Clerk's Stamp

COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

DOCUMENT	**BRIEF OF THE CANADIAN RESPONDENTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILES DAVISON LLP Barristers and Solicitors 900, 517 – 10th Avenue S.W. Calgary, Alberta T2R 0A8 Attention: Daniel Jukes Telephone: (403) 298-0327 Facsimile: (403) 263-6840 Email: djukes@milesdavison.com File No. 57066 DKJ

BRIEF OF THE CANADIAN RESPONDENTS
COMMERCIAL LIST APPLICATION
TO BE HEARD MARCH 3, 2025 AT 2:00 PM

MILES DAVISON LLP
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Calgary, Alberta T2R 0A8
Attention: Daniel Jukes
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LIST OF AUTHORITIES

I. INTRODUCTION

1. This Brief is provided on behalf of the Canadian Respondents that are subject to the Amended and Restated Initial Order that was granted by the Court on November 25, 2024 (the **"ARIO"**) and the Order of Justice Feasby granted January 29, 2025. The Respondents are categorized and defined using the following terms:

    a. The Respondents, Angus Manor Park A2A Developments Inc., Angus Manor Park A2A GP Inc., Angus A2A GP Inc., Angus A2A Limited Partnership, Angus Manor Park A2A Limited Partnership, Angus Manor Park A2A Capital Corp., A2A Capital Services Canada Inc., and Serene Country Homes (Canada) Inc. are hereinafter referred to as the **"AMP Respondents"**.

    b. The Respondent Hills of Windridge A2A GP Inc. Hills of Windridge A2A LP, and Hills of Windridge A2A Trust are referred to hereinafter as the **"Canadian Windridge Respondents"**.

    c. Fossil Creek A2A GP Inc., Fossil Creek A2A Limited Partnership and Fossil Creek A2A Trust are referred to hereinafter as the **"Canadian Fossil Creek Respondents"**.

    d. The Canadian Fossil Creek Respondents and Canadian Windridge Respondents are collectively referred to hereinafter as the **"Canadian WFC Entities"**.

    e. The AMP Respondents, the Canadian Fossil Creek Respondents, and the Canadian Windridge Respondents are collectively referred to as the **"Canadian Respondents"**.

    f. The Respondents, Windridge A2A Developments, LLC and Fossil Creek A2A Developments, LLC are collectively referred to hereinafter as the **"Texas LLCs"**.

2. This Brief is being provided in response to the Application of the Monitor to extend the stay of proceedings, approve the "Texas Plan", and approve conduct, activities, and fees of the Monitor.

3. The AMP Respondents have withdrawn their Applications for Permission to Appeal that were scheduled for March 6, 2025. However, those Applications remain existent for the Canadian WFC Entities.

4. The Canadian WFC Entities agree with and adopt the arguments set forth in the Brief filed by Bennett Jones on behalf of the Texas LLCs. The Canadian WFC Entities take the position that the Texas Plan is hopeless and cannot succeed in bringing the Windridge/Fossil Creek lands or proceeds under the control of the Monitor.

II. FACTS

5. The Canadian Respondents agree with the facts as recited in the Brief of the Texas LLCs, and accordingly this section of the Brief will simply serve to supplement the information provided about the structure of the Windridge and Fossil Creek investments.

6. The Affidavit of Allan Lind sworn December 13, 2024 (the **"Dec 13 Lind Affidavit"**) provides more fulsome details of the structure of the Windridge and Fossil Creek investments, in particular at paras. 4 - 14.

7. Canadian investors in the Windridge and Fossil Creek projects were effectively aggregated into a single entity for each project for the purpose of investing in land, those entities being the Hills of Windridge A2A LP and Fossil Creek A2A Limited Partnership (collectively, the **"Canadian LPs**").

8. The Canadian investors purchased trust units in Canadian trusts, (the Fossil Creek A2A Trust and Hills of Windridge A2A Trust) which are in turn the limited partners in the Canadian LPs.

9. The Canadian LPs used funds raised through the public offerings to purchase Undivided Fractional Interests ("**UFIs"**) in the lands that were initially purchased by the respective Texas LLCs. UFIs were also sold to multiple offshore investors. Fossil Creek A2A Limited Partnership purchased 269 of 2,100 UFIs in the Fossil Creek lands[1], and Windridge A2A Limited Partnership purchased 209 of 4,412 UFIS in the Windridge Lands[2].

10. At the time the Canadian LPs purchased their UFIs from the Texas LLCs, they became co-owners of the respective lands for the Fossil Creek and Windridge projects. After selling to the UFI holders, the Texas LLCs ceased to have any interest in the lands, and the rights of the co-owners (being the Canadian LP and the various off-shore UFI Holders) was governed by a Restrictive Covenant that was included in the ancillary documents to the purchase: *December 13 Lind Affidavit, Exhibit "E" (the Restrictive Covenant is separately bookmarked and can be found at p.256 of 477 of the pdf.*

11. However, contrary to the suggestion of the Monitor in its 3rd Report, the rights of the UFIs in Fossil Creek and Windridge are not currently governed by the Restrictive Covenant, but rather by the Sales Trust document.

12. The Restrictive Covenant governed co-owners up to the time when the lands were conveyed to the Dirk Foo as Trustee of the Texas Trusts. After that time, the rights and interests of the parties are determined by the "Sales Trust" document. The Sales Trust document for Windridge can be found at Exhibit "E" of the Dec 13 Lind Affidavit as a separate bookmark (at p. 347 of 477). It is identical to the form of Sales Trust document that was utilized for

[1] Affidavit of Allan Lind sworn December 31, 2024, pa.11
[2] Affidavit of Allan Lind sworn December 13, 2024, pa.9

Fossil Creek (see *Dec 13 Lind Affidavit, pa.8 in note re Exhibit G,* and Exhibit "R" to the Monitor's Third Report).

13. As contemplated by the package of sale documents signed by the UFI holders (Exhibit "E to the Dec 13 Lind Affidavit), deeds transferring title to the Texas Trusts were signed and held in escrow pending certain resolutions by Co-Owners, including a resolution confirming the conveyance to Dirk Foo as Trustee.

14. Those resolutions were passed by the vast majority of co-owners in 2014 (over 97% in the case of Windridge and over 99% in the case of Fossil Creek – *see Exhibits "I" and "J" to the Dec 13 Lind Affidavit*), with the result that the Trustee has had ownership and control of the Windridge and Fossil Creek projects since that time. The UFI holders are beneficiaries under those trust arrangements.

15. The documents sent to UFIs that resulted in the co-owners resolution was not available at the time of the Dec 13 Lind Affidavit, but have since been obtained and provided to the Monitor, along with minutes from the relevant meetings.

16. The express purpose of the Sales Trust is "to receive and convey real property on behalf of the Settlors and to distribute the Net Income . . . from the sale of real estate to the Beneficiaries." (Article One, Page 2)**.** The Sales Trust gives the Trustee broad powers (ex. Article 9, Sections A through J, Page 8) and protections (ex. Article 4, Sections F and G, p.3) regarding the ownership, development and/or sale of the property. In addition to broad powers, the Sales Trust requires a majority vote of the Settlors to replace the Trustee (Article 4, Section D, page 2) and provides the indemnity for the Trustee (including attorneys' fees) from the Trust to the full extent of the Trust assets (Article 4, Section G, p.3). The Sales Trust also incorporates the method of calculation of "Net Income" for purposes of distribution to the beneficiaries of the Sales Trust (Article 5, Page 3).

III. ISSUES

17. The most pressing issue for the Court to determine is whether the Texas Plan is reasonable, having regard to the comments and rationale expressed by the Honourable Justice Feasby.

18. Additional issues include the following:

    a. Whether the stay of proceedings should be extended.
    b. Whether the Administration charge should be increased.
    c. Whether the fees of the Monitor should be approved.

IV. LAW AND ARGUMENT

The Texas Plan

19. The Canadian WFC Entities fully agree with and support the argument set forth in the Brief of the Texas LLCs.

20. On the basis of those arguments, the Texas Plan is doomed to fail and is not reasonable. Accordingly, the CCAA proceedings should be confirmed as terminated as against the Canadian WFC Entities and the Texas LLCs.

