

# RECEIVERSHIPS THE WHY AND THE HOW

Debtor-Creditor Update and Refresher

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Law Society  
of Saskatchewan

# OVERVIEW OF FORMAL INSOLVENCY PROCEEDINGS

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- Bankruptcy (*Bankruptcy and Insolvency Act* (Canada) (“**BIA**”))
- Receivership (BIA, *The Personal Property Security Act, 1993* (Saskatchewan), *The King’s Bench Act, 1998* (Saskatchewan))
- BIA Proposal To Creditors
- CCAA Restructuring (*Companies’ Creditors Arrangement Act*)



# OVERVIEW OF FORMAL INSOLVENCY PROCEEDINGS

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- Different types of insolvency proceedings can yield significantly different outcomes for stakeholders (including employers & employees)
- Degree of control of business that remains with debtor varies considerably between these types of proceedings
- Names of these proceedings are often confusing (e.g. BIA proposal is not a bankruptcy)
- Cases often begin as one type of insolvency proceeding & evolve or change into a different type of insolvency proceeding



# OVERVIEW OF FORMAL INSOLVENCY PROCEEDINGS

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	<b>Debtor Driven</b>	<b>Creditor Driven</b>
<b>Structured</b>	BIA Proposal	Bankruptcy
<b>Flexible</b>	CCAA	Receivership

# RECEIVERSHIP: WHY DOES IT OCCUR?

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## Secured creditor may wish to:

- Preserve assets in jeopardy
- Preserve going-concern value where confidence in management is lost
- Complete a project, or collect WIP or A/R, to maximize value under supervision of creditors and the Court
- Inject funds as super-priority Receiver's Borrowings to e.g. make payroll where cashflow would not otherwise be sufficient
- Sell assets (going-concern or en bloc asset sale to maximize value)



# RECEIVERSHIP: WHY DOES IT OCCUR?

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## Receivership vs. Bankruptcy

- Rare to see a creditor petition a debtor into bankruptcy as an initial step in a commercial matter
- “Beyond a reasonable doubt” criminal standard of proof, requirement to prove “acts of bankruptcy”, and other procedural constraints resulting in greater expense and uncertainty
- Presumed termination of contracts in bankruptcy vs. option to continue as a going concern in receivership
- Bankruptcy system is structured to focus on unsecured creditors, whereas creditors motivated to enforce are often secured
  - Parties will want the ability to deal with assets encumbered by security



# RECEIVERSHIP: WHY DOES IT OCCUR?

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## Receivership vs. CCAA

- These are the two most common options for larger commercial enterprises
- Where the debtor-creditor relationship is contested, the Court sometimes sees dueling receivership and CCAA applications and chooses between the two types of proceeding
- Both provide some flexibility to restructure or to liquidate
  - “Liquidating CCAA” is an option and is sometimes the lender’s preferred option
  - Going concern sale is possible in a receivership (though a “true restructuring” generally is not)

# RECEIVERSHIP: WHY DOES IT OCCUR?

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## Receivership vs. BIA Proposal

- Similar to CCAA option but on a smaller scale and more structured
- “Liquidating proposals” are an option





# RECEIVERSHIP: HOW DOES IT OCCUR?

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## **Secured creditor applies to Court (King's Bench) for order appointing Receiver**

- “National Receiver” under s. 243 of the BIA is the most popular option since the 2007 amendments creating this option
- Jurisdiction exists under the PPSA and *The King's Bench Act* as well, and the Saskatchewan Template Receivership Order includes reference to these enactments by default
- Licensed Insolvency Trustee consents to act as receiver



## RECEIVERSHIP: HOW DOES IT OCCUR?

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**Secured creditor is required to establish that granting a Receivership Order is “Just and Convenient” (BIA, s. 243)**

- Courts consider a long, non-exhaustive list of factors (affirmed in Saskatchewan in *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228, quoting a commonly cited list of factors from *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63)



# RECEIVERSHIP: HOW DOES IT OCCUR?

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## Factors in granting a Receivership Order (*Vortex Drilling*)

- Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- the nature of the property;
- the apprehended or actual waste of the debtor's assets;
- the preservation and protection of the property pending judicial resolution;



# RECEIVERSHIP: HOW DOES IT OCCUR?

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## Factors in granting a Receivership Order (*Vortex Drilling*)

- the balance of convenience to the parties;
- the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;



# RECEIVERSHIP: HOW DOES IT OCCUR?

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## Factors in granting a Receivership Order (*Vortex Drilling*)

- the effect of the order upon the parties;
- the conduct of the parties;
- the length of time that a receiver may be in place;
- the cost to the parties;
- the likelihood of maximizing return to the parties;
- the goal of facilitating the duties of the receiver.



