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COURT FILE NUMBER	2003 03284
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**ROYAL BANK OF CANADA**
DEFENDANTS	**COPPERLINE EXCAVATING LTD., 1496986 ALBERTA LTD., SPRUCE CREEK CONTRACTING LTD., JAMIE BLACK, and LORI BLACK**
DOCUMENT	**SUPPLEMENTAL BENCH BRIEF OF ROYAL BANK OF CANADA**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dean A. Hitesman Dentons Canada LLP 2500 Stantec Tower 10220 – 103 Avenue Edmonton, Alberta T5J 0K4 Ph. (780) 423-7284 Fx. (780) 423-7276 File No.: 125665-8936/DAH

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I. INTRODUCTION

1. The Respondent, Accord Small Business Finance Corp. ("**Accord**"), on February 19, 2020 filed a Cross-Application, an Affidavit of James Jang (the "**Jang Affidavit**") and a Bench Brief of Accord (the "**Accord Brief**") in response to the Application of the Royal Bank of Canada ("**RBC**") filed February 12, 2020.

2. This supplemental brief is in reply to the Cross-Application, the Jang Affidavit and the Accord Brief.

II. RBC'S REPLY

Ability of this Honourable Court to Exempt Property from a Receivership at the First Instance

3. RBC agrees with Accord that that the three circumstances where a Receiver's charge should have priority to a secured creditor are:

    i. If a Receiver has been appointed at the request or with the consent or approval of the holders of security, the Receiver will be given priority over the security holders;

    ii. If a Receiver has been appointed to preserve and realize the assets for the benefit of all interested parties, including secured creditors, the Receiver will be given priority over the secured creditors for charges and expenses properly incurred; and

    iii. If the Receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

Edmonton (City) v Alvarez & Marsal Canada Inc., 2019 ABCA 109 at para 14 [_Alvarez_] [Tab 1]

4. As well, it is not disputed by RBC that this Honourable Court has the ability to exempt property from being subject to a Receivership at the first instance, as the approach generally taken in the case of *Integris Credit Union v Mercedes-Benz Financial Services Canada Corp.*, 2016 BCCA 231 [*Integris*] has been recognized by this Honourable Court with the additional considerations noted at paragraphs 5-7 herein.

Royal Bank of Canada v Reid-Built Homes Ltd., 2018 ABQB 124 at paras 95 and 97 [_Reid_][Tab 2], rev'd on other grounds in _Alvarez_ [Tab 1]

5. In determining whether property should be exempt from a Receivership at first instance, this Honourable Court shall look to the specific circumstances of the proposed Receivership in question.

Reid at para 98 [Tab 2]

6. However, this Court has emphasized that property will only be exempt from a Receivership at the first instance, and therefore not subject to the super priority of a Receiver's charge, where "the circumstances are clear" that such an Order should be made.

Reid at para 95 [Tab 2]

7. Valid considerations in the analysis of whether property should be exempt from a Receivership at the first instance include whether there is any prejudice to the creditor seeking to exempt property, whether there is any jeopardy in not recovering the full indebtedness owed to a creditor seeking to exempt property, and whether there is any inordinate harm in any delay in recovery that a creditor seeking to exempt property may face.

***Reid* at para 100 [Tab 2]**

Other Relevant Considerations

8. Both the Alberta Court of Appeal in *Alvarez* and the Honourable Mr. Justice R.A. Graesser in *Reid* recognized the practical and commercial realities relevant to consider when appointing a Receiver in a specific circumstance:

> The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.

***Alvarez* at para 16 [Tab 1]**

***Reid* at para 136 [Tab 2]**

9. Further the Alberta Court of Appeal notes that the super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships.

***Alvarez* at paras 17 [Tab 1]**

10. Where a receiver is appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs.

***Alvarez* at paras 18 [Tab 1]**

Should Accord's Property be Exempt from this Receivership?

11. RBC respectfully submits the property of Accord should not be exempt from the Receivership sought in the within Application.

12. Firstly, at this early juncture, it is not "clear" that RBC does not have an interest in the property sought by Accord to be exempt from the Receivership.

13. Accord states that various waivers have been executed by RBC extinguishing any interest that RBC may have in the Accord property in question. However, it is not clear if what was executed by RBC was a waiver of rights or more appropriately a postponement of its rights. There is ambiguity as to what RBC may have agreed to which requires more fulsome evidence and analysis.

The Jang Affidavit at Exhibit "D"

14. With ambiguity and uncertainty as to the interests of RBC and Accord it is not "clear" that other creditors, including RBC, do not have an interest in the property of Accord.

15. Furthermore, there is no evidence from Accord that it would suffer any prejudice with the appointment of a Receiver, that it is in jeopardy of not recovering the full indebtedness owed to it, or that it would suffer any inordinate harm with a delay in recovery that may be caused by the appointment of a Receiver.

16. The current circumstance is more akin to that of ICI Capital Corporation ("**ICI**") in *Reid* rather than Mercedes-Benz Financial Services Canada Corp. in *Integris*.

17. Justice Graesser determined that absent any sort of prejudice, jeopardy, or inordinate harm that ICI would suffer, its assets were properly subject to the Receivership in that case, including the Receiver's charge. ICI was granted leave to reapply should circumstances materially change.

Reid at para 100 [Tab 2]

18. The circumstances were different in *Integris* in that it was acknowledged and admitted that there would be insufficient funds from the Receivership to pay the secured creditors and the Receiver's costs and disbursements in that case.

Integris at para 54 [Tab 3]

19. Moreover, Accord admits to possessing a security interest in the personal property of Copperline Excavating Ltd. ("**Copperline**") over and above the specific property it seeks to exempt from the Receivership; Accord holds an all present and after-acquired security interest in the property of Copperline.

The Jang Affidavit at para 7 and Exhibit "F"

20. Should the property that Accord seeks to exempt not be included in the Receivership, a multitude of proceedings will be created. Accord would be liquidating assets it is claiming priority over that possibly RBC and certainly the unsecured creditors of Copperline have an interest in. At the same time Accord would look to the Receivership proceedings to recover any shortfall through its security interest in all present and after-acquired personal property of Copperline. There is the potential that Accord could, and likely would, receive a benefit from the Receivership. This is the exact circumstance that a court appointed Receivership is intended to avoid and runs contrary to the principles espoused by the Alberta Court of Appeal in *Alvarez* as outlined in paragraphs 8-10 herein.

21. It is important to further note that the ability of a creditor to remove property from a Receivership is not closed and a creditor has such an ability should "circumstances materially change". The Alberta Template Receivership Order, which is substantially the form of Order being sought by RBC, preserves the option for Accord to reapply based upon sufficient evidence to vary or amend the Receivership Order or to allocate the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets.

Reid at para 100 [Tab 2]

IV. CONCLUSION

22. RBC respectfully submits that although this Honourable Court does have the ability to exempt property from a Receivership at the first instance, it is neither "clear" in this circumstance nor equitable that the property of Accord should be exempt from the Receivership sought by RBC at this point in time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of February, 2020.

DENTONS CANADA LLP

Per: ______________________________
DEAN A. HITESMAN

Tab 1

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: City of Edmonton v. Alvarez & Marsal Canada Inc. | 2019 CarswellAlta 1429 | (S.C.C., May 23, 2019)

2019 ABCA 109
Alberta Court of Appeal

Edmonton (City) v. Alvarez & Marsal Canada Inc

2019 CarswellAlta 511, 2019 ABCA 109, [2019] 5 W.W.R. 38, [2019] A.W.L.D. 1566, [2019] A.W.L.D. 1570, [2019] A.W.L.D. 1624, 303 A.C.W.S. (3d) 478, 432 D.L.R. (4th) 724, 68 C.B.R. (6th) 165, 83 Alta. L.R. (6th) 34, 85 M.P.L.R. (5th) 1

City of Edmonton (Respondent / Applicant) and Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp. (Appellants / Defendants) and Royal Bank of Canada (Not a Party to the Appeal / Plaintiff) and Reid-Built Homes Ltd and Emilie Reid (Not Parties to the Appeal / Defendants)

Marina Paperny, Sheila Greckol, Ritu Khullar JJ.A.

Heard: February 7, 2019
Judgment: March 25, 2019
Docket: Edmonton Appeal 1803-0050-AC

Proceedings: reversing *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), [2018] 5 W.W.R. 565, 2018 CarswellAlta 305, 2018 ABQB 124, 57 C.B.R. (6th) 1, 65 Alta. L.R. (6th) 230, 72 M.P.L.R. (5th) 55, Robert A. Graesser J. (Alta. Q.B.)

Counsel: H.A. Gorman, Q.C., A.M. Badami, for Appellants
A. Turcza-Karhut, C.N. Androschuk, for Respondent

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order
Municipal law
XXI Tax collection and enforcement
XXI.9 Practice and procedure
XXI.9.a Parties
Headnote
Bankruptcy and insolvency --- Receivers — Fees and expenses
Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property

for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Municipal law --- Tax collection and enforcement — Practice and procedure — Parties

Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

Table of Authorities

Cases considered:

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp. (2013), 2013 ONSC 6809, 2013 CarswellOnt 15121 (Ont. S.C.J.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List]) — considered

JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp. (2006), 2006 CarswellOnt 4619, 25 C.B.R. (5th) 156 (Ont. S.C.J.) — followed

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — followed

Royal Bank of Canada v. Delta Logistics Transportation Inc. (2017), 2017 ONSC 368, 2017 CarswellOnt 340, 44 C.B.R. (6th) 77, 7 P.P.S.A.C. (4th) 1 (Ont. S.C.J.) — considered

Royal Bank of Canada v. Reid-Built Homes Ltd (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.) — referred to

Royal Bank v. Vulcan Machinery & Equipment Ltd. (1992), 3 Alta. L.R. (3d) 358, 13 C.B.R. (3d) 69, [1992] 6 W.W.R. 307, 1992 CarswellAlta 287 (Alta. Q.B.) — considered

Secure 2013 Group Inc. v. Tiger Calcium Services Inc (2017), 2017 ABCA 316, 2017 CarswellAlta 1856, 58 Alta. L.R. (6th) 209, 417 D.L.R. (4th) 509, 13 C.P.C. (8th) 1 (Alta. C.A.) — referred to

Statutes considered:

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

s. 243 — considered

s. 243(6) — considered

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

Generally — referred to

Municipal Government Act, R.S.A. 2000, c. M-26
s. 348 — considered

s. 348(d)(i) — considered

APPEAL by receiver from judgment reported at *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.), refusing to prioritize receiver's charge for fees and disbursements over municipality's claim for unpaid property taxes.

***Per curiam*:**

Introduction and Standard of Review

1 The issue on this appeal is whether the chambers judge properly exercised his discretion under s 243(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] when he refused to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Royal Bank of Canada v. Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta. Q.B.) [*Decision*].

2 The exercise of discretion is given deference on appeal unless the judge proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test: *Secure 2013 Group Inc. v. Tiger Calcium Services Inc*, 2017 ABCA 316 (Alta. C.A.) at para 34, (2017), 58 Alta. L.R. (6th) 209 (Alta. C.A.).

Background

3 The appellant, Alvarez & Marsal Canada Inc, was the court-appointed receiver (the Receiver) for seven companies, collectively referred to as Reid-Built, a residential home builder. Reid-Built was placed in receivership and the Receiver appointed under the *BIA* by court order on November 2, 2017. The receivership order gives priority to the Receiver's charges over other claims.

4 On November 24, 2017, the Receiver applied for an order granting it the authority to repair, maintain and complete Reid-Built's properties, and a corresponding first priority charge as against each specific property for any expenses incurred (Property Powers Order). Such expenses are included in the Receiver's claim for fees and disbursements (Receiver's Charge). The Receiver's application was heard on November 29, 2017. At the same time, the chambers judge heard applications filed by two secured creditors of Reid-Built, both of which disputed the priority for the Receiver's Charge. Before those applications were disposed of, the respondent Edmonton applied to modify the Property Powers Order, or alternatively for a declaration that its special lien for unpaid property taxes ranks ahead of the Receiver's Charge.

5 The chambers judge dismissed the applications of the secured creditors (that part of his order has not been appealed), but granted Edmonton's application. The Receiver appeals.

Issues on appeal

6 The issue on appeal is whether the chambers judge erred in principle in his approach to the applications before him. The Receiver submits that the chambers judge erred in the exercise of his discretion under s 243(6) by relying on considerations that were incorrect in fact or in law.

7 The Receiver also submits that the chambers judge failed to provide the parties with a proper opportunity to make submissions on the point, thereby breaching the duty of fairness.

8 For the reasons that follow, we have decided that the first ground of appeal must be allowed. The chambers judge improperly exercised his discretion in deciding that the Receiver's Charge ought not to rank ahead of Edmonton's property tax claim. Given our decision on the first issue, it is not necessary for us to consider the procedural fairness issue, and we have not done so.

Analysis

9 Section 243 of the *BIA* deals with the appointment of a receiver by the court on the application of a secured creditor. This appeal concerns the discretion granted the court by s 243(6), which governs the making of orders respecting the payment of the receiver's fees and disbursements and, in particular, gives the court the discretion to grant a super priority to a receiver's claim for fees and disbursements. It provides:

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the 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.