Extending the Stay of Proceedings

21. The AMP Respondents do not oppose the extension of the stay of proceedings as requested by the Monitor.

22. As noted, the AMP Respondents have withdrawn from the Applications for Permission to Appeal, with a view to reducing costs and allowing the Monitor to focus its efforts on selling the AMP lands for the benefit of investors. The AMP Respondents will be closely monitoring those efforts to determine their position on whether any further extension is appropriate beyond April 30, 2025.

23. Given the position on the Texas Plan above, the proceedings cannot continue as against the Canadian WFC Entities or Texas LLCs.

Approval of Administration Charge

24. The Canadian Respondents take no position on the requested increase as it pertains to the assets of the AMP Respondents. However, they reiterate ongoing concerns about the costs of these proceedings without any clarity as to how the Monitor's control of the sale process will provide a greater return to investors.

Approval of Fees and Disbursements

25. Subject to the concerns expressed below about the carve-out of certain actions, conduct, and activities of the Monitor, the Canadian Respondents take no position on the Monitor's request for approval of its fees and those of its counsel.

26. The potential issue arises from a concern previously raised by the Canadian Respondents, but not yet determined by the Court.

27. In his reasons for decision on the ARIO, Justice Simard had expressly extended the proceedings "for a limited time, and only for a limited purpose"[3], and expressly directed the Monitor to only undertake tasks that were necessary in that regard [4].

28. Although it does not appear the Monitor is seeking the approval of its actions, conduct, and activities in the present Application, that relief was sought on December 20, 2024 and on January 17, 2024 before Justice Feasby. On both occasions the issue was adjourned, primarily due to time constraints.

29. The position of the Canadian Respondents remains the same as was communicated to Justice Feasby on December 20, 2024. The Canadian Respondents are of the view there should be a carve-out from the approval of the Monitor's activities, actions, and conduct in relation to investigations it undertook with respect to other entities and projects that are not within the scope of these proceedings. These investigations are evident at paras. 171 - 183 of the Monitor's Third Report.

30. None of the initial Applicant investors purport to have investments in these other projects. These proceedings should not be permitted to devolve into a fishing expedition for unidentified non-parties.

31. In *Re Ursel Investments Ltd. [1992] 3 W.W.R. 106*, the Court cited Solomon J. in *Edinburgh Mortgage*, addressing the role of a receiver-manager when subject to court-imposed limitations (pa.42):

> When limitations are placed upon the receiver-manager by order of the court, he must perform strictly within the terms of those limitations and has no right to go beyond them without the approval of the court if he is to be indemnified for his actions. When a receiver-manager acts beyond the limits of the order appointing him, he cannot expect indemnification for such actions unless he demonstrates conclusively that not only did he act bona fide but that such actions were required to conscientiously discharge his duties before approval could be obtained from the court ...

32. At this stage, the existing issue about whether the Monitor acted outside its scope has not been resolved, and the Canadian Respondents do not have sufficient information to determine how much time or money was spent on activities that may have been outside the scope of the Monitor's mandate under the ARIO.

33. The Canadian Respondents are hopeful that these issues will not arise going forward. The Monitor now has a clear mandate to deal with the AMP project. It is the expectation of the AMP Respondents, and we submit it should also be the expectation of the Court, that the Monitor will focus its time and resources on monetizing those lands for the benefit of investors in the AMP project.

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[3] Transcript of Decision – Nov. 25, 2024, p.12, lines 29-30
[4] Transcript of Decision – Nov.25, 2024, p.17, lines 6 – 10.

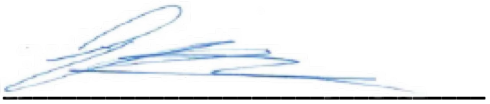
V. REMEDY SOUGHT

34. An Order declaring that the "Texas Plan" is not reasonable to achieve the purpose of bringing the Windridge and Fossil Creek lands and proceeds within the control of the Monitor.

35. An Order declaring that the CCAA proceedings terminated as against the Canadian WFC Entities and the Texas LLCs as of February 19, 2025, in accordance with the Order of Justice Feasby granted January 29, 2025.

36. Such further and other relief as the Canadian Respondents may request and the Honourable Court deems just and appropriate.

Respectfully submitted this 27th day of February, 2025



Dan Jukes, Miles Davison LLP
Co-Counsel to the Canadian Respondents

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Genoa Bay Lumber Co. v. Genoa Bay Marina Ltd. | 2001 BCSC 1325, 2001 CarswellBC 2157, 108 A.C.W.S. (3d) 827 | (B.C. S.C., Sep 21, 2001)

1992 CarswellSask 19
Saskatchewan Court of Appeal

Ursel Investments Ltd., Re

1992 CarswellSask 19, [1992] 3 W.W.R. 106, [1992] S.J. No. 90, 10 C.B.R. (3d) 61, 12 W.A.C. 170, 31 A.C.W.S. (3d) 1213, 89 D.L.R. (4th) 246, 97 Sask. R. 170

DELOITTE & TOUCHE INC. v. ERNST & YOUNG INC., as Receiver and Manager of Ursel Investments Ltd., Ursel Contractors Ltd., Vijan General Contractors Ltd., Krane Service Inc., Hawk Holdings Inc., Websen Technical Products (Canada) Ltd., Nu-Hawk Distributors Ltd., Specco Construction Products Ltd. and Ursel Fabricators Ltd. (the Petitioners) and CANADIAN IMPERIAL BANK OF COMMERCE

Wakeling, Lane and Jackson JJ.A.

Heard: November 22, 1991
Judgment: February 14, 1992
Docket: Doc. 898

Counsel: *G. Morris* and *Kelly Shuba*, for appellant, Canadian Imperial Bank of Commerce.
J. Ehmann, for Ernst & Young.
G. Scharfstein and *G. Dufour*, for Deloitte & Touche.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
XII Meeting of creditors
XII.6 Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
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Bankruptcy and insolvency
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XIX.3.a Approval by creditors
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.i General principles

Headnote

Receivers --- Conduct and liability of receiver — Duties

Interim receivers — Powers and duties — Court-appointed receivers — Misdirection by trial judge concerning standard by which conduct of receiver to be measured — Applicable tests set out.

The U group of companies ("U") operated profitably until 1988, when they experienced problems on two large contracts. U's principal secured creditor, CIBC, applied U's account balance against U's debt to CIBC. An interim receiver, D, was appointed by the court. On May 31, 1989, U obtained an order that they were corporations to which the *Companies' Creditors Arrangement Act* applied and that they had five months to file a plan of compromise between themselves and their creditors. The order also stayed all proceedings against U until a further order of the court.

After obtaining an extension and filing an information circular and reorganization plan unilaterally determining the amount of CIBC's secured claim, U set off their claim for damages against the amount owing to CIBC, which was intended to prevent CIBC from voting on the reorganization plans.

U applied for an order under the Act directing a meeting of certain classes of creditors to vote on the reorganization plans. CIBC opposed the order for a meeting and asked that its receiver, E, be appointed and that U be deemed unentitled to relief under the Act. U's motion was dismissed and the CIBC's was allowed. The order appointing D as receiver was rescinded.

CIBC appealed from the decision made on an application brought by D. An order was made directing payment of D's remuneration and the third party accounts it had authorized in its capacity as interim receiver prior to its replacement by E, appointed at the request of CIBC. The CIBC questioned whether D had standing to make the application and whether D was entitled to have the third party accounts and its fees paid out of the assets of U and to be indemnified with respect to the same.

Held:

The order was set aside.

The trial judge misdirected himself as to the standard by which the conduct of the receiver, D, should be measured. He should have considered two tests with respect to D's general duties as interim receiver: (1) did D exercise "reasonable care, supervision and control as an ordinary man would give to the business were it his own"; and (2) did D comply with the May 31, 1989 order imposing limitations on its actions.

