemption From Notice Requirements

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

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

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

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

Bankruptcy

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

Landlords

20 Clause 5(x) of the order allows the Interim Receiver to surrender any part of any leased premises, "in which case only the prorated portion of the occupation costs shall apply". It is not clear on the record whether Big Sky has any leased premises, but it is clear that any landlord has not been served with notice of this application. There is nothing on the record that would establish any urgency justifying the granting of this type of relief in an interim order on an *ex parte* basis. If the Interim Receiver believes that it has this type of power at law, and the order is merely intended to be declaratory of that power, then the Interim Receiver should simply proceed to exercise the rights it believes it has. However, if the Interim Receiver wishes to have that right declared and crystalized by the Court, and set out in an order that is enforceable by the usual methods, then the Interim Receiver is under an obligation to serve notice on the landlord whose rights are being affected. This is a good example of a provision in the Order which is designed to prospectively cut off the rights of a party who has not been served with any of the proceedings.

Variation of the Order

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

22 It is sometimes argued that the variation clause mitigates any concerns the Court might have about third parties whose rights are affected by the order. The argument is that any such party can simply come forward and have the order varied. While the variation clauses can provide some comfort to the Court, they are not a complete answer. First of all, an order with a variation clause in effect reverses the burden of proof, and there is no reason why the affected party should face that burden when the order was granted *ex parte*. Secondly, the affected party may be prejudiced because it cannot do the prohibited thing without first obtaining leave of the Court, and the passage of time might well prejudice that party. Thirdly, there is an

expense in making the initial application. Here, of course, there is a balancing of interests involved, because the Interim Receiver must have some ability to carry on with the business of a debtor without undue interference by unilateral acts of third parties. However, as a general rule, variation clauses are not a complete answer to the type of sweeping provisions included in this Order.

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

Contracting Parties

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

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

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

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

Restraint on Proceedings

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

(2d) 37, 47 A.R. 174, 50 C.B.R. (N.S.) 78 (Alta. Q.B.).

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

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

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

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

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

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

35 In summary, I am prepared to grant some general protection to the Interim Receiver against litigation. However, the

provisions of the Order should provide that:

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

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

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

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

Employees

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

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

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

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

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

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

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

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

Also relevant is s. 14.06(1.2) of the *Bankruptcy and Insolvency Act,* which deals with the continuation of employment by the Interim Receiver. The exact interplay of these two sections is complex, and while the Receiver might argue that the provincial provision is inapplicable for constitutional reasons, the very presence of these sections makes it inappropriate to include in the Order the sweeping words of paragraph 11. Section 14.06(1.2) does not exempt the debtor's estate or the Interim Receiver from all of the common and statutory law of employment. Nor does that section state that employment is "not continuous"; it merely states that the Interim Receiver is not liable for certain claims *ex officio.*

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

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

Environmental Risks

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

44 The case law on the environmental liability of receivers is sparse and inconsistent. In *Bank of Montreal v. Lundrigans Ltd.* (1992), 92 D.L.R. (4th) 554, 12 C.B.R. (3d) 170 (Nfld. T.D.) the Bank applied for an order appointing a receiver, but with a limit on the environmental liability of the receiver to the net value of any contaminated property. It was submitted that

no receiver would take the appointment without this protection, or an indemnity for these risks that the Bank was not prepared to give. The issue was argued on notice to the federal and provincial governments, who opposed the order. The key finding of the Court was that the various pieces of environmental legislation in question did not purport to impose liability for past environmental damage on receivers, as the definitions of those responsible for such damage did not expressly include receivers. On this interpretation of the legislation the order sought was merely declaratory of the law, namely that the environmental liability of the receiver was limited to the net value of the assets.

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

> Rather than suggest that the legislation must specifically *include* entities not intended to be made liable, the more logical approach would be to expect legislation to *exclude* those not liable. This is precisely the approach taken by Parliament with respect to trustees in bankruptcy. Under a recent amendment to the *Bankruptcy and Insolvency Act*, R.S.C. 1992, c. 27, s. 9, the potential environmental liability of a trustee has been expressly limited. No similar limitation is given to receivers in any legislation and accordingly I conclude that the legislators intended them to fall within the ambit of environmental legislation.
>
> To make the order requested the court would have to find jurisdiction within its own Rules, the *Law and Equity Act* or its inherent jurisdiction. Rule 47 provides that the court may appoint a receiver "either unconditionally or on terms ..." The *Law and Equity Act* empowers the court to appoint a receiver and the order may be made "on terms and conditions that the court thinks just." Neither of these, in my opinion, empowers the court to impose conditions that conflict with statutory duties, rights or liabilities.

The order was refused.

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

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

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

49 There would be nothing objectionable to a provision in the Order which essentially parallels s. 14.06(2) of the *Bankruptcy and Insolvency Act*. While such a provision might be redundant in legal terms, it is helpful to note those

provisions in the Order. However, the Order as drafted goes considerably beyond this. First of all, it deems the Interim Receiver not to be an occupier for the purposes of "environmental legislation". The *Bankruptcy and Insolvency Act* does no such thing. There is no indication what environmental legislation is being referred to, or whether the Court has any jurisdiction to make this type of declaration. No notice has been given to any Department of Environment or other regulator who might have an interest in the matter. These provisions are legislative in nature, in the sense that the Court is being asked to extend general and unlimited immunity to the Interim Receiver.