10 The standard receivership order template provides for such a priority. The intended purpose of the template, which was developed as a joint project of the insolvency bar and bench, is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. The receivership order issued in this matter included the following provision with respect to the Receiver's accounts:

> Any expenditure or liability which shall properly be made or incurred by the Receiver . . . shall be allowed to it in passing its accounts and 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 (the "Receiver's Charge")

11 Edmonton objected to the Receiver's Charge being granted priority over its claim to unpaid property taxes. It pointed out that s 348 of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*], grants to Edmonton a special lien over land and any improvements on it for property tax amounts owing. Section 348 provides:

> **Tax becomes debt to municipality**
>
> 348 Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) take priority over the claims of every person except the Crown, and
>
> (d) *are a special lien*
>
> (i) *on land and any improvements to the land, if the tax is a property tax*, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or
>
> (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community. [emphasis added]

12 Edmonton argued that its lien for unpaid property taxes should rank ahead of the Receiver's Charge, as Edmonton, whose claim is fully secured and in first position, will not gain any benefit from the receivership. In short, as Edmonton's claim will be paid out in full regardless of the receivership, it should not have to bear the cost of the receivership.

13 In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors — a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that,

as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

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

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

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

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

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

17 In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), where it was noted that in

CCAA proceedings, "professional services are provided . . . in reliance on super priorities contained in initial orders".[1] We agree with the observation of Brown J at para 22 that:

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

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

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

20 The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

21 There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

22 We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

23 The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in, *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) at para 26:

> The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

24 With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

25 This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

26 Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

Appeal allowed.

Footnotes

1 *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para 51.

End of Document

Tab 2

Most Negative Treatment: Reversed
Most Recent Reversed: Edmonton (City) v. Alvarez & Marsal Canada Inc | 2019 ABCA 109, 2019 CarswellAlta 511, 85 M.P.L.R. (5th) 1, [2019] A.W.L.D. 1566, [2019] A.W.L.D. 1570, [2019] A.W.L.D. 1624, 68 C.B.R. (6th) 165, 83 Alta. L.R. (6th) 34, [2019] 5 W.W.R. 38, 303 A.C.W.S. (3d) 478, 432 D.L.R. (4th) 724 | (Alta. C.A., Mar 25, 2019)

2018 ABQB 124
Alberta Court of Queen's Bench

Royal Bank of Canada v. Reid-Built Homes Ltd

2018 CarswellAlta 305, 2018 ABQB 124, [2018] 5 W.W.R. 565, [2018] A.W.L.D. 1030, [2018] A.W.L.D. 1031, [2018] A.W.L.D. 1107, 289 A.C.W.S. (3d) 16, 57 C.B.R. (6th) 1, 65 Alta. L.R. (6th) 230, 72 M.P.L.R. (5th) 55

Royal Bank of Canada (Plaintiff) and Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builders Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, Reid Capital Corp and Emilie Reid (Defendants) and Alvarez & Marsal Canada Inc in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp (Applicants)

Robert A. Graesser J.

Heard: November 29, 2017; January 9, 2018
Judgment: February 21, 2018
Docket: Edmonton 1703-21274

Counsel: Howard A. Gorman, Q.C., Aditya M. Badami for Receiver, Alvarez & Marsal Canada Inc.
Ray C. Rutman, Dean Hitesman for Royal Bank of Canada (November 29, 2017)
Daniel R. Peskett, Michael T. Coombs for ICI Capital Corporation and Standard General (November 29, 2017)
Kent A. Rowan, Q.C. for Emilie Reid (November 29, 2017)
Michael J. McCabe, Q.C. for Melcor Developments Ltd. (November 29, 2017)
Ryan Zahara for Laurentian Bank (November 29, 2017)
C.P. Russell, Q.C. for Canadian Western Bank (November 29, 2017)
Jerritt Pawlyk for K.V. Capital (November 29, 2017)
Dean Hitesman, Thomas Gusa for Royal Bank of Canada (January 9, 2018)
Ryan Trainer for Canadian Western Bank (January 9, 2018)
Allan Delgado, Carleen Androschuk for Edmonton (January 9, 2018)

Subject: Civil Practice and Procedure;, Insolvency; Property; Public; Tax — Miscellaneous; Municipal
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
 IV.2 Fees and expenses
Bankruptcy and insolvency
V Bankruptcy and receiving orders
 V.4 Rescission or stay of order
Municipal law

XXI Tax collection and enforcement
XXI.1 Tax as debt

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses

RB Ltd. group of companies ("RB Group") were placed into receivership through consent receivership order entered into between bank and various corporations comprising RB Group — Receiver granted order approving certain property powers and granting it first-ranking super priority charge for its property powers charge — Receivership order provided that creditors and other affected parties could apply to vary terms of order — Creditor I Corp. was mortgagee on four parcels of land owned by RB Group and S Ltd. had filed builders' liens against lands it worked on for RB Group — I Corp. and S Ltd. brought applications for relief, including varying charging provisions in order — Applications dismissed — There was no good reason why court-appointed receiver under Bankruptcy and Insolvency Act (BIA) should not have same rights and priorities as given to mortgagee — Orders made under BIA concerning priorities prevailed over priority given to S Ltd.'s builders' liens under Builders' Lien Act, based on paramountcy — It was appropriate to have receiver's charges rank ahead of claimants who would benefit from receivership, to extent that they had benefitted from receivership — For creditors who may benefit from receivership, super priority is generally appropriate for receiver's fees and disbursements, on expectation that these fees and disbursements will ultimately be fairly apportioned — Receiver's super priority charge was to remain, and it applied to I Corp. and S Ltd. with respect to receiver's fees and borrowing power.

Municipal law --- Tax collection and enforcement — Tax as debt

RB Ltd. group of companies ("RB Group") were placed into receivership as result of consent receivership order entered into between R bank and various corporations comprising RB Group — Receiver applied for, and was granted, order approving certain property powers relating to enhancement and preservation of property, and granting it first-ranking super priority charge for its property powers charge against any property so enhanced or preserved — Receivership order provided that creditors and other affected parties could apply to vary terms of order — Municipality E brought application to be exempted from super priority provisions of receivership order with respect to its property tax claims — E's application granted — Receivership order must fit circumstances of case — Ultimately, these determinations are in discretion of court — In liquidating receivership, it is appropriate that taxing authority's contribution to receivership is potential delay in receiving payment of outstanding taxes, penalties, and interest — On facts of this case, it being liquidating process and there being no apparent benefit to E arising out of receivership, E's priority for property taxes was not subordinate to receiver's fees or approved borrowings — While court has power to subordinate municipal tax claims to costs of receivership, this was not appropriate case in which to do so — In this case, receiver's charge and borrowing power did not rank ahead of E's property tax claims.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

RB Ltd. group of companies ("RB Group") were placed into receivership through consent receivership order entered into between bank and various corporations comprising RB Group — Receiver granted order approving certain property powers and granting it first-ranking super priority charge for its property powers charge — Receivership order provided that creditors and other affected parties could apply to vary terms of order — Creditor I Corp. was mortgagee on four parcels of land owned by RB Group and S Ltd. had filed builders' liens against lands it worked on for RB Group — Both creditors took issue with provisions in order giving receiver priority over their claims for receiver's fees and disbursements, as well as for approved borrowings — I Corp. brought applications for relief, including lifting stay of proceedings on mortgages held against RB Group — Application dismissed — Interests of I Corp. and other creditors did not completely align — I Corp. wanted to get paid out fully, and as quickly as possible — It has no interest in any surplus should properties be worth more than was owed to I Corp. on them — Receiver, on behalf of other creditors, had interest in maximizing return from these properties — Absent evidence of prejudice to I Corp., stay should not be lifted.

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Statutes considered:

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Generally — referred to

s. 31(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 187(5) — considered

s. 243(1) — considered

s. 243(6) — considered

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Generally — referred to

Builders' Lien Act, R.S.A. 2000, c. B-7

Generally — referred to

s. 54 — considered

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

Generally — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

Generally — referred to

Municipal Government Act, R.S.A. 2000, c. M-26

Generally — referred to

s. 348 — considered

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

Generally — referred to

Rules considered:

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R. 9.12 — considered

R. 9.13 — considered

R. 9.14 — considered

APPLICATIONS brought by various creditors to vary receivership order, concerning priorities and stays of proceedings.

***Robert A. Graesser J.*:**

Introduction and Background

1 These applications have been brought by creditors of the Reid-Built group of companies, which were placed into receivership on November 2, 2017 as a result of a consent receivership order entered into between the Royal Bank of Canada (Royal Bank) and the various corporations comprising the Reid-Built group of companies (Reid-Built Group). The Receivership Order followed the template order, but provided that creditors and other affected parties could apply to vary the terms of the order on November 29, 2017.

2 At the hearing on November 29, 2017, the Receiver applied for, and was granted, an order approving certain property powers relating to the enhancement and preservation of property, and granting it a first-ranking super priority charge for its Property Powers Charge (as defined in the Receivership Order) against any property so enhanced or preserved.

3 In addition, two creditors sought to vary the charging provisions in the Receivership Order, amongst other things. ICI Capital Corporation (ICI) objected to the charging order relating to the Receiver's fees, disbursements, and approved borrowings. It also sought to have the stay of proceedings lifted so that it could take proceedings under its mortgage, rather than have rents paid to the Receiver and its realization proceedings controlled by the Receiver. ICI is a first mortgagee on four parcels of land owned by Reid Worldwide, one member of the Reid-Built Group.

4 A second creditor, Standard General Inc. (Standard General), sought similar relief to ICI. Standard General was a contractor to Reid-Built Homes Ltd., and claims Reid-Built Homes owed it substantial funds for services performed. Standard General has filed builders' liens against the lands it claims it worked on for Reid-Built Homes.

5 Both of these creditors argue that it is unfair and inappropriate that the Receiver be granted a "super priority charge" for its fees, disbursements, and approved borrowings over their secured claims against real property owned by the respective Reid-Built Group member.

6 On November 29, I granted the Receiver's application. This resulted in the November 29 Order, which directed that the Receiver's super priority be extended to the extent of improvements to property under the Receiver's Property Powers (as defined in the Receivership Order), but with the addition of, "where such first charge ranks in priority to all other charges and claims, including lien claims."

7 I also amended paragraph 4 of the Receivership Order to provide that "the priorities and charges identified in the Receivership Order are hereby amended in accordance with and to reflect the terms of the (November 29) Order." As to the issues concerning the stay application and the super priority generally, I reserved.

8 The Receiver and the Royal Bank opposed the applications brought by ICI and Standard General.

9 Before making my decision, the City of Edmonton (Edmonton) applied to be exempted from the super priority provisions of the Receivership Order, as amended, with respect to its property tax claims. Edmonton had not participated in the November 29, 2017 application because at the time it understood that the Receiver was not seeking priority over its property tax claims. The Receiver has since clarified that it does intend to assert its super priority against Edmonton. The Receiver and Royal Bank also opposed Edmonton's application.

Position of the Applicants

10 Edmonton argues that its claim for property taxes should not be subordinate to the Receiver's super priority for fees, disbursements, and approved borrowings. It cites s 348 of the *Municipal Government Act*, RSA 2000, c M-26 which provides:

> 348 Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) take priority over the claims of every person except the Crown, and
>
> (d) are a special lien
>
> (i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy, or
>
> (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.

11 Edmonton argues that the wording of the Receivership Order, as amended by me on November 29, 2017, preserves its priority for property taxes and keeps the Receiver's claims behind it. It seeks clarification of the November 29 Order, as the Receiver is now taking the opposite position.

12 Edmonton cites *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781, 32 C.B.R. (3d) 303 (Ont. Gen. Div. [Commercial List]) [*Hamilton Wentworth*], and *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 24 C.B.R. (4th) 303 (Ont. C.A.) [*Usarco Ltd*], as authorities supporting its position.

13 The Receiver raises similar arguments with respect to all three of these creditors. It says that the super priority has been recognized as part of the template order for receiverships in Alberta. It argues that the property powers provisions (borrowing and super priority) are necessary as it expects that during the course of the receivership it will need to undertake work to repair, upkeep, enhance, complete, or partially complete improvements to various of the properties owned by the Reid-Built Group.

14 The Receiver raises paramountcy, as the City's priority claim comes from the provisions of the *Municipal Government Act*, and the Receiver's powers and the Receivership Order itself fall under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*").

15 Standard General relies on *Yorkshire Trust Co. v. Canusa Construction Ltd.* (1984), 10 D.L.R. (4th) 45, 54 B.C.L.R. 75 (B.C. C.A.), *Residential Warranty Co. of Canada Inc., Re*, 2006 ABCA 293 (Alta. C.A.), and *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682 (Alta. Q.B.).

16 Regarding Standard General's arguments, the Receiver notes the provisions of s 54 of the *Builders' Lien Act*, RSA 2000, c B-7, which provides:

> 54(1) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver on any terms and on the giving of any security or without security, as the court considers appropriate.
>
> (2) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, on the giving of any security or without security, as the court considers appropriate, appoint a trustee
>
> > (a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and
> >
> > (b) with power, on approval of the court, to complete or partially complete the improvement.
>
> (3) Mortgage money advanced to the trustee as the result of any of the powers conferred on the trustee under this section takes priority over all liens existing at the date of the appointment of the trustee.
>
> (4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.
>
> (5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.
>
> (6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.
>
> (7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

17 The Receiver argues that it is essentially looking for the same powers and priorities as are contemplated in that section, which are in priority to the builders' lien claims existing at the time of the appointment of the trustee.

18 The Receiver argues generally that it should have priority over claims such as Standard General's on the basis of the exceptions described in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84 (Ont. C.A.) [*Kowal*], which was applied in *Royal Bank v. Vulcan Machinery & Equipment Ltd.*, [1992] 6 W.W.R. 307, 13 C.B.R. (3d) 69 (Alta. Q.B.) [*Vulcan Machinery*].