Table of Authorities

Cases considered:

British Power Traction and Lighting Co.; Halifax Joint Stock Banking Co. v. British Power Traction and Lighting Co. (No. 1), Re, [1906] 1 Ch. 497 — *considered*

British Power Traction and Lighting Co.; Halifax Joint Stock Banking Co. v. British Power Traction and Lighting Co. (No. 2), Re, [1907] 1 Ch. 528 — *considered*

Canadian Commercial Bank v. Simmons Drilling Ltd. (1989), 76 C.B.R. (N.S.) 241, 62 D.L.R. (4th) 243, 35 C.L.R. 126, 78 Sask. R. 87 (C.A.) — *referred to*

Canadian Imperial Bank of Commerce v. Quintette Coal Ltd. (1991), 1 C.B.R. (3d) 253, 53 B.C.L.R. (2d) 34 (S.C.) — *referred to*

Crédit foncier franco-canadien v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. Q.B.), affirmed (1966), 56 W.W.R. 623n (Alta. C.A.) — *considered*

Doncaster v. Smith (1985), 57 C.B.R. (N.S.) 143, 65 B.C.L.R. 173 (S.C.), reversed in part 65 C.B.R. (N.S.) 133, [1987] 5 W.W.R. 444, 15 B.C.L.R. (2d) 58, 40 D.L.R. (4th) 746 (C.A.) — *considered*

Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd. (1977), 24 C.B.R. (N.S.) 187 (Man. Q.B.), affirmed *(*sub nom. *Rothberg v. Business Development Bank)* 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 (Man. C.A.) — *considered*

Fairview Industries Ltd., Re (sub nom. *Re Fairview Industries Ltd. (No. 2)*) (1991), 109 N.S.R. (2d) 12, 297 A.P.R. 12 (T.D.) — *referred to*

Fotti v. 777 Management Inc., [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd., 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *referred to*

Manchester & Milford Railway Co., Re; Ex parte Cambrian Railway Co. (1880), 14 Ch. D. 645 (C.A.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 — *referred to*

Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 117 A.R. 44, 2 W.A.C. 44, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66 [additional reasons at (1991), 8 C.B.R. (3d) 31 at 55, 84 Alta. L.R. (2d) 257, 86 D.L.R. (4th) 567, 120 A.R. 309, 8 W.A.C. 309, leave to appeal to S.C.C. refused (1992), 8 C.B.R. (3d) 31n, 83 Alta. L.R. (2d) 1xvi (note), 86 D.L.R. (4th) 567n] — *referred to*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) — *referred to*

Plisson v. Duncan (1905), 36 S.C.R. 647 — *followed*

Thompson v. Northern Trust Co., [1924] 2 W.W.R. 237, [1924] 1 D.L.R. 1135 (Sask. K.B.), varied [1925] 4 D.L.R. 184 (Sask. C.A.) — *applied*

Walter E. Heller (Canada) Ltd. v. Sea Queen of Canada Ltd. (1974), 19 C.B.R. (N.S.) 252 (Ont. Master), affirmed (1976), 21 C.B.R. (N.S.) 272 (Ont. Master) — *referred to*

Statutes considered:

Business Corporations Act, The, R.S.S. 1978, c. B-10 —

s. 95

Canada Business Corporations Act, R.S.C. 1985, c. C-44 —

s. 100

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11

Queen's Bench Act, The, R.S.S. 1978, c. Q-1 —

s. 45(8)

Appeal from order of Osborn J. (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), entitling interim receiver to be paid, in priority to all other claims, for all debts and obligations incurred in its capacity as court-appointed receiver.

The judgment of the court was delivered by *Jackson J.A.*:

Introduction

1 This is an appeal from an order of Osborn J. [(1990), 2 C.B.R. (3d) 260 (Sask. Q.B.)] made in chambers on an application brought by Deloitte & Touche Inc. ("Deloitte"), the interim receiver appointed under *The Queen's Bench Act*, R.S.S. 1978, c. Q-1 as part of an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A."). Deloitte sought an order directing payment of its remuneration and of the third party accounts it had authorized in its capacity as interim receiver prior to the termination of its appointment and its replacement by Ernst & Young Inc. ("Ernst") as receiver-manager appointed at the request of Canadian Imperial Bank of Commerce ("C.I.B.C.").

Background

2 Osborn J. stands seized with all matters arising from the receivership of a number of companies which I will call the petitioners. The petitioners are a group of nine companies engaged in the construction business and are operated and controlled by the Ursel family of Saskatoon, Saskatchewan. On May 31, 1989, by the order of Osborn J., Deloitte was confirmed as interim receiver of the assets of the petitioners, having been previously appointed in a brief order dated May 10, 1989. C.I.B.C., the principal secured creditor of the petitioners, consented to both orders. The earlier order is not in issue here. The May 31, 1989 order provided, in part, as follows:

> 2. THAT the Petitioners be and are hereby authorized to file with this Honourable Court, on or before September 30, 1989, a formal plan of compromise or arrangement (the 'Reorganization Plan') between the Petitioners and their secured and unsecured creditors.

. . . . .

6. THAT pursuant to the *CCAA* and pursuant to s. 45(8) of *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, Deloitte Haskins & Sells Limited be and is hereby appointed, until further Order of this Court, an Interim Receiver of the undertaking, property and assets of the Petitioners (the 'Interim Receiver') with the following powers and duties:

(*a*) to take possession and control of the Petitioners' undertaking, property and assets and to supervise and concur in carrying on any or all parts of the business of the Petitioners;

(*b*) to take all steps and do all things necessary to protect the interests of the members and creditors of the Petitioners consistent always with the efforts of the Petitioners to reorganize and restructure their affairs;

(*c*) to have access to and possession of all books, accounts, securities, documents, vouchers, cash, goods, wares, merchandise and other assets of the Petitioners;

(*d*) to pay such debts of the Petitioners as in its judgment may be required to be paid in order to properly preserve and maintain the undertaking, property and assets of the Petitioners in their current state or to carry on the business of the Petitioners as historically carried on and to permit the Petitioners to formulate and finalize their reorganization plan and other matters arising out of these proceedings but without diminishing the value of the security of the secured creditors and provided that no payment shall be made to reduce the indebtedness of any of the Petitioners to any creditor for amounts due prior to May 2, 1989 except as provided for in this order;

(*e*) subject to the terms of this Order, to incur obligations or to obtain trade credit under the terms of this Order in respect of the business operations of the Petitioners;

(*f*) to be at liberty to retain or appoint any agent or agents, including legal counsel, and to obtain such assistance from time to time as it may consider necessary in respect of its powers and duties hereunder;

(*g*) generally to supervise the carrying out of the business of the Petitioners.

. . . . .

8. THAT the Interim Receiver shall be at liberty to pay itself in respect of its remuneration, costs and expenses, from time to time subject to the passing of such accounts before this Honourable Court, and each amount so paid shall constitute an advance against such remuneration, costs and expenses.

9. THAT the Interim Receiver shall be entitled to indemnity out of the property and assets of the Petitioners in respect of its remuneration to be allowed by the Court and its costs and expenses properly incurred as Interim Receiver, together with the costs of legal counsel to the Interim Receiver in priority to any other creditors.

. . . . .

16. THAT until further Order of this Honourable Court, the Petitioners, and each of them, and the Interim Receiver, shall not, unless otherwise authorized by this Order:

. . . . .

(*b*) change the nature of their businesses or enter into any new business which is materially different than the business presently carried on by the Petitioners, or enter into any new partnerships, joint ventures or otherwise but shall maintain their businesses as presently carried on;

(*c*) incur any debts or obligations whatsoever, except in the ordinary and usual course of business and as is necessary to continue business operations in the manner conducted prior to May 2, 1989 all without prejudice to the interest of the secured creditors;

(*d*) apply any of their cash flow in any manner or for any purpose other than is specifically authorized by this or any sub sequent Order of this Court or in the ordinary and usual course of business and for the purpose of continuing present business operations and except as may be necessary to prepare and present a reorganization plan; and

(*e*) enter into or effect any arrangements or compromises with or make any payments other than in the ordinary and usual course of business and for the purpose of continuing present business operations to any creditors, including secured creditors except as provided in this Order, without obtaining an Order of this Honourable Court following notice to the parties of record.