# RECEIVERSHIP: HOW DOES IT OCCUR?

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## **Interim Receivership under section 47 of the BIA is an option as well**

- Useful for highly urgent matters, e.g. dissipation of or damage to assets
- Waiting 10 days after serving a Notice of Intention to Enforce Security pursuant to section 244 of the BIA is not required
- 30-day maximum time of appointment
- Terms of Receivership Order often less intrusive than “full” receivership (e.g. the Receiver’s mandate is likely to secure and preserve assets or investigate, as opposed to actual liquidation which likely requires a “full” receivership).

# RECEIVERSHIP: HOW DOES IT OCCUR?

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## **Private receiver appointments without a Court Order are still possible, though becoming rare**

- Liability concerns (Court-appointed receiver benefits from clear mandate and statutory and Court-ordered immunities)
- Courts are less skeptical of Court-appointed receivers than in the past due to “National Receiver” option pursuant to the BIA, and more comfortable with such appointments as common practice
- Private receivers may still be subject to all of the same regulations of receivers under Part XI of the BIA, including the requirement that they be a qualified Licensed Insolvency Trustee
  - Anyone who takes possession of all or substantially all of the property used in relation to the business carried on by the debtor is deemed to be a “receiver”: BIA s 243(2)

# SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

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- Most recent iteration adopted in 2017
- Proposed by a committee of local insolvency lawyers
- Based on prior Saskatchewan template and templates from other provinces (Ontario, Alberta, and British Columbia)
- Adopted by the Court after consultation with, and feedback to, committee members
- Contains very detailed provisions regarding all aspects of the Receiver's mandate
- The Template Receivership Order is not intended to relieve counsel of the burden of convincing the Court that each item of relief is appropriate
  - In practice, the template does serve to streamline the process considerably, especially as the Court continues to gain familiarity with the template and counsel can point to numerous past Receivership Orders based upon the template





# SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

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## Receiver's Powers (paragraph 3) include:

- Taking possession of all of the “Property” (typically business assets of the debtor)
- Receiving, preserving, protecting, and maintaining control of the Property
- Managing and carrying on business of the debtor, or ceasing to perform contracts if desired (though Court approval should be sought to disclaim material contracts)
- Receiving and collecting all monies and accounts owing to the debtor
- Selling or conveying property in the ordinary course of the debtor’s business, or up to certain dollar thresholds
- Applying for vesting orders to transfer the debtor’s property free and clear of encumbrances



# SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

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## **Co-operation (and non-interference) with Receiver (paragraphs 4-6 and 10)**

- The Receiver is an officer of the Court, which expects that all with notice of the Receivership Order will cooperate with its officer in the execution of its Court-mandated duties
- All with notice of the Receivership Order are required to deliver up Property or books and records of the debtor
- All with notice of the Receivership Order are required to facilitate the Receiver's access to the debtor's physical premises



# SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

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## Stay of proceedings and continuation of services (paragraphs 7-11)

- No proceedings against the Receiver permitted without leave of the Court
- No proceedings against the debtor or the Property permitted without leave of the Court
- No rights or remedies against the debtor can be commenced or enforced except with permission of the Receiver or the Court
  - This includes, especially, contractual rights purportedly triggered by insolvency or receivership



# SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

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- Employees remain employed unless terminated by the Receiver (para 13)
- Protections from personal liabilities, including environmental liabilities (paras 15-16)
- Receiver's Charge attaches to assets in a first priority position to secure the costs of receivership (para 17)
  - Such an Order can only be granted on notice to secured creditors: BIA s 243(6)
- Receiver's Borrowings Charge allows the Receiver to borrow funds on a secured basis to complete its work (paras 20-23)
- Parties can apply to allocate costs of receivership among creditors if the burdens or benefits would otherwise be unfair (para 24)
- Electronic Case Information and Service Protocol is adopted by default, with the preferred mode of service being by e-mail
  - A Service List with the e-mail addresses of all represented and unrepresented parties is maintained
- After the Receivership Order is granted, applications can be made on three days' notice



## NOTABLE CASES

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### *Affinity Credit Union 2013 v Vortex Drilling Ltd., 2017 SKQB 228*

- Affirming factors for granting Receivership Order
- Example of duelling receivership and CCAA applications
- Reminder to file quality affidavit evidence from officer with personal knowledge
  - CCAA application denied, and Receivership Order granted, in significant part because directors and officers put in evidence from an “Administrative Director” rather than “facing the music” in view of allegations of impropriety



# NOTABLE CASES

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## *Pillar Capital Corp. v Harmon International Industries Inc., 2020 SKQB 19*

- Receivership Order in respect of land holding corporation granted over strenuous objections of debtor
- Definition of “insolvent person” in s. 2 of BIA is disjunctive:
  - Unable to meet obligations as they become due;
  - Has ceased paying current obligations in the ordinary course of business as they become due; OR
  - Aggregate value of property is insufficient to satisfy liabilities
- Accordingly, “there is equity in the property” is not, by itself, a defence to a receivership application
  - If you have stopped paying creditors and property taxes, you are insolvent