19 The exceptions described in *Kowal* are:

> (1) If a receiver has been appointed at the request, or with the consent or approval, of the security holders, the receiver will be given priority;
>
> (2) If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority for charges and expenses properly incurred; or

(3) If the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors. In order to be payments made for the preservation of property, the payments must be made for the benefit of all parties, including secured creditors: *Vulcan* at para 33.

20 The Receiver also raises paramountcy with respect to Standard General's arguments, as it did in relation to Edmonton's property tax claim. The Receiver notes that paramountcy has been dealt with by Lovecchio J in *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682 (Alta. Q.B.), who accepted that orders under the *BIA* would prevail when there was a conflict between the order and the *Builders' Lien Act.*

21 ICI seeks to be removed from the receivership so that it can pursue its own remedies under its security against Reid Worldwide. Alternatively, it opposes any priorities over its security in favour of the Receiver. ICI relies on *Breiger Holdings Ltd. v. Thorne Riddell Inc.*, [1980] 5 W.W.R. 108, 34 C.B.R. (N.S.) 244 (Man. Q.B.), and *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp.*, 2016 BCCA 231 (B.C. C.A.) [*Integris Credit*], for its application to be removed from the receivership. It relies on *Vulcan Machinery* for its opposition to the Receiver's priority for fees and borrowings.

22 With respect to ICI's application to lift the stay to permit ICI to enforce its rights under its mortgages, the Receiver cites *General Motors Corp. v. Tiercon Industries Inc.* (2005), 35 R.P.R. (4th) 268, 2005 CarswellOnt 4156 (Ont. S.C.J.) [*General Motors v Tiercon*]; *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]); *Scanwood Canada Ltd., Re*, 2011 NSSC 189 (N.S. S.C.); *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809 (Ont. S.C.J.); *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.); Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto: Thomson Reuters Canada Ltd, 2011); *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017 (B.C. S.C.), and *Kowal.*

23 The Receiver relies on the same arguments and cases concerning ICI's objections to the super priority as it does for Edmonton's and Standard General's objections.

24 In its brief, the Royal Bank (as the applying creditor) supports the Receiver's positions on all of the applications. It cites *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 798 (Alta. Q.B.) [*Ford Credit*] with respect to ICI's application to be removed from the Receivership.

Analysis

25 Paragraphs 18 and 21 of the November 2, 2017 Receivership Order provide:

RECEIVER'S ACCOUNTS

18. Any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and 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 (the "Receiver's Charge").

. . .

FUNDING OF THE RECEIVERSHIP

21. 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 $1,500,000.00 (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 Borrowing 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.

26 The Receiver was appointed pursuant to section 243(1) of the *BIA*. That section provides:

> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> . . .

27 Subparagraph 6 deals with the Receiver's fees and disbursements:

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the 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.

28 The *BIA* provides for borrowing powers for receivers in section 31:

> 31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

Preliminary objection to Edmonton's application

29 The Receiver provided a preliminary objection to Edmonton's application. It noted that Edmonton did not bring this application at the come-back application, nor did it appeal the initial Receivership Order or the amended order following the November 29, 2017 application. The Receiver argues that this application is tantamount to an appeal of both orders, and Edmonton is out of time.

30 The Receiver did not provide any authority for the proposition that once a Receivership Order is granted and the appeal period has expired, the Court has no jurisdiction to vary the earlier order. Edmonton cites Rules 9.12, 9.13 and 9.14 of the *Alberta Rules of Court*, Alta Reg 124/2010, in support of its argument that the Court has jurisdiction to hear its application and grant the relief sought. Those Rules provide:

> 9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.
>
> 9.13 At any time before a judgment or order is entered, the Court may
>
> (a) vary the judgment or order, or
>
> (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if

(a) doing so does not require the original judgment or order to be varied, and

(b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.

31 I am satisfied from the authorities cited by Edmonton (*Evans v. Sports Corp.*, 2011 ABQB 478 (Alta. Q.B.); *Waquan v. Canada (Attorney General)*, 2016 ABQB 280 (Alta. Q.B.); *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731 (Alta. Q.B.); *Paniccia Estate v. Toal*, 2012 ABQB 11 (Alta. Q.B.); and *Strathcona (County) v. Hansen*, 2014 ABCA 17 (Alta. C.A.)), that I have the authority to revisit the earlier orders in appropriate circumstances.

32 Topolniski J considered the use of comeback provisions in *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta. Q.B.) [*Canada North*], and held that recourse through the comeback clause in a receivership order could be used "when circumstances change": at para 50. She noted at para 68 that comeback relief "cannot prejudicially affect the position of the parties who have relied bona fide on the previous order in question."

33 In *Garritty, Re*, 2006 ABQB 238 (Alta. Q.B.), Topolniski J discussed the Court's powers under section 187(5) of the *BIA*, which states that the court "may review, rescind or vary any order obtained by it under its bankruptcy jurisdiction." She summarized the principles applicable to s 187(5):

[46] The principles governing an application under s. 187(5) are that:

(i) The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.

(ii) Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.

(iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order.

(iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.

(v) In exercising its discretion, the court must consider the rights not only of the debtor and of the creditors but also of the public.

(vi) The court should resort to its s. 187(5) jurisdiction if it is just and expedient in the control of its own process.

(vii) Trustee conduct is a factor where statutory non-compliance results in lack of notice, particularly if it negatively affects the integrity of the bankruptcy system.

(viii) The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted.

34 I conclude that this is one of those circumstances warranting recourse to the comeback provision. Firstly, from the exchange at the November 29, 2017 hearing concerning property taxes, it was not unreasonable for Edmonton to conclude that its priority position was not affected by the Receivership Order. Indeed, it is seeking clarification on that point on this application, and is not necessarily seeking any variation.

35 Secondly, this is early days in what will probably be a lengthy matter. It is likely that there will be more applications to vary. The circumstances of the Reid-Built Group are unfolding and would not have been fully known to the Receiver on either the initial application or the come-back application on November 29.

36 Finally, there is no apparent prejudice to the Receiver, as the status of the super priority provision has been unclear since I reserved on the original comeback application. This is still early days in the receivership and there is no information to suggest that the Receiver is presently at risk for its costs.

37 As a result, I will consider Edmonton's application on its merits.

38 I recognize that there are cases indicating that comeback applications should be made promptly, as the Receiver and other parties may take positions and actions in reliance of the provisions of the original receivership order. In those cases, it may be unfair to vary the provisions to the detriment of a relying party. Those considerations do not apply in this case as there is no suggestion that the Receiver or any of the other creditors had taken positions to their detriment by the time Edmonton brought its application.

Onus on come-back application

39 On a comeback application, as was ordered by Hillier J on November 2, the onus is on the initial applicant (here the Royal Bank) to satisfy the Court that the original provisions of the Receivership order are appropriate when the applicant on the comeback application had no notice of the initial receivership application and had no opportunity to make representations about the terms of the order: *Canada North* at para 77, *General Chemical Canada Ltd., Re* (2005), 7 C.B.R. (5th) 102, 2005 CarswellOnt 210 (Ont. S.C.J. [Commercial List]) at para 2.

40 I do not see that the onus is any different on the application made by Edmonton, as it had no notice of the original receivership order.

Policy considerations

41 The Receiver and the Royal Bank make several "policy" arguments, that:

• The super priority is provided for in the template order and should not be challenged;

• The super priority is necessary to protect receivers, as without security for their fees and disbursements, they may be reluctant to take on receiverships; and

• The creditor applying for the receivership should not be left with the entire burden of any portion of the Receiver's fees and disbursements; they should be shared equitably amongst the creditors.

42 The Receiver also argued that the trend in the case law across Canada is to treat receiverships under the *BIA* and Receivers under the CCAA the same.

CCAA v BIA

43 Many of the cases cited by the Receiver and the Royal Bank are cases under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. The Receiver argues that there is developing policy to the effect that there should be consistency between *CCAA* proceedings and receivership proceedings under the *BIA*. In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) the Court noted:

> [5] Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors.

44 Similarly, in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Supreme Court of Canada noted that the *CCAA* and *BIA* had been amended in 2005, which was consistent with Parliament's "goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency": at para 54.

45 Those common goals were described as reorganizing or restructuring corporations to avoid the social impact of business failure.

46 There are undoubtedly many similarities between proceedings under these two Federal statutes. That being said, the intent of *CCAA* is to save corporations in financial difficulty. That is not necessarily the objective of receivership proceedings. Some receiverships attempt to salvage the business; others liquidate it. In this case, it was clear on the November 29, 2017 application that the Receiver's objective is to liquidate the assets. So, some of the principles relating to *CCAA* proceedings are not as applicable to receiverships. *CCAA* cases are thus, in my view, persuasive but not necessarily binding in receivership proceedings where the objective has moved past restructuring to liquidation.

47 I recognize that the *CCAA* contemplates liquidation, if restructuring cannot be accomplished. But liquidation is the result of an unsuccessful attempt to save the business. A reorganization with the hope of emerging from receivership may be the objective of some receiverships under the *BIA*.

48 Where proceedings under either statute are commenced with the initial intention of saving the underlying business or businesses, there are public policy considerations, as recognized in many of the *CCAA* cases. In particular, saving jobs or saving the municipal value of an enterprise are frequent considerations. Where the objective is to preserve the business, it is not necessarily inappropriate for secured creditors to participate to some extent in the reorganization process and bear some portion of the Receiver's costs (including court-approved borrowing costs).

49 In appropriate cases, it may be appropriate (following the *Kowal* principles) to provide security for the Receiver even if it might erode a secured creditor's position.

50 There is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate. It may be appropriate for a secured creditor to have to wait for repayment while the receivership takes its course. Allowing a secured creditor to seize its secured property or sell real property out from under the business in receivership may have a negative effect on the ability of the Receiver to maximize its recovery. Delaying payment is one thing, however, but having a secured creditor's recovery diminished by the receivership as a whole (including borrowings) is quite another.

51 While granting the Receiver priority over all secured creditors for its fees and disbursements may well be standard (having regard to the provisions of the template order), prejudice to the secured creditor is certainly a factor that should be considered when the court deals with a creditor's application to lift the stay of proceedings with respect to its security.

52 I have the same views regarding borrowings. I recognize the public policy issues surrounding borrowings to try to keep a business running in *CCAA* proceedings or a receivership with the initial intent of saving the business. If those objectives are absent, however, I have difficulty with the proposition that a secured creditor should recover less than it is owed as a result of borrowings that have no possible benefit for the secured creditor and are otherwise needed to increase the recovery for other creditors.

53 With respect to borrowings, especially in a liquidation situation, it seems to me that the court needs to be diligent regarding the purpose for any borrowings that may have the impact of lessening the potential recovery for secured creditors.

The super priority is provided for in the template order and should not be challenged

54 The use of templates is highly desirable. They provide consistency in practice and are a great convenience for the bar and the bench. However, they do not have the force of law, except when the provisions mirror the law as determined by applicable statutes and binding authorities. Templates are not statutory or regulatory forms. They are a starting point for crafting an appropriate order.

55 I do not think it can be said that if a creditor establishes that it is entitled to the appointment of a Receiver, the creditor and the Receiver are entitled to receive the template order from the Court. That is especially so when, as is the case here, the receivership was applied for by a creditor with the consent of the debtors, without any notice to the other creditors.

56 Those circumstances are one of the main reasons for the comeback provision. But despite the template order, in my view, any of the provisions of the template receivership order may be varied under appropriate circumstances. As noted in *Canada North*, variation applications should be made promptly, before anyone has relied on the order to its potential detriment.

57 Ultimately, the Court is not bound by the template order, but must craft an order that meets the particular circumstances of the receivership.

The creditor applying for the receivership should not be left with all of the burden of any portion of the Receiver's fees and disbursements; they should be shared equitably amongst the creditors

58 There is significant merit to this argument. Where a receivership has been ordered (whether *ex parte* or by consent or on notice), there is benefit to most and sometimes all creditors. I need not repeat them here other than to emphasize the avoidance of a multiplicity of proceedings, an orderly approach to liquidation, and the appointment of an officer of the court to carry out the liquidation in an impartial manner. Not only the applying creditor benefits. This is exactly what is contemplated by the apportionment proceedings, which typically follow receiverships where there is a shortfall in recoveries versus debts.

59 That being said, Receivers do not have carte blanche regarding their activities and their expenses. Ultimately, these must be approved by the court, which is why the courts have been given the powers they have under the *BIA*.

60 The Receiver's argument comes out of *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.) [*Braid Builders Supply*], where Dickson JA (as he then was) stated at pages 375-376:

> The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property?

61 This is a persuasive argument, although the *Braid Builders Supply* case references secured creditors in the context of preservation of property, and not with respect to the costs of the receivership generally.

62 In some cases, the super priority is necessary to protect Receivers, as without security for their fees and disbursements, they may be reluctant to take on some receiverships. However, I view the argument that, the superpriority is necessary in *all* cases because potential Receivers will refuse to take them on, as an exaggerated argument. Receivers took on receiverships long before there was a superpriority for their fees. With respect, I view the argument made in this case to be a "Chicken Little" argument, as characterized by Fitzpatrick J in *Walter Energy Canada Holdings, Inc., Re*, 2017 BCSC 709 (B.C. S.C.):

> [174] The 1974 Plan further argues that accepting the Walter Canada Group's argument on choice of law would result in a "blanket denial" of all *ERISA* claims against Canadian entities in Canadian courts. In my view, this is an exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.
>
> [175] The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other "chicken little" argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision

> does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

63 Ultimately, liquidating procedures should be considered differently from restructuring procedures, and a change from a restructuring procedure to a liquidating procedure is likely a change in circumstances that may require the court to revisit the terms of the original order.

