Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N:

THOMAS COOK CANADA INC.

Applicant

- and –

SKYSERVICE AIRLINES INC.

Respondent

BOOK OF AUTHORITIES

(Motion returnable April 15, 2010)

April 14, 2010

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INDEX

Tab No.	Description
1.	*Royal Bank of Canada* v. *1231640 Ontario Inc. (Trustee of)*, [2007] O.J. No. 4561 (Ont. C.A.)
2.	Model National Receiver Order (January 15, 2010)
3.	*Personal Property Security Act*, R.S.O. 1990, c. P-10, ss. 1(1), 2, 19, 20, 23, 30(6), 45(1), 46(1), 46(4)
4.	Minister's Order made under the *Personal Property Security Act* (Ontario), ss. 16(4)(2), 17
5.	*Personal Property Security Act,* R.S.A. 2000, c. P-7, s. 20
6.	*Personal Property Security Act,* R.S.B.C. 1996, c. 359, s. 20
7.	*Personal Property Security Act,* C.C.S.M. c. P35, s. 20

TAB 1

Case Name:

Royal Bank of Canada v. 1231640 Ontario Inc. (Trustee of)

IN THE MATTER OF the Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited) of the City of Toronto, in the Province of Ontario
Between
The Royal Bank of Canada, in its capacity as administrative agent for certain lenders, Appellant,
and
PricewaterhouseCoopers LLP, Trustee of the Estate of 1231640 Ontario Inc., a Bankrupt and St. Paul Guarantee Insurance Company, Respondents

[2007] O.J. No. 4561

2007 ONCA 810

13 P.P.S.A.C. (3d) 57

37 C.B.R. (5th) 185

2007 CarswellOnt 7595

163 A.C.W.S. (3d) 474

289 D.L.R. (4th) 684

Docket: C45883

Ontario Court of Appeal
Toronto, Ontario

K.M. Weiler, K.N. Feldman and H.S. LaForme JJ.A.

Heard: May 10, 2007.
Judgment: November 26, 2007.

(159 paras.)

Insolvency law -- Claims -- Priorities -- Appeal by Royal Bank, in its capacity as administrative agent for certain lenders, from a decision dismissing its claim wherein it asserted priority under ss. 20(1)(b) and 20(2)(b) of the Personal

Property Security Act over a tax refund and other undistributed funds -- Appeal dismissed -- Perfected security interest had lapsed -- While interim receiver might represent the creditors of the debtor for some purposes, it was not "a person who represent[ed] the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" was not to be read in to those subsections.

Insolvency law -- Creditors -- Secured creditors -- Unsecured creditors -- Appeal by Royal Bank, in its capacity as administrative agent for certain lenders, from a decision dismissing its claim wherein it asserted priority under ss. 20(1)(b) and 20(2)(b) of the Personal Property Security Act over a tax refund and other undistributed funds -- Appeal dismissed -- Perfected security interest had lapsed -- While interim receiver might represent the creditors of the debtor for some purposes, it was not "a person who represent[ed] the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" was not to be read in to those subsections.

Appeal by the Royal Bank of Canada, in its capacity as administrative agent for certain lenders, from a decision dismissing its claim wherein it asserted priority under ss. 20(1)(b) and 20(2)(b) of the Personal Property Security Act over a tax refund and other undistributed funds. When the appellant sought the appointment of an interim receiver for the debtor company, it held a perfected security interest over the assets of that company. However, during the receivership the appellant allowed its registration under the PPSA to lapse. The appellant did not re-perfect its security interest before the interim receiver assigned the debtor into bankruptcy, following which, a significant tax refund came into the debtor's estate. The appellant asserted priority over those funds and some other undistributed funds on the basis that the date when the receiver was appointed was the date for determining priority, and on that date, the appellant's security interest was perfected. The motion judge dismissed the appellant's claim.

HELD: Appeal dismissed. While an interim receiver might represent the creditors of the debtor for some purposes, it was not "a person who represent[ed] the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" was not to be read in to those subsections. Unlike a trustee in bankruptcy, a receiver did not obtain the debtor's proprietary interest in the collateral and obtained no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and therefore was not in a priority contest with any creditor on behalf of unsecured creditors.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 20(1)(b), s. 20(2)(b)

Appeal From:

On appeal from the order of Justice John D. Ground of the Superior Court of Justice dated July 7, 2006, with reasons reported at [2006] O.J. No. 2850.

Counsel:

Peter H. Griffin and Matthew Sammon for the appellant, Royal Bank of Canada in its capacity as Administrative Agent for Certain Lenders.

John D. Marshall for the respondent, St. Paul Guarantee Insurance Company.

Alex MacFarlane for the respondent, PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited).

Reasons for judgment were delivered by K.N. Feldman J.A., concurred in by H.S. LaForme J.A. Separate dissenting reasons were delivered by K.M. Weiler J.A.

K.M. WEILER J.A. (dissenting in part):--

Introduction

1 [1] This appeal concerns a priority dispute between two creditors of an insolvent company, The State Group Limited (now 1231640 Ontario Inc. but referred to here as "State"), over funds totalling approximately $5.5 million. The majority of the disputed amount resulted from an income tax refund to State of approximately $4.5 million.

2 [2] The priority dispute requires a consideration of the role of a receiver appointed by the court pursuant to s. 47 of the federal *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*"). It also requires the court to interpret the phrase "a person who represents the creditors of the debtor" in s. 20(1)(b) and the phrase "rights of a person....in respect of the collateral" in s. 20(2)(b) of the provincial *Personal Property Security Act,* R.S.O. 1990, c. P.10 ("*PPSA*").

3 [3] On one side of the priority dispute is the appellant, the Royal Bank of Canada ("the Bank"), which acted as the administrative agent for a syndicate of lenders to State. The loan was secured by a general security agreement. All parties agree that the terms of the general security agreement between the Bank and State cover all the assets of State, including the tax refund. On the other side of the dispute is the respondent, St. Paul Guaranty Insurance Company ("St. Paul"). St. Paul also holds a general security agreement over all of the assets of State, which would include the tax refund. In the middle is PricewaterhouseCoopers Inc. ("PWC"), who acted as both the s. 47 *BIA* receiver and as the trustee in bankruptcy.

4 [4] At this juncture, it may be helpful to provide a brief overview of the priority regime established by the *PPSA*. The *PPSA* creates a regime that enables creditors to record written agreements giving them a security interest in a debtor's property, known as "collateral".[1] A security interest is not enforceable against a third party unless the requirements of the *PPSA* are met.[2] Because multiple secured creditors can acquire security interests in the same collateral, the concept of "perfection" is used to order the priorities among them. The basic rule is that perfected security interests have priority over those that are unperfected. One method of perfection is for the creditor to take actual possession of the collateral.[3] The most common method of perfection, however, is by registration of a financing statement in the Ontario Personal Property Security Registry ("PPSR"). Generally, the first person to register has a first priority secured interest that is effective against third parties, including other secured parties.[4] Perfection may last as long as the period chosen for registration lasts, generally some time longer than the length of the security agreement, or until there is a change affecting the collateral.

5 [5] In this case, the Bank had a first priority secured interest. St. Paul's security interest was registered after the Bank's and thus was subordinate to that of the Bank.

6 [6] On November 14, 2001, the Bank obtained a court order appointing PWC as an interim receiver pursuant to s. 47 of the *BIA* ("Appointment Order").[5]

7 [7] A s. 47 *BIA* receiver is appointed by the court when a debtor is insolvent and a creditor gives notice that it intends to enforce its security pursuant to s. 244 of the *BIA*. The applicant creditor must satisfy the court that the appointment of the receiver is necessary to protect the debtor's estate or the interest of the creditor who sent the s. 244 notice. Thus, the receiving order is not made in the context of an application for a bankruptcy order or in a situation where the debtor seeks to avoid bankruptcy by making a proposal to its creditors. The appointment is for "such term as the court may determine" and allows the receiver to take possession of the debtor's property that is subject to the security interest, to exercise control over it, and to take such action as the appointment order provides. The appointment order usually provides, as this order does, that third parties are prevented from taking or continuing any legal proceedings against the debtor without leave of the court.

8 [8] Pursuant to the Appointment Order allowing it to do so, PWC sold State's name on November 14, 2001. The next day, the name of the debtor company was changed to 1231640 Ontario Inc. Section 48(3) of the *PPSA* provides that if the secured creditor learns that the debtor has changed its name, the secured creditor's interest in the collateral becomes unperfected unless the secured creditor takes possession of the collateral[6] or files a financing change statement giving the new name of the debtor within thirty days.[7] If the secured creditor fails to file a financing change statement within thirty days, it can reperfect its interest by filing a fresh financing statement.[8]

9 [9] The Bank conceded that it would have been aware of State's name change at least by the time PWC made a second sale of State's assets on December 6, 2001. The Bank did not file, or seek leave of the court to file, a financing change statement within thirty days of becoming aware of the name change, nor did it file a fresh financing statement after that date. St. Paul also filed nothing. The proceeds of the December 6, 2001 sale and a further sale on December 24, 2001 are not in dispute on this appeal.

10 [10] The Appointment Order permitted PWC to assign State into bankruptcy, which it did on January 31, 2002. By this date, the previously perfected security interests of both creditors had become unperfected.

11 [11] Following the assignment into bankruptcy, PWC received the income tax refund owing to State in the amount of approximately $4.5 million. The Bank claimed that it was entitled to the proceeds because when PWC was appointed a receiver on November 14, 2001, it had a properly perfected first security interest. St. Paul contended that the relevant date for determining priorities was the date that PWC was appointed trustee in bankruptcy, *i.e.*, January 31, 2002, and that as of this date, the Bank had lost its priority because it had failed to file a financing change statement as required by s. 48(3) and had also failed to file a fresh financing statement thereafter. PWC sought the direction of the court on the priority issue.

12 [12] Before the motion judge, the Bank argued that it was implicitly exempted from having to file a financing change statement as required by s. 48(3) of the *PPSA* in light of the terms of the Appointment Order. In the alternative, the Bank argued that because its security interest was perfected at the time of PWC's appointment as receiver, it did not lose its priority because a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. Since s. 20(2)(b) provides that "[t]he rights of a person... under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect", the relevant date for determining the priority dispute is the date of the receiver's appointment. At that date, the Bank's security interest was perfected and the Bank's failure to make a further filing when PWC sold State's name did not result in a loss of its priority.[9]

13 [13] The motion judge rejected both of the Bank's arguments. He concluded that the November 14, 2001 court order appointing PWC as interim receiver did not have the effect of exempting the Bank from having to comply with s. 48(3) of the *PPSA* by filing a financing change statement within thirty days of learning that PWC had sold State's name.

14 [14] With respect to the Bank's alternative argument, the motion judge held that PWC, as a receiver under s. 47 of the *BIA,* was not "a person who represents the creditors of the debtor" under s. 20(1)(b) of the *PPSA*, but rather was appointed for the protection of the Bank's interests. He observed that the assets of the debtor did not vest in PWC, nor did the liabilities of the debtor become PWC's liabilities, as is the case with a trustee in bankruptcy. He further held that PWC did not have the authority to settle or compromise liabilities owed to the creditors of the debtor. The motion judge reasoned that the application of the *ejusdem generis* principle of statutory interpretation applied to the interpretation of s. 20(1)(b). He held that "a person who represents the creditors of the debtor" must be of like kind or class as a trustee in bankruptcy or an assignee for the benefit of creditors. Given the distinctions he had observed between a receiver and the representatives specified in s. 20(1)(b), he held that a s. 47 *BIA* receiver is not "a person who represents the creditors of the debtor."

15 [15] Accordingly, the motion judge concluded that pursuant to s. 20(2)(b), the effective date of the appointment of a person with representative status, and the date that the representative's rights in respect of the collateral are to be determined, is the date PWC was appointed as trustee in bankruptcy, namely January 31, 2002. At that time, both St. Paul and the Bank were unperfected secured creditors. Pursuant to the priorities under the *BIA,* as unperfected secured creditors, the Bank and St. Paul were entitled to share rateably in the income tax refund. Since the Bank's claim was for $29 million and St. Paul's was for some $88 million, the result of the motion judge's decision is that St. Paul would be entitled to the bulk of the refund.

The Issues

16 [16] This appeal requires me to consider two issues:

1. Did the Appointment Order implicitly give the Bank an exemption from complying with s. 48(3) of the *PPSA*?
2. Did the Bank's failure to file a financing change statement or fresh financing statement result in a loss of its priority as a secured creditor?

17 [17] On the first issue, like the motion judge, I conclude that the obligation to make filings under the *PPSA* continued and that the Appointment Order did not exempt the Bank from complying with s. 48(3) of the *PPSA.* My colleagues agree.

18 [18] My colleagues and I disagree on the answer to the second question, whether the Bank lost its priority as a secured creditor. The answer depends on the date chosen for the determination of priorities. If, as I conclude, a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, then in light of the combined operation of ss. 20(1)(b) and 20(2)(b), the relevant date for determining the Bank's priority status is the date

of the appointment of PWC as interim receiver. On that date, the Bank's security interest was perfected and had priority over that of St. Paul.

19 [19] In answering the second question, it is also necessary to address an alternative argument put forward by PWC. According to PWC, the Bank's priority status had to be determined all over again as of the date PWC was appointed trustee in bankruptcy on January 31, 2002. PWC argues that the s. 47 *BIA* receivership ended when it was appointed trustee in bankruptcy and that the s. 47 *BIA* receiver had no proprietary interest in the disputed assets. I reject PWC's position and conclude that the s. 47 *BIA* receivership did not end with PWC's appointment as trustee and that the Bank retained its priority over the tax refund following State's assignment into bankruptcy by PWC.