. . . . .

17. THAT the Interim Receiver do, from time to time, pass its accounts with this Court and for such purpose the said accounts are referred to a Justice of the Court of Queen's Bench of Saskatchewan.

. . . . .

25. THAT the Interim Receiver may from time to time apply to this Court for direction and guidance in the discharge of its powers and duties as Interim Receiver hereunder.

26. THAT liberty be reserved to any and all persons interested to apply to this Court for such further or other Order as they may be advised.

Deloitte was also directed to provide financial and other information on request.

3 On September 29, 1989 the petitioners applied for and received an order extending the date for filing the formal plan of compromise or arrangement, as required by para. 2 above, until November 22, 1989. Also, at some point, C.I.B.C. applied for leave to have Clarkson Gordon Inc. (now Ernst) appointed as receiver-manager of the undertaking, property and assets of the petitioners, thereby bringing Deloitte's appointment to an end. This application was also adjourned until November 22, 1989. Subsequently, both applications were adjourned to February 21, 1990.

4 The petitioners commenced an action against C.I.B.C. by statement of claim dated November 16, 1989, alleging that C.I.B.C. had refused to honour its commitments to provide financial support to the petitioners and had failed to give reasonable demand or notice prior to commencing realization proceedings; and that, in applying certain ac count balances against the indebtedness of the petitioners, C.I.B.C. had acted in direct and flagrant violation of the May 31, 1989 order. The petitioners also alleged that the actions of C.I.B.C. were the direct cause of their acute financial distress and sought damages in excess of $15 million.

5 On the same day, the petitioners filed with the court their reorganization plans which, for the purposes of the C.C.A.A., set off their claim for unliquidated damages in the amount of $15 million against the amount owing by the petitioners to C.I.B.C., thereby effectively eliminating C.I.B.C. as a participant in the reorganization plans.

6 Osborn J. made his decision with respect to the application of the petitioners and of C.I.B.C. on March 2, 1990. He refused to grant the application of the petitioners and proceeded to appoint Ernst as a receiver and manager under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and *The Business Corporations Act*, R.S.S. 1978, c. B-10, of Saskatchewan. Osborn J. had this to say about the reorganization plans submitted by the petitioners [at p. 279 C.B.R.]:

> The two plans put forward by the petitioners will result in one group of companies being wound up after the assets have been liquidated and the other group of companies being continued in the building supply business indefinitely. To accomplish this the companies would have to continue to use the bank's security and attempt to defeat the claim of the bank by way of a set-off of anticipated damages from the lawsuit commenced after the court order was obtained to prepare and file a reorganization plan.
>
> I have concluded that the continuation of these companies cannot be justified by either the provisions or the intent of the *Companies' Creditors Arrangement Act*.
>
> (*b*) It has not been shown by the material filed that the public has any interest in the continuation of the enterprise. The companies do not provide essential services and do not employ a large number of workers. The continuation of these companies will benefit only the Ursel family members.

> (*c*) The plan of reorganization as it is presently framed is not likely to accomplish its purpose as the principal creditor has been excluded from participation in the plan. Throughout the information circular reference is made to the result of the lawsuit to the success of the plan. This court cannot forecast the result of any lawsuit, much less this one.
>
> The plan cannot succeed as it does not embrace all parties, particularly the principal secured creditor. The debtor companies by suing the principal secured creditor for $15,000,000 and then indicating in the information circular that it intended to set off against the secured claim the amount of the unproven claim in damages showed lack of good faith and will result in the principal secured creditor voting against the plan.
>
> . . . . .
>
> The reorganization plans submitted by the petitioners do not comply with the purpose and intent of the *Companies' Creditors Arrangement Act*. The petitioners have invoked the Act, not for the legitimate purpose of compromise or arrangement, but for their own purposes ...
>
> On the basis of the material filed I have concluded that the reorganization plans are nothing more than a scheme of liquidation to be spread out over a considerable period of time to the benefit of the Ursel family and to the detriment of the creditors and in particular the principal secured creditor, the Canadian Imperial Bank of Commerce. The object and purpose of the Act [the C.C.A.A.] is to continue the company through its period of difficulty to become a viable company for the benefit of its creditors, shareholders, employees and the public.
>
> The reorganization plans as proposed fall far short of these objectives.

In refusing to approve the reorganization plans, Osborn J. directed that his orders appointing Deloitte be "hereby rescinded."

7 After March 2, 1990 the assets available to pay the creditors of the petitioners as authorized by Deloitte were in the custody and control of Ernst, but significant costs had been incurred in the name of Deloitte, which were unpaid as of March 2, 1990 when Ernst was appointed.

Disposition in the Court of Queen's Bench

8 Deloitte's first attempt to have these creditors paid was by application dated March 21, 1990. Deloitte applied pursuant to s. 100 of the *Canada Business Corporations Act*, s. 95 of *The Business Corporations Act* and para. 17 of the March 2, 1990 order, for an order directing Ernst to honour all "debts, obligations and payables incurred by Deloitte" in its capacity as court-appointed interim receiver pursuant to the May 31, 1989 order, including its own fees. On April 10, 1990 that application was dismissed by Osborn J., who stated as follows:

> I find that, from the material before me on this application, the relief sought by Deloitte & Touche Inc. is premature at this time as the court cannot adjudicate on the validity of any claims that may be in existence that have come to the attention of Ernst & Young Inc. as court-appointed receiver.

9 On January 10, 1991 Deloitte renewed its application. The application was opposed by C.I.B.C. on the basis that:

10 (1) Deloitte had no standing to bring the application since the May 31, 1989 order under which it was appointed had been rescinded by the order appointing Ernst; and, alternatively,

11 (2) Deloitte had acted contrary to the terms of the May 31, 1989 order such that it was not entitled to be paid its remuneration or indemnified with respect to the third party accounts and should therefore be responsible for payment of the outstanding third party accounts out of its own funds.

12 Osborn J. did not accept C.I.B.C.'s arguments and on May 21, 1991 ordered payment of Deloitte's accounts and fees, indicating they were to be paid in priority to all other claims. He had this to say:

The role of an interim receiver appointed by the court to preserve the assets of a company during the period of reorganization under the C.C.A.A. has not to date been scrutinized by our courts in Saskatchewan. There have been very few instances where Saskatchewan companies have sought the protection of the C.C.A.A. Counsel for Deloitte pointed out in its brief that the creditors compromise their ability to immediately realize upon their security, which would result in certain losses, in exchange for the opportunity to lessen or avoid losses which a restructured, potentially viable corporation would be able to effect.

It is not a risk-free process. There is the risk that no restructuring plan will be acceptable. There is the risk that security will be devalued by a wide range of factors from changing market conditions to interest rate fluctuations to changes in government policy and programs. The C.I.B.C. was facing a certain loss between two and three million dollars (affidavit of Thomas Baumann, January 23, 1991, para. 20). It is submitted that by consenting to the order of May 31, 1989, as it did, the C.I.B.C. avoided accepting this certain loss immediately, hoping that the petitioners could resolve the difficulties that resulted in insolvency and eventually repay all of the money it owed C.I.B.C. It was a business decision, a calculated risk. A risk that the C.I.B.C. now seeks to shift to the applicant. This position runs contrary to general business practice, the structure of the C.C.A.A. and the specific words and general intent of the order of May 31, 1989.

I have some difficulty with the spending carried out by Deloitte during the period of reorganization without referring some matters to the court for directions. When it came to the knowledge of Deloitte, in its position of receiver, that the Ursels had sued the bank, its principal creditor, for $15,000,000 and had then indicated that it intended to eliminate the bank as a creditor at the proposed meeting of the creditors by way of set-off, Deloitte should have known, from that point on, that the Ursels were not above using the C.C.A.A. for their own purposes to the detriment of their principal creditor.