ICI Opt out/lifting the stay application

64 As pointed out by ICI, the Receiver and the receivership is standing in ICI's way regarding the enforcement of its security. ICI would prefer to collect the rents pursuant to its security, and to foreclose on the properties. They believe that would give them a quicker remedy. It is unclear if the cost of having the Receiver preserve these properties to sell them will be more expensive than if ICI did it itself. It is also unclear at this stage as to how the receivership benefits from taking control of these properties.

65 ICI notes that the four properties mortgaged to it are owned by Reid Worldwide, one of the Reid Group but not one of the members carrying on any active business. ICI argues that the receivership will not benefit the creditors of Worldwide.

66 However, ICI is not the only creditor of Reid Worldwide; the Royal Bank is a second mortgagee on two of the properties. I cannot see that the receivership was not properly ordered so as to include Reid Worldwide, and there is in any event no application to remove the Receiver and appoint a new one with respect to Reid Worldwide.

67 This receivership is undoubtedly complicated by the fact that it encompasses a number of related, but separate, entities comprising the Reid-Built Group. One of ICI's main objections is that the Receiver is using the cash flow from the properties ICI has first mortgage security against (rents from tenants) to fund its expenses as Receiver. ICI says these rents should be paid to it, as it holds an assignment of rents as collateral security to its first mortgages.

68 The first issue here is whether ICI has satisfied the onus on it to lift the stay of proceedings at this stage.

69 The Court in *General Motors Corp. v. Tiercon Industries Inc.* noted:

> [18] Where relief from a stay is sought in an insolvency context, whether from an order issued pursuant to the Courts of Justice Act or the Bankruptcy and Insolvency Act, R.S. 1985, c. B-3, the Court should consider a balancing of the interests of all affected parties: Toronto Dominion Bank v. Ty (Canada) Inc., [2003] O.J. No. 1552, (2003) 2003 CanLII 43355 (ON SC), 42 C.B.R. (4th) 142 (Ont. S.C.J.) at paragraph 22.

70 The Court noted that termination of the lease by Tiercon's landlord would shut down the business and threaten some 700 jobs. Here, the Receiver has not demonstrated that the properties mortgaged to ICI are necessary to keep the business going. Indeed, the business appears to have nothing to do with these buildings. All that is occurring from a business perspective appears to be the completion of some sales of homes that were substantially complete at the time of the receivership.

71 In *Village Green Lifestyle Community Corp., Re* (2007), 27 C.B.R. (5th) 199, 2007 CarswellOnt 654 (Ont. S.C.J.), the project's insurer was not permitted to cancel the insurance, despite a material change in the risk that it had underwritten. In denying the insurer the ability to terminate the policy, the Court observed:

> [12] The order before me requires leave of the Court and therefore the Court must exercise its discretion in making this determination. In this regard, it seems to me that the burden should be on the party seeking leave to persuade the Court that leave ought to be granted.
>
> [13] In this case, I am of the view that the burden has not been met. There is no viable alternative available to the Receiver as the cost of the one alternative policy is prohibitive and cannot be funded by the receivership. Furthermore, the Facility cannot be operated without insurance coverage. In addition, Economical had renewed the policy to July 1, 2007 and I fail to see that there has been any material change in the risk insured. If anything, I agree with the Receiver that, with its appointment, the risk has diminished. I also note that, although not strictly applicable, guidance may be drawn from the

provisions of section 69.4 of the Bankruptcy and Insolvency Act wherein a person affected by the operation of a statutory stay may apply to the court to request that the stay be inoperative. The court may make such a declaration if it is satisfied that the person is likely to be materially prejudiced by the stay or if the court is satisfied that it is equitable on other grounds. If one applies that test to the court imposed stay, neither of those grounds are met by Economical either.

72 Here, for prejudice, ICI points to the loss of cash flow from the properties. However, there is no evidence before me that the value of the properties is such that ICI is in jeopardy of not being fully paid out, including interest. ICI has, for example, not pointed to any specific loss or harm to it arising out of any delay in receiving funds, and it has not quantified any such loss.

73 ICI refers to Francis C R Price and Marguerite Trussler, *Mortgage Actions in Alberta: The Law and Practice in Actions upon Mortgages and Collateral Security and Agreements for Sale of Land* (Calgary: Carswell Co Ltd, 1985) at page 309, where the authors state:

> The fact that there may be sufficient to pay the mortgagee out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor.

74 In *Cumberland Trading Inc*, the application for the lifting of a stay was dismissed on the basis that the applicant had not demonstrated that it would suffer material prejudice if the stay were not granted.

75 The Court there considered the operation of section 69.4 of the *BIA*:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

76 Farley J stated in *Cumberland Trading Inc*:

> [11] Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor qua person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

77 The Court in *Scanwood Canada Ltd* held:

[26] The case law, in my view, makes it clear that mere supposition or speculation is not sufficient to warrant lifting of the stay. The Receiver's duty is to act in the interests of the general body of creditors. This does not, in my view, necessarily mean that the majority rules. The Receiver must consider the interests of all creditors and then act for the benefit of the general body of creditors. The Court must weigh the benefits and disadvantages to each against the general good and consider the totality of the circumstances.

78 In *Caisse Desjardins*, mortgagees sought to carve their secured properties out of the receivership. McCarthy J stated:

[20] Having considered all of the circumstances, including the nature of the real property and the rights and interests of the parties, I find that it is just and convenient that the receiver's mandate extend to all of the real property. The Caisse is a secured creditor no less than the mortgagees. I fail to see any utility or fairness in distinguishing between a conventional mortgagee and a collateral mortgagee. I was not referred to any authority that would. In the case of BNS v. Freure, *supra*, Blair J. (as he then was) stated that the exercise of the Court's discretion should involve an examination of all of the circumstances, " . . . including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager." Although the latter case dealt with the appointment of a receiver rather than the scope to be assigned to his or her mandate, in my view, those considerations should still apply.

[21] I find that it is just and convenient that a receiver should be appointed over both the receivables of the corporate debtors and the real property of the individual debtors. While the real property has no connection to the business, I find it to be in the interests of all parties that one person, assigned by the court, operating under an order tailored to the circumstances, and responsible to the court for its actions, should control the process or processes under which the receivables and real property are managed, preserved and ultimately disposed of. This strikes me as convenient to all. It also guarantees transparency and accountability. I agree with counsel for the Caisse that, under a private sale, the mortgagees would be entitled to transfer the real property without providing notice to the Caisse or accounting to it until late in the process. Under a court-appointed receivership, PwC would be required to keep all stakeholders informed of the sale process and would be obliged to seek court approval of any transaction. This would provide all stakeholders with the opportunity to raise any concerns that they have with the receiver, and if need be, to bring these concerns to the attention of the court.

79 The Court noted that there was no evidence that the property was worth less than what was owed to the mortgagees.

80 *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) dealt with an application by the Receiver to require a secured creditor to turn over a number of trucks on which the creditor had a lien. The Court, citing from the Receiver's factum, provided a good description of the power of receivers and the benefits of a receivership:

[26] . . . a court-appointed receiver . . . is authorized and empowered to liquidate all of the assets of the debtor under the supervision of the court, to the exclusion of all others including secured creditors, whereas the stay in a bankruptcy specifically preserves the rights of secured creditors to exercise their remedies. The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors' claims should be prioritized. As is clear from the broad wording of the Appointment Order, all creditors, secured and unsecured, are stayed from exercising remedies against the insolvent person's assets in favour of a single, court-supervised liquidation process by the Receiver. Whether a secured creditor's rights arise under the Mortgages Act, the Personal Property Security Act, the Construction Lien Act, the Repair and Storage Liens Act, at common law, or otherwise, that creditor is bound by the provisions of the Appointment Order . . .

81 The Court held:

[27] The court order prevails. Given its breadth, the receiver is and must be entitled to take possession of the liened articles, without prejudice to the claimant's possessory lien claim to be determined at another time. Such an interpretation is consistent with the necessity for the receiver to maintain control over the debtor's assets to ensure their advantageous and

orderly disposition for the benefit of all creditors and to avoid duplicative costs that would otherwise arise from multiple sales. The receiver's rights and obligations derive from the court order and not from the debtor as 233 asserts.

82 ICI references *Breiger Holdings Ltd*, which held that a prior mortgagee could put an end to the right of the subsequent mortgagee to receive rents by applying to discharge the original Receiver. In that case, Kroft J stated:

> [27] The recognized principle seems to be that the receiver is entitled to retain such rents even as against a prior mortgagee, so long as they were collected before any prior mortgagee intervenes. A prior mortgagee may, however, put an end to the right of the subsequent mortgagee to receive rents by himself applying to court to discharge the original receiver and to have his own receiver appointed, (Falconbridge on Mortgages (4d) pp. 754 and 755).

83 Instead of seeking its own Receiver, ICI has chosen to seek to lift the stay of enforcement so it can take its own proceedings. The principles discussed above govern the lifting of the stay. Doing so would undoubtedly create additional proceedings. ICI has not demonstrated that it will suffer any measurable prejudice.

84 The Royal Bank points to *Ford Credit*. In that case, Thomas J considered an application by Ford Motor to remove its inventory from the facility and Ford Credit (the appointing creditor) sought leave to remove vehicles subject to its financing. Both applications were essentially dealing with lifting the stay of proceedings in the receivership order. Thomas J concluded:

> [24] In the result, I conclude that Ford Motor has not demonstrated material prejudice which may result if the D.S.S.A. is not immediately terminated. Further, as pointed out by BMO, if the D.S.S.A. was immediately terminated, there would be no way of measuring the prejudice that action might cause to the other creditors who are affected by this Receivership.
>
> [28] There is obviously some evidence of prejudice to Ford Credit which could and must be considered in deciding whether the stay should be lifted. That evidence of prejudice must be weighed against the interest of all of the other parties and creditors who assert that an en bloc sale should be conducted to maximize recovery. Clearly, that opportunity will be gone if the inventory claimed by Ford Credit is removed from the en bloc sale.

85 He observed:

> [29] In the final analysis, it is my view that the concerns of Ford Credit, at least in respect to future losses, can be addressed through a tightly controlled, time-limited en bloc sale. This will put a cap on the vehicles falling out of the buy-back opportunity. Accordingly, the application by Ford Credit to lift the stay and remove its collateral is denied.

86 ICI refers to *Integris*. In that case, the BC Court of Appeal concluded that trucks financed by the debtor from Mercedes-Benz should have been excluded from the receivership and should not be subject to the Receiver's charges. There was an unanticipated shortfall because of debt to CRA, leaving Integris to pay the shortfall as the applying creditor.

87 The receivership order in that case had a provision that varied from the BC template order, providing that an interested party could make an application to "release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein (para 16 being the Receiver's charge and para 19 being the Receiver's borrowing charge)." Mercedes-Benz had made an application for the release of three trucks financed to it. That application was dismissed.

88 The BC Court of Appeal considered the wording of the receivership order in *Kowal*, holding:

> [41] In my view the exceptions provided for in Kowal are not engaged here. From the outset of the application, the Appellants took the position that they wanted no part in the receivership. Prior to the court application, BHL engaged in correspondence with KPMG in an attempt to have the Receiver give up the property without a court application. The Receiver also had early notice of MBFS's interest in the Trucks.
>
> [42] The most telling circumstance weighing in favour of excluding the Trucks from the receivership is that the Appellants have priority over Integris with respect to the Trucks pursuant to their PMSI's. To allow the Trucks to remain under the

> receivership would grant the Receiver, and indirectly Integris who must indemnify the Receiver's losses, priority over the Appellants.
>
> [43] By virtue of the lease or conditional sale agreements, All-Wood had only possessory interests in the Trucks. The Appellants retained the proprietary rights. All-Wood had only the right to possess and use the Trucks, on certain terms and conditions as set out in the agreements. The Receiver could not acquire a greater interest than All-Wood held.

89 To the BC Court of Appeal, it was significant that Mercedes-Benz's interest in the trucks was governed by the *Personal Property Security Act*, RSBC 1996, c 359 ("PPSA"). The Court held:

> [48] In my opinion, even if the Trucks fell within the definition of "property" in the Receivership Order, the question of whether the Appellants had superior entitlement under the priority rules of the PPSA was critical to the applications before the court. The priority rules of the PPSA are designed to achieve commercial certainty and predictability. To keep the Trucks within the Receivership, and thus subject to the charges of the Receiver, would circumvent the priority rules of the PPSA.

90 The Court held:

> [50] The clear rules of the PPSA should not be circumvented by the appointment of a receiver, when the exceptions outlined in Kowal are not met.

91 It also noted:

> [55] Nor is it appropriate, as Integris argues, to reserve the issues here to a future allocation hearing. As the Appellant's PMSIs take priority over Integris' GSA, and the Appellants wanted no part of the receivership, in the circumstances here the Trucks should have been released to the secured creditors at the earliest opportunity.

92 It is significant that the BC Court of Appeal recognizes that *Kowal* applies to receiverships in British Columbia. Inferentially, the Court recognizes that the super priority permitted by *Kowal* may prevail over provincially-legislated priorities in a receivership order made under the *BIA*.

93 This is, in my view, an important case. Court of Appeal cases in this area are rare. While decisions from Courts of Appeal other than the Alberta Court of Appeal are not binding on me, they are highly persuasive, especially when they deal with Federal legislation. Consistency across Canada is an important objective when considering Federal legislation, or matters involving "uniform" legislation such as PPSA issues.