Analysis

1. Did the Appointment Order implicitly give the Bank an exemption from compliance with s. 48(3) of the *PPSA*?

20 [20] The Bank submits that to require it to comply with s. 48(3) of the *PPSA* by filing a financing change statement after it learned PWC sold State's name is inconsistent with the spirit of the Appointment Order, which had the effect of maintaining the existing priorities among creditors. The Bank also submits that exempting it from compliance with s. 48(3) does no injustice to the policy underlying the *PPSA*. The registration regime established by the *PPSA* is intended to provide a means of giving notice to interested parties of existing security interests in the debtor's property so that they can govern their dealings with the debtor accordingly. Interested parties can search the PPSR against the debtor's name for existing registrations against that debtor and its collateral. Although the *PPSA* requires that the debtor's name must appear correctly on a registration in order for that registration to be effective, the policy reason for requiring a secured creditor to maintain the perfection of its security interest disappears on a s. 47 *BIA* receivership. Under that type of receivership, the secured creditor is in the process of enforcing its security and the debtor is deprived of possession of its property and is not in a position to grant further security interests.

21 [21] The Bank further argues that to require it to comply with s. 48(3) would effectively require it to act in a manner that is contrary to the wording of the Appointment Order. The Bank relies on s. 7 of the order appointing PWC, which stays any "legal proceeding, enforcement process, extra-judicial proceeding or other proceeding against or in respect of the Debtor or the Property". Similarly, s. 8 of the Order restrains the enforcement or exercise of certain rights, including registration, against the debtor or the property. The Bank argues that these provisions prevented it from registering a financing change statement.

22 [22] The motion judge rejected the Bank's submissions. He held that even if the Bank was correct that the policy considerations requiring registration were no longer applicable in the circumstances, the court could not override the provisions of the legislation unless there was a legislative gap, which he concluded there was not. Insofar as the Appointment Order was concerned, he held that even if the filing of a financing change statement was a "proceeding" that was stayed under s. 7 or restrained under s. 8, the Bank could have applied to lift the stay and the court would likely have allowed the application. Thus, the terms of the Order did not preclude the Bank from filing the required financing change statement to maintain its perfected status prior to the assignment in bankruptcy.

23 [23] The motion judge's approach was intended to protect the integrity of the registration requirements of the *PPSA*. I agree that nothing in the Appointment Order or in the *PPSA* exempts the Bank from having to comply with the filing requirements of the *PPSA*. As indicated by the motion judge, if the filing of a financing statement was a "proceeding" that was stayed by the Appointment Order, an application to lift the stay would likely have been successful since no other creditor would be prejudiced. The reason that an application to lift the stay would likely be successful even after the expiry of the thirty day period for filing a financing change statement is reinforced by the existence of s. 30(6) of the *PPSA*. That subsection permits re-registration of a security interest that has become unperfected.[10] See *Re PSINet Ltd.*, [2002] O.J. No. 271 (S.C.J.).

24 [24] Alternatively, instead of bringing an application to lift the stay for the limited purpose of allowing it to either maintain or to reperfect its security interest, s. 31 of the Appointment Order provides that any interested party may apply to vary or amend the order on seven days notice. The Bank could thus have applied to the court to amend the initial Appointment Order so as to enable the Bank to obtain the receiver's consent to lifting the stay or to filing the requisite *PPSA* registration.

25 [25] I note that the *Standard Template Receivership Order* ("the Model Order") prepared by a subcommittee of the Commercial List Users Committee in conjunction with the Canadian Bar Association Insolvency section contains standard language ordering that all rights and remedies against the debtor, the receiver, or affecting the property are stayed except with leave of the court or "except with the written consent of the Receiver" and further that nothing shall "prevent the filing of any registration to preserve or perfect a security interest." The wording of the Model Order provides further support for my conclusion that the motion judge was correct in holding that the Appointment Order did not give the Bank an implied exemption from complying with the requirement to file a financing change statement as required by s. 48(3) upon learning that PWC had sold State's name.

2. Did the Bank's failure to file a financing change statement result in a loss of its priority as a secured creditor?

26 [26] The resolution of this issue requires me to determine whether a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA,* as well as to interpret the meaning of the words "rights of a person" in s. 20(2).

27 [27] For ease of reference, the relevant portions of s. 20 are as follows:

> 20 (1) Except as provided in subsection (3),[11] until perfected, a security interest,
>
> ...
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy; ...
>
> (2) The rights of a person,
>
> ...
>
> (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

28 [28] The Bank submits that the motion judge erred in holding that an interim receiver appointed by the court under s. 47 of the *BIA* is not "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. If the receiver is a "person" within the meaning of s. 20(1)(b), then the date for determining the parties' priorities is the date that PWC was appointed as a s. 47 *BIA* receiver. On that date, the Bank had a properly perfected security interest.

29 [29] St. Paul's position is that the motion judge was correct in holding that an interim receiver is not a "person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The trustee in bankruptcy, not the s. 47 *BIA* receiver, is the representative of the creditors and the date for determining priorities is the date of the trustee's appointment. On that date the Bank did not have a properly perfected security interest. In the alternative, St. Paul agrees with the position of PWC.

30 [30] PWC agrees with the Bank that an interim receiver is a representative of the creditors for the purposes of s. 20(1)(b). However, PWC submits that even if the Bank's security interest was effective as against the interim receiver, once the estate funds vested in the trustee in bankruptcy, the interim receivership ended. The relevant date for determining the effectiveness of the Bank's security interest then became January 31, 2002, when its status as trustee in bankruptcy took effect. As of January 31, 2002, the Bank's security interest was no longer perfected. The Bank responds that the receivership and the bankruptcy are not two separate processes, but one continuous process and that the date for determining priorities did not change when the trustee in bankruptcy was appointed.

31 [31] I first confront the issue of whether a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). In my view, the motion judge erred in concluding that an interim receiver is not such a person. In reaching this conclusion, I am guided by the following considerations:

(a) the relevant principles of statutory interpretation;

(b) the history of the legislative provision and the view of commentators on the meaning of s. 20(1)(b);
(c) the fiduciary role and the powers of the s. 47 *BIA* receiver;
(d) the word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession;
(e) the overall scheme of the *PPSA*, including s. 20 as a whole and s. 30(6); and
(f) the purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed.

32 [32] I now discuss each of these considerations supporting my conclusion that a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). I will then go on to address PWC's alternative argument.

(a) The relevant principles of statutory interpretation

33 [33] Section 20(1)(b) renders any security interest in the debtor's collateral ineffective against "a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy" until that security interest is perfected. All provinces have legislation governing priorities between and among secured and unsecured creditors.[12] However, no other province uses the general words, "a person who represents the creditors of the debtor" as found in s. 20(1)(b) of the Ontario legislation. The *PPSA* does not define "a person who represents the creditors of the debtor". Consequently, resort must be had to ordinary principles of statutory interpretation to determine the meaning of this phrase.

34 [34] The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at p. 1; *R. v. Bell ExpressVu Limited Partnership*, [2002] 2 S.C.R. 559 at para. 26. In order to maintain harmony within the scheme of the Act, the same word must consistently be given the same meaning throughout a statute. See Sullivan, *supra*, at p. 163; *Thomson v. Canada (Minister of Agriculture)*, [1992] 1 S.C.R. 385. The principle is also one of the Drafting Conventions adopted by the Uniform Law Commission of Canada in s. 21(5) and s. 34(2). See Sullivan, *supra,* Appendix I at pp. 619, 623. The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". See Sullivan, *supra*, at p. 21; *Canadian Pacific Air Lines v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 at 735.

35 [35] Words take their meaning from the context in which they are found. Thus, in interpreting a statutory provision, among the considerations to which the court will have regard are the immediate context of the words in the section, any adjacent and closely related provisions, the Act as a whole, the history of the legislation and other external sources. See Sullivan, *supra*, at pp. 261-62.

(b) Having regard to the history of the legislative provision, a s. 47 *BIA* receiver is not excluded from being "a person who represents the creditors of the debtor"

36 [36] The predecessor version of the *PPSA* included a receiver in the list of persons who represent the creditors of the debtor. Section 22 of the *Personal Property Security Act*, R.S.O. 1980, c. 375, stated:

> 22 (1) Except as provided in subsection (3),[13] an unperfected security interest is subordinate to,
>
> (a) the interests of a person,
>
> ...
>
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...

...

(2) The rights of a person under subclause (1)(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the security interest.

The question is, therefore, whether the removal of the word "receiver" from the current version of the Act, and the substitution of the word "includes" for the word "as" indicates that the legislature intended to exclude an interim receiver from the category of persons referred to in the section.

37 [37] In my opinion, the removal of the word "receiver" is not indicative of any legislative intention to exclude receivers appointed under s. 47 of the *BIA* from the category of persons included under s. 20(1)(b). I say this for four reasons.

38 [38] First, the earlier version of the *PPSA* was limitative, not expansive. The use of the word "as" in the phrase "a person who represents the creditors of the debtor *as* assignee ... trustee in bankruptcy, or receiver" meant that only the three categories of persons mentioned were included: see R. McLaren, *Secured Transactions and Personal Property in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1989) at pp. 5-160 to 5-161.

39 [39] What the legislature intended to do and did do in amending s. 20(1)(b) was to expand the category of persons representing the creditors of the debtor. The word "including" in the current legislation is a term of extension. See Sullivan, *supra*, at p. 181; see also *National Bank of Greece (Canada) v. Katsiknouris,* [1990] 2 S.C.R. 1029 at 1041, where LaForest J. wrote that the word "including" is normally "designed to enlarge the meaning of preceding words, and not to limit them." Accordingly, the examples that follow the word "including", namely, an assignee for the benefit of creditors and a trustee in bankruptcy, are not meant to be exhaustive. Further, an interpretation of legislation that narrows the scope of general words so that there is nothing but the enumerated items to which they can apply must be rejected. See Sullivan, *supra*, at p. 179. Limiting the meaning of s. 20(1)(b) to an assignee for the benefit of the creditors and a trustee in bankruptcy would leave no other persons to whom the general words, "a person who represents the creditors of the debtor" could apply.

40 [40] Second, there is a presumption against implicit alteration of law. The legislature is presumed not to change existing law or to depart from established practices beyond that which is expressly stated. Failing to explicitly alter the law results in the law remaining undisturbed. See Sullivan, *supra*, at pp. 395-96. The legislature would have had to use more precise language to exclude all receivers from the category of persons "who represent the creditors of the debtor" if it wished to have done so.

41 [41] Third, the commentary of Mr. Fred M. Catzman, Q.C., the former chair of the Attorney General's advisory committee on the *PPSA*, lends some insight into why the term "receiver" was removed from the current legislation. In reference to the previous legislation, he stated that the term "receiver" is a generic term and, in his opinion, whether the receiver represented the interests of the creditors depended on whether the receiver was appointed by court order. If appointed by private agreement, the receiver represented only the interests of the creditor appointing it. See F. M. Catzman *et al., Personal Property Security Law In Ontario* (Toronto: Carswell, 1976) at p. 114. Where, as here, legislative change is preceded by a report of a person or body that has investigated a condition and made a recommendation, the courts are entitled to take judicial notice of it. While the commentary cannot be used as direct evidence of legislative intent, the court may use it to draw inferences about the meaning of particular provisions. See Sullivan, *supra*, at pp. 484-85. Removing the word "receiver" was intended to exclude a privately-appointed receiver, whose role is to protect the interests of a single secured creditor, from the class of persons contemplated by s. 20(1)(b).

42 [42] Fourth, the interpretation of legal scholars with expertise in the particular statute under consideration has become an authoritative source for consideration by courts. See Sullivan, *supra*, at p. 502. The unanimous opinion of academics and other commentators respecting s. 20(1)(b) is that the phrase "a person who represents the creditors of the debtor" is not limited to assignees or trustees in bankruptcy. In *The Ontario PPSA Commentary and Analysis* (Markham, Ont.: Butterworths, 2000) at p. 163, under the heading "Trustee in bankruptcy and other representative creditors", Jacob S. Ziegel and David L. Denomme write in reference to s. 20(1)(b):

> It is clear from the structure of clause (b) that it is not meant to be confined to an assignee for the benefit of creditors and a trustee in bankruptcy but also covers other creditors' representatives.

43 [43] Frank Bennett states in *Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53:

> .... even though there is no reference to a receiver in s. 20(1), it is clear that a court-appointed receiver comes within the subsection... The court-appointed receiver is an officer of the court with fiduciary duties to *all* creditors and the debtor although its appointment was initiated by the secured party. [Emphasis added.]

Richard McLaren writes in *Secured Transactions and Personal Property in Canada, supra*, at p. 5-162:

> A receiver is not listed in the revised Act [R.S.O. 1990, c. P.10] as a type of creditor's representative, but it is likely that court-appointed receivers will still qualify as a representative of creditors. Receiver is a generic term describing a person having the attributes characteristic of a receiver in chancery: one must be an officer judicially appointed and responsible to the court with the object of preserving property pending litigation to decide the rights of the parties. Once appointed by the court, the receiver is answerable to the court and to all interested parties. Given the cited case law decisions on the characteristics of a receiver, a liquidator under the *Winding-Up and Restructuring Act*, the *Business Corporations Act* or the *Bank Act* would qualify as a receiver.
>
> Given that privately-appointed receivers only represent one or some of the creditors and that they are not judicially appointed, it has been held that they do not come within the ambit of s. 20(1)(b). [Citations omitted.][14]

44 [44] I am not aware of any scholarly opinion to the contrary. The unanimous opinion of scholars appears to be that the phrase used in s. 20(1)(b), "a person who represents the creditors of the debtor", is not limited to an assignee or trustee in bankruptcy. Further, in the opinion of two of the authors cited above, the phrase includes a court-appointed receiver.