With this knowledge at hand Deloitte went ahead and paid huge sums of money on legal fees incurred by the Ursels during the reorganization period without question or without seeking direction from the court. The material before me raises doubts that such legal bills were 'costs of legal counsel to the interim receiver' as contemplated by cl. 9 of the order of May 31, 1989.

. . . . .

I find that even though some of the payments made by the interim receiver were imprudent they were made bona fide and as such were not improper.

It matters little if I disagree with the manner in which the interim receiver carried out some of its duties during the reorganization period. Only if I find that its actions were improper or in direct violation of the order appointing it, could I deny its right to be indemnified out of the assets against expenses and liabilities properly incurred in the execution of its duty.

After giving consideration to all of the material filed in this application and having regard to the briefs of law filed and the arguments of counsel, I have concluded that Deloitte & Touche Inc. is entitled to be paid, in priority to all other claims, the debts, obligations and payables incurred by it in its capacity as court-appointed interim receiver pursuant to an order of this court dated May 31, 1989, but such amount shall not exceed the sum of $260,000 unless approved by further order.

13 C.I.B.C. appealed the decision of Osborn J., raising the following issues: (1) whether Deloitte had standing to make the application; and (2) whether Deloitte was entitled to have the third party accounts and its fees paid out of the assets of the petitioners in the first instance and to be indemnified with respect to same.

The Issue of Standing

14 The appeal cannot succeed on the ground that Deloitte had no standing to bring the application. The March 2, 1990 order "rescinding" the orders that appointed Deloitte and appointing Ernst cannot be taken, as a matter of status, as eliminating the right of Deloitte to apply for an order to have the present receiver pay accounts incurred under Deloitte's receivership. We agree with counsel for Deloitte that a fair reading of the March 2, 1990 judgment indicates the intention of Osborn J. was not to treat the order appointing Deloitte as if the order had never existed, but to end the process commenced by the petitioners under

the C.C.A.A. and to begin a new process of liquidation under the stewardship of Ernst. All actions taken or omitted during the period from May 31, 1989 to March 2, 1990 must be measured against the May 31, 1989 order. Under that order Deloitte had the right to apply for directions and to be indemnified. Furthermore, s. 100 of the *Canada Business Corporations Act* and s. 95 of *The Business Corporations Act* of Saskatchewan, which were the Acts under which Ernst was appointed, allow "interested persons" to apply to the court for directions.

Right of Deloitte to Have Third Party Accounts Paid

15 There are two aspects to this issue. There remain significant creditors of the petitioners who relied on Deloitte's guarantee of payment and who were, as of the date this matter was heard by us, unpaid. Deloitte asked for and received from Osborn J. an order compelling Ernst to pay Deloitte sufficient funds so that these creditors could be paid. The second aspect of this issue is whether or not Deloitte is entitled to be indemnified for the amounts required to pay these accounts. This aspect will be considered later in this judgment.

16 In the usual case a receiver would pay the creditors of the estate in accordance with the order appointing it out of the assets of the es tate as the debts were incurred, and then, subject to such order, would pass its accounts. In this case Deloitte incurred the liability, but Ernst was given control of the assets before the accounts could be paid. In the circumstances, the procedure chosen by Deloitte was to apply for an order to have the third party accounts paid first, including its own account for fees, and then after these had been paid to apply to pass its accounts in the usual way.

17 We are advised that Deloitte has given its undertaking that if the accounts are paid by Ernst as directed by the order of Osborn J., and it is subsequently found on the passing of accounts that these accounts were improperly incurred and should be the responsibility of Deloitte, it will immediately arrange payment as may be directed. This being so, we affirm Osborn J.'s order directing that Ernst pay Deloitte sufficient funds to allow Deloitte to pay the accounts in question to the maximum as directed in his order. The third party creditors should not have to wait any longer for payment. In fact, this part of our decision was given following oral argument to allow creditors to be paid in 1991, if possible. In making this order, we did not see the same urgency in paying Deloitte's account for fees. Only third party claims including the claims of Deloitte's solicitors as contemplated by cl. 9 of the May 31, 1989 order were directed to be paid. The question of paying Deloitte's account was to be left until the passing of accounts.

Deloitte to Apply to Pass Its Accounts

18 There is nothing in the judgment appealed from that would indicate that Osborn J. concluded that a passing of accounts would not be necessary. Counsel for both parties indicated they were in agreement that the order appealed from was not construed by them as the equivalent of a passing of accounts by Deloitte and that such passing was still to be undertaken.

19 We are of the view that the proper procedure in this case would have been to direct Ernst to provide Deloitte with sufficient funds to pay the outstanding third party accounts, to direct Deloitte to apply to pass its accounts, and to decide the issue of whether Deloitte should be indemnified on that application.

20 Both *Walter E. Heller (Canada) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. Master), affirmed (1976), 21 C.B.R. (N.S.) 272 (Ont. Master) and *Plisson v. Duncan* (1905), 36 S.C.R. 647 are cases where the court considered the receiver's conduct on the application to pass accounts.

21 In *Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd.* (1977), 24 C.B.R. (N.S.) 187 (Man. Q.B.), affirmed *(*sub nom. *Rothberg v. Business Development Bank)* [1978] 2 W.W.R. 744, 28 C.B.R. (N.S.) 73 (Man. C.A.), it was argued that some expenses incurred by the receiver to make up the amount of $50,000 covered by the original borrowing limit were not properly chargeable to the operation of the company in receivership. Solomon J. stated at p. 189 [24 C.B.R.]:

> The court advised respondent that such matters could and should be dealt with during the passing of accounts and not on this motion before the court. It was finally agreed between the parties that applicant would pass his accounts and tax his fees and disbursements by this court in the ordinary way, and the court, on this motion, would only determine whether the

> borrowing limits of applicant should be increased retroactively beyond $50,000 in order to indemnify applicant for losses incurred by him over and above the $50,000 limit.

On appeal the issue of when complaints about the receiver's conduct should be considered was not addressed by the majority. However, O'Sullivan J.A., who wrote a separate opinion from that of the majority, had this to say at p. 76 [28 C.B.R.]:

> Those reasons, as I say, suggest that the applicant, in making financial expenditures above the borrowing limits set by the court, was doing so more for the protection of his business clients and associates than in the discharge of his duties as receiver and manager of Voyageur Inn. That may be so or it may not be so but, in my opinion, with respect, the appropriate place for the receiver's conduct to be examined is on the passing of his accounts.

He continued at p. 77:

> It would not surprise me if the applicant in this case followed that example, but that would not justify charging the respondent's interest in the property for work done or expenses incurred in the interest only of prior mortgagees. The place to determine that, however, is on the passing of accounts when the applicant seeks to be indemnified for his disbursements and costs and claims his fees. His accounts can be surcharged and falsified and the surcharges, if any, and the falsifications, if any, can be dealt with in the normal way with each side having the opportunity to lead evidence and to address the issues.

In *Doncaster v. Smith* (1985), 65 B.C.L.R. 173, 57 C.B.R. (N.S.) 143 (S.C.), reversed in part [1987] 5 W.W.R. 444, 15 B.C.L.R. (2d) 58, 40 D.L.R. (4th) 746, 65 C.B.R. (N.S.) 133 (C.A.), the trial judge stated that the remedy is not to sue for damages but for an order charging his accounts for the loss. On appeal, this issue was not canvassed.

22 There is a statement in F. Bennett, *Receiverships* (Toronto: Carswell, 1985) which could be construed as authority for the proposition that complaints against a receiver's conduct and the right of a receiver to be indemnified cannot be considered, as a matter of law and practice, on the application to pass accounts. At p. 297, Bennett states:

> Another purpose [of the passing of accounts] is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities to date. However, where the receiver had already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the mathematics of the accounts and whether the receiver proceeded without specific authority. The court may in addition consider complaints concerning the alleged negligence of the receiver.
>
> There does not appear to be any jurisdiction at the passing of accounts to make an award against the receiver. *If a complaint is justified, all the court can do is order the receiver to make further and better accounts and penalize him with respect to his remuneration. Any substantive issue would have to be dealt with in a trial of an issue or be the subject matter of a separate action in which damages or other relief including his discharge may be claimed*.

