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| COURT FILE NUMBER | 1703 21274 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| PLAINTIFF | ROYAL BANK OF CANADA |
| DEFENDANTS | REID-BUILT HOMES LTD., 1679775 ALBERTA LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., REID CAPITAL CORP. AND EMILIE REID |
| DOCUMENT | **WRITTEN BRIEF OF CANADA ICI CAPITAL CORPORATION** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | DANIEL R. PESKETT / MICHAEL T. COOMBS<br>Brownlee LLP<br>#2200 Commerce Place<br>10155-102 Street<br>Edmonton, Alberta T5J 4G8<br>Telephone: (780) 497-4800<br>Facsimile: (780) 424-3254<br>File #: 77676-0766, 77676-0767, 77676-0768 and 77676-0772 |



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**SPECIAL CHAMBERS WRITTEN BRIEF CANADA ICI CAPITAL CORPORATION**
**BEFORE THE HONOURABLE JUSTICE S.D. Hillier**
**SCHEDULED FOR November 29, 2017**

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Brownlee LLP
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Solicitors for Canada ICI Capital Corporation

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1. Royal Bank of Canada ("RBC") never provided Canada ICI Capital Corporation ("Canada ICI") with notice of the application for the Consent Receivership Order. Further, at no time has RBC or the Receiver discussed with Canada ICI its plans for the properties subject to Canada ICI security or why Canada ICI should consider the Receivership, or the involvement of the Receiver, as it relates to lands which are the subject of Canada ICI security.

2. Canada ICI has security in relation to four sets of lands. These lands are being commonly referred to as the Parkwest Lands, the Hawkstone Lands, the Granville Lands and the Encumbrance Lands.

3. Canada ICI has the prior security and is the first mortgagee in relation to the Parkwest Lands and the Hawkstone Lands. The RBC security is subordinate to the Canada ICI security for these lands. Both Parkwest and Hawkstone have commercial tenants which pay monthly rents. Canada ICI, as part of its prior registered security, has an assignment of rents and leases. Canada ICI is entitled to receipt of this monthly income stream while its loans are in default until they are fully repaid.

4. notwithstanding Canada ICI's security priority, the Receiver rejects lifting the stay in relation to Canada ICI's enforcement rights including collecting monthly rents. Furthermore, the Receiver rejects excluding the Parkwest Lands and the Hawkstone Lands from the Receivership or from the purposed Receiver fees and borrowing charges. Canada ICI does not consent to the Receivership involvement in relation to Parkwest Lands and the Hawkstone Lands and Canada ICI is entitled to recovery of the rents pursuant to its prior registered security. Furthermore, Canada ICI does not require the Receiver or RBC to enforce Canada ICI's rights pursuant to its security in relation to the Parkwest Lands and the Hawkstone Lands. There is no basis or need to have prior registered Receivership charges being placed by the Court in priority to Canada ICI's security interests against the wishes of Canada ICI respectfully. There is no reason to encumber the Parkwest Lands or the Hawkstone Lands with Receivership costs, expenses and administration associated with other companies and other lands. Additionally, a Receivership as broad as the one contemplated by RBC in the current Receivership in relation to all the different companies and lands, has no benefit to Canada ICI or the creditors of Reid Worldwide as it relates to the enforcement of Canada ICI security which would involve the collection of rents for Canada ICI and a sale process for the Parkwest and Hawkstone Lands.

5. In the case of Breiger Holdings Ltd. and Thorne Riddell Inc. [1980] 5WWR108, the Court held that a prior mortgagee can put an end to the right of the subsequent mortgagee to receive the rents by themselves by applying to the Court to discharge the original Receiver and to have his own Receiver appointed.