(c) The fiduciary role and powers of the s. 47 *BIA* receiver

45 [45] The motion judge concluded that a receiver appointed by the court under s. 47 of the *BIA* is effectively the representative of the Bank alone. In my opinion, his conclusion on this issue is in error. A s. 47 *BIA* receiver owes a duty to all of the creditors of the debtor.[15] For example, a s. 47 *BIA* receiver was described by Cumming J. in *Ravelston Corp.*, [2007] O.J. No. 414 (S.C.J.), aff'd (2007), 85 O.R. (3d) 175 (C.A.), as an officer of the court, who owes a duty not only to the court, but also to all persons interested in the debtor's assets, property and undertakings. These duties must be carried out honestly and in good faith. The receiver's role, like that of a trustee in bankruptcy, is "that of a fiduciary to all interested stakeholders." He concluded at para. 67:

> A court-appointed receiver under the *BIA* or [*Courts of Justice Act*], as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. [Citations omitted.]

46 [46] In addition to the fiduciary relationship to all creditors, the s. 47 receiver typically has vast powers over the property of the debtor and performs functions similar to those of a trustee in bankruptcy, albeit without relying on a change in the locus of title. The powers of the s. 47 receiver were discussed by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc,* [1994] O.J. No. 953 (Gen. Div.). At para. 3, Farley J. noted how amendments to the *BIA* in 1992 had affected the rights of secured creditors by the requirement in s. 244 to give notice to the debtor of an intention to enforce its security and to refrain from taking action for ten days, but providing for the remedy of a s. 47 receiver.

47 [47] After quoting the provisions of s. 47, and noting that the interim receivership in *Curragh* had continued for much longer than ten days, Farley J. observed that the object of the s. 47 receivership process appeared to be to maintain the mining property in question, while marketing it with a view to selling it, and that the s. 47 receivership would likely continue until the mine was sold. He concluded that "it would seem that in many practical aspects in these circumstances that the [interim receiver] is functioning as a quasi-receiver and manager/trustee in bankruptcy." He pointed out

that the 1992 amendments to the *BIA* dealt more extensively with insolvency as contrasted with bankruptcy and that pre-amendment cases dealing with the powers of the interim receiver had to be analyzed with care.[16] Farley J. concluded that the regime providing for the appointment of a s. 47 *BIA* receiver was flexible and that the court could allow the interim receiver to exercise control over the business in question as opposed to limiting its powers for narrow purposes such as the sale of perishable goods. In addition, he observed at para. 6 that because s. 47(2)(c) allows the interim receiver to apply to the court for directions, "it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case."

48 [48] In deciding whether the s. 47 receiver falls within s. 20(1)(b), it is also relevant to consider that such a receiver has exclusive control over the assets and affairs of the company and, in this regard, the receiver displaces the board of directors and the company's managers: *Toronto Dominion Bank v. Fortin et al.* (1978), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.); *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 65 (Sask. Q.B.). Further, the s. 47 receiver has the power to settle liabilities and can be a successor employer, that is, it can stand in the shoes of the owner towards the employees of the company: *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123. In addition, s. 47(2)(c) of the *BIA* empowers the interim receiver to "take such other action as the court considers advisable."

49 [49] Frank Bennett, in *Bennett on Bankruptcy, supra*, at p. 119-20, contrasts the appointment of a s. 47 interim receiver with that of receivers appointed in the context of an application for a bankruptcy order under s. 46 or pending the proposal process under s. 47.1 of the *BIA* as follows:

> There does not appear to be any limitation on this appointment. There is no defined end of the interim receivership and the word "interim" is clearly a misnomer of the receiver's powers and duties that are more akin to a court-appointed receiver and manager under provincial legislation.

50 [50] As these cases illustrate, the role played by the s. 47 *BIA* receiver is akin to that of a trustee in bankruptcy in the sense that the s. 47 *BIA* receiver owes a fiduciary duty to all of the creditors and typically has vast powers over the property of the debtor. Furthermore, as in a bankruptcy, the exercise of the s. 47 *BIA* receiver's powers and duties is overseen by the court to ensure that the creditors of the debtor are not prejudiced.

51 [51] My colleague Feldman J.A. cites the case of *Re TRG Service Inc.*, [2006] O.J. No. 4521 (S.C.J.), in which it was held that a monitor under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, is not a representative of creditors within the meaning of s. 20(1)(b) of the *PPSA*. The role of a court-appointed s. 47 *BIA* receiver stands in sharp contrast to that of a court-appointed monitor. A monitor's powers are limited and a court-appointed monitor does not stand in the shoes of the company nor owe fiduciary duties to creditors. See *Re Ivaco* (2006), 83 O.R. (3d) 108 (C.A.) at paras. 49-50, leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 490.

(d) The word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession

52 [52] A person "who represents the creditors of the debtor" under s. 20(1)(b) must be a person exercising rights, because s. 20(2) refers to the time when "[t]he rights of a person... in respect of the collateral under clause 1(b)" are to be determined. The *PPSA* does not define the word "rights" or the phrase "rights of a person...in respect of the collateral". In my opinion, the word "rights" in the *PPSA* is used more broadly than referring to title alone.

53 [53] The motion judge was of the opinion that the rights referred to in s. 20(2) are proprietary rights akin to those exercised by a trustee in bankruptcy. He concluded that a receiver is not the type of representative of creditors included in s. 20(1)(b) because, unlike with the trustee in bankruptcy, title to the debtor's assets does not vest in a s. 47 *BIA* receiver. In my opinion, the motion judge erred in interpreting the word "rights" in s. 20(2) as meaning proprietary rights limited to the traditional concepts of title and ownership.

54 [54] The motion judge's conclusion ignores the fact that the *PPSA* is not about title to property or rights against the debtor, but is about notice to and priorities between creditors. In *Re Giffen*, [1998] 1 S.C.R. 91 at para. 28, Iacobucci J. was critical of the British Columbia Court of Appeal's approach to a priority dispute under the B.C. *Personal Property Security Act* because that court "did not look past the traditional concepts of title and ownership." He held that the dis-

pute could not be resolved through the determination of who had title because the dispute was one of priority to the collateral and not ownership in it.

55 [55] As noted by Tamara M. Buckwold and Ronald C.C. Cuming in their article, cited with approval in *Giffen, supra* at para. 26, "The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?" (1997) 12 B.F.L.R. 476 at 470:

> The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the [Personal Property Security] Act itself.

56 [56] Other legal scholars have made similar comments. In *2006 Ontario PPSA & Commentary*, (Markham, Ont.: Butterworths, 2006) at p. 3, editors Jennifer G. Legge and Daphne J. MacKenzie explain that "neither the application [of the Act] nor priority contests among creditors with an interest in personal property collateral are governed by title." In his *2008 Annotated Ontario Personal Property Security Act, supra* at p. 247, Richard McLaren states in regard to the general priority rules that are to be applied if no other provision of the Act is applicable: "The general priority scheme set up in s. 30(1) disregards the pre-Act law and its reverence for legal title in collateral."[17] By focusing on where title was held in interpreting s. 20(1)(b), the motion judge ignored the overall context of the *PPSA*.

57 [57] I am of the opinion that the phrase "rights of a person" in s. 20(2) refers to the entitlement of the person under s. 20(1)(b) to exercise its powers, such as the power to take possession of the debtor's assets. In *Re Giffen, supra*, Iacobucci J. held at para. 34 that the right to possession is a right to property or a proprietary right under the *BIA*. He stated: "In my opinion, the bankrupt's right to use and possession of the car constitutes 'property' for the purposes of the *BIA*..."[18]

58 [58] This interpretation of "rights of a person" in s. 20(2) is also in harmony with the use of the phrase "rights" in other sections of the *PPSA*, as well as scholarly comment on the word "rights" as used in the *PPSA* context.

59 [59] Although title to a debtor's property does not vest in a receiver, s. 60(1) of the *PPSA* states:

> 60. (1) Nothing in this Act prevents,
>
> (a) the parties to a security agreement from agreeing that the secured party may appoint a receiver or receiver and manager and, except as provided by this Act, determining the *rights* and duties of the receiver and manager by agreement [Emphasis added.]

As the word "rights" is specifically used in relation to receivers in s. 60(1), the argument that "person" in s. 20(2) must have proprietary rights akin to those of a trustee in bankruptcy cannot succeed.

60 [60] Zeigel and Denomme also discuss the word "rights" in relation to one of the prerequisites for attachment under s. 11 of the *PPSA*: that the debtor have "rights" in the collateral. See *The Ontario PPSA Commentary and Analysis, supra*, at pp. 124-27. They begin by saying that the section merely states the obvious, namely, that if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor. One subheading asks the question: "Is it sufficient that the debtor only has a 'power' to transfer rights in the collateral?" The authors conclude that the power to vest a good title in the goods of a third party is a sufficient right to create a security interest. They also ask the question whether anything turns on the distinction between "power" and "rights" and conclude at p. 127 that nothing turns on the distinction:

> "Rights" is used elliptically in paragraph [11(2)(c)] to describe collateral to which the secured party's security interest is capable of attaching, and is not concerned with the purity of the debtor's title.

61 [61] In addition, under s. 1 of the *PPSA*, a "debtor" is defined as: "a person who ... owns or has rights in the collateral, including a transferee of or a successor to a debtor's interest in collateral." The construction of this definition makes it clear that the word rights has a broader meaning than ownership.

62 [62] I would adopt the same approach to interpreting the word "rights" in s. 20(2). In my opinion, the phrase "a person who represents the creditors of the debtor" is not limited to persons with the same proprietary rights in the collateral as an assignee for the benefit of creditors and a trustee in bankruptcy, but includes a receiver appointed by the court pursuant to s. 47 of the *BIA* who has the right to take possession of the collateral and the right to sell it. If "rights" in s.

20(2) were read as only referring to ownership rights, then the phrase "including" in s. 20(1)(b) would have no significance because only the named representatives hold title in the debtor's collateral. My interpretation of the word "rights" in s. 20(2) as referring to the receiver's rights to possess and sell the debtor's collateral gives effect to the phrase "including" in s. 20(1)(b).

(e) The overall scheme of the *PPSA* including s. 20 as a whole and s. 30(6)

63 [63] In *The Ontario PPSA Commentary and Analysis, supra*, at pp. 170-71, Ziegel and Denomme consider what happens when a properly perfected security interest becomes unperfected, or in other words, when it lapses. After noting that the current s. 20 does not deal with the question of what happens to a lapsed registration, the authors say that the question would have been resolved in favour of the secured party whose perfected interest had lapsed, for a number of reasons. One reason is that under the pre-PPSA statutes, the lapsed registration did not affect the validity of pre-lapse interests. The underlying reason was that priority between competing consensual interests was determined on the basis of a reliance theory. The authors then consider what the approach to priorities would be under the current s. 20(1)(b). They note that one of the arguments in favour of not giving any effect to the lapsed interest is to protect the integrity of the registration system. In opposition to this position, they note that in ss. 20(1)(c) and (d),[19] the general rule that a security interest is not effective until perfected only applies where there is a transferee for value who does not know of the security interest at the time of the transfer.

64 [64] The authors conclude that the argument in favour of subordinating lapsed interests in determining priorities so as to protect the integrity of the registration system is further undermined by s. 30(6) of the *PPSA*.[20] Under that section, a secured creditor may reperfect a security interest in the debtor's collateral that was perfected but has become unperfected. The effect of reperfecting is to restore the secured creditor to the position it had prior to becoming unperfected, subject only to the rights of a person acquired during the period of unperfection. There is no time limit for reperfecting in s. 30(6) and Ziegel and Denomme consider the reperfection requirement to be little more than a formality that "might as well be dispensed with." These provisions show that when a previously perfected security interest lapses, the integrity of the registration system is not the ultimate value to be protected.

65 [65] As mentioned, s. 30(6) of the *PPSA* also contains an exception. The exception is "...that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period." Use of the generic word "person" encompasses legal entities other than a secured or unsecured creditor. See Ziegel and Denomme, *supra*, at p. 259. Since the word "rights" in the *PPSA* has a broader meaning than proprietary rights and is to be given a consistent meaning throughout the *PPSA*, the reference to "rights in all or part of the collateral during the period when the security interest was unperfected" includes the rights in the collateral acquired by the s. 47 *BIA* receiver to take possession of a debtor's property and to sell it. On my interpretation of s. 30(6), if St. Paul had attempted to reperfect its security interest by registering a fresh financing statement after the appointment of PWC as a s. 47 *BIA* receiver, the exception would apply because the s. 47 *BIA* receiver acquired rights in the collateral, namely the right to possession of all present and future money and the right to sell the debtor's assets on behalf of all creditors and distribute the proceeds. Thus, my interpretation of s. 20(1)(b) is consistent with the interpretation of rights in the collateral under other sections of the *PPSA*.

(f) The purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed

66 [66] The purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the creditors at the time "a person who represents the creditors of the debtor" is appointed. This conclusion flows from the Supreme Court's rulings on the relationship between provincial security interest legislation and federal bankruptcy legislation.

67 [67] One of the clearest and most trenchant explanations of s. 20(1)(b) and its relationship to the *BIA* is found in Anthony Duggan and Jacob Ziegel's commentary on the decision of Iacobucci J. in *Re Giffen, supra*. See "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007) 57 U.T.L.J. 227 at 231-34. In that case, Telecom Leasing Canada Ltd. ("TLC") leased a car to B.C. Tel, who leased it to its employee, Carol Giffen. Leases of more than one year are subject to the B.C. *PPSA* irrespective of who has title and even though the lease does not secure

payment or performance of an obligation. Neither TLC nor B.C. Tel filed a financing statement. Giffen went bankrupt. Even though Giffen did not have title to the car, the Supreme Court held that pursuant to the B.C. *PPSA*, title to the car vested in the trustee in bankruptcy.