[emphasis added]

23 This statement does not mean that a detailed review cannot be undertaken to determine whether the receiver should be indemnified with respect to any individual account or all accounts. From our review of the cases cited by the appellant, it appears to us that the passing of accounts, which by its very nature allows for a detailed analysis of the accounts, the manner and circumstances in which they were incurred and the time when incurred (a potentially important factor in this case), is, at least, the starting point for a review of the receiver's conduct. The options available to the judge on the passing of accounts, in addition to approving them, appear from the cases, notably *Heller*, supra, to include finding that no liability has been incurred as a result of the impugned act or, if liability has been incurred or loss is attributable to such act and the receiver is to be penalized in some way with respect to same, the judge may hold the receiver responsible with respect to individual accounts, all accounts, its costs or its fees.

24 In any event, it is our view that given the issues to be determined it is appropriate that they be canvassed on the application to pass accounts. It is not appropriate to consider Deloitte's conduct in the context of the outstanding accounts only. Accordingly,

Deloitte is hereby directed to pass its accounts before Osborn J. as soon as possible, and that its conduct in the receivership be considered on that application. As indicated earlier, Osborn J. stands seized with all matters involving the receivership of the petitioners. Counsel agrees that the application to pass accounts should be made to Osborn J. and we agree with that view.

Standard of Care of Interim Receiver

25 On this appeal, the parties invited us to state the standard of care required of an interim receiver appointed in the circumstances of Deloitte and to, thereby, provide the standard against which Deloitte's actions as interim receiver in relation to each of the accounts of Deloitte is to be measured on the passing of accounts. It is not usual to give directions in advance of the matter being heard by the court below, but this is an unusual case. All parties have requested that we do so, and the point was argued by the parties with supporting materials. This also was an issue addressed by Osborn J., and, as we have concluded that he may have applied the wrong standard, addressing the issue in this judgment may prevent the need for a further appeal following the passing of accounts. It should be underscored that we view this additional task as the establishment of a standard of care of Deloitte in its capacity as interim receiver only.

26 Osborn J., in considering the applicable standard of care, referred to the following comments of Solomon J. in *Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd.*, supra, at p. 189 [24 C.B.R.]:

> There is very little, if any, dispute about the rights and responsibilities of the receiver-manager appointed by the court to manage the business of the delinquent debtor. He is appointed by the court to receive and manage the business of the delinquent debtor in a business-like manner. He is the agent of neither the delinquent debtor nor the creditors. He is an officer of the court, appointed by it to take charge of the estate of the delinquent debtor and manage the business of that estate in accordance with the provisions of the order appointing him. When such order does not place any limitations on the receiver-manager, he has the responsibility of managing the delinquent estate in a business-like manner, and as long as he discharges his duty in a bona fide manner he is entitled to be indemnified for actions performed in the course of his duties.

In applying this test, Osborn J. was prepared to indemnify the receiver even though he found some of the payments to have been imprudent. He concluded, as indicated above, that as the payments were made bona fide, they were not improper. He then stated that only if he found the actions of the receiver to be "improper or in direct violation of the order appointing it" could he deny Deloitte's right to be indemnified.

27 Counsel for C.I.B.C. submits that the chambers judge misdirected himself in setting forth and applying the appropriate test. It is C.I.B.C.'s position that Osborn J. did not give sufficient weight to the words of Solomon J. in *Edinburgh Mortgage Ltd.*, supra, where he stated at p. 189: "when such order *does not place any limitations* on the receiver-manager" [emphasis added]. It is contended that Osborn J. should have found that Deloitte's general authority was limited by the May 31, 1989 order appointing it, and if he had done so the test should have been as follows:

> (1) costs and expenses incurred by Deloitte as interim receiver in good faith and in the ordinary course of business within those limitations are costs and expenses properly incurred; and
>
> (2) costs and expenses incurred by Deloitte as interim receiver in excess of its authority are not costs and expenses properly incurred unless Deloitte can demonstrate that, having regard to all the circumstances under which those costs and expenses were incurred, it was justified in incurring them without first obtaining court approval.

Counsel for C.I.B.C. argued that those costs and expenses are not costs and expenses properly incurred merely because they were incurred bona fide and in the ordinary course of business.

28 Inherent in any discussion of a receiver's standard of care is the nature of the appointment. Deloitte was appointed under the C.C.A.A. and cl. 45(8) of *The Queen's Bench Act* (Saskatchewan). The purpose of an order under the C.C.A.A. is described in an article by D.H. Goldman, D.E. Baird, Q.C. and M.A. Weinczok, "Arrangements under the *Companies' Creditors Arrangement Act*" (1991) 1 C.B.R. (3d) 135 at p. 138 as follows:

> As noted by Urquhart J. in *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) at 18 [C.B.R.] and in *Re Arthur Flint Co.*, 25 C.B.R. 156, (1944) O.W.N. 325, [1944] 3 D.L.R. 13 (S.C.), at 162 [C.B.R.] the object of the *Companies' Creditors Arrangement Act*, S.C. 1933, c. 36 was to keep a company going despite insolvency. When [the Act was] introduced as a Bill into the House of Commons, the Honourable C.H. Cahan indicated that it was designed to permit a corporation through reorganization to continue its business and thereby to prevent its organization from being disrupted and its goodwill lost; Canada, House of Commons Debates, 1932-33, Vol. IV, 4090-4091. Thus, an insolvent corporation has a great deal to gain from implementing a successful arrangement.
>
> The CCAA also incorporates concern for other involved interests, such as those of creditors and shareholders of the corporation.

The authors continued at p. 139:

> Reorganization may provide those who have a financial stake in the company with an opportunity to secure the maximum amount from its intangible assets. In order to succeed, all parties must be prepared to give up some of their nominal rights in order to ensure that the enterprise continues until business improves. Therefore, it may be in the interests of all affected parties to compromise their claims against the insolvent company.

Section 11 of the C.C.A.A. authorizes the granting of an order staying all proceedings, and the May 31, 1989 contained an express order to that effect.

29 Deloitte was appointed interim receiver as part of an order issued pursuant to the C.C.A.A. There is no express authority to appoint a receiver contained in the C.C.A.A. In an article written by David H. Goldman, "Reorganizations under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. 36, the author said at p. 42:

> It is generally accepted that prior to the mechanics of the C.C.A.A. taking full effect a structured plan must be formulated by the party petitioning the court. However, in the case of *United Co-operatives of Ontario*, August 1984 (not yet reported), an order was made staying all proceedings by creditors and the company was ordered to file a plan of arrangement by a specified date.

The case referred to has not been reported. In a rewrite of the above article, by D.H. Goldman, D.E. Baird, Q.C., and M.A. Weinczok, "Arrangements under the Companies' Creditors Arrangement Act," [(1991) 1 C.B.R. (3d) 135] when the same issue is discussed at p. 156, the above comment is no longer made. Since 1985, when the first article was written, there have been a number of cases under the C.C.A.A., and the courts have given the C.C.A.A. a liberal interpreta tion: see, e.g., *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 at p. 297 [O.R.] and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.) at p. 144 [W.W.R.]. There have been several cases where no plan of reorganization was presented to the court at the time of the initial application. These have been gathered together in a recent decision of the Nova Scotia Supreme Court Trial Division: see *Re Fairview Industries Ltd.* (November 6, 1991), Doc. S.H. 78982/91, Glube C.J.T.D. (N.S. T.D.) [now reported *(*sub nom. *Re Fairview Industries Ltd. (No. 2))* 109 N.S.R. (2d) 12, 297 A.P.R. 12]. The procedure described in these cases is also the procedure followed by Osborn J. on May 31, 1989 in giving full effect to the Act before the plan of arrangement was filed with the court.