94 I do not see *Integris* as a PPSA case, as was argued by the Receiver. It is an important interpretation of *Kowal*. It is fairly recent, and it does not appear to have been considered on the issue of priorities.

95 I am challenged by paragraph 55 of *Integris*, as quoted above. The easy answer to priority questions is to leave them to the allocation hearing. But that creates uncertainty, and where the circumstances are clear, Courts should not hesitate to provide clarity.

96 In the *Integris* case, the Court of Appeal had the benefit of hindsight, but the judge managing the receivership process had recognized that Mercedes-Benz was in a better position to sell the trucks than the Receiver, and took the trucks out of the Receiver's control for the purposes of sale.

97 What *Integris* seems to encourage is applications to exempt property from the receivership rather than applications to set priorities. I agree with that approach. If a creditor can establish that it has priority to the creditor applying for the receivership and that its priority is a proprietary one, it might apply to have the property released from the receivership. The Court will then have to rule on that, in the same fashion as the Court has to rule on applications to lift the stay.

98 Such an application will require an analysis of the circumstances of the receivership. If the receivership is under the *CCAA*, or one where a notice of intention to file a proposal to creditors is contemplated, different considerations may apply. But

in a case such as *Integris*, it may well be appropriate to release property (real or personal) from the receivership. Considerations for that will have to develop with the case law.

99 In this case, the interests of ICI and other creditors do not completely align. ICI wants to get paid out fully, and as quickly as possible. It has no interest in any surplus should the properties be worth more than is owed to ICI on them. The Receiver, on behalf of the other creditors, has an interest in maximizing the return from these properties.

100 Absent evidence of prejudice to ICI, the stay should not be lifted and I decline to do so. ICI's application is dismissed, with leave to reapply should circumstances materially change. However, I do not see that ICI has only one chance to apply for the stay to be lifted or to opt out of the receivership. There is no indication that ICI is in any jeopardy of not recovering its full indebtedness from Reid Worldwide, and there is no evidence that any delays in recovery will cause ICI inordinate harm.

Priority issues

101 Standard General, ICI, and Edmonton all take issue with the provisions in the order giving the Receiver priority over their claims for the Receiver's fees and disbursements, as well as for approved borrowings.

102 ICI argues that as a first mortgagee, it should not yield its priority position to the Receiver at all. It also notes that it is only a creditor of Reid Worldwide, and it disputes that it should be responsible for any portion of the Receiver's fees, disbursements, and borrowings related to any of the other Reid-Built Group entities.

103 Both Standard General and Edmonton rely on Provincial legislation, which they say establish their priority positions ahead of the Receiver.

104 The Alberta Court of Queen's Bench dealt with the priority issue for receivership fees in *Vulcan Machinery*, which followed *Kowal*. In that case, the Court determined that there were some exceptions to the general principle that the Receiver's fees and disbursements did not take priority over the position of a security holder claiming a charge against a specific asset.

105 The exceptions recognized in *Kowal*, as noted above are:

(1) If the receiver has been appointed at the request, consent or approval of the security holders; or

(2) If the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; or

(3) If the receiver has expended money for the necessary preservation or improvement of the property.

106 It is clear that the Receiver was not appointed at the request, consent, or with the approval of any of Standard General, ICI, or Edmonton.

107 The Receiver's powers include preservation and realization of assets for the benefit of all interested parties. That is part of the template order. I have difficulty with the argument that because the powers are in the template order, that automatically makes the receivership one for the "benefit of all interested parties, including secured creditors."

108 ICI relies on *Vulcan Machinery*, where Cairns J referenced *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 10 D.L.R. (4th) 630, 55 B.C.L.R. 54 (B.C. C.A.). That case held that the secured creditors did not have to rank behind the proper expenses and charges of the Receiver because the secured creditors had never been given notice of the receivership proceedings and they had not consented to renovations conducted by the Receiver.

109 The British Columbia Court of Appeal considered *Kowal* and concluded that the case did not come within any of the exceptions. The Court noted:

[15] So, I go back to what Mr. Justice Houlden said with respect to the common law position, namely that a Court under such circumstances has no power to authorize expenses for improving or making additions to the property for carrying on

> the business of the defendant at the expense of prior mortgagees or lien holders without the sanction of such mortgagees or lien holders. It seems to me that that is the principle that applies in these circumstances

110 In *Vulcan Machinery*, Cairns J conducted the *Kowal* analysis. After finding that the first two exceptions did not apply, he concluded:

> [61] As to Mitsubishi and exception 3, and this is the most difficult of the six analyses I have had to conduct, I have again considered the arguments of counsel and the evidence submitted. Despite the fact that the receiver manager performed services such as employee retention, changing locks, inventory lists, hiring Mr. McIvor (a former employee of Vulcan) dealing with landlords and ensuring that no restraints or seizures occurred, liquidating furniture, ensuring equipment, attending warranty work and service work, attending to statutory claims, dealing with parts over which Mitsubishi had no security, and other miscellaneous matters, none of these activities, in my view, benefited, on balance, Mitsubishi and were conducted by Price Waterhouse knowing of Mitsubishi's position that it simply wanted its goods back and wanted nothing to do with Price Waterhouse in its capacity as receiver-manager of Vulcan and would have, subject to Price Waterhouse inquiring as to the validity and equity of their security, applied for and likely been exempted from the receivership order had it received notice. On a strict wording of the third Kowal exception being: "The receiver has expended money for the necessary preservation and improvement of the property."

111 The priority issue was discussed in *Caisse Desjardins*. Noting at paragraph 22 that "I cannot conceive of any scenario wherein the Receivers' costs or disbursements would compromise a full return on the mortgagees' interest," McCarthy J continued:

> In my view, it is just and convenient that the costs of the receiver as they pertain to the real property be allocated amongst all creditors. Moreover, this arrangement ensures that the realization of the mortgagees' security will not be subjected to the operation of the business, matters which are of no concern to them as mortgagees. On the other hand, it is only reasonable and fair that the receiver be given priority for expenditures incurred for the necessary preservation and improvement of the property. Where a receiver is appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no good reason why the mortgagee should not have to pay its proportionate share of the receivership costs [see: JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp (2006), 25 C.B.R. (5th) 156, 2006 CanLii 25352 (ON SC) at para. 45.

112 In *Terra Nova Management*, the Court considered whether the receivership was necessary in the first place and noted that the British Columbia Court of Appeal had "restated" the *Kowal* exceptions. The Court cited *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984), 10 D.L.R. (4th) 572 (B.C. C.A.):

> [23] . . . if a receivership is not necessary to protect or realize interests of mortgagees and lienholders, the court cannot authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees without their agreement.

113 The Court of Appeal did, however, recognize the *Kowal* exceptions.

114 In *Terra Nova Management*, Stromberg-Stein J concluded that there was no evidence that the receivership was necessary and did not apply any of the exceptions, releasing the creditor from any liability for the Receiver's fees.

115 I would observe in this case that there is no evidence that the receivership here was not necessary.

116 Additionally, the interests of ICI and other creditors may not completely align. ICI wants to get paid out fully, and as quickly as possible. It has no interest in any surplus should the properties be worth more than is owed to ICI on them. The Receiver, on behalf of the other creditors, has an interest in maximizing the return from these properties.

117 Absent evidence of prejudice to ICI, the stay should not be lifted and I decline to do so. ICI's application is dismissed, with leave to reapply should circumstances materially change.

118 Topolniski J considered the super priority issue in *Canada North*. There, Canada Revenue Agency challenged the Receiver's super priority charge, claiming that its security interest should rank ahead of the Receiver's charges. Topolniski J distinguished between CRA's statutory deemed trust, which she described as a security interest, and "proprietary interests" such as those under a mortgage registered against property.

119 Topolniski J concluded at paragraphs 112 to 113 that in *CCAA* proceedings, it is the Court's order that sets the priority of charges in issue. Under the *CCAA*, the Court has the power "to grant priority only to those charges necessary for restructuring": at para 112. She stated:

> [112] . . . The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over all other security interests, but those ordered under ss 11.2, 11.51, and 11.52.

120 I will deal with the applications of each of the creditors separately as they relate to the priority issue, as each has different aspects to it.

Standard General

121 Standard General relies on *Yorkshire Trust Co* for the proposition that the Court does not have the jurisdiction to make an order granting a Receiver priority over a registered builders' lien. That case concluded that the express wording of the British Columbia *Builders' Lien Act*, SBC 1997, c 45, which gave a registered lien priority over "judgements, executions, attachments and receiving orders recovered, issued or made after the lien takes effect," included Receivers appointed by court order.

122 That case appears to have considered the BC *Law and Equity Act*, RSBC 1996, c 253, and not the *BIA*. *Kowal* was not discussed, and *Lochson Holdings* was decided a few days later. I note that the BC Court of Appeal considered overturning *Yorkshire Trust Co* in *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 (B.C. C.A.) [*Peri Formwork Systems*].

123 The Court of Appeal declined to do so (with a five-judge panel), but on the basis that it was not necessary to do so. The Court noted that the Receiver in that case had been specifically appointed under the provisions of the BC *Builders' Lien Act*. While the receivership followed an unsuccessful attempt to reorganize under the *CCAA*, those proceedings were at an end and "effectively terminated."

124 The Court dealt with *Kowal* as follows:

> [36] As to the respondents' next alternative argument, that the court had inherent jurisdiction to grant priority to the Bank in this case based on Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 1975 CanLII 681 (ON CA), 9 O.R. (2d) 84, I am of the view that there is no merit to the proposition that the court has an inherent jurisdiction that could override the specific statutory language found in the Builders Lien Act (see Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480, citing Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd., 1971 CanLII 960 (MB CA), [1971] 4 W.W.R. 542.) This argument was not pressed on appeal and need not be considered further.

125 I conclude that *Yorkshire Trust Co* and *Peri Formwork Systems Inc* have no significant bearing here, as the Receiver was appointed under the *BIA* and not the *Builders' Lien Act* or under the *Judicature Act* powers. The Court in *Peri Formwork Systems Inc* implicitly recognized that there is a statutory power under the *CCAA* to give the priority sought by the Receiver, but found that the *CCAA* had no application to the case because those proceedings were at an end. It follows that if a Receiver under the *CCAA* could have such powers and priorities (that could prevail over the BC *Builders' Lien Act*) a Receiver appointed under the *BIA* could have the same powers and priorities.

126 In *Residential Warranty Co*, the Court of Appeal considered a claim by a creditor, Kingsway, that funds held by the bankrupt and thus the Receiver were trust funds and did not (and could not) form part of the bankrupt's estate. The Court of Appeal concluded that the Court's powers under the *BIA* included an inherent jurisdiction to permit trustee fees to be paid from property that is subject to an undetermined trust. It described the inherent power as one that "must be used sparingly," stating:

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480; Wasserman Arsenault Ltd. v. Sone (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th) 145 (Ont. C.A.). In Wasserman, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the BIA Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. The Ontario Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

127 In *Sulphur Corp of Canada Ltd*, Lovecchio J considered whether a Receiver under the *CCAA* could be granted borrowing powers that would rank in priority to registered builders' liens. He noted that a super priority had been granted in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 546 (Alta. Q.B.).

128 Lovecchio J concluded that the circumstances did indeed engage paramountcy, and found that the powers in the *CCAA* were in conflict with the *Builders' Lien Act*. He stated:

> [37] Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.
>
> [38] The case of Pacific National Lease Holding Corp. v. Sun Life Trust Co.[10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

129 Ultimately, recognizing that the decision involved the exercise of discretion, Lovecchio J concluded:

> [47] In my view given the magnitude of the numbers we are dealing with, at this stage the prejudice to the lienholder's is outweighed by the potential benefit for all concerned.

130 I agree with Lovecchio J's analysis and conclusion. The priorities for builders' liens set out in the *Builders' Lien Act* conflict with the provisions of the *BIA* concerning priorities for the Receiver's fees and disbursements and approved borrowings.

131 It is significant that as between mortgagees and builders' lien claimants, mortgagees who expend money to preserve and improve property subject to builders' liens have priority for such expenses over the builders' liens. There is no good reason why a court-appointed Receiver under the *BIA* should not have the same rights and priorities as are given to a mortgagee.

132 In *Temple City Housing Inc., Re*, 2007 ABQB 786 (Alta. Q.B.), Romaine J concluded that the *CCAA* permitted the Court to give priority over CRA deemed trust claims to debtors in place financing, holding:

> [14] It is clear that a court in a CCAA proceeding is able to grant a super-priority over existing security interests for DIP financing. If it were otherwise, and if super-priority could not be granted without the consent of secured creditors, "the protection of the CCAA effectively would be denied a debtor company in many cases": ***Hunters Trailers & Marine Ltd.***, at para. 32. It is also undoubtedly true that, since DIP financing may erode the security of creditors, the Court should be cautious in exercising its inherent jurisdiction to order priority for a DIP Charge over the objection of a secured creditor. I am satisfied that, in this case, Temple requires the protection of the CCAA if there is to be any possibility that it will be able to continue in business for the benefit of its creditors, employees and other stakeholders. I am also satisfied that granting a limited DIP Charge to take the company through the first crucial weeks of the process is necessary and in the best interests of the company's stakeholders generally. For this reason, I allowed a DIP Charge in the amount of $300,000.

133 The Receiver also refers to *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). In that case, the Receiver applied for an order granting it priority for its fees and with respect to its borrowing power. Brown J discussed the priority issues at length. He cited the following comments from his decision in *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]):

> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

134 I am satisfied that orders made under the *BIA* concerning priorities prevail over the priority given to Standard General's builders' liens under the *Builders' Lien Act*, based on paramountcy. The priority issues here relate to three things: (1) the Receiver's fees and disbursements generally; (2) the Receiver's fees and disbursements as they relate to preservation; and (3) borrowings for the purpose of the receivership.

