
Mums Unlimited Incorporated and 3-D Greenhouses Inc. ("3-D Greenhouses") (November 17, 2004) London 04-CL-5609 (Ontario S.C.J.), unreported endorsement

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In *3-D Greenhouses*, Justice Browne, writing for the Ontario Superior Court of Justice, granted an application by two debtors for the appointment of an interim receiver and the borrowing by the interim receiver of up to \$200,000 secured by a first charge ranking in priority to existing security held by the Canadian Imperial Bank of Commerce (the "CIBC"). The application was made concurrently with the filing by the debtors of notices of intention to file proposals under the *Bankruptcy and Insolvency Act* (the "BIA"). The Court approved the appointment, loan and charge notwithstanding the objection of CIBC. While the inherent jurisdiction of the courts to approve first priority debtor in possession financing has been upheld in numerous proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA"), the decision in *3-D Greenhouses* may be the first in which such approval has been granted over the objection of a secured creditor in the context of a proposal made under the BIA.

The Court noted that most receiverships have historically been creditor initiated, but cited Justice Farley's conclusion in *Canada (Minister of Indian Affairs and Northern Development) v. Justice Browne* granted the relief sought (less a deduction on account of further credit already extended by CIBC to allow the debtor to meet its payroll obligations), he ordered that it be subject to further review upon the expiration of a limited time period.

The availability of super priority interim financing in proposal cases under the BIA is a recent development and is accordingly, somewhat controversial. While the Model Order contemplates super priority for costs and borrowing by interim receivers, the Model Order was generally developed with creditor appointed interim receivers in mind. A concern exists that the relatively small size of many proposal cases may not provide suf-

Curragh Inc., that the BIA leaves the court with the inherent jurisdiction to enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". The Court held that the granting of the debtor's application for the appointment of a receiver would assist in preserving and realizing assets for the benefit of all interested parties, including CIBC.

The Court addressed the issue of super priority security for the interim receiver's costs and borrowing and noted that both were contemplated by the standard form receivership order (the "Model Order") as developed by the Ontario Superior Court of Justice (Commercial List) User's Committee Subcommittee on Model Orders. The Court also referred to the decision in *Re Charon Systems Inc. ("Charon Systems")* in which Justice Campbell approved super priority borrowing for working capital purposes by an interim receiver appointed by the debtor. In *Charon Systems*, none of the secured creditors objected to the application for super priority financing. However, Charon Systems Inc. did not have a traditional bank as a secured creditor. Instead, the primary secured lender was the company's U.S. parent. Although efficient financial incentive for creditors to exercise a disciplinary role over the process. It has been suggested that, in the absence of such discipline, it is inappropriate to subject secured lenders to the risk of erosion of the value of their security. While there has been considerable debate among practitioners as to whether it makes sense from a policy perspective to provide debtors with access to interim financing in BIA proposal cases, the supplementary submissions of the Joint Task Force on Business Insolvency Law Reform will reflect the apparent majority view that interim financing should be available subject to the same checks and balances applicable in CCAA proceedings.