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

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

52 Paragraph 25 of the Order limits the Interim Receiver's liability for environmental damage to the "Net Realizable Value of the Property" in the estate. Again, the *Bankruptcy and Insolvency Act* contains no such provision. If Parliament had intended a cap on the liability of receivers, it presumably would have provided for one. Furthermore, I note that the Net Realized Value of the property is defined in paragraph 29 as being net of the remuneration of the Interim Receiver and a number of other items including "distributions of proceeds". Accordingly, if the estate was only large enough to pay the secured creditors and the Interim Receiver's compensation, there would be nothing left and the Interim Receiver would be absolved of any liability whatsoever. After distribution of the assets, the Interim Receiver's liability is limited under the Order to the amount of its fees. I am unable to see on what basis the Court could grant this sort of relief *ex parte* and before the Interim Receiver has even gone into possession.

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

General Protection of the Receiver

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

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

unjustified on this record. The Applicant may include in the Order a provision that paraphrases s. 215. A provision paraphrasing s. 247 should also be included.

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

Conclusion

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

Order accordingly.

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

DISTRICT OF ALBERTA
DIVISION NO. 1

COURT NO. 96892
ESTATE NO. _______

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL DISTRICT OF EDMONTON
IN THE MATTER OF
THE INSOLVENCY OF
BIG SKY LIVING INC.

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

ORDER APPOINTING INTERIM RECEIVER

UPON the application of the **HSBC BANK CANADA** (the "Bank"); AND UPON having read the Affidavit of DAVID BELL, filed; AND UPON hearing counsel for the Bank;
AND UPON IT APPEARING that the Bank has a security interest in all present and after-acquired personal property of **BIG SKY LIVING INC.** (the "Debtor"), and has a first mortgage registered against title to certain real property located in the Province of Alberta;
AND UPON IT APPEARING that the Bank has sent to the Corporation the notice prescribed by Subsection 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (as amended) (the "BIA");
AND UPON IT APPEARING to this Honourable Court that there is sufficient urgency and reason for abridging notice of this application;
AND UPON IT APPEARING that it is necessary for the protection of the interests of the Bank and of the Debtor's estate that this Order be granted;
And upon Big Sky not appearing, though served, Atco and Country Squire not appearing, though served, Engcon Holdings appearing on a watching brief;

IT IS HEREBY ORDERED AND DECLARED THAT:

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

2. Effective as of 12:01 a.m. Mountain Standard Time on the date hereof, KMPG Inc. is hereby appointed interim

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

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

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

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

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

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

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

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

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

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

(g) take steps for the preservation and protection of the Property, including, without restricting the generality of the foregoing, to pay any debts, claims, obligations or liabilities, of the Debtor which have priority over the claims of the Bank and to pay such other debts, claims, obligations or liabilities, of the Debtor as the Receiver deems necessary or advisable to protect or properly realize on the Property, provided that all of the aforementioned payments are to be allowed to the Receiver in passing its accounts and shall form a part of the Receiver's First Charge (as defined below) on the Property;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Debtor;

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

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

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

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

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

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

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

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

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

(c) all Persons having Agreements (as hereinafter defined) with the Debtor, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such Agreements or the supply of goods and services and are also hereby restrained from exercising any right of distress, recission, set-off or consolidation of accounts in relation to any indebtedness or obligation in favour of the Debtor or from retaining goods, without the prior written consent of the Receiver or leave of this Honourable Court on proper notice to the Receiver. Without limiting the generality of the foregoing, all Persons are restrained until further Order of this Honourable Court from discontinuing or interfering with any utility or required services to or utilized by the Debtor (including telephone, facsimile or other communication services at the present numbers used by the Debtor in respect of any Property), the furnishing of oil, gas water, heat or electricity, the supply of equipment, computer software, hardware support and electronic, internet access, electronic mail and other data services, so long as the Receiver pays (subject to the other provisions of this Order) the normal prices or charges (other than security or other deposits whether by way of cash, letter of credit or guarantee or otherwise, stand-by fees or similar items, which the Receiver shall have no obligation to pay or grant) for such goods and services received after the date of this Order as same become due and payable in accordance with present payment practices, or as may be hereafter agreed by the Receiver from time to time, or as otherwise may be provided for in this Order. Provided that nothing herein shall prohibit any Person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the date hereof, and all Persons shall continue to perform and observe the terms and conditions contained in any Agreements (as hereinafter defined) entered into with the Debtor whether in connection with any of the Property or otherwise;

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

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

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

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

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

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

prosecution or defence of which will in the judgment of the Receiver, be necessary to properly receive, manage, operate, protect, preserve or realize on the Property or to protect the administration by the Receiver of the Property, and to settle or compromise any such actions, applications, proceedings, administrative hearings or arbitrations which in the judgment of the Receiver should be settled or compromised. The authority hereby bestowed shall extend to such appeals or applications for judicial review as the Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any such application, proceeding or action, administrative hearing or arbitration.