**Tab 1- Breiger Holdings Ltd. v. Thorne Riddell Inc.**

6. As a general rule, we submit the Receiver should have no power to subject a prior secured creditor to the charges of a Receivership when Canada ICI does not approve of the Receivership as the prior registered security holder. There can be exceptions to this general rule but given the lack of information from the Receiver and RBC, Canada ICI is unaware as to what exception would apply and, on present information, Canada ICI does not believe there is a basis for the exceptions to override the general rule. Furthermore, Canada ICI's prior security rights should not be subordinated pursuant to RBC Receiver efforts in relation to other companies and lands.

**Tab 2 – Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (see paragraphs 13, 14, 16, 17 & 21)**

7. The case of Royal Bank versus Vulcan Machinery Equipment Ltd. sets out various cases being considered in relation to a Receiver being a first charge over secured creditors and after discussing various cases, concluded in that case that the Receiver charges should not be in priority to the rights of two secured creditors who did not consent to the Receivership priority Order and which secured creditors were prepared to rely on enforcing their own security. Similarly in this case, Canada ICI can enforce its own security without the additional costs and administration of a Receiver charging costs and borrowings associated with recovery efforts that go well beyond the scope of the lands subject to the Canada ICI security. There is no basis to dilute Canada ICI's security in that regard and there is no reason, respectfully, to reduce available sale proceeds for the benefit of all creditors, after Canada ICI, with those additional Receivership charges.

**Tab 3 – Royal Bank of Canada v. Vulcan Machinery Equipment Ltd. (see highlighted paragraphs 44, 59, 72, 78 & 83)**

8. The third set of land security held by Canada ICI is known as the Granville Lands. These Lands, to Canada ICI's knowledge, are raw development lands that do not have any tenants. However, and similarly, Canada ICI is the prior registered security holder in priority to any security held by RBC. Canada ICI does not know why a Receiver needs to be appointed for the Granville Lands or what the Receiver intends to do with the Granville Lands. Canada ICI at present does not approve of any Receivership affecting the Granville Lands and Canada ICI can enforce its own security in relation to the Granville Lands. Canada ICI does not approve or see any need for the Granville Lands to be encumbered by Receiver costs and borrowings in priority to its security. Such additional costs of the Receiver from other companies or other lands will only reduce amounts available to creditors with recovery rights against the Granville Lands or against Reid Worldwide Corporation.

9. Finally, Canada ICI has an encumbrance registered against lands that are described as the Encumbrance Lands in its Notice of Motion and supporting Affidavit. The Encumbrance is a second charge below the Laurentian Bank but in priority to any RBC security. Canada ICI repeats its submissions in relation to the Granville Lands and the fact that it opposes any Receivership costs and borrowings in priority to its encumbrance charges especially when the Receivership costs and borrowings involve such a broad scope, at present orchestrated by RBC, to cover other companies and land developments whereby such costs are not relevant to the enforcement rights of security registered in priority to RBC on the Encumbrance Lands.

ALL OF WHICH IS RESPECTFULLY submitted by Brownlee LLP this 17th day of November, 2017.

BROWNLEE LLP

PER: _____
Daniel R. Peskett/Michael T. Coombs
Legal Counsel for Canada ICI Capital Corporation

# TAB 1

1980 CarswellMan 10
Manitoba Court of Queen's Bench, In Bankruptcy

Breiger Holdings Ltd. v. Thorne Riddell Inc.,

1980 CarswellMan 10, [1980] 5 W.W.R. 108, 34 C.B.R. (N.S.) 244, 3 A.C.W.S. (2d) 102

# BREIGER HOLDINGS LTD. v. THORNE RIDDELL INC.

Kroft J.

Judgment: March 24, 1980

Counsel: *A. H. Adams*, for plaintiff, applicant.
*W. T. Wright*, for respondent.
*A. S. Corne*, for National Bank of Canada.