68 [68] Commenting on this decision, Duggan and Ziegel state:

> The *PPSA* registration requirements serve a publicity function. "Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral." From this perspective, s. 20(b)(1) of the *PPSA* presents a puzzle: the trustee in bankruptcy is not in the position of an innocent third party, he does not rely on the register for the purpose of any dealings with the debtor, and so he is not prejudiced by a secured party's failure to perfect a security interest. Therefore, why should an unperfected security interest be ineffective against him? According to *Re Giffen,* [1998] 1 S.C.R. 91, the answer relates to the rights of execution creditors and the like. *PPSA* s. 20(a) provides that an unperfected security interest is subordinate to execution creditors. An execution creditor may be prejudiced by an unperfected security interest, and *PPSA* s. 20(a), provides a remedy by giving the execution creditor priority over the secured party. If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70. In effect, "the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings." *PPSA* s. 20(b)(i) is a kind of *quid pro quo.* It compensates unsecured creditors for the loss of their priority rights under s. 20(a) by giving the corresponding priority to the trustee in the trustee's capacity as the creditors' representative. *In summary, the purpose of the PPSA s. 20 (b)(i) is "to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security interests which they enjoyed prior to the bankruptcy of the debtor."*
>
> ....
>
> In *Re Giffen*, Justice Iacobucci put the case for *PPSA*, s. 20(b)(i) in fairness terms: when the debtor becomes bankrupt the execution creditor loses the priority it previously had over unperfected security interests but this is offset by giving priority to the trustee instead. However, the justification can by expressed in economic terms. The thinking goes like this: Bankruptcy creates a common pool problem, which bankruptcy law addresses by substituting a mandatory system of collective debt collection for the individual first-come, first-served debt collection system that operates outside bankruptcy. *Creditors' relative entitlements should be the same inside bankruptcy as they are outside bankruptcy because otherwise there will be incentives for individual creditors to use the bankruptcy laws opportunistically.* [Citations omitted; emphasis added.]

69 [69] The rationale given by Duggan and Ziegel in relation to bankruptcy applies equally whenever "a person who represents the creditors of the debtor" is appointed. When the s. 47 *BIA* receiver was appointed in this case, it was because the Bank was about to enforce its security. At that time, the Bank had a properly perfected security interest. An execution creditor would not have had any priority vis-à-vis the Bank. Because the Appointment Order stayed any actions, the execution creditor would have lost any priority it had over unperfected security interests as of the commencement of the receivership, subject to the stay being lifted by the court. Whether the *BIA* stay is imposed automatically under s. 69.3 or by court order under s. 47, the effects of the stay and the considerations it engages are similar. To prevent insolvency as well as bankruptcy laws from being used opportunistically, creditors' relative entitlements should be the same as they were immediately prior to the time "a person who represents the creditors of the debtor" was appointed.

70 [70] Duggan and Ziegel then address the second question raised in *Re Giffen,* namely, whether s. 20(1)(b) of the *PPSA* is in conflict with the *BIA* because of the principle of bankruptcy law that a trustee has no greater claim to property than the debtor herself had. Iacobucci J. held that the principle is not an inflexible one and that the provinces are competent to modify it as long as the modifications are not in conflict with the provisions of the *BIA*.

71 [71] In *Re Giffen*, Iacobucci J. did not directly address the issue of whether a conflict exists between then s. 20(b)(i) of the B.C. *PPSA* and bankruptcy policy that a trustee has no greater claim to property than the debtor had. However, he provided a clue to his thinking at para. 52 of his reasons where he approved a statement from *Donaghy v.*

CNS Vehicle Leasing, [1992] 6 W.W.R. 70 (Alta. Q.B.), to the effect that the issue is not ownership of the property but priority to it. Duggan and Ziegel state:

> From a bankruptcy perspective, what matters is not the rights a creditor may have had against the debtor herself to the disputed asset but, rather, the creditor's rights against other creditors at the moment of bankruptcy: "it is a question of priority, not property." In other words, the flaw in TLC's argument was that it focused on the wrong attribute of the property right its security interest gave it. The question is not whether TLC could have enforced its security interest against Giffen just before she went bankrupt but, rather, whether TLC would have had a priority over an execution creditor at the same point. Section 20(1)(a) of the *PPSA* determines the answer to the second question, and *bankruptcy policy dictates that bankruptcy law should preserve the parties' relative entitlements.* If this is the real meaning of the principle at stake, there is no conflict between *PPSA* s. 20(1)(b), and the bankruptcy laws. On the contrary, the provision reinforces bankruptcy policy. [Emphasis added.]

72 [72] I take Duggan and Ziegel's reference to bankruptcy policy and bankruptcy law to be a reference to insolvency policy and law as well. Inasmuch as the purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the parties at the time "a person who represents the debtors of the creditor" is appointed, the Bank's priority status falls to be determined at the time PWC was appointed as receiver under s. 47 of the *BIA*.

73 [73] The purpose of s. 20 of the *PPSA* is to permit a person who takes over control of the assets or business of the debtor to distribute those assets in an orderly fashion in accordance with the existing priorities. It is for this reason that s. 20(2) determines the rights of the representative as of the date from which her status takes effect. Determining priorities at the commencement of the distribution process when the receiver assumes control over the debtor's assets is in keeping with the goals of the legislation.[21]

Conclusion on whether PWC is "a person who represents the creditors of the debtor" and the date on which the determination of priorities should be made

74 [74] Giving effect to the unique wording of Ontario's *PPSA*; the history of the section; the opinion of scholars; existing jurisprudence holding that the role of a s. 47 *BIA* receiver is similar to that of a trustee in bankruptcy; and having regard to the section as a whole, to related provisions of the *PPSA*, as well as to the purpose of the section, I conclude that PWC's appointment as a s. 47 *BIA* receiver made it "a person who represents the creditors of the debtor" within s. 20(1)(b). Pursuant to s. 20(2)(b), the time for determination of priorities is thus "the date from which the person's representative status takes effect." PWC's representative status took effect on the date of its appointment under the Appointment Order, namely November 14, 2001. On that date, the Bank had a properly perfected first security interest.

PWC's alternative argument: did the relevant date for determining priorities change when the trustee in bankruptcy was appointed?

75 [75] I must also address PWC's submission that its status as interim receiver under s. 47 of the *BIA* effectively ended when it became trustee in bankruptcy on January 31, 2002 and that the relevant date for the purpose of determining the relative effectiveness of the Bank's security as against PWC is no longer the date on which PWC became the interim receiver, but is now the date on which it became the trustee in bankruptcy. PWC submits that because of the intervening bankruptcy, it is no longer in possession of any of the assets of State in its capacity as receiver and thus it has no interest in the assets that are subject to the Bank's security. Thus, it argues that the Bank's secured interest is no longer effective against it in its capacity as trustee in bankruptcy because that interest became unperfected prior to the assignment into bankruptcy by operation of s. 48(3) of the *PPSA*.[22]

76 [76] There are five considerations that lead me to reject PWC's submission that the date for assessing the effectiveness of the Bank's security interest was the date of the assignment into bankruptcy:

(a) the s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed;
(b) the date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift;
(c) the date when the respective security interests of the parties come into conflict is the date of the Appointment Order;
(d) the policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security; and

(e) giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty.

77 [77] I now discuss each of these factors in turn.

(a) The s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed

78 [78] PWC submits that the s. 47 *BIA* receivership and the bankruptcy of State are two separate judicial proceedings and that when PWC was appointed trustee in bankruptcy on January 31, 2002, the s. 47 *BIA* receivership ended. According to PWC, the Bank's priority status must therefore be reassessed as of January 31, 2002 when it became trustee in bankruptcy.

79 [79] PWC cites no authority for its proposition and, in my view, its position that the receivership ended upon the bankruptcy is not supported by the jurisprudence or by the terms of the Appointment Order. The effect of bankruptcy on the authority of a court-appointed receiver depends on the circumstances. See *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.). The court's brief endorsement (per Blair, Robins and Krever JJ.A.) states:

> The appellants submitted that on the occurrence of the bankruptcy the court-appointed receiver was deprived of jurisdiction to deal with the property of the bankrupt. We do not accept this argument and agree with Hughes J. who held that the activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy not so appointed can co-exist in the absence of conflict of interest and of jurisdiction.

80 [80] PWC's submission also ignores the wording of the Appointment Order, which is silent as to when PWC's receivership ends. There is no evidence before us that PWC has passed its final accounts as interim receiver thereby bringing its receivership to an end. More importantly, the Appointment Order specifically contemplates that PWC's receivership will continue after assigning State into bankruptcy. The order appointing PWC as interim receiver gave it broad powers, including the power to make an assignment in bankruptcy and to act as trustee.[23] Under s. 3 of the Order, PWC had the right to "take possession and control of the Property ... and all receipts ... arising out of or from the Property" of the Debtor. It was also given the power in s. 3(f) "to receive and collect *all monies* and accounts *now owed or hereafter owing* to the Debtor in respect of the Property". [Emphasis added.] The property of the debtor would include receivables such as an income tax refund.

81 [81] Further, s. 3(p) of the Appointment Order gives PWC as interim receiver the power to enter into arrangements with any trustee in bankruptcy, including an occupation agreement, and the power to lend money to the trustee, not exceeding $250,000 unless increased by the court. For the interim receiver to be in a position to lend money to the trustee in bankruptcy as contemplated by the Appointment Order, the s. 47 receiver must necessarily continue to exercise possession and control over the assets. I note that almost a year after the trustee was appointed, on December 19, 2002, the s. 47 BIA receiver transferred the amount of $1,180,243.72 (proceeds from the third asset sale) from its account to the account of the trustee in bankruptcy. The s. 47 BIA receiver then distributed $950,000 to the Bank.

82 [82] Thus, in this case, the role of the s. 47 *BIA* receiver and that of the trustee in bankruptcy were intended to be complimentary.[24] The process envisaged was that the interim receiver would realize all of State's assets and take possession of them, and would continue to act in conjunction with the trustee in bankruptcy. Accordingly, the receivership and the bankruptcy were not two separate and distinct procedures.

(b) The date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift

83 [83] PWC submits that the appointment of a s. 47 *BIA* receiver did not "crystallize" the rights of the parties who had a claim against the assets of State.

84 [84] Contrary to PWC's submission, when a secured party acts to realize on its security, that is generally the date on which to apply priority rules. Richard McLaren in *The 2008 Annotated Ontario Personal Property Security Act, supra*, at p. 246, states in reference to s. 30:

> A general issue which may arise through the course of the application of the priority rules is the date upon which the priority dispute will be determined. Generally, this will be the date where a secured party acts to realize upon its security.

This passage was also in an earlier version of McLaren's text and was quoted with approval in *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* (2004), 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.).

85 [85] PWC relies on the Model Order referred to above (see para. 25), which expressly permits the filing of registrations under provincial personal property regimes, in support of its position that the appointment of a s. 47 *BIA* receiver is not the date that triggers the application of priority rules. However, at the time the events in the case at bar occurred, the practice in Ontario was to interpret the stay of proceedings in receivership orders to include a stay of any action on the part of a secured creditor to reperfect its security through registration of a financing statement.[25] A secured creditor whose interest had become unperfected could not reregister its interest without leave of the court. Thus, at the relevant time, the practice was to consider the appointment of a s. 47 *BIA* receiver as a triggering event. The effect of PWC's submission is to suggest that the 2004 procedural change to the standard form template receivership order has retrospective substantive implications.

86 [86] The change in practice does not affect the fact that the appointment of a s. 47 *BIA* receiver continues to result in a court-ordered stay of all actions and that this appointment still affects the enforcement rights of unsecured creditors. In that sense, the date of the appointment of the s. 47 *BIA* receiver is a triggering event and the date of the receiver's appointment can still be used to determine priorities.

(c) The date when the respective security interests of the parties came into conflict was the date of the Appointment Order

87 [87] In *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (C.A.), aff'g (1982), 40 O.R. (2d) 54 (H.C.), Morden J.A. dealt with a priority conflict between a bank, whose security interest had become unperfected through a lapse in registration, and an inventory supplier, whose security interest was also unperfected. After resolving the priority issue on the basis of which creditor's interest had attached first, Morden J.A. expressed his view on a different basis for coming to the same conclusion. He stated at para. 35:

> ...I think that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests came into conflict. This would appear to be March 14, 1980, when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest. The issue arose at that time - what right did the bank have against Sperry to enforce its security?

The step the bank took on March 14, 1980 to enforce its interest in the collateral was the appointment of a private receiver pursuant to its general security agreement.

88 [88] In this case, the Bank acted to realize upon its security by giving a s. 244 notice and by asking the court to appoint a s. 47 *BIA* receiver pursuant to its general security agreement. The effect of the Bank's act was to have all actions against the debtor stayed by court order. The question of the Bank's right to enforce its security over all of the assets of the debtor arose at that time. The asset sales in November and December merely converted those assets into proceeds which could be distributed according to the priorities over them when the receiver was appointed. I am not aware of any authority that suggests that the date for determining priorities should be the date when funds owing to a debtor are actually received.