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

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

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

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

15. The Receiver shall be at liberty, from time to time, to pay, from monies in its hands, costs and other expenses relating to the Property, including its own remuneration and disbursements and that of its legal counsel, whether incurred prior to or subsequent to the date of this Order. Any amounts so applied against the Receiver's remuneration and expenses shall constitute advances against the amounts allowed on the passing of the Receiver's accounts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"L.P.L. J. Smith"
JUSTICE OF THE COURT OF QUEEN'S BENCH

OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
ENTERED this *3rd* day of
June, 2002.
"W. Breitkreuz"
REGISTRAR IN BANKRUPTCY

SCHEDULE "A"

AMOUNT $ RECEIVER CERTIFICATE NO.

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

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

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

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

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

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

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

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

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

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

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

DATED the __________ day of _________.
KPMG Inc., as Receiver of the assets, property
and undertaking of
By:______________________________________
Name:
Title:

End of Document

Most Negative Treatment: Distinguished
Most Recent Distinguished: AbitibiBowater inc., Re | 2010 QCCS 1261, 2010 CarswellQue 2812, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, EYB 2010-171844, J.E. 2010-790, [2010] Q.J. No. 4006 | (C.S. Qué., Mar 31, 2010)

2005 ABQB 559
Alberta Court of Queen's Bench

Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)

2005 CarswellAlta 1018, 2005 ABQB 559, [2005] A.W.L.D. 2962, [2005] A.J. No. 915, [2006] 3 W.W.R. 195, 12 M.P.L.R. (4th) 167, 13 C.B.R. (5th) 145, 141 A.C.W.S. (3d) 524, 256 D.L.R. (4th) 536, 386 A.R. 338, 47 Alta. L.R. (4th) 138

Strathcona County (Applicant) and PriceWaterhouseCoopers Inc., Trustee of the Estates of Fantasy Construction Ltd., Madison Development Corporation 1984 Ltd., John Van Leenen, and Irene Jean Van Leenen, Bankrupts (Respondents)

Burrows J.

Heard: June 10, 2005
Judgment: July 21, 2005
Docket: Edmonton BK03-109703, BK03-109704, BK03-109685, BK03-109686

Counsel: Jeneane S. Grundberg, Daniel R. Peskett for Applicant
Michael J. McCabe, Q.C., Rebecca Ratti for Respondent
Jeremy H. Hockin for Sunrise Park Condominium Corporation

Subject: Civil Practice and Procedure; Insolvency; Public; Contracts; Municipal

Related Abridgment Classifications

Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.1 Proceedings against bankrupt
XVI.1.a Before discharge of trustee
XVI.1.a.v Miscellaneous

Municipal law
VII Municipal contracts
VII.9 Miscellaneous

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Miscellaneous issues
Proceedings by county — County issued development permits to F Ltd., which was to build condominium development — Permits were issued subject to express conditions requiring installation of appropriate stormwater management — F Ltd. was to submit grading plans to county officials for review and approval and perform site grading in accordance with those plans — F Ltd. repeatedly failed to provide adequate grading plans and county issued stop orders and eventually commenced action against F Ltd. — County received court order authorizing it to do drainage work itself at expense of F Ltd. and for F

Ltd. to pay $240,000 into court as security — F Ltd. and its sole shareholder never did so and made voluntary assignments in bankruptcy — County performed necessary drainage work at its own expense — County brought application for order declaring that trustee in bankruptcy was responsible for paying F Ltd.'s debt to county in advance of debts to secured creditors — Application granted — Obligation of bankrupt to comply with public safety or environmental standards imposed pursuant to statutory authority must be honoured by trustee using estate assets — F Ltd. undertook such an obligation in undertaking to perform drainage work in public interest, and as such debt survived bankruptcy — Even though secured creditors might not recover as much on their claims, trustee was obligated to use bankrupt's assets to cover costs of drainage work.

Municipal law --- Municipal contracts — General
County issued development permits to F Ltd., which was to build residential development — Permits were issued subject to express conditions requiring installation of appropriate stormwater management — F Ltd. was to submit grading plans to county officials for review and approval and perform site grading in accordance with those plans — F Ltd. repeatedly failed to provide adequate grading plans and county issued stop orders and eventually commenced action against F Ltd. — County received court order authorizing it to do drainage work itself at expense of F Ltd. and for F Ltd. to pay $240,000 into court as security — F Ltd. and its sole shareholder never did so and made voluntary assignments in bankruptcy — County performed necessary drainage work at its own expense — County brought application for order declaring that trustee in bankruptcy was responsible for paying F Ltd.'s debt to county in advance of debts to secured creditors — Application granted — Obligation of bankrupt to comply with public safety or environmental standards imposed pursuant to statutory authority must be honoured by trustee using estate assets — F Ltd. undertook such an obligation in undertaking to perform drainage work in public interest, and as such debt survived bankruptcy — Even though secured creditors might not recover as much on their claims, trustee was obligated to use bankrupt's assets to cover costs of drainage work.