30 Counsel were unable to refer the court to any case where the powers, duties and responsibilities of a receiver appointed as part of an order under the C.C.A.A. were considered. There are some cases involving the appointment of a monitor: see, e.g., *Canadian Imperial Bank of Commerce v. Quintette Coal Ltd.* (1991), 1 C.B.R. (3d) 253, 53 B.C.L.R. (2d) 34 (S.C.) and *Re Fairview Industries Ltd.*, supra, and see L.W. Houlden and C.H. Morawetz, Q.C., *Bankruptcy Law of Canada*, 3rd ed., vol. 2 (Toronto: Carswell, 1989) (looseleaf) at pp. 10A-11.

31 Throughout this judgment, and, in the various judgments from the court below, Deloitte has been referred to as an "interim receiver." However, paras. 6(*a*) and (*g*) of the May 31, 1989 order gave Deloitte the power "to supervise and concur

in carrying on any or all parts of the business of the Petitioners" and "generally to supervise the carrying out of the business of the Petitioners." In discussing the differences between a receiver and manager, Bennett, supra, at p. 108 states:

> A *receiver* is no more than his name suggests. His primary function is merely to seize and sell the debtor's property and to collect the accounts receivable ...
>
> On the other hand, a *manager* displaces the board of directors and operates or 'manages' the debtor's business, including the buying and selling. If a manager is appointed, he has the power to and may take upon himself the duty of carrying on the business.

32 Bennett quotes, at pp. 108 and 109, from *Re Manchester & Milford Railway Co.; Ex parte Cambrian Railway Co.* (1880), 14 Ch. D. 645 at p. 653 (C.A.) per Jessel M.R. to further describe the distinction:

> 'A receiver' is a term which was well known in the Court of Chancery, as meaning a person who receives rents or other income paying ascertained outgoings, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind. We were most familiar with the distinction in the case of a partnership. If a receiver was appointed of partnership assets, the trade stopped immediately. He collected all the debts, sold the stock-in-trade and other assets, and then under the order of the Court the debts of the concern were liquidated and the balance divided. If it was desired to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade. ... So that there was a well-known distinction between the two. The receiver merely took the income, and paid necessary outgoings, and the manager carried on the trade or business in the way I have mentioned.

33 From the application of this law to the duties given to Deloitte in the May 31, 1989 order, it is clear that Deloitte is not a "receiver" as such, but is more closely akin to a "manager." Accordingly, the cases applicable to "managers" and "receiver-managers" are useful in considering the appropriate standard. This accords with the approach taken by Osborn J. in referring to *Edinburgh Mortgage*, supra, which was a case involving a receiver-manager. Deloitte was not to manage the business of the petitioners, but was to supervise and concur in the management of the petitioners.

34 It is accepted that a receiver-manager appointed by the court owes its duty to the court. In *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) at p. 167 [A.C.], Viscount Haldane L.C. stated:

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs ...

Recent Canadian pronouncements on the issue of the duty of a court appointed receiver-manager include *Fotti v. 777 Management Inc.*, [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.), at p. 54 [W.W.R.]; *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 78 Sask. R. 87 (C.A.) at pp. 250-51 [D.L.R.] and *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.*, 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 117 A.R. 44, 2 W.A.C. 44, 81 D.L.R. (4th) 280 at pp. 293-94 [D.L.R.].

35 The conduct of a receiver-manager carrying out its general duty has been considered on several occasions. In *Plisson*, supra, Davies J., Girouard and Idington JJ. concurring, states at p. 651:

> The deficit in this manager's accounts was, in my judgment, shewn to be the direct result of his wilful default in leaving the business for months together to take care of itself without his own or any other supervision or control ...
>
> If under such circumstances as those described in this case a paid receiver and manager of a business is not to be held liable for the deficit in his accounts I do not know under what circumstances he should be. Surely it is not necessary to prove personal wrong-doing or peculation on his part in order to make such liability attach. *Creditors of an estate, the*

> *running business of which is placed by a court in the hands of a receiver and manager, are entitled to exact from him such reasonable care, supervision and control as an ordinary man would give to the business were it his own*.

[emphasis added] The court went on to order that the receiver and manager be declared liable for and charged with the deficit in the estate.

36 In *Thompson v. Northern Trust Co.*, [1924] 2 W.W.R. 237, [1924] 1 D.L.R. 1135 (Sask. K.B.) at p. 1137 [D.L.R.] Brown C.J.K.B. quotes from *Plisson*, supra. He stated that the court will exact from the receiver the same degree of care and devotion that a prudent man would be expected to give to his own personal affairs. On appeal (reported at [1925] 4 D.L.R. 184) this court did not take issue with the test as stated by Brown C.J.K.B., but did vary the judgment by charging the receiver for certain travelling expenses and by awarding costs to the mortgagee, in addition to affirming the trial judge's decision to reduce the remuneration of the receiver.

37 In *Doncaster v. Smith*, supra, counsel agreed that the principle governing the conduct of the receiver-manager is that he must manage the company's affairs with the same prudence and supervision as an ordinary man would give his own business. The British Columbia Court of Appeal did not take issue with the test as agreed to by counsel but disagreed with the trial judge's application of this test and found the receiver liable to a greater extent than had been determined by the trial judge. The matter was remitted to the trial judge for an assessment of damages.

38 We agree with the standard as articulated in *Plisson*, supra, and dealt with in *Thompson*, supra, and *Doncaster*, supra.

39 In addition to the general duty imposed by the common law, Deloitte had to also comply with the order appointing it. It is clear that the general authority of Deloitte was limited by the May 31, 1989 order. For example, para. 6(*e*) of the order prescribed both a power and a duty. Deloitte had the authority to incur obligations or to obtain trade credit, but could only do so under the terms of the May 31, 1989 order and in respect of the business operations of the petitioners. Similarly, para. 16(*c*) allowed the interim receiver to incur debts in the ordinary and usual course of business and as was necessary to continue business operations in the manner that it was conducted prior to May 2, 1989 without "prejudice to the interest of the secured creditors." Paragraph 16(*d*) allowed use of the *cash flow* only for "ordinary and usual course of business" operations and "for the purpose of continuing present business operations and except as may be necessary to prepare and present a reorganization plan." Other paragraphs in the May 31, 1989 order can be construed in the same way. We do not yet know whether the limitations imposed by this order on the activities of the interim receiver were met. We merely refer to some of the parameters of the order for further consideration by the parties and Osborn J.

40 Having determined that the May 31, 1989 order imposed limitations on Deloitte, it will be incumbent on Osborn J., on the application to pass accounts, to determine whether Deloitte acted in accordance with these limitations. It is clear from the case law that where the general power of a receiver is limited by the order appointing it, it is not enough for the receiver to say it acted in accordance with its general duty of care. The first case to be discussed in this context is *Re British Power Traction and Lighting Co.; Halifax Joint Stock Banking Co. v. British Power Traction and Lighting Co. (No. 1)*, [1906] 1 Ch. 497. Warrington J. said at p. 506:

> It seems to me the true position in these cases is that the order is intended to limit his general authority, and, if he finds that the fund provided by the Court is not sufficient, it is his duty to cause the matter to be brought before the Court, so that, if it sees fit, it may increase it, or give him leave to incur further expenses or liabilities, which comes to the same thing. If, without such an application being made, he incurs expenses and liabilities exceeding the limit, he is, in my opinion, not entitled to be indemnified against them unless he can shew that, having regard to all the circumstances under which they were incurred, he was justified in incurring them without first obtaining leave. If he succeeds in shewing this, then I think the expenses and liabilities would be properly incurred, but not otherwise. What circumstances would justify the conduct of the manager in so increasing such expenses and liabilities without leave cannot, I think, be defined in general terms, but must be determined in each particular case. I will only say that, in my opinion, it would not be enough to shew that the expenses or liabilities were incurred bona fide and in the ordinary course of business.

In this case the power exceeded was a borrowing power which when exceeded was easier to measure than the powers under consideration here. Nonetheless the case is a useful starting point. Subsequently the same receivership came under the court's scrutiny in *Re British Power Traction and Lighting Co.; Halifax Joint Stock Banking Co. v. British Power Traction and Lighting Co. (No. 2)*, [1907] 1 Ch. 528 at pp. 534-536. Warrington J. held that funds expended to buy cars for a trade show were speculative and should not be allowed the receiver. He says this at p. 535:

> I cannot take the same view with regard to the cars ordered for the show. It may have been a prudent thing in the interests of the debenture-holders to embark in a speculation of the kind with the object of increasing the value of the business; but it was none the less a speculation, and ought not to have been undertaken without the specific leave of the Court.