(d) The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security

89 [89] The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security. Frank Bennett, in *Bennett on Creditors' and Debtors' Rights and Remedies*, 4th ed. (Toronto: Carswell, 1994) states at p. 703: "The trustee in bankruptcy acquires title to the assets of the bankrupt subject to the rights of secured creditors." Similarly, at p. 416 of *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2006), Lloyd W. Houlden and Geoffrey B. Morawetz state:

> The policy of the *BIA* in the case of bankruptcy is not to interfere with secured creditors except in so far as it may be necessary to protect the estate as to any surplus on the assets covered by the security.
>
> ....
>
> No leave is necessary for a secured creditor to proceed to realize upon its security...

90 [90] The statutory stay of proceedings contained in s. 70(1) of the *BIA* specifically excepts "the rights of a secured creditor", as does s. 71, which vests the property of the bankrupt in the trustee. If the debtor gives notice of his intention to make a proposal, the stay imposed by s. 69(1) does not apply where the secured creditor has given notice of its intention to enforce its security under s. 244(1) more than ten days before the proposal.

91 [91] In light of my earlier comments about the Supreme Court's decision in *Re Giffen*, it is also important to observe that *Re Giffen* does not justify using the date of the bankruptcy, rather than the date of the receivership, as the necessary reference date for determining priorities for the significant reason that the wording of the Ontario legislation is different from that considered by the Supreme Court in *Re Giffen*. The B.C. provision the Supreme Court was asked to interpret read: "A security interest ... in collateral is not effective against ... a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy." The B.C. legislation, unlike Ontario's *PPSA*, does not refer to "a person who represents the creditors of the debtor." Section 20(2)(b) of the Ontario *PPSA* further specifies that the rights of the creditor's representative are to be "determined as of the date from which the person's representative status takes effect" while the B.C. legislation forces an inquiry as to whether the security interest was perfected at the date of the bankruptcy. This different legislative language means that the decision in *Re Giffen* cannot be applied to set the date of the bankruptcy, rather than the date of the receivership, as the starting point.[26]

92 [92] The importance of the wording of the applicable provincial legislation in determining parties' rights in a bankruptcy is highlighted by the decision of *Lefebvre (Trustee of); Tremblay (Trustee of)*, [2004] 3 S.C.R. 326. In *Lefebvre*, the bankruptcy judge and the majority of the Quebec Court of Appeal had applied *Re Giffen* to two priority disputes, the facts of which were indistinguishable from those considered in *Re Giffen*. Writing for the court, Lebel J. allowed the appeal and held at para. 40 that the Quebec courts had given *Re Giffen*:

> ...a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. ... [T]he provincial legislation itself defined the nature of the respective rights of lessors and trustees. ... As has already been mentioned, the *Civil Code of Quebec* does not provide for a similar consequence for failure to publish the rights out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal.

93 [93] *Lefebvre* thus makes it clear that *Re Giffen* cannot be applied generally without regard to the statutory context.

94 [94] To interpret s. 20(2)(b) in a manner that shifts the reference point for the determination of priorities from the date the Bank acted to realize on its security by appointing a s. 47 *BIA* receiver to the date the trustee in bankruptcy was appointed interferes with the enforcement process and is not consonant with bankruptcy policy.

(e) Giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty

95 [95] Finally, to read the reference point for determining priorities between the representative of the creditors and the secured creditor as changing in the way that PWC suggests undermines the purpose of s. 20 which, as I have indicated, is to preserve the priorities as they stood at the time "a person who represents the creditors of the debtor" was appointed. From a practical point of view, changing the date for determining priorities would lead to commercial uncertainty. As noted by Winkler J. in *Sun Life Assurance Co. of Canada v. Royal Bank* (1995), 10 P.P.S.A.C. (2d) 246 (Ont. Ct. (Gen.Div.)), the purpose of the *PPSA* registration regime is to impart order and certainty to commerce. To reverse priorities in the middle of the distribution process when there has been no change in the receiver's control over the assets is completely contrary to the goals of the legislation.

Conclusion

96 [96] Although the Bank was not exempt from the obligation to file a financing change statement or a fresh financing statement upon learning of State's name change, its failure to do so in this case did not result in a loss of priority. In my opinion, the date for determining the effectiveness of the Bank's security interest is November 14, 2001, when the court appointed PWC as interim receiver. This date for determining priorities did not change with the appointment of PWC as trustee in bankruptcy.

Disposition

97 [97] For the reasons I have given, I would allow the appeal, set aside the order of the motion judge, and in its place provide the following direction to PWC:

> That the security granted by State to the Bank as Agent is fully effective as against PWC with respect to the Estate Funds (as defined in PWC's notice of motion and attached report) and that PWC act in the administration of the Estate accordingly.

98 [98] With respect to costs, I note that no award of costs was made to the Bank or to St Paul at first instance as this was a novel issue and the costs of PWC were ordered to be paid out of the estate. I would make the same order here.

99 [1] K.N. FELDMAN J.A.:-- When the appellant bank sought the appointment of an interim receiver of the debtor company, it held a perfected security interest over the assets of that company. However, during the receivership the appellant allowed its registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*") to lapse. The appellant did not re-perfect its security interest before the interim receiver assigned the debtor into bankruptcy, following which, a significant tax refund came into the debtor's estate.

100 [2] The appellant asserts priority under ss. 20(1)(b) and 20(2)(b) of the *PPSA* over the tax refund and some other undistributed funds, on the basis that the date when the receiver was appointed is the date for determining priority, and on that date, the appellant's security interest was perfected. In contrast, the trustee in bankruptcy says that the relevant date for determining priority is the date of the assignment into bankruptcy. Because on that date the appellant's security interest was unperfected as against the trustee, the appellant ranks as an unsecured creditor, *pari passu* with other unsecured creditors.

101 [3] The motion judge dismissed the appellant's claim. For the reasons that follow, I agree with the motion judge and would dismiss the appeal.

Background

102 [4] The appellant held a first registered general security interest over the personal property of State, the debtor, and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A court order appointing the respondent, PricewaterhouseCoopers Inc. ("PWC"), as interim receiver was issued on November 14, 2001. Following its appointment, the interim receiver sold the substantial assets of State in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale on November 14, 2001, the receiver sold State's name triggering s. 48(3) of the *PPSA*, which provides:

> Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the se-

cured party registers a financing change statement or takes possession of the collateral within such thirty days.

103 [5] On January 31, 2002, in accordance with the terms of the order appointing it as interim receiver, PWC assigned the debtor into bankruptcy and PWC was appointed the trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received an income tax refund of $4.325 million from the Canada Revenue Agency.

104 [6] Before the date of the debtor's assignment into bankruptcy (and before the third sale of assets) both the appellant bank and St. Paul Guarantee Insurance Company ("St. Paul"), a subsequent secured creditor, had knowledge of the sale of the debtor's name and failed to register a financing change statement. Therefore, both of their secured debts had become unperfected in accordance with s. 48(3).[27]

105 [7] Following the debtor's assignment into bankruptcy, the appellant bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim, which included a secured claim in the amount of $20 million, with PWC as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the appellant bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee.

106 [8] The motion judge reached the following conclusions:

1. An interim receiver appointed under s. 47(1) of the *BIA* is not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*.
2. The order appointing the interim receiver, which contemplated that interested parties could move for a lift of the stay it imposed, did therefore not have the effect of precluding the appellant from maintaining the perfected status of its security interest following the appointment of the interim receiver.
3. A court has no jurisdiction to override provisions of the *PPSA*, including s. 48(3), and the appellant's security interest became unperfected in accordance with that section.
4. As an alternative to its argument that the interim receiver is a person who represents the creditors of the debtor, the appellant argued before the motion judge that it held a perfected security interest in the income tax refund and other amounts on the basis that the interim receiver took possession of those funds "on behalf of" the appellant upon its appointment at the behest of the appellant. The motion judge rejected that argument and held that s. 26(2) of the *PPSA* has no application to the facts of this case, as the interim receiver did not take possession of the income tax refund on behalf of the appellant bank.[28]
5. PWC only became a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* upon its appointment as trustee in bankruptcy. Because at that time the security interest of the appellant was unperfected, it was and remains ineffective against the trustee from that date.

Issues

107 [9] My colleague has identified two issues for determination on this appeal:

1. Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?
2. Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

The resolution of the second issue requires a determination of whether an interim receiver appointed under s. 47(1) of the *BIA*, although not referred to by name in ss. 20(1)(b) and 20(2)(b), is "a person who represents the creditors of the debtor" within the meaning of these provisions. It also requires a determination of the purpose and effect of ss. 20(1)(b) and 20(2)(b).

108 [10] During the applicable period, ss. 20(1) and 20(2) of the *PPSA* read as follows:

20(1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or
(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or
(iii) all persons entitled by the *Creditors' Relief Act* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;

(b) *in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy*;
(c) in chattel paper, documents of title, securities, instruments or goods is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or
(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) *under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.*

[Emphasis added.]

109 [11] In his submissions, counsel for the appellant characterized the effect of ss. 20(1)(b) and 20(2)(b) to be that when a representative of creditors is appointed, "the music stops" under the *PPSA*, meaning that the priority rights of all parties are frozen for the purpose of distribution of the estate of the debtor.

110 [12] The appellant's position is that an interim receiver, appointed by the court under s. 47(1) of the *BIA*, is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The appellant submits that upon the appointment of the interim receiver, the priority interests of all creditors of the debtor are frozen and the interim receiver is to distribute the assets or proceeds of the assets of the debtor, no matter when they are realized or distributed, in accordance with the respective priority positions of the creditors as of the date of the receiver's appointment.

111 [13] To the extent that the security interest of a secured creditor may become unperfected under s. 48(3) of the *PPSA* following the appointment of a representative of creditors, submits the appellant, this post-appointment event has no bearing on the secured creditor's priority for the purpose of the distribution of assets of the debtor's estate. Or, put another way, the effect of the order appointing the interim receiver was to exempt the appellant from the requirement of complying with s. 48(3). Consequently, the fact that the appellant failed to file a financing change statement before the date of the debtor's assignment into bankruptcy and the appointment of the trustee in bankruptcy did not affect the appellant's entitlement to continue to be paid from the assets of the estate in accordance with its priority position as it stood on the date of the appointment of the interim receiver, at which time its security interest was perfected.

112 [14] I summarize my reasons for rejecting the appellant's position as follows. First, although an interim receiver may represent the creditors of the debtor for some purposes, it is not "a person who represents the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" should not be read in to these subsections. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the col-

lateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not in a priority contest with any creditor on behalf of unsecured creditors. The purpose of these subsections is to allow the representative of creditors to defeat unperfected security interests on behalf of unsecured creditors whose rights to collect outstanding debts from the debtor are statutorily stayed, such as on bankruptcy or assignment for the benefit of creditors. Unlike on a bankruptcy or assignment for the benefit of creditors, creditors' priority rights are not statutorily stayed on a receivership. Although such rights may be stayed by the order appointing the receiver, a creditor may apply to lift the stay in order to commence or continue proceedings to collect its debt.

113 [15] Second, the effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time, or, in the words of appellant's counsel, to "stop the music". Neither these subsections nor the order appointing the interim receiver had the effect of exempting the appellant from the requirement of complying with s. 48(3). Consequently the appellant's security interest became unperfected by its failure to file a financing change statement within the time period specified by s. 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the appellant's security interest is not effective against the trustee in bankruptcy.

Analysis

Issue 1: **Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?**

114 [16] The motion judge found that the order appointing the receiver did not exempt the appellant from complying with s. 48(3), nor did the stay provisions of the order prevent the appellant from seeking to lift the stay in order to file a financing change statement. My colleague concludes that the motion judge was correct on this issue and I agree. In my view, the consequence of this conclusion is that the appellant's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b).

Issue 2: **Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?**

(i) Subsection 20(1) of the *PPSA*

115 [17] Subsection 20(1) prescribes the effect of perfection of a security interest in collateral in relation to other claims against the same collateral and defines the rules for determining priority between the holder of an unperfected security interest and others with a claim to, or an interest in, the collateral. Under s. 20(1)(a), an unperfected security interest "is subordinate to" perfected security interests in the same collateral as well to the interests of lienholders and of unsecured creditors who have seized the collateral through legal processes.

116 [18] In contrast, under ss. 20(1)(b), (c) and (d), an unperfected security interest "is not effective" against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy, and against certain transferees of the debtor's property. The different language is used because s. 20(1)(a) orders the priority among secured creditors and other creditors with a realized interest in the collateral, while under ss. 20(1)(b), (c) and (d), an unperfected security interest is treated as an unsecured interest as against the named persons.

117 [19] In order to interpret the meaning and scope of the term "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, one must examine the language of ss. 20(1)(b) and 20(2)(b), since both clauses work together, as well as the purpose of the provisions, which I will discuss later in these reasons.

118 [20] Clause 20(1)(b) states that a security interest in collateral, until perfected, "is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy." Before this provision was amended in 1989, it provided that an unperfected security interest in collateral was ineffective against three named representatives: a trustee in bankruptcy, an assignee for the benefit of creditors and a receiver. See *Personal Property Security Act*, R.S.O. 1980, c. 375, s. 22(1)(a)(iii). While in amending the provision the legislature specifically removed the reference to a "receiver", it also added the term "including", which now precedes "assignee for

the benefit of creditors" and "trustee in bankruptcy". The appellant argues that because the legislature used the word "including", the removal of the reference to a "receiver" does not indicate an intention by the legislature to exclude receivers from the ambit of the provision.[29]

119 [21] I disagree. The legislature's removal of a receiver from s. 20(1)(b) means the appellant cannot succeed without showing that an interim receiver is a "person who represents the creditors of the debtor" in the sense that fits the language and purpose of both ss. 20(1)(b) and 20(2)(b). There is no question that, in carrying out its functions and duties, an interim receiver can act in a representative capacity on behalf of some or all of the creditors.[30] The issue in this case is whether an interim receiver is the type of representative of creditors that is referred to in these two clauses.