Table of Authorities

Cases considered by *Burrows J.*:

Big Sky Living Inc., Re (2002), 2002 ABQB 659, 2002 CarswellAlta 875, 37 C.B.R. (4th) 42, (sub nom. *Big Sky Living Inc. (Bankrupt), Re)* 318 A.R. 165 (Alta. Q.B.) — considered

Canada Trust Co. v. Bulora Corp. (1981), 39 C.B.R. (N.S.) 152, 1981 CarswellOnt 203 (Ont. C.A.) — referred to

Fantasy Construction Ltd., Re (2005), 2005 ABQB 63, 2005 CarswellAlta 129, 8 C.B.R. (5th) 216 (Alta. Q.B.) — referred to

Lamford Forest Products Ltd., Re (1991), 10 C.B.R. (3d) 137, 8 C.E.L.R. (N.S.) 186, 63 B.C.L.R. (3d) 388, 86 D.L.R. (4th) 534, 1991 CarswellBC 443, 63 B.C.L.R. (2d) 388 (B.C. S.C.) — considered

Midlantic National Bank v. New Jersey Department of Environmental Protection (1986), 106 S.Ct. 755, 474 U.S. 494 (U.S. N.J.) — referred to

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

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1992), 8 C.B.R. (3d) 31n, 7 C.E.L.R. (N.S.) 66n, 83 Alta. L.R. (2d) lxvi, 86 D.L.R. (4th) 567n, 137 N.R. 394, 127 A.R. 396 (note), 20 W.A.C. 396, 3 C.P.C. (3d) 100n (S.C.C.) — referred to

Roadstar Aggregates Inc. (Receiver of) v. Kovacs (2003), 2003 ABQB 861, 2003 CarswellAlta 1497, 2 C.B.R. (5th) 320 (Alta. Master) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3
Generally — referred to

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

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

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

s. 14.06(8) [en. 1997, c. 12, s. 15(1)] — considered

s. 30(1)(g) — referred to

s. 121(1) — considered

Municipal Government Act, R.S.A. 2000, c. M-26
Generally — considered

s. 554 — referred to

s. 624(1) — referred to

s. 639 — referred to

s. 640(2)(c)(iv) — referred to

APPLICATION for declaration that trustee in bankruptcy was bound to pay for drainage work owed to county by bankrupt out of bankrupt's estate.

***Burrows J.*:**

1 Strathcona County seeks a declaration that PriceWaterhouseCoopers, as Trustee in Bankruptcy of the bankrupts, is bound by the terms of Development Permits issued by the County in respect of a condominium project in the County. In particular the County seeks declarations which would have the effect of requiring the Trustee to use the assets of the bankrupt estates to pay the cost of drainage work the Development Permits required be done, but which was not done. The Trustee takes the position that it cannot be required to use estate assets to do the work and that, at best, the Trustee may have a provable claim as a creditor in the bankruptcy.

The Development Permits and Stop Orders

2 In 1999 and 2000 the County issued three Development Permits to Fantasy Construction Ltd., all relating to a proposed multi-family residential development in the County known as Sunrise Park. The first permit, dated May 31, 1999, was for Phase I of the project which covered 12 dwelling units. The second, dated October 4, 1999, was for Phase II covering 14 units. The third was issued on August 30, 2000 for Phases III and IV and covered 25 units.

3 Each of the permits was issued subject to express conditions requiring the installation of appropriate stormwater management. The permits required Fantasy to submit grading plans to County officials for review and approval and then to do site grading in accordance with those plans.

4 At least as of February 2004 titles to various units of the condominium project were in the names of Madison Development Corporation 1984 Ltd. and the individual bankrupts. The bankrupt John Van Leenen is the sole shareholder and

director of both corporate bankrupts.

5 On November 13, 2003 the County issued Stop Orders to Fantasy in respect of all three Development Permits. Grading on the project lands did not comply with the design grades that had been submitted. There had been unauthorized alterations to a berm structure on the property. The Stop Orders required Fantasy to submit a new surface drainage plan for approval by November 30, 2003 and to complete the drainage work by May 31, 2004. Fantasy submitted a new drainage plan in response to the Stop Orders but there were a number of deficiencies and it was not approved.

The Drainage Action

6 On February 6, 2004 the County commenced an action by Originating Notice against Fantasy, Madison and the Van Leenens (the "developers") seeking declarations that they were in breach of the *Municipal Government Act*, the Strathcona County Land Use Bylaw, the Development Permits, and the Stop Orders. The County also sought a mandatory injunction pursuant to the *Municipal Government Act*, s. 554 requiring the developers to complete the necessary grading and drainage work to the satisfaction of the County. This proceeding is referred to as "the drainage action".

7 The developers did not contest the drainage action. They acknowledged that the County was entitled to the relief claimed. However, they asked for more time to comply with the Stop Orders.

8 On February 18, 2004 Sanderman J. issued an Order, founded on the developers' concessions, declaring the developers in breach of the Act, Bylaw, Development Permits, and Stop Orders, and granting the mandatory injunction which the County had sought. The developers were required to submit drainage plans prepared by an engineer to the satisfaction of the County by March 31, 2004.

9 The plans were not submitted as required by the injunction. The developers sought and were granted time extensions. They submitted plans to the County but they were unacceptable.

10 On June 15, 2004 County personnel inspected the construction site and discovered a contractor doing drainage work though no plan had been approved. When informed that there was no approved plan, the contractor stopped work.