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.2 Effect of order
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.C Mortgagee
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.vii Miscellaneous

**Headnote**

Bankruptcy --- Receiving order — Effect of receiving order
Receivers --- Appointment — Application for appointment — Person entitled to make application — Mortgagee
Receivers --- Conduct and liability of receiver — Duties
Receiver — Appointed by court on application of debenture holder holding third mortgage as collateral security to debenture — Rent from tenants collected by receiver — No payments by receiver to prior mortgagees — Rents claimed by prior second mortgagee — No attempt by such mortgagee to obtain rent — Application dismissed.
A receiver was appointed by the court upon the application of a debenture holder. The receiver collected rents from certain property owned by the company in receivership. The debenture holder held a third mortgage on the property as collateral security for the debenture. Subsequently, another receiver of the property was appointed by the court on the application of the first mortgagee. The second mortgagee brought an application to the court for an order requiring the receiver appointed on the application of the debenture holder to pay to it the net amount realized by such receiver from the management of the property.

**Held:**

Application dismissed.

The receiver was entitled to retain such rents as against the prior mortgagee so long as they were collected before the prior mortgagee intervened. The prior mortgagee had the right to put an end to the right of such receiver to collect the rents by intervening. This could have been done by the second mortgagee taking steps to receive rent from the property directly or bringing an application for the appointment of another receiver.

**Table of Authorities**

**Cases considered:**

*Hoare, Re; Hoare v. Owen*, [1892] 3 Ch. 94 — *applied*

*Kennedy (C.A.) Co. v. Stibbe-Monk Ltd.* (1976), 14 O.R. (2d) 439, 23 C.B.R. (N.S.) 81 (Div. Ct.) — *applied*

*Metro. Amalgam. Estates Ltd., Re; Fairweather v. Metro. Amalgam, Estates Ltd.*, [1912] 2 Ch. 497 — *applied*

*Preston v. Tunbridge Wells Opera House Ltd.*, [1903] 2 Ch. 323 — *applied*

**Statutes considered:**

Bankruptcy Act, R.S.C. 1970, c. B-3.

Real Property Act, C.C.S.M., c. R30.

**Authorities considered:**

Falconbridge on Mortgages, 4th ed., pp. 754-55.

Kerr on Receivers, 14th ed.

Application by second mortgagee to require receiver to pay to it the net amount realized by such receiver from the management of property owned by the company in receivership.

***Kroft J.*:**

1 The applicant is second mortgagee of an office building in downtown Winnipeg known as the Bestlands Building. The registered owner of the property is Abacus Cities Ltd. ("Abacus"). The respondent, Thorne Riddell Inc., is the receiver and manager appointed by the then Supreme Court of Alberta on 17th May 1979, pursuant to the terms of a debenture for $10,000,000 in favour of the Bank of Montreal. Collateral to the debenture is a third mortgage on the Bestlands Building. The respondent is also the trustee named in a proposal made by Abacus pursuant to the Bankruptcy Act, R.S.C. 1970, c. B-3, which proposal was confirmed by the Court of Queen's Bench of Alberta on 19th October 1979.

2 When the respondent, in its capacity as receiver and manager, took over management of the property of Abacus, it hired Robbins Management Services ("Robbins") to manage the Bestlands Building and other real properties in Manitoba. Robbins continued in that role until 21st November 1979. On that date, pursuant to an order of this court, Robbins replaced the respondent as receiver and manager of the Bestlands Building and the other Manitoba properties owned by Abacus. The order was granted on the application of the National Bank of Canada ("National Bank"), first mortgagee of the Bestlands Building. Since then the building has been managed by Robbins in its new capacity.

3 The accounts prepared by Robbins and received by the respondent indicate that for the period 17th May 1979 to 21st November 1979 there is a net positive cash position of $99,752.49, and that for the period 21st November 1979 to 31st January 1980 there is a net positive cash position of $36,168.46. The respondent, in its capacity as trustee under the proposal in bankruptcy, has not received payment of any moneys from the operation of the Bestlands Building.

4 The entire principal of $1,100,000 owing to the applicant under the second mortgage became due on 6th July 1979 but was not paid. Mortgage sale proceedings were commenced, and on 19th December 1979 the Bestlands Building was offered for sale, but the sale was abortive.