(ii) A receiver does not obtain the debtor's proprietary interest in the collateral

120 [22] The first relevant difference between a receiver and a trustee in bankruptcy or an assignee for the benefit of creditors is that a receiver does not obtain the debtor's proprietary interest in the collateral. In their text *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005), Professors Cuming, Walsh and Wood, at pp. 441-42, begin their discussion of the interface between s. 20 of the *PPSA* and the *BIA* by explaining that the vesting of the debtor's personal property in the trustee in bankruptcy under s. 71(2) of the *BIA* gives the trustee the independent status to defeat unperfected security interests in that property under s. 20:

> The *PPSA* provides that a security interest is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy. The effect of this is to give to the debtor's trustee in bankruptcy an independent status to defeat unperfected security interests in personal property that vests in the trustee as provided by *BIA* [sub]section 71(2). [Citations omitted.]

121 [23] The two creditors' representatives named in s. 20(1)(b) share an important characteristic: by virtue of statute (s. 71 of the *BIA* and ss. 7 and 8 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33), upon their respective appointments, the proprietary rights of the debtor in the collateral vest in these representatives.

122 [24] Section 71 of the *BIA* provides:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

123 [25] Sections 7 and 8 of the *Assignments and Preferences Act* provide:

> 7. Every assignment made under this Act for the general benefit of creditors, if the property is described in the words "all my personal property that may be seized and sold under execution and all my real estate, credits and effects", or in words to the like effect, vests in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except such as are by law exempt from seizure or sale under execution, subject, however, as regards land, to the *Registry Act* and the *Land Titles Act*.
>
> 8. Every assignment for the general benefit of creditors, whether it is or is not expressed to be made under or in pursuance of this Act and whether the assignment does or does not include all the real and personal estate of the assignor, vests the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and the assignment and the property thereby assigned is subject to all the provisions of this Act, and the same applies to the assignee named in the assignment.

124 [26] As a result, these representatives hold the debtor's proprietary interest in the collateral. This is to be contrasted with the role and legal status of a receiver, whether privately or court-appointed. I will discuss court-appointed receivers because in this case, PWC is a court-appointed receiver and a court-appointed receiver has statutory authority.

125 [27] One important difference between a court-appointed receiver and a trustee in bankruptcy (or assignee for the benefit of creditors) is that a receiver obtains its powers from an order of the court . These powers allow the receiver to administer the business and assets of the debtor, and to effect a sale of the debtor's assets pursuant to a vesting order of the court. However, the debtor's property rights in the assets, whether the debtor has full or partial title or merely a right of possession, do not devolve onto the receiver as they do onto a trustee in bankruptcy by statute under s. 71 of the *BIA*. As the motion judge stated at para. 29:

> The appointment of an Interim Receiver does not vest the assets of the debtor in the Interim Receiver, as in the case of a Trustee in Bankruptcy, nor do the liabilities of the debtor become liabilities of the Interim Receiver whereas, in the case of a bankruptcy, the liabilities become liabilities of the bankrupt estate to be administered and, subject to the rights of secured creditors, paid or compromised by the Trustee out of the assets of the bankrupt estate.

126 [28] The receiver is solely an administrator accountable to the court and to all stakeholders in the receivership, appointed to ensure that the debtor's assets are realized in an orderly manner and for the maximum realizable value, and then to distribute the proceeds to creditors and other claimants in accordance with their respective priorities. It is in that way that a receiver may represent creditors. As the motion judge pointed out, a debtor could retain possession and remain in business during a receivership, and, subject to the terms of the order appointing the interim receiver, could borrow additional funds and create additional security that would continue after the termination of the receivership. In some circumstances the debtor could retain the business following the discharge of the receiver. The debtor is not stripped of all of its interest in the collateral upon the appointment of an interim receiver.

127 [29] The fact that ss. 20(1)(b) and 20(2)(b) deal with proprietary rights is reflected in the language and effect of s. 20(2)(b) which states:

> 20(2) The rights of a person,
>
> ...
>
> (b) under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

The effect of s. 20(2) is to define the time from which the rights of statutory lienholders under s. 20(1)(a)(i) and of representatives of creditors under s. 20(1)(b) are to be determined. The effective timing of the other rights under ss. 20(1)(a), (c) and (d) is built into the description of those rights. (See para. 10 above for the relevant provisions.)

128 [30] However, the wording of s. 20(2)(b) also tells us that s. 20(1)(b) has conferred "rights ... in respect of the collateral" on the representative of creditors and that those rights are to be determined "as of" the effective date of the representative's appointment. Although the term "rights", standing alone, is used in s. 60 of the *PPSA* to mean the right to take administrative steps, "rights ... in respect of the collateral" are rights that indicate a proprietary or priority interest in the collateral that entitles the holder of such rights to be paid out of the proceeds of that collateral in accordance with its priority.

(iii) A receiver does not assert the claim of the unsecured creditors against competing security interests

129 [31] A trustee in bankruptcy, unlike a receiver, represents the creditors in another way beyond administering the estate: the trustee holds the debtor's proprietary interest in the assets on behalf of the unsecured creditors. As Iacobucci J. stated in *Re Giffen*, [1998] 1 S.C.R. 91 at para. 41 (referring to the Saskatchewan Court of Appeal decision in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481 at 490):

> [T]he trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests."

130 [32] Consequently, a trustee occupies a priority position for the purpose of distribution of the proceeds of the debtor's estate. In that sense, a trustee in bankruptcy is in competition with other creditors for its priority position among creditors, and its rights in the collateral are in competition with the rights of other creditors in the collateral. In contrast, a receiver is not in competition with creditors and has no priority position itself because any rights it has in the collateral are administrative but not proprietary. It is merely an administrator who pays out the proceeds to the creditors, both secured and unsecured, if there are sufficient funds, in the order of their priority.

131 [33] In *Re Giffen*, Iacobucci J. discussed the purpose and effect of s. 20 of the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359 - which is the counterpart of s. 20 of the *PPSA* but with slightly different wording. He explained that the reason why the *PPSA* provides that a trustee in bankruptcy defeats an unperfected security interest is because, before bankruptcy, an unsecured creditor can take steps to obtain and enforce a judgment against the debtor through execution proceedings that will rank ahead of an unperfected security interest under s. 20(1)(a)(i). However, once bankruptcy occurs, "all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims." *Re Giffen, supra* at para. 39. As Anthony Duggan and Jacob Ziegel explain when discussing *Re Giffen* in their article, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 U.T.L.J. 227 at 231: "If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70."

132 [34] In *Re Giffen, supra* at para. 39, Iacobucci J. adopted the following statement by Professor Cuming in his article entitled "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 Can. Bus. L.J. 17 at 27-28:

> In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the B.C. *PPSA* to attack the unperfected security interest.

And at para. 41, Iacobucci J. agreed with the conclusion of the Saskatchewan Court of Appeal at p.490 of *Paccar* that: "It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest."

133 [35] In their discussion of *Re Giffen*, Professors Duggan and Ziegel, *supra* at 231-34, explain how bankruptcy law works with the *PPSA* to preserve creditors' relative priority entitlements post-bankruptcy. The authors comment that Iacobucci J.'s decision in *Re Giffen* confirms "the complementary relationship between the federal bankruptcy statute and the provincial PPSAs": *supra* at 249.

134 [36] It follows from *Re Giffen* that a receiver is not intended to be included as a "person who represents the creditors of the debtor" for the purpose and therefore within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*. The reasons for this conclusion are: (a) unlike in a bankruptcy, a receiver, including a court-appointed interim receiver, does not stand in for unsecured creditors in a priority contest with any other creditor; (b) a receiver is not the "repository of enforcement rights" of unsecured creditors with any status to "attack the unperfected security interest" (*Re Giffen, supra*, at para. 39); and (c) in a receivership, unlike in a bankruptcy, there is no statutory stay causing execution creditors to lose their priority and ability to realize on their debt.

(iv) Personal Property Security Acts of other provinces

135 [37] The conclusion that a receiver is not a person who represents the creditors of the debtor under s. 20 is also consistent with the correlative sections of the Personal Property Security Acts of the other common law provinces.[31] The comparable provisions in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland do not include a receiver.[32] Only the relevant sections of the Manitoba and Ontario Acts formerly referred to a receiver, but both have since been amended to remove this reference.

136 [38] The Manitoba statute contained a provision with language identical to the previous version of the Ontario section, R.S.O. 1980, c. 375, which read:

> 22(1) [A]n unperfected security interest is subordinate to
>
> (a) the interest of a person

...

(iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...

22(2) The rights of a person under sub-clause 1(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest.

Manitoba's replacement provision does not use the term "includes", but instead lists only two representatives of creditors, neither of which is a receiver.[33]

137 [39] The Manitoba courts considered the effect of the former wording of s. 22 in the context of a court-appointed receivership in the case of *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receiver of)*, [1991] 6 W.W.R. 764 (Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (C.A.). The court had appointed a receiver of the debtor trucking company at the request of a secured creditor, Roynat. Another secured creditor, Paccar, had a prior purchase-money security interest in some of the trucks, but had inadvertently failed to renew its *PPSA* registration and was unperfected on the date of the appointment of the receiver. Paccar sought an extension of time to re-perfect its security under s. 65 of the Manitoba *PPSA*, which provided that when an extension is granted "the rights of other persons accrued up to the time of the registration of the order made under this section are not affected by the order." The receiver opposed Paccar's motion. It took the position that on its appointment as a receiver, by operation of ss. 22(1)(a)(iii) and 22(2), it had accrued the rights referred to in s. 65.

138 [40] In the Court of Queen's Bench, Scollin J. rejected the position of the receiver. He explained that even though a receiver was referred to in s. 22, the rights and interests of a receiver are not the same as those of a trustee in bankruptcy. He concluded at 768 that:

> [T]he provisions of s. 22 can be sensibly reconciled with the provisions of s. 65 by recognizing that the only rights of the creditor which should be subordinated to the interest and rights of the receiver are those which necessarily conflict with the due exercise of the rights of the receiver as representative of the creditors in executing the mandate of the court. The status of a receiver does not bring with it a cornucopia of rights.... Beyond his mandate, the receiver has no status. Unless his rights or interests are affected, no issue of subordination even arises. In this case he has demonstrated no diminution of his rights or interest and no prejudice to any creditor. To recognize the substantive security interest of Paccar causes no injustice or prejudice to the receiver or to other creditors and permits full recognition of and harmony between ss. 22 and 65 of the Act. Absent prejudice, the receiver's rights or interest do not extend to defeating an application which, but for his appointment, would be effective to relieve against an inadvertent lapse.

139 [41] The Court of Appeal dismissed the appeal. Twaddle J.A. acknowledged that Scollin J. may have been correct in his view, distinguishing a trustee in bankruptcy from a receiver, that while a trustee in bankruptcy does acquire a priority property right on appointment, a receiver does not. However, he said he was not required to decide the issue because he could dismiss the appeal based on his interpretation that s. 22 did not defeat the remedial effect of s. 65. He stated at p. 615:

> An order made under s. 65 re-perfects the security interest as though it had never lapsed, subject only to the rights of those who have dealt with the debtor in the meantime and who would be prejudiced by permitting the order under s. 65 to have retroactive effect.

140 [42] In my view, Scollin J.'s analysis of the rights of a receiver was correct and consistent with the conclusion reached on the appeal. Furthermore, his understanding was given full effect when s. 22 was repealed and replaced in Manitoba in 1993 with the new provision that excludes a receiver from its ambit. As mentioned above, the equivalent statutory provisions of the other common law provinces do not make reference to a receiver.

(v) The effect of a court-ordered stay

141 [43] Other case law has also considered the issue of re-perfecting a security interest following the appointment of a receiver or of a monitor under s. 11.7 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. This case law arises because when a receiver (or monitor) is appointed, unlike in a bankruptcy, the debtor does not lose all rights and interest in the collateral and the rights of creditors are not statutorily frozen. Although an order appointing a receiver will normally stay all proceedings against the interests of the debtor, the court can always lift the stay to allow a creditor to take certain steps to enforce its rights or perfect its security against the debtor, subject to considering competing rights acquired by other creditors in the interim.

142 [44] Subsection 30(6) of the Ontario *PPSA* provides:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Using s. 30(6), a secured creditor with a security interest that is originally perfected by registration but becomes unperfected, can re-perfect by registration and regain its priority standing as against all other creditors except as against someone who "acquired rights in all or part of the collateral" while the creditor's security interest was unperfected.

143 [45] As was decided in *Roynat*, supra, on appointment, a receiver does not acquire any rights in the collateral that are in competition with the rights of any creditor. In other words, a receiver does not obtain the right to receive any portion of the proceeds of the estate of the debtor. Consequently, a secured creditor whose security interest had been perfected at some point but was unperfected on the date of the appointment of a receiver may re-perfect under s. 30(6) and retain its priority, regardless of the appointment of a receiver in the interim, by obtaining a lift-stay order from the court, if necessary.

144 [46] For example, in *Re TRG Service Inc.* (2006), 26 C.B.R. (5th) 203 at paras. 53-59 (Ont. Sup. Ct.), C. Campbell J. held that a monitor under the *CCAA* is not a representative of creditors within s. 20(1)(b) of the *PPSA*. He stated that "[t]he fact that the Initial Order envisaged the Monitor assessing claims as between creditors does not grant it any legal entitlement to or over the assets of the debtor": *Re TRG Service Inc.*, *supra* at para. 57. C. Campbell J. allowed the appeal from the decision of the monitor who had refused to allow a secured creditor to perfect its security after the *CCAA* order. He concluded that there was nothing in the *CCAA* that would permit the exercise of any jurisdiction to disallow registration and that s. 20(1)(b) did not apply for the reasons quoted.