July 22, 2004 Order

11 On July 22, 2004 the County applied before Sanderman J. for further relief in the drainage action. Efforts to get Fantasy to provide an acceptable drainage plan had been in vain. Unapproved drainage work had been done. Counsel who had appeared for Mr. Van Leenen in February had ceased to act. Mr. Van Leenen had fired the successor counsel just before the July 22 application. Purchasers of condominium units had advised the County that they had lost all confidence in Fantasy and would not allow Fantasy on their property to do drainage work. The transcript of the proceedings on July 22 demonstrates that Sanderman J. concluded that Mr. Van Leenen was solely at fault for the drainage issue not having been resolved by that date.

12 The main thrust of the July 22 application was to put in place a procedure by which the drainage work would get done without further involvement of the developers, but at their expense.

13 The County had sought a temporary injunction preventing the developers from engaging in unapproved drainage work. However, it was plain that approved work would not get done if any reliance was placed on the developers. So Sanderman J. issued a permanent injunction requiring them "to cease drainage related work including trenching, excavation and pouring of concrete". The Order also declared that the County would be at liberty to engage an engineer to complete a satisfactory drainage plan and to complete the required work at the expense of the developers. The Order further required:

- Fantasy and Madison to pay $240,000 into Court by July 30, 2004 as security for the completion of the work,

- Fantasy, Madison and the Van Leenens not to sell any of the lands, and

• any funds received on existing sales to be paid into Court pending further directions.

14 On August 12, 2004 the developers, having retained new counsel, applied to Sanderman J. for a variation of the July 22 Order on the ground that they had not had notice of the application and because the obligations imposed by the Order were "unnecessarily onerous and difficult to comply with". In an affidavit filed in support of this application Mr. Van Leenen swore that Fantasy, Madison and he, himself, did not have the funds required to be paid into Court and attempts to borrow them had been unsuccessful.

15 On that application Sanderman J. suspended the requirement that Fantasy and Madison pay $240,000 into Court as security until August 26, 2004.

Safety Code Proceedings

16 At the same time as the drainage action was proceeding, the County was also taking steps against Fantasy and Madison in relation to violations of the Safety Code. Those proceedings were also under Sanderman J.'s case management. Mr. Van Leenen's actions in that context were similarly uncooperative and frustrating to the County, purchasers of condominium units and the Court.

August 26, 2004 Order

17 On August 26, 2004 Mr. Van Leenen, who had again changed counsel, submitted, based on his construction experience, that the required drainage work would not cost more than $45,000 so that security of $240,000 was excessive. He made various proposals for dealing with the safety code and drainage concerns and other issues. Both the County and the Court found the proposals unacceptable. Sanderman J. ordered Fantasy and Madison to pay $625,000 and the Van Leenens to pay $125,000 into Court by October 1, 2004 as security in respect of the safety code deficiencies, and ordered that all assets owned by the developers be frozen. The obligation created by the July 22 Order to pay $240,000 into Court as security in respect of the drainage work continued to be outstanding.

The Bankruptcies

18 The developers assigned themselves into bankruptcy on September 9 and 10, 2004. PriceWaterhouseCoopers Inc. was appointed Trustee of all four bankrupt estates.

Drainage Work Not Done

19 Though, at the time of the July 22 Order, the intention clearly was that the County would do the drainage work that the developers had not done, that did not occur by the time of the bankruptcies. The intention had been that the County would do the work at the expense of the developers who would pay $240,000 into Court to secure payment. The funds were not paid into Court. The County did not therefore do the work.

20 After the assignments into bankruptcy, the County took the position that the Trustee was obliged to carry out the drainage work. In October 2004 the Trustee attempted to find a practical solution and applied for an order appointing the Trustee as a receiver and authorizing it to charge the bankrupt estate in priority to other secured creditors in order to obtain funds to do the required work. Creditors who would have realized no benefit from the proposed work and who feared deterioration of their security position opposed that application. I declined to grant the receivership order because, in my view, the question of whether the proposed course of action was in the interests of the bankrupt estates, and should therefore be undertaken, was for the Inspectors and Trustee, not the Court, to determine. (*BIA* s. 30(1)(g))

21 It was essential that some of the required work not be further delayed. It was done. At least some of it was done

pursuant to an order preserving the County's right to claim that the Trustee ought to have done it and without prejudice to the County's claim to have the cost paid out of the bankrupt estates. (Order of November 25, 2004)

22 In January 2005 the Sunrise Park Condominium Corporation, supported by the County, applied in early 2005 to have the bankruptcies of Fantasy and Madison annulled. I dismissed the application. ([*Fantasy Construction Ltd., Re*] (2005), 8 C.B.R. (5th) 216 (Alta. Q.B.))

County's Position

23 The County, supported by the Sunrise Park Condominium Corporation, now takes the position that the obligation to do drainage work according to a County approved plan, survived the bankruptcy and is now an obligation of the Trustee. They seek a declaration to that effect and an order requiring that the drainage work, for which an engineering firm retained by the County has prepared a plan, be completed at the expense of the bankrupt estates.

***Panamericana* Case**

24 The County cites *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.) (leave to appeal to the Supreme Court of Canada refused, (1992), 86 D.L.R. (4th) 567n (S.C.C.)) in support of its application. Northern Badger was the operator of several oil wells. The Energy Resources Conservation Board regulated oil well operations. The Board had ordered Northern Badger to properly abandon several non-producing wells to make them environmentally safe. The process was expected to cost in excess of $200,000. Northern Badger defaulted on security held by Panamericana and a Court-appointed receiver was put in place. Shortly thereafter a bankruptcy receiving order was issued. Northern Badger's assets were insufficient to cover both Panamericana's secured claim and the abandonment costs. The Alberta Court of Appeal held that the receiver was obliged to use the bankrupt's funds to pay for the well abandonment — to comply with the ERCB's order — even though doing so would prejudice the secured creditor, Panamericana.