135 Builders' liens give the claimant a proprietary interest in the property improved. Nevertheless, they are lower in the food chain than other claims in receiverships or in bankruptcy. Part of the Receiver's function will be to assess the validity of builders' lien claims and determine where they fit for distribution purposes. I have no difficulty with the Receiver's fees and disbursements as they relate to assessing the validity of the claims and preserving the property taking priority over the builders' liens. If borrowings are necessary to fund the Receiver's activities (such as paying property taxes and utility costs), those too may appropriately rank ahead of the builders' liens, to the extent that such fees and disbursements and costs have been allocated to the builders' lien claimants.

136 The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.

137 Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

138 Borrowings are similar. At the outset of a receivership, it is likely not possible or feasible for the Receiver to know what borrowings, if any, may be necessary to facilitate the liquidation process. It is similarly not possible to know at the outset, which creditors may benefit from borrowings. Generally, the cost of borrowing and repayment of the borrowings should be borne by the creditors who have benefitted from the borrowing. That too leads to the apportionment process.

139 Even first mortgagees may benefit from borrowings, to the extent that the injection of funds is necessary to pay off or service claims, which rank ahead of the first mortgagee, as well as for preservation, protection, and liquidation costs.

140 My conclusion with respect to the super priority over builders' lien claimants, for both the Receiver's costs and borrowings, is that it has been appropriately ordered and put in place. I recognize that this approach places a great deal of emphasis on the apportionment of the costs at the end of the Receivership. That is unfortunate, as everyone seeks certainty. But I do not see that certainty can be accomplished fairly at the outset of a receivership.

141 For creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay.

142 Standard General's application opposing the super priority and borrowing power is accordingly dismissed.

Edmonton

143 It is interesting that there does not appear to be any Alberta Court of Appeal authority on this point. Edmonton relies on *Usarco Ltd* from the Ontario Court of Appeal.

144 The issue in that case was whether a municipality's claim for property taxes (including interest, penalties, and other costs) ranked ahead or behind the claim of a mortgagee. The Court considered *Hamilton Wentworth.* In that case, Blair J had dealt squarely with the priority issue between the municipality and the Receiver, as the property sold for less than the amount of the taxes and the Receiver's costs.

145 Blair J stated at 794:

> Accordingly, I am of the opinion that the statutory scheme enacted through the Municipal Act and the Municipal Tax Sales Act for the imposition and collection of municipal property taxes precludes an order granting a receiver and manager priority over the municipality for the receiver and manager's fees and disbursements, regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors.
>
> While this approach denies a receiver and manager a "super priority" with respect to municipal property taxes, it does not, in my view, alter what has traditionally been the case -- and the understanding in the industry -- concerning the payment of such taxes. Such taxes have traditionally been considered to be part of the "necessary costs of preservation" to be made by a receiver and manager . . .

146 However, Blair J stated at 795:

> I should add, before concluding, that if I am in error in arriving at the foregoing conclusions, and there is some discretion in the court to grant the receiver priority over the municipality for its fees and disbursements, I would not have granted such an order in any event, in the circumstances of this case, except to a limited extent. I would have been prepared to grant the receiver priority only to the extent of its fees and disbursements (including its costs for the "necessary preservation and improvement" of the property) incurred before the Jacob Ellen & Associates Inc. appraisals obtained in June 1993.

147 That case did not discuss court-ordered priorities in the receivership order itself. From the decision, it does not appear that the order addressed the issue. The Receiver was given the power to, at 786:

> (b) pay all debts of Courtcliffe Parks which [it] deems necessary or advisable to properly operate, manage and sell the business of Courtcliffe Parks and all such payments to be allowed Deloitte Touche Inc. in passing its accounts and shall form a charge on the Assets in priority to the mortgage;
>
> . . .

148 In *Usarco Ltd*, the Ontario Court of Appeal stated:

> [39] The City's claim with respect to realty is quite straightforward. Section 382 puts the City's claim ahead of all others except the Crown. As stated by Sherstobitoff J.A. in Canadian Commercial Bank, *supra* at p. 251, "the Court will not permit or approve any action on the part of its officer [the receiver] which has the effect of changing the rights of competing creditors . . . " This is precisely what the City says has happened. I agree with Sherstobitoff J.A. that the court will not

> permit such conduct. The same result is dictated by consideration for other interested parties. Levy and Ursaco should not be prejudiced by the City's claim increasing because of accretion of penalties and interest.

149 The issue in that case, however, did not involve the Receiver's fees and disbursements per se, but rather the Receiver's failure to pay the municipal taxes when they were due. The Court found the Receiver failed in its duty to pay taxes and to avoid penalties and interest to the prejudice of other secured creditors.

150 At the application, I inquired as to whether there were any cases where anything other than property taxes had been granted priority over the Receiver's fees. Edmonton provided me with *Canadian Imperial Bank of Commerce v. Wildflower Productions Inc.*, 2001 BCCA 159 (B.C. C.A.). In that case, Newbury JA described the issue as follows:

> [1] The sole question arising on this appeal is whether the priority normally given to a court-appointed receiver-manager for its fees and expenses over the claims of secured creditors may be, and has been, displaced by a statutory lien.

151 Newbury JA concluded (following *Hamilton Wentworth*):

> [14] [Counsel for the receiver] argued that the receiver is not a "person" within the meaning of that section and, consequently, that the provisions can have no application to preclude the court from awarding priority to the receiver's fees and disbursements. I cannot accept this argument. Nothing in the relevant statutes excludes a receiver and manager as a "person" for these purposes . . . "Person", in my view, is simply the generic word used by the legislature to describe those making claims against the land, of whatever type or origin. What s. 382 provides for is a special lien in favour of a municipality for realty taxes due, in priority to all other claimants, except for the Crown. The receiver is clearly in the category of claimant, and falls easily into what is contemplated by the language of the section. Tortuous arguments about whether or not it is a "person" are unnecessary . . .

152 The Receiver responded with reference to the specific terms of the receivership order, which only gave the Receiver a charge ranking ahead of the bank's general security agreement.

153 The *Wildflower Productions* decision does not change my analysis above.

154 None of these cases assist Edmonton in arguing that the tax priority provisions of the *Municipal Government Act* prevail over a priority order made under the *BIA*, and I conclude that its position may be properly subordinate to the Receiver's fees, disbursements, and borrowings as may ultimately be apportioned amongst the creditors.

155 That being said, the matter does not end there. The receivership order must fit the circumstances of the case. Ultimately, these determinations are in the discretion of the Court.

156 Here, there is a liquidating process. There are no businesses to run and few employees left. The policy considerations in a restructuring do not apply to this receivership. There is no apparent benefit to Edmonton as a result of this type of receivership. I cannot think that there are any charges that rank higher than property taxes and I do not see any reason why payment of property taxes should potentially be eroded.

157 In a liquidating receivership, it seems to me that it is appropriate that the taxing authority's contribution to the receivership is the potential delay in receiving payment of outstanding taxes, penalties, and interest. It is evident from my analysis that I see no reason why Edmonton should be subordinate to any borrowings.

158 My conclusion is that while the Court has the power to subordinate municipal tax claims to the costs of the receivership (as they may be apportioned to the municipality), this is not an appropriate case in which to do so. In this case, the Receiver's charge and the Borrowing Power do not rank ahead of Edmonton's property tax claims.

ICI

159 My conclusion with respect to ICI is the same as it is to Standard General. In the absence of circumstances that allow them to lift the stay or opt out of the Receivership, I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. The same holds true for the Borrowing Power. The Receiver may (for example) borrow to pay off claims ranking in priority to ICI, or for maintenance or improvements to the properties. The cost of any borrowings will have to be apportioned fairly at the end of the process so there is no free ride for any creditor.

160 ICI's application regarding its priority position vis a vis the Receiver is dismissed.

Conclusion

161 In reviewing the various submissions and the case law submitted, I have arrived at a number of conclusions.

162 Where there is a conflict between provincial legislation dealing with priorities and the provisions of the *BIA* or the exercise of powers by the Court under the *BIA*, the provisions of the *BIA* prevail.

163 On the appointment of a Receiver under the *BIA*, or during the receivership, the Court has the jurisdiction to determine the priority of the Receiver's fees and disbursements, as well as repayment of any court-authorized borrowing.

164 The Court has the power to grant a super priority for the Receiver's fees and disbursements ahead of secured creditors, including secured creditors with proprietary interests.

165 This power must be exercised equitably, having regard to the purpose of the legislation and the purpose of the receivership.

166 Creditors should not get a "free ride" in a receivership, paid for by other creditors.

167 Court approved borrowings for the purpose of preserving and improving property may properly enjoy a priority over proprietary interests such as property taxes, mortgagees, and builders' lien claimants in appropriate circumstances.

168 Different considerations apply to liquidating processes than to restructuring processes under either the *BIA* or the *CCAA*.

169 Ultimately, the apportionment of the Receiver's fees and disbursements is for the Court to determine at the end of the receivership, including repayment of any borrowings authorized by the Court: see e.g. *Maple Leaf Loading*, *Integris Credit Union*,*Medican Holdings Ltd., Re*, 2013 ABQB 224 (Alta. Q.B.), *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277 (Alta. Q.B.).

170 As a result of this analysis, I conclude that the Receiver's super priority charge should remain, and that it applies to ICI and Standard General with respect to the Receiver's fees and the Borrowing Power.

171 On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

172 ICI has not met its burden to lift the stay of proceedings or to otherwise be removed from the Receivership. If circumstances change, ICI (and other creditors) may reapply for appropriate relief.

173 Ultimately, apportionment of the Receiver's fees, expenses, and approved borrowings will have to be done at the end of the receivership.

174 I am indebted to counsel for their able written and oral arguments.

Order accordingly.

End of Document

Tab 3

Most Negative Treatment: Check subsequent history and related treatments.

2016 BCCA 231
British Columbia Court of Appeal

Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp.

2016 CarswellBC 1462, 2016 BCCA 231, [2016] 10 W.W.R. 287, [2016] B.C.W.L.D. 4667, [2016] B.C.W.L.D. 4735, 267 A.C.W.S. (3d) 865, 37 C.B.R. (6th) 1, 387 B.C.A.C. 196, 668 W.A.C. 196, 85 B.C.L.R. (5th) 10

Integris Credit Union, Respondent (Plaintiff) and Mercedes-Benz Financial Services Canada Corporation, Appellant (Defendant) and KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd., BHL Capital, a division of Berner Holdings Ltd., Respondents (Defendants)

Integris Credit Union, Respondent (Plaintiff) and BHL Capital, a division of Berner Holdings Ltd., Appellant (Defendant) and KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd. and Mercedes-Benz Financial Services Canada Corporation, Respondents (Defendants)

Neilson, Bennett, Savage JJ.A.

Heard: May 9, 2016
Judgment: June 1, 2016
Docket: Vancouver CA42954. CA42958

Proceedings: reversing *Integris Credit Union v. All-Wood Fibre Ltd.* (2015), 2015 CarswellBC 1850, 2015 BCSC 1146, D.M. Masuhara J. (B.C. S.C.)

Counsel: G.G. Plottel, for Appellant, Mercedes-Benz Financial Services Canada
C.D. Brousson, for Respondent, Integris Credit Union
R.A. Finlay, for Respondent, BHL Capital, a division of Berner Holdings Ltd.
No one for Respondent, KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd.

Subject: Civil Practice and Procedure;, Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
  VII.7 Actions involving receiver
    VII.7.a Actions by receiver
Personal property security
IV Priority of security interest
  IV.3 Purchase money security interest

Headnote

Debtors and creditors --- Receivers — Actions involving receiver — Actions by receiver

Insolvent company A Ltd. (debtor) financed trucks from financing company M Corp. and from leasing company B Ltd. (together, companies) — Debtor ceased operations and had total indebtedness exceeding $8,000,000 — Creditor I Union, who had general security agreement with debtor, obtained order appointing receiver pursuant to s. 47(1) of Bankruptcy and Insolvency Act and s. 39 of Law and Equity Act — Chambers judge granted receiver's application for approval of sale of certain property by auction and dismissed companies' applications that their trucks were not subject to receivership order — Judge held that trucks constituted "property" and were subject to receivership order, but allowed companies to sell trucks on their own, with receiver's consent, on condition that proceeds be held in trust — Companies appealed judgment dismissing their

applications — Appeals allowed — Trucks should have been excluded from receivership and should not be subject to receiver's charges — Issue did not turn on interpretation of "property" in receivership order — Companies' applications were expressly contemplated by receivership order — Companies had priority over creditor with respect to trucks pursuant to their purchase money security interests (PMSI) — To allow trucks to remain under receivership would grant receiver, and indirectly creditor who must indemnify receiver's losses, priority over companies — By virtue of lease or conditional sale agreements, debtor had only possessory interests in trucks, and receiver could not acquire greater interest — As companies' PMSIs took priority over creditor's general security agreement, and companies wanted no part of receivership, trucks should have been released.
Personal property security --- Priority of security interest — Purchase money security interest
Application of receivership order — Insolvent company A Ltd. (debtor) financed trucks from financing company M Corp. and from leasing company B Ltd. (together, companies) — Debtor ceased operations and had total indebtedness exceeding $8,000,000 — Creditor I Union, who had general security agreement with debtor, obtained order appointing receiver pursuant to s. 47(1) of Bankruptcy and Insolvency Act and s. 39 of Law and Equity Act — Chambers judge granted receiver's application for approval of sale of certain property by auction and dismissed companies' applications that their trucks were not subject to receivership order and should be returned to them — Companies appealed judgment dismissing their applications — Appeals allowed — Trucks should have been excluded from receivership in response to companies' applications and should not be subject to receiver's charges — Companies had priority over creditor with respect to trucks pursuant to their purchase money security interests (PMSI) — To allow trucks to remain under receivership would grant receiver, and indirectly creditor who must indemnify receiver's losses, priority over companies — True lease or financing lease dichotomy was not helpful in this analysis — Even if trucks fell within definition of "property", question of whether companies had superior entitlement under priority rules of Personal Property Security Act (PPSA) was critical to determination of applications — To keep trucks within receivership would circumvent priority rules of PPSA — As companies' PMSIs took priority over creditor's general security agreement, and companies wanted no part of receivership, trucks should have been released at earliest opportunity.