145 [47] Similarly, in *Brookside Capital Partners Inc. v. RSM Richter Inc.* (2007), 25 C.B.R. (5th) 273 (Alta. Q.B.), Richter was first a monitor of the debtor, Kodiak, under the *CCAA* and subsequently, receiver-manager of Kodiak appointed by the court to carry out a sale of its assets. Brookside was a secured creditor of Kodiak whose registration under the Alberta *PPSA* was defective. Consequently, both before and on the date of the appointment of the receiver, Brookside's security interest was unperfected.

146 [48] Brookside registered a financing change statement on the day the receiver was appointed and sought leave of the court to lift the court-ordered stay and validate that registration *nunc pro tunc*. Richter, as Kodiak's receiver, took the position that Brookside's security interest was ineffective against it. As in this case, the receiver argued that its role was similar to a trustee in bankruptcy and it should therefore have the same tools as those provided to trustees in bankruptcy by the *PPSA*

147 [49] The first issue before the *Brookside* court was "whether a receiver should be seen as entitled to the same priority as is granted to a trustee in bankruptcy by s. 20(a)(i) of the *PPSA*": *supra* at para. 13. The second question was whether the stays under both appointment orders should be lifted to allow Brookside to validate its registration *nunc pro tunc*. The application judge made the important observation that the second issue would not arise if a receiver is the same as a trustee under s. 20(a)(i) because, in that event, Brookside's unperfected security interest would be ineffective against the receiver and "Brookside's attempted correction of its registration after the date of the Receivership Order *could not improve its position*": *supra* at para. 14. [Emphasis added.]

148 [50] The application judge concluded on the first question that because s. 20(a)(i) of the Alberta *PPSA* refers only to a trustee in bankruptcy, it cannot be interpreted to also refer to a receiver.[34] He then went on to decide the second

question. He concluded that there would be no prejudice to the debtor or any of the other creditors by allowing Brookside to perfect its security as of the date of the receivership, because had the *CCAA* and receivership orders not been made, Brookside could have perfected at any time. Since s. 20(a)(i) did not apply, there was no reason why the secured creditor could not register under the *PPSA*. Nor was there any purpose in precluding the *ex post facto* registration.

149 [51] As these cases demonstrate, in a receivership, because a creditor's right to take steps against the debtor is stayed not by any legislative directive, but rather by virtue of the terms of the order appointing the receiver, such a stay can be lifted by the court to allow a secured or unsecured creditor to pursue its rights against the interests of the debtor in appropriate circumstances, including obtaining judgment or asserting a lien, and to effect relevant registrations. This includes registrations under s. 30(6) of the *PPSA* to regain priority for the purpose of distribution of the debtor's assets by the receiver.

150 [52] In fact, the new Standard Template Receivership Order of the Commercial List - which is to be used when a receiver is appointed by the Superior Court of Justice - clearly excepts registrations under the *PPSA* from the effect of the stay. Paragraph 9, which contains the stay order, specifically provides that nothing in that paragraph prevents "the filing of any registrations to preserve or perfect a security interest". This paragraph clearly describes the understanding of the bench and bar that the "music" does not stop on the appointment of a receiver because the ongoing need to register and to perfect security is recognized and acknowledged. There would be no cause or purpose in doing so if priorities were frozen on the date of the order.

151 [53] There is nothing in the *PPSA* that says that it stops being applicable at any time. In particular, s. 20 does not prevent ss. 48(3) or 30(6) from continuing to apply and to have effect. It does not freeze priority positions but just states the consequences of non-perfection at a point in time. There is no legislated freezing of priorities, or anything that "stops the music" in a receivership, other than the court order creating it which provides for the ability to seek and obtain a lift-stay order. Consequently, the result the appellant seeks to achieve - the freezing of priority positions - does not occur in a receivership. Nor are the unsecured creditors left in a position where they are necessarily precluded from taking further steps to enforce their rights against the interest of the debtor. Therefore, when a receiver is appointed, the unsecured creditors do not need s. 20(1)(b) to level the playing field for them as against unperfected security interests. A receiver is not a "repository of enforcement rights" like a trustee in bankruptcy; nor do unsecured creditors need to rely on a receiver to attack unperfected security interests

152 [54] In a bankruptcy, not only does the debtor have no further interest in the collateral, but also the priority rights of creditors are "frozen", as stated by Iacobucci J. in *Re Giffen, supra* at para. 39 by virtue of s. 71 and s. 69.3(1) of the *BIA*,[35] the latter of which provides:

> Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

153 [55] Consequently, in a bankruptcy, the effect of ss. 20(1)(b) and 20(2)(b) together with the *BIA* is that a security interest in collateral that is unperfected on the date of bankruptcy is ineffective against the trustee throughout the bankruptcy, and that unperfected status cannot be cured in relation to the trustee. Similarly, a security interest that is perfected on the date of bankruptcy is effective against the trustee and remains effective because the bankrupt estate is frozen and the debtor no longer has any interest in the collateral for the purposes of registration.

(vi) Trustee's alternative argument

154 [56] The trustee in bankruptcy argued on this appeal that even if the receiver is "a person who represents the creditors of the debtor" under s. 20(1)(b), because the appellant bank's security interest was unperfected on the date when the trustee in bankruptcy was appointed, its security interest was ineffective against the trustee under the express words of s. 20(1)(b). The appellant's position was that once priorities were frozen on the appointment of the interim receiver, they remained frozen on the appointment of the trustee. My colleague has concluded that the interim receivership never terminated, that the tax refund came to the interim receiver, and that the sections operate from and relate back to the original date when PWC was first appointed as interim receiver, at which time the appellant's security interest was perfected.

155 [57] In respect of the trustee's position, I agree that the appellant's security interest is ineffective against the trustee. As I have explained, ss. 20(1)(b) and 20(2)(b) should not be read to apply to a receiver for two reasons. Unlike a trustee in bankruptcy and an assignee for the benefit of creditors, a receiver does not obtain the debtor's rights in respect of the collateral and is therefore not in a priority contest with any creditor on behalf of unsecured creditors. Also, in a receivership, the debtor maintains its rights in the collateral. Second, unlike in a bankruptcy, creditors' rights are not frozen on a receivership by statute. Those rights may be stayed by the court order appointing the receiver, but as in the order in this case, the stay can be and often is lifted in order to allow a creditor to register to maintain its perfected status -- for example, under s. 48(3) -- or to re-perfect under s. 30(6). As already noted, the new standard form of order for a court-appointed receiver no longer includes any stay of a creditor's right to perfect or re-perfect its security interest. The only purpose for a creditor to perfect or re-perfect after a receiver is appointed is to maintain its priority during the receivership.

156 [58] The motion judge found, in accordance with the record and the position of the trustee, that the tax refund came into the hands of PWC as trustee in bankruptcy. The interim receiver assigned the debtor into bankruptcy in accordance with the order appointing it, at which time the provisions of the *BIA* applied, including s. 71. It was not disputed, either before the motion judge (see para. 59 of his reasons) or on this appeal, that the property of the debtor passed to the trustee on the date of the bankruptcy. Section 20(1)(b) of the *PPSA* says that an unperfected security interest is ineffective against a trustee in bankruptcy. The court is required to give effect to that specific statutory provision.

Conclusion

157 [59] I agree with the motion judge that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* and the term "receiver" should not be read in to the legislation. Because the appellant's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was unperfected on the date of the appointment of the trustee and its security interest is therefore ineffective against the trustee.

158 [60] The unfortunate result for the appellant, and apparent windfall for St. Paul, is that the appellant loses its priority over St. Paul, and even though St. Paul also lost its secured standing, they rank *pari passu* as unsecured creditors in the bankruptcy. This result flows from the fact that both were unperfected on the date of the appointment of the trustee and both their security interests are therefore ineffective against the trustee.

159 [61] I would dismiss the appeal with costs to the trustee and to St. Paul out of the estate. I would fix those costs in the amount of $15,000 each, inclusive of disbursements and G.S.T.

K.N. FELDMAN J.A.
H.S. LaFORME J.A.:-- I agree.

cp/e/qlmxd/qljjn/qlhcs/qljxl/qlaxr

1 Section 1(1) of the *PPSA* defines "collateral" as "personal property that is subject to a security interest".

2 Under s. 11(1) of the *PPSA*, a security interest is not enforceable against a third party unless the requirements of the *PPSA* for "attachment" are met. Attachment occurs when: (1) the creditor takes possession of the collateral or enters into a written security agreement with the debtor; (2) the agreement is signed by the debtor; and (3) the agreement contains a description of the collateral enabling it to be identified. In addition, "value" or consideration for the agreement must be given by the creditor and the debtor must have "rights" in the collateral.

3 A security interest in investment property may now be perfected by control of the collateral under subsection 1 (2). *Securities Transfer Act, 2006,* S.O. 2006, c. 8, s. 123(9).

4 There are a number of exceptions to the general priority rules contained in s. 30 with which we are not concerned. One exception is a Purchase Money Security Interest (PMSI) in inventory.

5 Unless otherwise indicated, where the term "receiver" is used in these reasons, it is used to refer to an interim receiver appointed by the court under s. 47 of the *BIA*.

6 The motion judge held that the refund was a receivable that was not capable of being possessed. This aspect of the motion judge's decision is not under appeal. I make no comment as to the correctness of the motion judge's conclusion.

7 Section 48(3) reads:

> (3) Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

8 A financing change statement cannot be used to reperfect a lapsed security interest. A fresh financing statement is required. See s. 52(2) of the *PPSA*.

9 The relevant provisions of s. 20 provide:

> 20 (1) Except as provided in subsection (3), until perfected, a security interest,
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
>
> ...
>
> (2) The rights of a person,
>
> ...
>
> (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

10 Section 30(6) reads:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

11 The exception in subs. (3) is not relevant on this appeal.

12 The most common formulation is: "A security interest... in collateral is not effective against (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or (ii) a liquidator appointed under the *Winding-up Act (Canada)* if the security interest is unperfected at the date that the winding-up order is made..." as found, for example in Manitoba's *Personal Property Security Act*, C.C.S.M. c. P.35, s. 20(b).

13 Subsection (3) deals with purchase-money security interests, and its exception is not relevant here.

14 McLaren goes on to comment that the 1992 amendments to the *BIA* brought with them regulation of receivers where a debtor is insolvent. He observes that federal bankruptcy legislation has increased the control and accountability of these privately-appointed receivers. He raises the possibility that in light of these statutory changes, privately-appointed receivers will also be held to be representatives of the creditors within the meaning of s. 20(1)(b) of the Act. Ziegel and Denomme, *supra*, query at p. 163 whether Ontario law would recognize a category of creditors' representatives who do not owe their status to statutory authority. In this case, we are not concerned with a privately-appointed receiver but a court-appointed interim receiver who derived his status from the *BIA*.

15 If in fact PWC is acting as a representative of the Bank alone, it seems it would have been under a duty to apply to the court to lift the stay to permit it to register a financing change statement on behalf of the Bank.

16 For example, the decision in *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receiver of)*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (C.A.), discussed by Feldman J.A., not only deals with differently worded legislation, it is a case decided under the *BIA* prior to the 1992 amendments creating the s. 47 *BIA* interim receiver.

17 Section 30(1) reads:

> 30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

> 1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
>
> 2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
>
> > i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
> >
> > ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
>
> 3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
>
> 4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

18 Iacobucci J. also considered the meaning of the phrase "rights in goods" in s. 12(2) of B.C.'s *PPSA* dealing with leased goods. He concluded that a lessee had a proprietary interest in such goods (at para 36):

> I note that s. 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Section 12(2) states explicitly that 'a debtor has rights in goods leased to the debtor...when he obtains possession of them in accordance with the lease. [Emphasis in original.]

19 For ease of reference, ss. 20(1)(c) and (d) read:

> 20 (1) ...until perfected, a security interest,
>
> ...
>
> (c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
>
> (d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20 Section 30(6) reads:

> (6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

21 The importance of control is emphasized in Ontario's new *Securities Transfer Act, 2006* (*STA*), S.O. 2006, c. 8 which came into force on January 1, 2007 together with related *PPSA* amendments. In addition to registration and perfection, a new, third, method of perfecting a security interest is by control of the security which can include an intangible interest. John Cameron, in his article on the *STA*, 22 B.F.L.R. 309-352 at 321, states," As the Comment notes, obtaining 'control' means a secured party has taken whatever steps are necessary to place itself in a position where it can have the securities sold, without further action by the owner." The secured party need not have exclusive control over the security. Other secured parties can have a concurrent right and a debtor can retain rights in the security.

22 I acknowledge that in some cases, a secured creditor's failure to comply with s. 48(3) during a s. 47 *BIA* receivership could result in a loss of that party's priority depending on the nature of the court order appointing the interim receiver. The role of the s. 47 *BIA* receiver is very much defined by the terms of the court order appointing the receiver and the common law describing its role. As Farley J. noted in *Curragh, supra*, at para. 6, the regime providing for the appointment of a s. 47 *BIA* receiver is a flexible one and the court is empowered to give directions to the interim receiver that can meet the practical demands of any given case. If then, for example, the court did not order a stay of all

actions on the appointment of a s. 47 *BIA* receiver, then this would affect the extent to which the particular s. 47 *BIA* receiver qualifies as "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). Also, if for some reason the s. 47 receivership ended before there was any priority conflict, then the failure to reregister could well have consequences following the debtor's emergence from receivership. In other words, the significance of a failure to reregister will depend on a number of relevant factors in each case.