## NOTABLE CASES

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### *Re Tyler Smith, Pamela Smith, Smith Northern Ranching, and 101197829 Saskatchewan Ltd. – QBG 1337 of 2020, Judicial Centre of Saskatoon*

- Receivership Order contained a special section 2.2:

*2.2 To the extent that the Property includes any asset that would constitute an "implement" as defined in The Saskatchewan Farm Security Act, S.S., c. S-17.1 (the "SFSA") (such assets, collectively, the "**Implements**"):*

*(a) the Receiver shall be permitted to preserve, protect, maintain control of and utilize any such Implements (in the ordinary manner in which such Implements are intended to be used) for the purposes of carrying out its mandate under this Order, and such action by the Receiver shall not be construed as a breach of the SFSA; and*

*(b) this Order shall not be interpreted in such a manner as to construe the Receiver's execution or enforcement of this Order as a seizure of any Implement unless and until the Receiver actually takes exclusive possession of such Implement to the exclusion of the Debtors.*



# NOTABLE CASES

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## *Smith Northern Ranching* – Special Treatment of Farm Implements

- The reason for this provision was that BMO had not initiated or completed the required steps contemplated in Part IV of *The Saskatchewan Farm Security Act* (“SFSA”) in order to take possession of a farmer’s agricultural implements
- Consider whether this is or is not required going forward
- Part IV of the SFSA only purports to restrict a secured party from taking possession of (and, in section 55, disposing of) an implement
- It does not purport to restrict a secured party from applying to Court for the appointment of a receiver pursuant to the BIA
- It does not purport to restrict the conduct of a receiver in any way



## NOTABLE CASES

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### *Smith Northern Ranching* – Special Treatment of Farm Implements

- Requiring the Receiver to take possession of the implements for the purpose of securing them, while simultaneously preventing the Receiver from disposing of them, creates practical problems for the Receiver
- The stay of proceedings in the Receivership Order prevents any equipment lenders from seizing equipment
- However, the equipment lenders cannot look to the Receiver to realize upon their security, as it is carved out from the Receivership Order
- As the implements are technically “Property” within the meaning of the Receivership Order, the Receiver is required to oversee the seizure and sale of agricultural implements for the benefit of the receivership estate, even though the Receiver has no power to do so itself.



## NOTABLE CASES

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### ***Smith Northern Ranching* – Special Treatment of Farm Land**

- The Receivership Order expressly excluded “any real property of the Debtors” from the scope of Property subject to the receivership
- Compliance with the financial review, mediation, and leave application process required by Part II of the SFSA would have been required in order to include it, per *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53
- In any case, the lender with first mortgages over the farm land would have opposed its inclusion in the receivership

# NOTABLE CASES

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## ***Smith Northern Ranching – Special Treatment of Farm Land***

- Significant land sales occurred during the proceedings without the Receiver's involvement
- The Court held after the fact that any sale proceeds not required to pay out the land mortgages were assets captured within the Receivership
- The Receiver had no control over the sale of the debtors' lands and was not entitled to notice of any such proposed sale, but was expected immediately to gain control of the proceeds derived from such a sale forthwith upon closing
- In the future, treatment of proceeds from the sale of farm land should be considered and addressed in the Receivership Order so that the Receiver has a clear mandate



## NOTABLE CASES

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### *Bank of Montreal v Smith, 2021 SKQB 47*

- Reported decision in the *Smith Northern Ranching* proceedings is now the leading case in Saskatchewan regarding the disclaimer of contracts by a receiver
- Receiver is not bound by the debtor's contracts, but must exercise its discretion properly in terminating or "disclaiming" such a contract in order to ensure that the goodwill of the business is not materially impaired (as the debtor is liable for any damages resulting from the breach of contract)
- Improper to disclaim "executory" contracts (where the debtor has yet to perform) or material contracts without leave of the Court
- Receiver must act in an equitable manner and not prefer one creditor over another



## NOTABLE CASES

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### *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*, 2016 SKQB 306

- Affirming factors for approving the sale of assets by a Receiver
- “*Soundair* factors” (*Royal Bank v Soundair Corp.*, 1991 CanLII 2727 (Ont CA))
  - Consider whether the receiver has made a sufficient effort to get the best price, or has acted improvidently
  - Consider the interests of all parties
  - Consider the efficacy and integrity of the sales process
  - Consider whether there has been unfairness in the sales process



# NOTABLE CASES

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## *Peace River Hydro Partners v Petrowest Corp.*, 2022 SCC 41

- Supreme Court of Canada decision from November 10, 2022
- Interaction between BIA receivership process and arbitration agreement and legislation
- In this case, the proceeding was not stayed in favour of arbitration
  - Rather, the matter was dealt within the “single proceeding model” of the receivership



# CONCLUSION

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- Saskatchewan Template Receivership Order and Explanatory Notes are available on the website of the Court of King's Bench for Saskatchewan
  - Under “Administrative Notices”
  - NOT “Rules & Practice Directives”



# Questions?

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