

# focus

## on

# Insolvency Law

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FRASER MILNER CASGRAIN LLP

### **BANKRUPTCY COURT ALLOWS DIP FINANCING IN A BIA PROPOSAL**

In *Re Farmpure Seeds Inc.* (2008 CarswellSask. 639) the Saskatchewan Court of Queen's Bench considered the proposal of a debtor which was conditional upon the Court approving DIP financing and a super priority charge.

The debtor company had an active business, however became insolvent as a result of rapid expansion and some improvident contracts. The debtor could not meet its immediate obligations such as payroll, and the need to pay its suppliers upon receipt of their seed product. As a result, the debtor could not maintain its business without immediate interim financing.

In allowing the DIP financing, the Court considered the pending amendments to the BIA, including section 50.6, which is not yet in force. That provision outlines the factors a Court must consider when granting interim financing:

- (a) the period during which the debtor is expected to be subject to proposal proceedings;
- (b) how the debtor's business and financial affairs will be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made;

- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced; and
- (g) the report of the Trustee.

The Court observed that this provision mirrors the proposed amendment to the CCAA, and the Court therefore also analysed some of the recent jurisprudence under the CCAA, which held that it is now well established that the Court may confer upon a DIP lender the benefit of a super priority charge on the assets of the insolvent corporation, in priority to pre-existing secured creditors.

Additionally, the Saskatchewan Court considered and followed the reasoning of Madam Justice Romaine in the *Re Bearcat Exploration Ltd.* (2004), 3 CBR (5th) 167 (Q.B.) which held there is nothing in the BIA which precludes the bankruptcy Court in proposal proceedings from authorizing DIP financing and awarding a super priority charge.

In the circumstances of the case, the Court found that the prospective statutory requirements set out above were fulfilled, and therefore allowed the DIP financing and super priority charge.

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