41 We come then to the Canadian cases. Kirby J. in *Crédit foncier franco-canadien v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734 (Alta. Q.B.), affirmed (1966), 56 W.W.R. 623 (Alta. C.A.) stated at p. 745 [55 W.W.R.]:

> Expenses and liabilities *bona fide* incurred by a receiver-manager in the ordinary course of the business would, where his general authority has not been limited by the order appointing him, *prima facie* be treated as having been properly incurred.

42 Osborn J., as indicated above, referred to a statement made by Solomon J. in *Edinburgh Mortgage Ltd.*, supra, at p.189 [24 C.B.R.]. However, Solomon J. went on to consider the position of a receiver-manager when limitations are imposed by the court order at pp. 189 and 190:

> When limitations are placed upon the receiver-manager by order of the court, he must perform strictly within the terms of those limitations and has no right to go beyond them without the approval of the court if he is to be indemnified for his actions. When a receiver-manager acts beyond the limits of the order appointing him, he cannot expect indemnification for such actions unless he demonstrates conclusively that not only did he act bona fide but that such actions were required to conscientiously discharge his duties before approval could be obtained from the court ...
>
> Before applicant can be indemnified for losses incurred above the borrowing limits imposed upon him by the order of this court in priority to the claim of the first mortgagee, he must prove that he exceeded the borrowing limits bona fide in the ordinary course of business before he had an opportunity of obtaining approval of the court.

43 In each of the cases of *Re British Power Traction and Lighting Co. (No. 1)*, supra, *Crédit foncier franco-canadien*, supra, and *Edinburgh Mortgage Ltd.*, supra, the court was considering whether the receiver was justified in exceeding a borrowing power with a prescribed limit. It seems clear from these cases that bona fides on the part of the receiver, in the face of a limitation or prohibition in the order appointing it, is not enough. The receiver is obliged to, in the words of Solomon J. referred to above, "demonstrate conclusively that not only did he act bona fide but that such actions were required to conscientiously discharge his duties before approval could be obtained from the court." The receiver can, of course, obtain the order nunc pro tunc.

44 We find that Osborn J. misdirected himself as to the standard by which the conduct of Deloitte should be measured. He should have considered whether with respect to its general duties as interim receiver Deloitte exercised "reasonable care, supervision and control as an ordinary man would give to the business were it his own." Then, since the order of May 31, 1989 imposed limitations on the interim receiver, it was incumbent on him to ask himself whether the interim receiver complied with the order. If Deloitte met both of these tests, that, of course, would end the matter. If it had not, Osborn J. then had to embark upon the course of determining whether the interim receiver was justified in its actions or omissions having regard to all of the circumstances, including that it had taken such action or failed to take action without first obtaining court approval. It was not enough for Osborn J., having found that some of the payments were imprudent, to then find them to be proper because they were made bona fide. As Warrington J. held in *Re British Power Traction and Lighting Co., (No. 1)*, supra, at p. 506 and quoted above, as soon as a receiver exceeds the limits of the order appointing him, it is not enough to simply show that the activities outside the court order were undertaken bona fide and in the ordinary course of business. Something more will be required. Warrington J. was reluctant to be specific as to what circumstances would justify such activities other than in general terms. We share his reluctance, as the evidence in this case has yet to be reviewed in this light by the chambers judge, but we can offer some of the factors which we believe are germane to this case.

45 Clearly, a relevant factor to be considered by Osborn J. is the nature of Deloitte's appointment. The May 31, 1989 order effected a stay of proceedings and kept the petitioners going despite their insolvency. However, although the exercise of the rights and powers of the creditors of the petitioners were stayed by the operation of the C.C.A.A., no plan of reorganization was put in place. This is a significant fact and must form the backdrop against which the tasks and role of Deloitte are considered. Deloitte was not the usual type of a receiver or a monitor as described in the cases referred to above. It was appointed to supervise and concur in carrying on the business of the petitioners and to perform certain tasks prior to the filing of a reorganization plan under the C.C.A.A. No plan of arrangement was filed at the time of Deloitte's appointment. The petitioners were given until September 30, 1989 to file same. This time was subsequently extended. C.I.B.C. consented to the May 31, 1989 order, but both counsel for Deloitte and for C.I.B.C. submitted that Deloitte was appointed at the request of C.I.B.C. Counsel for Deloitte made this submission to show that C.I.B.C. could not complain of its actions. Counsel for C.I.B.C. submitted that the appointment of Deloitte as interim receiver was to counteract the effect of the C.C.A.A. on their ability to realize on security. In this respect C.I.B.C. relies upon the circumstances of the appointing orders and the form the order ultimately took. With the parameters placed on the interpretation of the order, as prescribed above, C.I.B.C.'s position on this point bears further consideration.

46 Other factors which may become relevant are the timing of the filing of the application for the reorganization plan and of C.I.B.C.'s application for the appointment of a receiver, and the basis of the adjournments from September 22, 1989 until the matter was ultimately argued on February 21, 1990. When the various accounts were incurred may be relevant in this context.

47 To sum up, Osborn J.'s tasks on the passing of accounts include answering the following questions:

48 (1) Subject to the terms of the May 31, 1989 order, did Deloitte give to the running of the business that "reasonable care, supervision and control as an ordinary man would give to the business were it his own"?

49 (2) Insofar as Deloitte's general duty was limited by the May 31, 1989 order, did Deloitte perform strictly within the limitations im posed on it?

50 If it did not, can it demonstrate not only that it acted bona fide but that its actions, outside these tests, were required to conscientiously discharge its duties before court approval could be obtained?

51 There is no doubt that Deloitte was placed in an extremely difficult position from the beginning of September until its removal in March of 1990 by the various adjournments and applications by the parties. However, on this point the remarks of Bennett, supra, at p. 309 are appropriate:

> In the situation where the receiver and manager may be substituted or replaced the receiver must still act honestly and in good faith and he should deal with the property in a commercially reasonable manner.

52 This now brings us to the question of onus. It is our opinion that C.I.B.C. bears the initial burden of satisfying Osborn J. that Deloitte did not meet the standard of care referred to above or that it acted outside the order appointing it. If C.I.B.C. meets this onus, the burden shifts to Deloitte to justify its actions in accordance with this decision.

53 We are in agreement with Osborn J. that the process under the C.C.A.A. is not risk-free. C.I.B.C. cannot simply shift risk to Deloitte, but it can ask that it meet the standard of care imposed on court-appointed receiver-managers and that the limitations imposed on Deloitte by the order appointing it are not exceeded. If it does not comply with its appointing order or does not meet its standard of care, then C.I.B.C. can ask that Deloitte justify its position according to the applicable principles.

Order

54 In the circumstances, we therefore set aside the order of Osborn J. and substitute the following:

55 (1) We confirm our previous order that Ernst is directed to provide such funds (not to exceed $260,000 unless further ordered) to Deloitte as Deloitte needs to satisfy all third party claims including the claims of Deloitte's solicitors as contemplated by cl. 9 of the May 31, 1989 order, excluding payment of its own account;

56 (2) Deloitte is directed to apply to Osborn J., as soon as possible, for an order passing its accounts;

57 (3) On the application to pass accounts, the issues to be determined include those identified herein;

58 (4) In determining the extent to which Deloitte is to be indemnified for accounts and fees, the court should consider all such evidence as it deems fit;

59 (5) If it is concluded that any third party account should not be awarded to Deloitte, Deloitte is directed to reimburse Ernst for any such amount that had been paid to Deloitte by Ernst in accordance with its undertaking to do so; and

60 (6) The costs of this application are reserved for Osborn J.

61 This order is not to be taken as indicating any view that Deloitte should or should not be indemnified with respect to accounts incurred by it or for its fees. Rather, this issue is to be determined on the passing of accounts.

Order accordingly.