Table of Authorities

Cases considered by *Savage J.A.*:

Bell v. Bell (2001), 2001 BCCA 148, 2001 CarswellBC 692, 15 R.F.L. (5th) 23, 153 B.C.A.C. 10, 251 W.A.C. 10, [2001] B.C.T.C. 81 (B.C. C.A.) — referred to

Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp. (2013), 2013 ONSC 6809, 2013 CarswellOnt 15121 (Ont. S.C.J.) — considered

Credit Suisse AG v. Great Basin Gold Ltd. (2015), 2015 BCSC 1199, 2015 CarswellBC 1953, 27 C.B.R. (6th) 32 (B.C. S.C.) — considered

Daimler Chrysler Services Canada Inc. v. Cameron (2007), 2007 BCCA 144, 2007 CarswellBC 486, [2007] 5 W.W.R. 223, 27 B.L.R. (4th) 19, 30 C.B.R. (5th) 1, 65 B.C.L.R. (4th) 388, 11 P.P.S.A.C. (3d) 19, 279 D.L.R. (4th) 629, 239 B.C.A.C. 3, 396 W.A.C. 3 (B.C. C.A.) — considered

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Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

KBA Canada Inc. v. 3S Printers Inc. (2014), 2014 BCCA 117, 2014 CarswellBC 832, 10 C.B.R. (6th) 286, [2014] 6 W.W.R. 695, 372 D.L.R. (4th) 303, 353 B.C.A.C. 167, 603 W.A.C. 167, 59 B.C.L.R. (5th) 273, 2 P.P.S.A.C. (4th) 145 (B.C. C.A.) — considered

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Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered

Smith Brothers Contracting Ltd., Re (1998), 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264, 13 P.P.S.A.C. (2d) 316 (B.C. S.C.) — referred to

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Terra Nova Management Ltd. v. Halcyon Health Spa Ltd. (2005), 2005 BCSC 1017, 2005 CarswellBC 1630, 13 C.B.R. (5th) 273 (B.C. S.C.) — considered

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Yu v. Jordan (2012), 2012 BCCA 367, 2012 CarswellBC 2760, 36 B.C.L.R. (5th) 248, [2013] 1 W.W.R. 103, 327 B.C.A.C. 170, 556 W.A.C. 170, 354 D.L.R. (4th) 8, 24 R.F.L. (7th) 154 (B.C. C.A.) — followed

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Statutes considered:

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

s. 2 "property" — considered

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

s. 47(1) — considered

s. 71 — referred to

s. 81.4(4) [en. 2005, c. 47, s. 67] — considered

s. 81.6(2) [en. 2005, c. 47, s. 67] — considered

s. 243(1) — considered

s. 243(6) — considered

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

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 39 — considered

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

Generally — referred to

s. 3 — considered

s. 55 — considered

APPEAL by financing company and leasing company from judgment reported at *Integris Credit Union v. All-Wood Fibre Ltd.* (2015), 2015 BCSC 1146, 2015 CarswellBC 1850 (B.C. S.C.), dismissing their applications for orders that their trucks were not subject to receivership order and should be returned to them.

Savage J.A.:

I. Introduction

1 With PD-47 - Model Orders, the Supreme Court has prescribed the use of model forms for certain types of orders. The purpose of the model orders is to encourage parties and the Court to focus on the issues in dispute in a particular proceeding. This appeal concerns an application made under a receivership order based on the Model Receivership Order made pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], and/or s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*].

2 The Appellant Mercedes-Benz Financial Services Canada Corporation ("MBFS") is a company which finances the acquisition of equipment, including vehicles. The Appellant BHL Capital, a division of Berner Holdings Ltd. ("BHL"), is an equipment lessor. All-Wood Fibre Ltd.'s ("All-Wood") principal line of business was fibre supply for the forestry industry. It financed trucks from MBFS and BHL. All-Wood ceased operations March 9, 2015. Integris Credit Union ("Integris") is a lender with a General Security Agreement with All-Wood. Integris sought and obtained a receivership order. KPMG Inc. ("KPMG") is the receiver. The indebtedness of All-Wood to all of its creditors is now estimated to exceed $8 million.

3 As a result of the size of an unanticipated CRA liability Integris stands to pay for a significant part of KPMG's fees. The Appellants say that their security over the trucks ranks ahead of the General Security Agreement. They say the receivership order should not cover their trucks and, in any event, their trucks should have been excluded upon application in the court below.

4 For the reasons that follow, I would allow these appeals.

II. Background

5 MBFS and BHL supplied four trucks to All-Wood (the "Trucks"):

(a) MBFS provided a 2010 Freightliner CA125DC to All-Wood under a Conditional Sale Contract and Security Agreement dated December 4, 2012. MBFS registered a financing statement for this truck in the British Columbia Personal Property Registry ("PPR") on December 10, 2012.

(b) MBFS provided another 2010 Freightliner CA125DC to All-Wood under a Conditional Sale Contract and Security Agreement dated January 14, 2013. MBFS registered a financing statement for this truck in the PPR on January 16, 2013.

(c) MBFS provided a 2014 Freightliner 122SD to All-Wood under a Lease Agreement dated December 22, 2014. MBFS registered a financing statement for this truck in the PPR on December 29, 2014.

(d) BHL provided a 2015 Freightliner 122SD 48 to All-Wood under a Lease Agreement dated May 23, 2014 (All-Wood was one of several lessees). BHL registered a financing statement for this truck in the PPR on May 23, 2014.

6 By March 9, 2015, All-Wood had ceased operations. On March 17, 2015, Integris obtained an *ex parte* order appointing KPMG as an interim receiver of All-Wood's "assets, undertakings and properties", pursuant to s. 47(1) of the *BIA* and s. 39 of the *LEA*.

7 On March 25, 2015, Ehrcke J. appointed KPMG as the receiver (the "Receiver") in respect of "all of the assets, undertakings and properties of [All-Wood], including all proceeds thereof", pursuant to s. 243(1) of the *BIA* and s. 39 of the *LEA* (the "Receivership Order"). The Receivership Order was based on the court's Model Receivership Order, and includes the following terms:

• Paragraph 2(a) authorizes the Receiver 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".

• Paragraph 2(j) authorizes the Receiver to "market any or all of the Property ... as the Receiver in its discretion may deem appropriate".

• Paragraph 16 provides for a receiver's charge (the "Receiver's Charge"), which "shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, ... but subject to Sections 14.06(7), 81.4(4), and 81.6(2) of the *BIA*".

• Paragraph 19 provides for a charge not to exceed $100,000 (the "Receiver's Borrowings Charge") as security for funds borrowed by the Receiver, "in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, ... but subordinate in priority to the Receiver's Charge and the charges set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the *BIA*".

• Paragraph 29 provides that "[a]ny interested party may apply to this Court to vary or amend this Order ..., specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein".

8 I pause to note here that the Receivership Order at issue here differs from the Model Receivership Order by the addition of the phrase, handwritten in the original, "*specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein*".

9 Notably, the business of All-Wood had ceased. The form of receivership order sought did not empower the Receiver to carry on the business of All-Wood.

10 On May 13, 2015, BHL filed a notice of application seeking the following relief:

1. An order that KPMG Inc., receiver of the assets and undertaking of All-Wood Fibre Ltd. pursuant to an order in these proceedings dated March 25, 2015, forthwith deliver up to BHL the following property:

2015 Freightliner 122SD 48 in. Midroof Tri-Drive Tractor ...

11 On May 25, 2015, MBFS filed a similar notice of application seeking:

1. An order that the Equipment [the three trucks], in the possession or control of the Receiver, be delivered by the Receiver to Mercedes-Benz Financial Services Canada Corporation, or its authorized agent.

2. A declaration that the Equipment is not subject to the Receivership Order made March 25, 2015, herein.

12 By order dated June 8, 2015, the Chambers Judge (the "Judge") approved the Receiver's proposed sale of All-Wood's assets by auction but reserved judgment on the issue of whether the Trucks fell "within the scope of the Receivership Order".

13 By order dated July 3, 2015, the Judge dismissed MBFS and BHL's applications. In addition, he declared that:

1. The truck which is subject to the BHL ... Lease Agreement dated May 23, 2014, ...constitutes "property" within the scope of, and is subject to, the Interim Receivership Order granted March 17, 2015 and the Receivership Order granted March 25, 2015 herein (together the "Receivership Order").

2. The three trucks which are subject to the Mercedes-Benz Financial Services Canada Corporation Conditional Sale Contract and Security Agreement dated December 4, 2012, Conditional Sale Contract and Security Agreement dated January 14, 2013 and Lease Agreement dated December 14, 2014, respectively, ... constitute "property" within the scope of, and are subject to, the Receivership Order.

14 There is some dispute concerning the effect of these orders. The Appellants say that the effect of these orders is that the Trucks are subject to a priority charge in favour of the Receiver's costs by paragraphs 16 and 19 of the order. Integris says that there needs to be a further hearing at which the court will make an allocation of the Receiver's costs. Conceivably, no allocation or a minor allocation of those costs could result. The Receiver, who filed a factum, but did not appear, made no submission on this issue.

15 By virtue of the nature of the Appellants' interests and the timing of the registrations, it is not disputed that the Appellants had duly registered purchase money security interests (PMSI) in the Trucks and serial-number registrations, which establish the Appellants as the highest ranking secured creditors in respect of the Trucks. Integris holds a General Security Agreement

in favour of All-Wood, which security is subordinate to that of the PMSI's. Accordingly, Integris is in a subordinate position to the Appellants in respect of the Trucks.

III. Reasons Below

16 The Judge first considered the meaning of "property" in the Receivership Order. He interpreted this term broadly, with reference to s. 243(1) and the definition of "property" in s. 2 of the *BIA*.

17 Next, the Judge considered whether the impugned agreements were "financing leases" or "true leases" (apparently in an effort to address the Appellants' submission that All-Wood did not obtain an interest in the title to the Trucks, and therefore the Trucks did not qualify as "property" under the impugned contracts).

18 At para. 30, he summarized the Receiver's submissions on this issue as follows:

> [30] The position of the Receiver ... is that the agreements relating to the subject trucks are "financing leases" as opposed to "true leases". As such, the trucks constitute Property and are subject to the Receivership Order. The Receiver submits that if the agreements are "true leases" then the trucks do not form part of the assets of All-Wood and would not be subject to the Receivership Order.

19 After reviewing the "test" for a financing lease (i.e., security lease) in *Daimler Chrysler Services Canada Inc. v. Cameron*, 2007 BCCA 144 (B.C. C.A.), the Judge concluded that the impugned agreements met this test and were therefore not true leases (paras. 38-39).

20 At para. 40, he summarized his findings as follows:

> [40] Given my interpretation of the term Property, the trucks fall within the scope of the Receivership Order. Further, the agreements between All-Wood and BHL and MBFS are financing leases; as a result the trucks fall within the scope of the Receivership Order.

IV. Statutory Provisions

21 Section 243(1) of the *BIA* authorizes a court, upon the application of a secured creditor, to appoint a receiver over an insolvent or bankrupt person's property where it is "just or convenient to do so":

> **Court may appoint receiver**
>
> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> >
> > (c) take any other action that the court considers advisable.

22 Section 243(6) of the *BIA* also authorizes a court to "make any order respecting the payment of fees and disbursements of the receiver that it considers proper", and order that the receiver's charge has priority ahead of "any or all... secured creditors" although "other secured creditors who would be materially affected by the order" must receive notice and have the opportunity to make representations:

> **Orders respecting fees and disbursements**

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, <u>but the court may not make the 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</u>.
>
> [Emphasis added.]

V. Standard of Review

23 Generally on appeal, questions of law are reviewable on a standard of correctness. Findings of fact may be reversed on a palpable and overriding error. For true questions of mixed fact and law, where a legal principle is not readily extricable, the matter should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 8-12, 36. Failure to give sufficient weight to relevant considerations may justify appellate review: *Bell v. Bell*, 2001 BCCA 148 (B.C. C.A.) at para. 11.

VI. Interpretation of the Order

24 The arguments here and below focused on the interpretation of the Receivership Order, and in particular the meaning of "property".

25 The principles concerning the interpretation of orders are well settled. In *Yu v. Jordan*, 2012 BCCA 367 (B.C. C.A.), this Court said:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, <u>the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted</u>.
>
> [Emphasis added.]