25 Laycraft J.A., writing for the Court, articulated the issue as follows: (page 289)

> Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

26 The main argument in support of the secured creditor's position was that the obligation to the Board was a "provable claim" under the *Bankruptcy Act.* It was therefore subject to the scheme of distribution under that Act which gave priority to secured creditors. The Trustee would therefore not be able to obey the Board's abandonment order. The requirements of provincial legislation could not subvert the scheme of distribution specified by the *Bankruptcy Act.*

27 Laycraft J.A. observed that a "provable claim" in bankruptcy has two features. First the bankrupt must have been subject to a liability. This feature was present. From the day the wells were drilled, Northern Badger was liable for their ultimate abandonment.

28 The second feature was that the liability must be owed to the party said to have the provable claim, the creditor. Laycraft J.A. held that this feature was not present. Northern Badger's abandonment obligation was not owed to the ERCB. It was owed to the public at large. Laycraft J.A. said: (page 290)

> With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.
>
> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the

clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

29 Laycraft J.A. held that the Board was not a creditor even though the statute which empowered it gave it the authority to do the required abandonment work itself and to create a statutory debt in its own favour. He observed that though such powers existed, the Board had not chosen to use them. It had not taken the steps which the statute permitted it to take to make itself a creditor. It was seeking to enforce the bankrupt's obligation by steps which did not involve making itself a creditor.

30 Having concluded that the Board was not a creditor, Laycraft J.A. went on to consider whether a receiver appointed under a security instrument had a duty to comply with the provincial law which the Board was charged to enforce. After considering several points relevant to that issue, including the constitutionally validity of provincial legislation which has an incidental effect on a subject within federal jurisdiction, Laycraft J.A. concluded that the Receiver was bound to obey the Board's order and to use estate assets to pay for the abandonment despite the resulting prejudice to the secured creditor.

31 Strathcona County submits that the situation in this case is governed by *Panamericana*. The obligation imposed on Fantasy in the Development Permits relating to drainage grading was an obligation owed to the public in general — not to the County. The County's position is analagous to that of the ERCB in *Panamericana*. It is the public agency charged by the Legislature to ensure that standards required for the safety of citizens and their property are imposed on those who undertake land development. On the day it began to develop the Sunrise Park Condominium project pursuant to the first Development Permit, Fantasy acquired an obligation to ensure that the required drainage work was done. That obligation did not cease to exist when Fantasy assigned itself into bankruptcy and the Trustee became responsible for the administration of its assets. Just as the receiver in *Panamericana* was obliged to use the assets of Northern Badger to cover the cost of abandonment of the oil wells even though the secured creditor would not, as a result, realize as much of its secured debt, so here, the Trustee is obliged to use the bankrupts' assets to cover the cost of the drainage work, even though secured creditors may not, as a result, recover as much on their claims.

***BIA* Amendments**

32 The Trustee submits that amendments to the *BIA* made after *Panamericana* and in response to that case have "overruled the state of the common law created by *Panamericana*."

33 It appears accurate that implications of the decision in *Panamericana* and other similar decisions that preceded it (*Canada Trust Co. v. Bulora Corp.* (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.) and *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (U.S. N.J. 1986)) resulted in both judicial and legislative response. Developments are traced by Dr. Dianne Saxe in her article *Trustee's and Receivers' Environmental Liability Update* (1997) 49 C.B.R. (3d) 138.

34 Dr. Saxe observes that these cases created uncertainty which produced a reluctance on the part of Trustees and receivers to accept assignments in cases involving environmental issues. Some of this reluctance was overcome judicially. In *Lamford Forest Products Ltd., Re* (1991), 10 C.B.R. (3d) 137 (B.C. S.C.) Harvey J. held that though the cost of compliance with an environmental protection order would have priority to the claim of a secured creditor, it would not have priority to the fees of the Trustee. He also held that the Trustee would not be personally liable for the compliance cost.

35 In November 1992, the *BIA* was amended to confirm the protection of Trustees from personal liability. A Trustee could not be personally liable for any environmental damage that occurred before the Trustee's appointment. If there was environmental damage after the Trustee's appointment, the Trustee could only be liable if the damage resulted from the Trustee's negligence. (S.C. 1992, c. 27, s. 9(1) enacting *BIA* s. 14.06(2))

36 In April 1997 the *BIA* was further amended to extend to receivers the protection from personal liability that had been granted to Trustees in 1992. The standard of care required of Trustees and receivers in respect of after appointment environmental damage was reduced from negligence to "gross negligence or willful misconduct". In limited circumstances, a Trustee could avoid personal liability for failure to comply with an order requiring the Trustee to remedy an environmental condition by abandoning any interest in the property affected by the condition. The Crown was given a charge, prior to any other claim, against real property on which an environmental cleanup was required for the cost of the cleanup. Though normally a liability must exist at the time of the bankruptcy in order to be a provable claim, claims against a bankrupt estate for environmental cleanup costs would be provable claims regardless of when the claim arose.