5 There was also default under the first mortgage in favour of the National Bank, and it also commenced mortgage sale proceedings. However, on 29th January 1980, the day before the sale was to take place, the applicant paid the arrears and costs in the sum of $300,763.05, thereby placing the first mortgage in good standing.

6 As at 30th January 1980 there was, therefore, owing to the applicant $1,183,997.26 principal and interest under its second mortgage plus the sum of $300,763.05, being the amount paid by it to the National Bank.

7 The respondent, through Robbins, collected rent from 17th May 1979 to 21st November 1979 but at no time made payments of principal or interest to either the first or second mortgagee. However, Robbins, after being appointed receiver under the first mortgage, has made payments to National Bank towards principal, interest and taxes. There remains owing to the National Bank, as at 28th February 1980, the sum of $19,765.46.

8 The applicant brought these proceedings by way of originating notice of motion in this court. The style of cause refers to the Bankruptcy Act and names Thorne Riddell Inc. as receiver and manager, and as trustee under the proposal. The respondent was served in both capacities. Service was also effected on the National Bank.

9 The relief sought by the applicant was an "order that Thorne Riddell Inc., trustee in bankruptcy for the estate of Abacus Cities Ltd. be ordered to pay to the applicant the net cash realized by it from its management of the Bestlands Building".

10 It became quickly apparent that there was considerable confusion as to whether the proceedings related to the bankruptcy or the receivership. At the court's suggestion, an adjournment was granted to enable the parties to clarify matters. When they returned, they advised the court that they were agreed that:

11 (1) The proceedings were not in bankruptcy;

12 (2) Thorne Riddell Inc. should be named as respondent only in its capacity as receiver and manager in respect of the Bank of Montreal debenture and mortgage;

13 (3) The proper relief, if any, would be an order that Thorne Riddell as receiver and manager be ordered to pay to the applicant the net cash realized by it from its management of the Bestlands Building between 17th May 1979 and 21st November 1979.

14 Counsel for the applicant and counsel for Thorne Riddell Inc. (both as trustee under the proposal and as receiver and manager) consented to an order directing the necessary amendments. Counsel for the National Bank also consented, subject to its claim that, if the applicant succeeds, any moneys payable by the respondent should be paid firstly on account of any arrears on the first mortgage.

15 It is, therefore, ordered that the amendments above referred to be made.

16 There was another preliminary but undisputed issue. Paragraph 5 of the order of the Supreme Court of Alberta appointing the respondent as Receiver and Manager stated:

> 5. IT IS FURTHER HEREBY ORDERED that no action at law or other proceedings shall be taken or continued against the said Receiver and Manager without leave of this Court first being obtained.

17 The applicant clearly could have gone to Calgary to seek leave to bring these proceedings. However, I do not think it is necessary that it do so. To begin with, I am satisfied that this court can and should recognize the appointment of a receiver in another jurisdiction: *C.A. Kennedy Co. v. Stibbe-Monk Ltd.* (1976), 14 O.R. (2d) 439, 23 C.B.R. (N.S.) 81 (Div. Ct.). Further, we are dealing with real property in Manitoba which is subject to mortgages registered in accordance with the laws of Manitoba. I am satisfied that this court provides a proper and convenient forum in which to hear this matter. I note that Solomon J. must have reached the same conclusion when he granted his order last November, discharging the respondent and appointing Robbins as the new receiver-manager. All counsel present confirmed their agreement with my conclusion.

18 The question to be resolved, then, is this: Is a receiver appointed on the motion of a mortgagee or debenture holder bound to make payment of interest or principal due to prior mortgagees from the profits or rents received in the course of its management?