26 In *Sutherland v. Reeves*, 2014 BCCA 222 (B.C. C.A.), it was argued that the interpretation of an order turned on the meaning of the Model Receivership Order. This Court rejected that approach saying:

> [30] But I do not accept Mr. Sutherland's underlying premise. <u>This appeal does not turn on an interpretation of the Model Order. It turns on the interpretation of the specific Order</u> made by Mr. Justice Willcock. This is so for two reasons.
>
> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
>> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, <u>the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.</u>
>>
>> [Emphasis added in original.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.
>
> [Emphasis added.]

27 Those principles were recently applied to the interpretation of a Receivership Order by Fitzpatrick J. in *Credit Suisse AG v. Great Basin Gold Ltd.*, 2015 BCSC 1199 (B.C. S.C.). She found that all of the aspects of the receivership order, based on the factors set out in *Yu*, were interrelated and supported an interpretation of the stay provisions at issue there.

28 As this Court noted in *Sutherland*, the order to be interpreted is a specific order of the court. It is an error to focus on the Model Order rather than the specific order at issue. It is the pleadings, relevant circumstances and specific wording of the order that governs the interpretation of the Receivership Order.

29 The pleadings reveal the nature of the receivership was to liquidate the assets over which Integris held priority for their security. Integris' notice of civil claim sought an order, *inter alia*, giving Integris conduct of sale over All-Wood's assets, or alternatively empowering the Receiver to sell the assets. MBFS's response to civil claim expressly opposed this relief. Further, Integris' notice of application and accompanying affidavit established that All-Wood ceased to carry on business. The draft form of receivership order sought by Integris did not empower the Receiver to carry on the business of All-Wood.

30 Accordingly, realization of Integris' interests, and not operation of All-Wood, was the Receiver's focus. Integris required the Receiver's assistance to realize on the security. Conversely, the Appellants did not want or need the assistance of the Receiver. The pleadings reveal that the Receiver, as Integris' appointee, was intended to be the agency by which Integris would realize on the security it held.

31 The Receivership Order did not incorporate by reference the statutory definition of "property". The reference to "property" provided in the Order was less expansive:

> 1. Pursuant to Section 243(1) of the BIA and Section 39 of the LEA KPMG Inc. is hereby appointed Receiver, without security, <u>of all of the assets, undertakings and properties of the Debtor, including all proceeds thereof (the "Property")</u>.
>
> [Emphasis added.]

32 In *Sutherland*, the receivership order's definition of "property" differed from that of the Model Order. Bauman C.J.B.C. found the definition used to be "significantly broader" than that of the Model Order:

> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.
>
> [33] When the word "Property" is replaced with its definition in the first portion of clause 10 of the Order, that portion provides:
>
>> 10. No Proceeding against or in respect of Tangerine or the [affairs, business, undertaking and assets of Tangerine] shall be commenced or continued except with the written consent of the Receiver or with leave of this Court ...

33 Integris describes the factual circumstances at the time the Receivership Order was made as chaotic. It says All-Wood's equipment was scattered among various locations, some remote; the landlord had distrained; the company's records had been

removed; the employees were laid off; the company's management had walked away; the creditors were seizing assets; and CRA had a lien.

34 Integris submits the definition of "property" should include the Trucks because the Receiver could not have practically considered priorities before needing to step in and take control for the benefit of all creditors. I agree that certain circumstances may justify finding a higher-ranking creditor liable to a receiver appointed by a general creditor. However, such scenarios are an exception to the general rule that a receiver cannot subject secured creditors to liability for disbursements or fees.

35 Although I have reviewed the circumstances of the Receivership Order and the parties' arguments, I do not think the issue before the court properly turns on the interpretation of "property" in the Receivership Order. Here, the applications before the court were to deliver up to MBFS and BHL the Trucks and exclude them from the receivership. That was something expressly contemplated by paragraph 29 of the Receivership Order and is determinative of these appeals.

VII. Application Before the Court

36 The Judge did not find, nor did the Receiver or Integris establish in evidence, that the Receiver expended money necessary for the preservation of the Trucks. The Judge ultimately ordered that the Trucks be excluded from the package of assets auctioned by the Receiver because the Appellants "had the ability and resources to market the trucks on their own".

37 The Appellants could sell the Trucks, with the consent of the Receiver, on the condition that the proceeds be held in trust. The real issue before the court was the Receiver's right to indemnity for the costs of the receivership, and whether the Trucks should be removed from the receivership or be subject to such charges.

38 It is apparent that there are significant differences between a court-appointed receiver and a trustee in bankruptcy. A receiver does not obtain the debtor's proprietary interest in the collateral: *1231640 Ontario Inc., Re*, 2007 ONCA 810 (Ont. C.A.) at para. 22, 27-28. On the other hand, a trustee becomes vested with the property of the bankrupt debtor, which may allow the trustee to assert a claim that the bankrupt cannot: *BIA*, s. 71; *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.).

39 A receiver's right to indemnity may exceptionally extend to the security of secured creditors as was discussed in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492 (Ont. C.A.) at 496:

> [13] Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. <u>As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him</u>. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:
>
>> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. <u>No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership</u>. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.
>
> [Emphasis added.]

40 *Kowal* was approved and applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (B.C. C.A.). In *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017 (B.C. S.C.), aff'd 2006 BCCA 458 (B.C. C.A.), Stromberg-Stein J., as she then was, summarized the exceptions to the general rule provided in *Kowal*:

> [30] Although a secured creditor in a priority position may not be bound by a court order granting priority to another party, as held in *Kowal*, a creditor in a superior priority position may nevertheless forgo that priority position by some other means. For example, three exceptions to the general rule that a receiver has no priority for his expenses over a prior secured creditor were recognized by the Ontario Court of Appeal in *Kowal*, and by the British Columbia Court of Appeal in *Lochson*. The three exceptions as provided in *Kowal* at 496, 497, and 499, respectively, are:
>
> 1. If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders;
>
> 2. If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him; and
>
> 3. If the receiver has expended money for the necessary preservation or improvement of the property he may be given priority for such expenditure over secured creditors.

41 In my view the exceptions provided for in *Kowal* are not engaged here. From the outset of the application, the Appellants took the position that they wanted no part in the receivership. Prior to the court application, BHL engaged in correspondence with KPMG in an attempt to have the Receiver give up the property without a court application. The Receiver also had early notice of MBFS's interest in the Trucks.

42 The most telling circumstance weighing in favour of excluding the Trucks from the receivership is that the Appellants have priority over Integris with respect to the Trucks pursuant to their PMSI's. To allow the Trucks to remain under the receivership would grant the Receiver, and indirectly Integris who must indemnify the Receiver's losses, priority over the Appellants.

43 By virtue of the lease or conditional sale agreements, All-Wood had only possessory interests in the Trucks. The Appellants retained the proprietary rights. All-Wood had only the right to possess and use the Trucks, on certain terms and conditions as set out in the agreements. The Receiver could not acquire a greater interest than All-Wood held.

44 The court below focused on a "true lease / financing lease" analysis. The true lease / financing lease dichotomy arises in the context of the *Personal Property and Security Act*, R.S.B.C. 1996, c. 359 [*PPSA*]. Section 55 of the *PPSA* exempts Part 5 from transactions referred to in s. 3, which includes a lease for a term of more than one year that does not secure payment or performance of an obligation (i.e., a true lease). However, Part 5 is irrelevant to the application before the court. *DaimlerChrysler*, cited by the Judge, did not involve a receivership but determined whether Part 5 of the *PPSA* applied to a particular lease.

45 The true lease / financing lease analysis is also relevant in a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 proceeding in that creditors with a true lease are entitled to continuing payments under s. 11.01(a) while those with a financing lease are not: *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264 (B.C. S.C.).

46 In my view the true lease / financing lease dichotomy is not helpful in the analysis here. Section 243(6) of the *BIA* allows a court to direct that a receiver's charges rank ahead of security interests but requires notice to secured creditors. The Appellants applied for orders directing the Receiver to release the Trucks and exclude the property from the Receivership Order (the Receiver's fees and borrowing charges). This type of application was expressly contemplated in paragraph 29 of the Receivership Order, which included these handwritten changes to the Model Receivership Order:

> 29. Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) clear business 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, *specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein.*

[Italics denote the handwritten addition to the order.]

47 The Judge concluded the Trucks fell within the scope of the Receivership Order because the Trucks were "property" and the agreements between All-Wood and the Appellants were financing leases. However, the Judge did not consider whether, pursuant to paragraph 29 of the Order, the Trucks should be excluded from the priorities set out in paragraphs 16 and 19 despite being "property". Effectively that is what the applications sought.

48 In my opinion, even if the Trucks fell within the definition of "property" in the Receivership Order, the question of whether the Appellants had superior entitlement under the priority rules of the *PPSA* was critical to the applications before the court. The priority rules of the *PPSA* are designed to achieve commercial certainty and predictability. To keep the Trucks within the Receivership, and thus subject to the charges of the Receiver, would circumvent the priority rules of the *PPSA*.

49 Groberman J.A. summarized the goal of the *PPSA* and its application to third parties in *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117 (B.C. C.A.):

> [20] It is well-established that the overriding goal of the *PPSA* is to provide commercial certainty and predictability to personal property financing. The statute includes clear rules for registration of financing statements in respect of security interests and for priorities among secured creditors. Courts have been very reluctant to circumvent or modify the explicit statutory provisions through the use of extra-statutory principles of common law or equity. The general approach to the statute is well-described in the first chapter of Ronald C.C. Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, 2d ed. (Toronto: Irwin Law, 2012) at 51:
>
>> The PPSA is founded on certain legislative policies that generally inform its interpretation. The most prominent of these is the advancement of commercial certainty and predictability. This is a primary value in commercial law generally. Its principal application in the PPSA context takes the form of an appropriate reluctance to countenance judicial glosses on the statutory rules, especially those dealing with priority.
>>
>> . . .
>
> [27] <u>It is difficult to conceive of a situation in which principles of common law, equity, or the law merchant will be applicable to a priorities dispute, because the *PPSA* deals with priorities comprehensively</u>. In discussing similar Saskatchewan legislation in *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, the Supreme Court of Canada said this of the priorities scheme:
>
>> [22] The *PPSA* provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the debtor and against third parties, the *PPSA* recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to third parties' interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2) and (3) [ss. 20(b) and (c) of the B.C. Act]. <u>Thus, within the domain of application of the Act, the *PPSA* provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property</u>.
>>
>> [Emphasis added.]

50 The clear rules of the *PPSA* should not be circumvented by the appointment of a receiver, when the exceptions outlined in *Kowal* are not met.

51 Integris submits that in the appropriate circumstances a court may appoint a receiver and grant it priority over other pre-existing charges, such as occurred in *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809 (Ont. S.C.J.).

52 *Caisse* was an application for the appointment of a receiver over the assets of a debtor. Certain mortgagees argued that the real property over which they hold security by way of first and second mortgages respectively should be carved out of any receivership order because "a receiver would do no more than add a layer of expense and procedure to the handling of the real property, resulting in increased expense but adding nothing of convenience" (para. 17). The mortgagees ranked in priority to Caisse, the general creditor who sought the appointment. The judge rejected the mortgagees' argument and found that it was just and convenient that a receiver should be appointed over both the receivables of the corporate debtors and the real property of the individual debtors.

53 In my view, *Caisse* does not assist Integris. There the judge applied the analytical framework of *Kowal* and found an exception was made out. The particular circumstances of that case justified the order, most notably that (1) the mortgagees would receive a full return on their interests and (2) the realization of the mortgagees' security would not be subjected to the costs arising from the other interests:

> [22] I see no injustice or prejudice to the mortgagees under such an arrangement: there is no evidence before me that the real property is worth any less than the $13.5 million put forth by Hubert Belanger. I cannot conceive of any scenario wherein the receivers' costs or disbursements would compromise a full return on the mortgagees' interest. The proposed order contains a limit on the right of the receiver to borrow in order to fund the receivership (see paragraph 24 of Appendix "A"). To the extent that the receiver conducts itself in a manner similar to a mortgagee in possession, one must assume that some of its costs in that regard would simply be incurred in the stead of the costs that a mortgagee in possession would incur or charge. This assurance can be enhanced by a clause in the order which would serve to ensure that the priority of a receiver's charge or borrowing charge should rank ahead of the three conventional mortgages only to the extent that those charges relate exclusively to the preservation, maintenance, upkeep or condition of the real property. The proposed order put forward by the Caisse contains such a clause at paragraph 28. In my view, it is just and convenient that the costs of the receiver as they pertain to the real property be allocated amongst all creditors. Moreover, this arrangement ensures that the realization of the mortgagees' security will not be subjected to the operation of the business, matters which are of no concern to them as mortgagees. On the other hand, it is only reasonable and fair that the receiver be given priority for expenditures incurred for the necessary preservation and improvement of the property. Where a receiver is appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no good reason why the mortgagee should not have to pay its proportionate share of the receivership costs [see: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp* (2006), 25 C.B.R. (5 th) 156 (ONSC) at para. 45.
>
> [Emphasis added.]

54 In the present case, we are advised that there are insufficient funds from the Receivership to pay the secured creditors and the Receiver's costs and disbursements. The situation described in *Caisse* does not arise.

55 Nor is it appropriate, as Integris argues, to reserve the issues here to a future allocation hearing. As the Appellant's PMSIs take priority over Integris' GSA, and the Appellants wanted no part of the receivership, in the circumstances here the Trucks should have been released to the secured creditors at the earliest opportunity.

VIII. Conclusion

56 In my opinion the Trucks should have been excluded from the Receivership in response to the Appellants' applications. The Trucks should not be subject to the Receiver's charges. It follows that I would allow the appeals.

Neilson J.A.:

I AGREE.

Bennett J.A.:

I AGREE.

Appeals allowed.

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