23 Other powers included the following: to take control of the property to preserve, protect, and liquidate it; to manage and carry on the business; to purchase or lease machinery; to receive and collect all money "now owed or hereafter owing" to the debtor; to execute transfers, conveyances, leases, bills of sale, or other documents respecting the property in the name and on behalf of the debtor; to report to, meet with and discuss with secured and unsecured creditors of the debtor deemed appropriate including offers and expressions of interest received; to apply for any vesting orders in order to convey the property; to register a copy of the Order appointing it and "any other Orders obtained by the Interim Receiver in respect of the Property against title to any or all property comprised in the Property" and; to sell, convey, or mortgage the property out of the ordinary course of business and without compliance with Part V of the *PPSA* (Ontario), or providing any other notice which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, with the approval of the Court.

24 I am under the impression that, as here, the same person often acts as a s. 47 *BIA* receiver and trustee in bankruptcy. Based on my interpretation of their roles, namely, that a s. 47 receiver owes a fiduciary duty to the creditors of the debtor and its function is similar to that of a trustee in bankruptcy, a trustee in bankruptcy is not a third party vis-à-vis the s. 47 receiver who also represents those same creditors. Thus, I see no conflict in the same person fulfilling both roles. To hold otherwise and to open the door to a potential for conflict between the role of the s. 47 receiver and a trustee in bankruptcy would result in the same person ordinarily not being able to fulfill both roles with attendant increased expense, duplication of effort, and delay.

25 A proceeding is any step that must be taken before a creditor or the creditor's representative can enforce its rights and may include the delivery of a copy of a certificate: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 at para. 26 (B.C.S.C.).

26 McLaren, *supra*, at p. 172, in discussing s. 20(1)(b) and *Giffen*, writes that "the wording of the B.C. Act on debtor security interests is very different from Ontario's s. 20(1)(b).

27 Nor did either re-perfect under s. 30(6) of the *PPSA*, discussed below.

28 Subsection 26(2) of the *PPSA* provides that a "security interest in collateral in the possession of a person, other than the debtor, the debtor's agent or a bailee mentioned in subsection (1), is perfected by, (a) issuance of a document of title in the name of the secured party; (b) possession on behalf of the secured party; or (c) registration." No appeal was taken from this finding.

29 Whether a particular representative of creditors, other than a receiver, may be included in s. 20(1)(b) need not be decided in this case.

30 Although a court-appointed receiver owes duties to the court and to the creditors in respect of the proper conduct of the receivership (see for example *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 at paras. 28-30 (Ont. C.A.)), it is interesting to compare ss. 47(3) and 47.1(3) of the *BIA*. Under the first subsection, an interim receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of the creditor who sought the appointment, while under the second subsection, the receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of one or more creditors or the creditors generally. The difference may impact on the particular receiver's duties as a representative of creditors.

31 In Quebec there is a different regime. See *Lefebvre (Trustee of); Tremblay (Trustee of)*, [2004] 3 S.C.R. 326 at paras. 19-40, where the Supreme Court of Canada discusses the regime in Quebec.

32 See *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 20(b); *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 20(a); *Personal Property Security Act*, S.S. 1993, c. P-6.2, s. 20(2)(b); *Personal Property Security Act*, C.C.S.M. c. P35, s. 20(b); *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s. 21(2); *Personal Property Security Act*, S.N.B. 1993, c. P-7.1, s. 20(2); *Personal Property Security Act*, R.S.P.E.I. 1988, c. P-3.1, s. 20(2); *Personal Property Security Act*, S.N.L. 1998, c. P-7.1, s. 21(1).

33 The equivalent provision of Manitoba's statute now reads:

> 20. A security interest
>
> ...
>
> (b) in collateral is not effective against
>
> (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or
>
> (ii) a liquidator appointed under the *Winding-up Act* (Canada) if the security interest is unperfected at the date that the winding-up order is made.

Personal Property Security Act, C.C.S.M. c. P.35.

34 The judge is referring only to ss. 20(a)(i), not 20(a)(ii), which also lists a liquidator under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

35 Section 71 of the *BIA* is set out above at para. 24. Section 69.4 of the *BIA* allows the court to declare that sections that freeze rights do not apply to a particular creditor if that creditor is likely to be materially prejudiced by the continued operation of the sections or it is otherwise equitable to make such a declaration. It is unlikely that this section could be used to assist an unperfected secured creditor because such a person is always going to be prejudiced by the operation of s. 20(1)(b) of the *PPSA*. As this court has held in *Re Ma* (2001), 143 O.A.C. 52 at paras. 2 and 3, 'The role [of the courts under s. 69.4] is one of ensuring that sound reasons, consistent with the scheme of the [*BIA*] exist for relieving against the otherwise automatic stay.... [L]ifting the automatic stay is far from a routine matter.' [Citations omitted.] In most instances, a lift stay is ordered under s. 69.4 where (a) the proceeding in respect of which the lift is requested is one in relation to which the debtor's liability would not be released by an order of discharge from bankruptcy, or (b) where the bankrupt "is a necessary party for the completed adjudication" of the relevant proceeding: see *Re Koval* (2003), 48 C.B.R. (4th) 103 at para. 6 (Ont. Sup. Ct.).

TAB 2

January 15, 2010
s.243(1) BIA (National Receiver) and s. 101 CJA (Ontario) Receiver

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE ___	)	__DAY, THE ___ DAY
	)	
JUSTICE _____	)	OF _____, 20__

PLAINTIFF[1]

Plaintiff

- and -

DEFENDANT

Defendant

ORDER

THIS MOTION made by the Plaintiff[2] for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA")appointing [RECEIVER'S NAME] as receiver (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of [DEBTOR'S NAME] (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

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[1] The Model Order Subcommittee notes that a receivership proceeding may be commenced by action or by application. This model order is drafted on the basis that the receivership proceeding is commenced by way of an action.

[2] Section 243(1) of the BIA provides that the Court may appoint a receiver "on application by a secured creditor".

ON READING the affidavit of [NAME] sworn [DATE] and the Exhibits thereto and on hearing the submissions of counsel for [NAMES], no one appearing for [NAME] although duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of [RECEIVER'S NAME] to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated[3] so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, [RECEIVER'S NAME] is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security

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[3] If service is effected in a manner other than as authorized by the Ontario *Rules of Civil Procedure*, an order validating irregular service is required pursuant to Rule 16.08 of the *Rules of Civil Procedure* and may be granted in appropriate circumstances.

codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter

instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $_____, provided that the aggregate consideration for all such transactions does not exceed $_____; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, 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 Debtor;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including

without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.[4]

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

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[4] Note that subsection 243(6) of the BIA provides that the Court may not make such an order "unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations".

FUNDING OF THE RECEIVERSHIP

20. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $_____ (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

23. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

GENERAL

24. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

26. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

27. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

28. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

29. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the receiver (the "Receiver") of the assets, undertakings and properties [DEBTOR'S NAME] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such 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, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has 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 holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. 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 _____, 20__.

[RECEIVER'S NAME], solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

TAB 3

Personal Property Security Act
R.S.O. 1990, c. P.10, ss. 1(1), 2, 19, 20, 23, 30(6), 45(1), 46(1), 46(4)

Definitions

1. (1) In this Act,

"lease for a term of more than one year" includes,

(a) a lease for an indefinite term, even if the lease is determinable by one of the parties or by agreement of two or more of the parties within one year from the date of its execution,

(b) a lease for a term of one year or less if the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a continuous period of more than one year, but a lease described in this clause is not a lease for a term of more than one year during the period before the day the lessee's possession of the leased goods exceeds one year,

(c) a lease for a term of one year or less if,

(i) the lease provides that it is renewable for one or more terms at the option of one of the parties or by agreement of all of the parties, and

(ii) it is possible for the total of the original term and the renewed terms to exceed one year,

but does not include,

(d) a lease by a lessor who is not regularly engaged in the business of leasing goods, or

(e) a lease of household furnishings or appliances as part of a lease of land, if the use and enjoyment of the household furnishings or appliances is incidental to the use and enjoyment of the land.

"purchase-money security interest" means,

(a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price,

(b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral, to the extent that the value is applied to acquire the rights, or

(c) the interest of a lessor of goods under a lease for a term of more than one year.

"security interest" means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

(a) the interest of a transferee of an account or chattel paper, and

(b) the interest of a lessor of goods under a lease for a term of more than one year;

Application of Act, general

2. Subject to subsection 4 (1), this Act applies to,

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and

(ii) an assignment, lease or consignment that secures payment or performance of an obligation; and

(b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation. R.S.O. 1990, c. P.10, s. 2

Perfection

19. A security interest is perfected when,

(a) it has attached; and

(b) all steps required for perfection under any provision of this Act have been completed, regardless of the order of occurrence. R.S.O. 1990, c. P.10, s. 19.

Perfection by registration

23. Registration perfects a security interest in any type of collateral. R.S.O. 1990, c. P.10, s. 23.

Unperfected security interests

20. (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the Creditors' Relief Act or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest. R.S.O. 1990, c. P.10, s. 20 (1); 2006, c. 8, s. 132.

Idem

(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) under clause (1) (b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect. R.S.O. 1990, c. P.10, s. 20 (2).

Purchase-money security interest

(3) A purchase-money security interest that is perfected by registration,

(a) in collateral, other than an intangible, before or within ten days after,

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is earlier; or

(b) in an intangible before or within ten days after the attachment of the security interest in the intangible,

has priority over,

(c) an interest set out in subclause (1) (a) (ii) and is effective against a person described in clause (1) (b); and

(d) the interest of a transferee of collateral that forms all or part of a sale in bulk within the meaning of the Bulk Sales Act. R.S.O. 1990, c. P.10, s. 20 (3).

Reperfected security interests

30. (6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period. R.S.O. 1990, c. P.10, s. 30 (1-6).

Registration of financing statement

45. (1) In order to perfect a security interest by registration under this Act, a financing statement shall be registered. R.S.O. 1990, c. P.10, s. 45 (1).

Registration requirements

46. (1) A financing statement or financing change statement that is to be registered shall contain the required information presented in a required format. 2006, c. 34, Sched. E, s. 15 (1).

Errors, etc.

46. (4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission. R.S.O. 1990, c. P.10, s. 46 (4).

TAB 4

Minister's Order made under the
***Personal Property Security Act* (Ontario), ss. 16(4)(2), 17**

16. (4) The Name of a debtor that is an artificial body shall be set out in the financial statement as follows:

2. If the artificial body is a corporation, the incorporated name of the corporation.

17. Despite paragraph 2 of subsection 16(4), if a corporation has an English form of name and a French form of name,

(a) the English form of the name shall be set out in the appropriate line for the name of the business debtor; and

(b) the French form of the name shall be set out on another appropriate line for the name of the business debtor.

TAB 5

Personal Property Security Act
R.S.A. 2000, c. P-7, s. 20

Priority of unperfected and certain perfected security interests

20. A security interest

(a) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the Winding-up and Restructuring Act (Canada) if the security interest is unperfected at the date the winding-up order is made;

(b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value, and

(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

TAB 6

Personal Property Security Act
R.S.B.C. 1996, c. 359, s. 20

Subordination of unperfected security interests

20. A security interest

(a) in collateral is subordinate to the interest of

(i) a person who causes the collateral to be seized under legal process to enforce a judgment including execution, garnishment or attachment, or who has obtained a charging order or equitable execution affecting or relating to the collateral,

(ii) a sheriff who has seized or has a right to the collateral under the Creditor Assistance Act,

(iii) a judgment creditor entitled by law to participate in the distribution of property or its proceeds seized under legal process as provided in the Creditor Assistance Act, and

(iv) a representative of creditors, but only for the purposes of enforcing the rights of a person referred to in subparagraph (i),

if that security interest is unperfected at the time

(v) the interest of a person referred to in subparagraph (i), (ii) or (iv) arises, or

(vi) the judgment creditor referred to in subparagraph (iii) delivers a writ of execution or certificate to the sheriff under section 3 of the Creditor Assistance Act,

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, or

(ii) a liquidator appointed under the Winding-up and Restructuring Act (Canada) if the security interest is unperfected at the date that the winding-up order is made, and

(c) in chattel paper, a document of title, an instrument, money, an intangible or goods is subordinate to the interest of a transferee who

(i) acquires an interest under a transaction that is not a security agreement,

(ii) gives value, and

(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

TAB 7

Personal Property Security Act
C.C.S.M. c. P35, s. 20

20. A security interest

(a) in collateral is subordinate to the interest of

(i) a person who causes the collateral to be seized under legal process to enforce a judgment, including execution, attachment or garnishment, or who has obtained a charging order or equitable execution affecting or relating to the collateral,

(ii) a sheriff who seizes the collateral under The Executions Act,

(iii) a judgment creditor entitled by law to participate in the distribution of property seized under legal process, or its proceeds, as provided in The Executions Act, and

(iv) a representative of creditors, but only for the purpose of enforcing the rights of persons referred to in subclause (i),

if that security interest is unperfected at the time

(v) the interest of the persons mentioned in subclause (i), (ii), or (iv) arises, or

(vi) the judgment creditor referred to in subclause (iii) causes the collateral to be seized under The Executions Act;

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the Winding-up Act (Canada) if the security interest is unperfected at the date that the winding-up order is made;

(c) in goods, chattel paper, a document of title, an instrument or an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value, and

(iii) acquires the interest without knowledge of the security interest before the security interest is perfected.

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N :

THOMAS COOK CANADA INC. - and - SKYSERVICE AIRLINES INC.

Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at Toronto

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