37 The principle established in *Panamericana* is that an obligation of a bankrupt to comply with public safety or environmental standards, imposed pursuant to statutory authority, must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt. The *BIA* amendments deal with Trustee's personal liability, Trustee's standard of care in relation to environmental issues, Trustee's abandonment of property to avoid liability for environmental conditions, crown priority, and timing of provable claims. It may be that *Panamericana* inspired the concerns that lead to the amendments. Parliament responded to those concerns as it considered necessary. But in doing so it did not overrule *Panamericana* In my view the principle articulated and applied in *Panamericana* is still part of the law.

38 The Trustee referred to an extensive collection of materials generated by the parliamentary committee which reviewed both *BIA* amendments. Those materials do not support the conclusion that Parliament's intention in enacting the amendments was to overrule *Panamericana*.

39 I note that the vitality of the *Panamericana* principle was not doubted by either Slatter J. in *Big Sky Living Inc., Re* (2002), 318 A.R. 165 (Alta. Q.B.) (para. 46) or Master Wacowich in *Roadstar Aggregates Inc. (Receiver of) v. Kovacs* (2003), 2 C.B.R. (5th) 320 (Alta. Master).

BIA s. 14.06(8)

40 I wish to comment more specifically on *BIA* s. 14.06(8) because it could appear to be directed to the reasoning in *Panamericana* The subsection reads:

> (8) Notwithstanding subjection 121(l), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

41 In *Panamericana* Laycraft J.A. held that the obligation to pay the abandonment costs was not a provable claim. It was a liability of the bankrupt. But it was a liability owed to the public at large which the ERCB was charged to enforce. So it was not a liability owed to a creditor. It therefore lacked the features of a provable claim. It might be argued that s.14.06(8) provides, despite that reasoning, that an environmental costs claim is a provable claim.

42 That, in my view, would be a misinterpretation of s. 14.06(8). I interpret the section as intending only to overcome what would otherwise be the effect of s. 121(1). That section provides that liabilities to which the bankrupt is subject on the day on which he becomes bankrupt, or to which he may become subject before discharge by reason of an obligation existing at the time of bankruptcy, are provable claims. If that section applied, an environmental claim arising after the date of bankruptcy but before discharge might not be a provable claim. Section 14.06(8) deals only with that timing issue. It does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it.

Application of _Panamericana_

43 The *Panamericana* principle continues to be part of the law. I am obliged to apply it where a bankrupt has an

obligation of the type contemplated by the principle at the time of bankruptcy. In my view that is the situation in the case before me.

44 The obligation to provide an approved drainage system for the land on which the condominium development was built was imposed pursuant to statutory authority. The *Municipal Government Act*, RSA 2000, c. M-26, requires the County to enact a land use bylaw (s. 639), and to have a designated development authority to exercise development powers on its behalf (s. 624(1)). The Act requires that the land use bylaw prescribe the conditions that are to be attached to a Development Permit (s.640(2)(c)(iv)). The County's land use bylaw requires applicants for Development Permits to address site drainage issues. It requires the development authority to ensure that site drainage issues are properly addressed in a development plan: *Strathcona County Land Use Bylaw*, Bylaw 8-2001, s. 6.13. As previously noted, the Development Permits issued in this case required drainage grading plans to be approved and followed in construction.

45 In *Panamericana* Laycraft J.A. held that the obligation to abandon the oil wells was an obligation owed by Northern Badger to the citizens of Alberta. He said that the obligation was:

> . . . part of the general law of Alberta, binding every citizen of the province. All who became licensees or oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing or ice and snow, or the demolition of unsafe structures are examples which come to mind.

46 Is the *Panamericana* principle limited to a certain subclass of statutory obligations? Is the obligation to provide appropriate stormwater drainage grading in a land development in that class? In my view whether the type of statutory obligation to which *Panamericana* applies is limited to obligations imposed to protect the safety of citizens or their property or is as broad as any obligation imposed pursuant to the general law of Alberta, the obligation here in question is included. The obligation imposed on the land developer in this case was for the benefit of citizens who would eventually buy units in the project. It was also for the benefit of the taxpayers of the County upon whom fall some part of the expense of responding to floods which damage property with inadequate drainage. It is an obligation to which the *Panamericana* principle applies.

Effect of July 22, 2004 Order

47 Was the obligation affected by the July 22, 2004 Order of Sanderman J.? As previously noted, that Order provided, in part, as follows:

> 1. A permanent injunction is hereby granted requiring the Respondents to cease drainage related work, including trenching, excavation and pouring of concrete.
>
> 2. It is hereby declared that the County is at liberty to engage the services of an engineer or engineering firm of the County's choice to have a Drainage Plan completed to the County's satisfaction at the expense of the Respondents.
>
> 3. It is hereby declared that the County, its designated officers or employees, agents or contractors, without further notice or further leave of this Court, are at liberty to enter the Lands and proceed with completion of the work contemplated under an approved Drainage Plan, at the Respondents' expense.
>
> 4. The Respondents Fantasy and Madison are hereby ordered to pay $240,000 into Court by July 30, 2004 as security for completion of the aforementioned orders.

. . . . .

