COURT FILE NUMBER	**Q.B.G. No. 1705 of 2020**
COURT OF QUEEN'S BENCH FOR SASKATCHEWAN	
IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	REGINA
APPLICANTS	R.M. OF EYE HILL NO. 382,
	R.M. SENLAC NO. 411,
	R.M. GRASSLAKE NO. 381, and
	R.M. FRENCHMAN BUTTE NO. 501
RESPONDENTS	HER MAJESTY THE QUEEN, SASKATCHEWAN
	(as represented by THE MINISTER OF ENERGY AND RESOURCES)
	BDO CANADA LIMITED in its capacity as Receiver of BOW RIVER ENERGY LTD.
	BOW RIVER ENERGY LTD.

IN THE MATTER OF THE RECEIVERSHIP OF BOW RIVER ENERGY INC.

SUPPLEMENTAL Authorities OF THE APPLICANTS, R.M. OF EYE HILL NO. 382, R.M. SENLAC NO. 411, R.M. GRASSLAKE NO. 381, AND R.M. FRENCHMAN BUTTE

SUBMITTED BY:

RUSSELL GREGORY, SOLICITOR

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INTERPLAY OF CCAA AND BIA

DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2021 ABCA 226

Para 18

How these various sections interact is a pure question of statutory interpretation. The provisions of the *CCAA* and *BIA* should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament. Since the two statutes deal with the same topic, they should be interpreted and applied in a complementary way, with due regard to their different focuses: ***Century Services*** at paras. 24, 76, 78; ***Reference re Broadcasting Regulatory Policy CRTC 2010-168***, 2012 SCC 68 at paras. 37, 41, [2012] 3 SCR 489.

Para 24

Some argument was directed to whether, at the time the Receiver's Borrowings Charge was granted, the *CCAA* proceeding was "successful", "unsuccessful", "continuing", or "terminated". The Receiver argues that once the insolvency transitioned from the *CCAA* to the *BIA* ". . . the CCAA Proceedings were no more". However, merely because the insolvency transitioned from one statute to the other did not mean that the Interim Lenders' Charge somehow disappeared or lost its priority or could just be disregarded. The Interim Lenders' Charge exists whether or not the *CCAA* proceedings are terminated and whether or not they are successful. The status of the *CCAA* proceedings was obviously relevant, as it was the apparent lack of success of the restructuring that led to the appointment of the receiver. However, the inability of the *CCAA* proceeding to achieve its desired objectives did not invalidate the prior Interim Lenders' Charge. The appellant still held that valid charge and was entitled to put forward the legitimate expectations that it had with regard to its priority. Circumstances had changed, but the background need to respect the position of debtor-in-possession financing remained.

Receiver's priority

Edmonton (City) v Alvarez & Marsal Canada Inc, 2019 ABCA 109

[14] The chambers judge exercised his discretion to grant the Receiver's Charge priority over the claims of both the mortgagee and builders' lien claimant. Relevant to his consideration was the 2019 ABCA 109 (CanLII) decision in *Robert F Kowal Investments Ltd v Deeder Electric Ltd* (1975), 59 DLR (3d) 492, 9 OR (2d) 84 (CA) [*Kowal*], applied in *Royal Bank v Vulcan Machinery & Equipment Ltd*, [1992] 6 WWR 307, 13 CBR 69 (ABQB). *Kowal* refers to a general rule that secured creditors may not be subject to the charges and expenses of a receivership. This is so because, "the general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders": *Kowal*, quoting Ralph Ewing Clark, *Clark On Receivers*, 3rd ed, vol 1, s 22, p 25. There are, however, exceptions to that general rule, three of which were enumerated in *Kowal*:

> 1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;
>
> 2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or
>
> 3. if the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

[15] These principles are well accepted and proper considerations for a court in exercising its discretion under s 243(6). The principles are also expressly incorporated in the explanatory notes to the template receivership order, which also states that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions apply.

[16] In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (*Decision* at paras 136-137):

> [136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.
> [137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super

> priority is generally appropriate for the Receiver's fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

[17] In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in *CCM Master Qualified Fund v blutip PowerTechnologies*, 2012 ONSC 1750, where it was noted that in *CCAA* proceedings, "professional services are provided ... in reliance on super priorities contained in initial orders".[1] We agree with the observation of Brown J at para 22 that:

> … comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA*…

[18] The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in *JP Morgan Chase Bank NA v UTTC United Tri-Tech Corp* (2006), 25 CBR (5th) 156 at para 45 (and cited in *Caisse v River*, 2013 ONSC 6809 at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

[19] Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

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