48 This Order was in force at the time of the bankruptcy. The Trustee observes that paragraph 1 of the Order enjoined the developers from doing any further drainage work. How then can it be that the Trustee acquired an obligation to do drainage work?

49 As noted above, at the time of this Order the County had been attempting for many months to secure the developer's compliance with the drainage obligations of the Development Permits. The developers had never disputed their obligation. They had repeatedly acknowledged it and sought time extensions to permit them to comply with it. In the weeks immediately preceding the July 22 Order it had become plain that efforts to secure compliance were unlikely to succeed. In that context, it appeared that the only way the work would get done was if the County stepped in to do it. Given that the County had recently discovered the developer doing drainage grading without an approved plan, it was necessary to have that activity stopped. The July 22 Order stopped it and contemplated the County doing the required work at the developer's expense.

50 The injunction therefore was part of a plan to secure compliance with the developers' obligation. Its purpose was similar to the purpose of the Stop Orders which had, it appeared, been ignored. The other parts of the plan were that the County would retain an engineer to do the drainage design, would get the work done, and that the developers would pay funds sufficient to pay for drainage work into Court. The plan failed because the developer did not pay the funds into Court. Without that security, the County did not do the work.

51 It is clear that the Order, read as a whole, did not intend to relieve the developers of their obligation. Quite the contrary. The intention clearly was to ensure the obligation was met at the expense of the developers. In my view, the Order had no effect on the obligation the County now seeks to enforce against the Trustee. That obligation was extant at the time of the bankruptcy. The *Panamericana* principle applies in this case.

Are all bankrupt estates liable?

52 The County seeks a declaration that all four of the bankrupt estates, those of Fantasy, Madison and both Mr. and Mrs. Van Leenen, are subject to the obligation to complete the drainage work. However, the Development Permits were issued only to Fantasy. Likewise, the Stop Orders were issued only to Fantasy, albeit to the attention of Mr. Van Leenen.

53 The Originating Notice of Motion by which the drainage action was commenced on February 9, 2004 named Madison and the Van Leenens as Respondents in addition to Fantasy and sought declarations that all four respondents were in breach of the *Municipal Government Act*, the Development Permits and the Stop Orders. The pleading alleged that Fantasy was the developer of the land, that Madison was the owner of 16 units and that the Van Leenens were the owners of two units.

54 The Affidavit filed in support of the application contained evidence supporting those allegations and also indicating that Mr. Van Leenen was the sole director and shareholder of both Fantasy and Madison. It also recited that the Stop Orders were provided to the registered owners of the lands including Madison and the Van Leenens.

55 The Order granted on February 18, 2004 in the drainage action granted the declarations the County sought. It was declared that all four Respondents were in breach of the *Municipal Government Act*, the Development Permits and the Stop Orders. As previously noted this Order was founded on concessions by the Respondents which are recited in the Order as follows:

> . . . AND UPON hearing that the Respondents do not contest the validity of the Stop Orders, nor do they intend to cross examine Mr. Lanuk on his evidence, nor do they intend to submit evidence, but they do wish additional time to comply with the requirements of the Stop Orders . . .

56 I have reviewed an excerpt from the transcript of the proceedings before Sanderman J. on February 18, 2004 and there appears to have been no discussion of the basis for concluding that Madison and the Van Leenens owed, and should be declared to be in breach of, the obligations imposed by the Development Permits. It does not appear that that specific point was either raised or conceded in the hearing. It is not specifically mentioned in the recital quoted above. A concession that the Stop Orders were valid does not equate to an admission that parties not named in them have an obligation under them.

57 The materials before me do not address the basis upon which Madison and the Van Leenens were held in breach. The point was not addressed on this application. I am not certain as to the effect of the February 18, 2004 Order. Is it now, by reason of the Order, beyond dispute that Madison and the Van Leenens are in breach of the drainage work obligation

imposed by the Development Permits? In considering whether to make the declaration sought in this application am I obliged to accept the conclusion recorded in the February 18, 2004 Order?

58 It may be that these questions do not have practical significance. It may be that the assets of Fantasy are sufficient to cover the cost of the required work. Or it may be that creditors with claims only against Fantasy would wish to submit that the cost of the drainage work must be shared by all four bankrupt estates.

59 Since this aspect of the matter was not addressed in the application I will at this point only grant the declaration sought by the County in respect of Fantasy. If counsel wish to address the issue of whether the same declaration should also be made in respect of Madison and the Van Leenens, they may arrange to make submissions in that regard.

60 I therefore grant the declarations sought in paragraphs 1 and 2 of the Notice of Motion in respect only of the estate of Fantasy Construction Ltd. It may be that the formal order will require other provisions to give practical effect to these declarations. If counsel are unable to agree in that regard they may make arrangements for an application to address the matter.

61 Finally, I wish to observe that during the hearing of this application there was some discussion of *BIA* s. 14.06(4) which gives the Trustee the right in certain circumstances to avoid personal liability for failure to comply with an order requiring a Trustee to remedy an environmental condition by abandoning the property. It appears from their submissions that counsel differ on the applicability of this section to this case. If it becomes necessary to determine whether the section could be invoked in this situation, counsel may wish to make application in that regard. Though there was argument addressed to the point, I do not consider it necessary to make any ruling on it now.

Application granted.