19 As indicated, the Bank of Montreal is holder of a debenture charging all the properties and assets of Abacus, and it is the mortgagee named in a third mortgage against the Bestlands Building, registered under the Real Property Act, C.C.S.M., c. R30. Upon the default of Abacus, there were a number of options open to the Bank of Montreal. It could, pursuant to the Real Property Act, itself have entered into possession of the building and taken the rents and profits, or it could have commenced mortgage sale proceedings. It could, pursuant to its debenture, have appointed a receiver on its own initiative. Finally, it could, by virtue of its position as a debenture holder or third mortgagee, and pursuant to the powers vested in the courts, have applied for the appointment of a receiver. In accordance with the common practice in these situations, it exercised the last-mentioned option. The respondent was named as receiver-manager by the court of all undertakings, properties and assets of Abacus (including the Bestlands Building) with authority to enter into possession of the lands of Abacus.

20 The applicant also had, at all times since the default of Abacus, the right to go into possession to recover rents, the right to institute mortgage sale and foreclosure proceedings and the right to apply for the appointment of a receiver. It elected to proceed by way of mortgage sale under the Real Property Act, and it is now in a position to foreclose if it chooses.

21 It is interesting to note that the National Bank, although commencing mortgage sale proceedings, also elected to apply for the appointment of a receiver on its own behalf. Pursuant to the order then granted by Solomon J., Robbins was named to replace the respondent as receiver of the Bestlands Building and other Manitoba properties. The new receiver has been collecting rents and paying the net cash balance to the National Bank ever since.

22 Counsel for the applicant does not question the National Bank's right to receive rents since it was granted its order on 21st November 1979. He argues, however, that until then the respondent should have paid rents firstly to mortgagees with priority over the Bank of Montreal.

23 In his submission, counsel referred extensively to Falconbridge on Mortgages, 4th ed., and Kerr on Receivers, 14th ed., and emphasized the differences between mortgagees in possession on the one hand, and court-appointed receivers on the other. He particularly stressed the differences in rights and duties.

24 A study of this subject is intriguing. It leads one back to the days before the enactment of the Judicature Act in England and equivalent statutes in Canada, and prior to the introduction of our systems for registering mortgages under the Real Property Act. The study is, however, one which begs the question now before this court.

25 The fact is that the respondent is a court-appointed receiver named at the instance of a debenture holder and third mortgagee. The rights and duties of such a receiver were considered in the late 19th and early 20th centuries and have not, at least in Canada, been altered by judicial decision or statute. The receiver must answer and account to the court. It must manage prudently and cannot, through failure to pay taxes or insurance premiums or through disposition or waste, imperil the property and thereby the security of prior encumbrances.

26 None of this is in dispute. What is at issue is the disposition of the net rents or profits remaining after these obligations have been discharged.

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 the court to discharge the original receiver and to have his own receiver appointed: Falconbridge on Mortgages, pp. 754-55.

28 *Preston v. Tunbridge Wells Opera House Ltd.*, [1903] 2 Ch. 323, and *Re Metro. Amalgam. Estates Ltd.; Fairweather v. Metro. Amalgam. Estates Ltd.*, [1912] 2 Ch. 497, are two of the authorities for this proposition. In the latter case, Swinfen Eady J. said at p. 501:

> It is well settled that until a mortgagee takes possession by himself or a receiver the mortgagor is in undisputed possession of the property and the rents. If a puisne incumbrancer enters into possession or receipt of the rents, the mortgagor's possession is displaced and the puisne incumbrancer can receive the rents without accounting to any prior incumbrancer until that prior incumbrancer intervenes. When he intervenes he displaces the puisne incumbrancer, but until that intervention the puisne incumbrancer is entitled to remain in possession of the rents. This law is clear and undisputed.
>
> In the present case the second incumbrancer Fairweather obtained the appointment of a receiver in the debenture-holder's action. The first mortgagees were not parties to the action, and the receiver Whitehill was not appointed on their behalf. He was merely appointed in the debenture-holder's action.

29 And at p. 502 he said:

> It is clear, however, that, notwithstanding the order appointing Whitehill, the first mortgagees were entitled to come in and displace him. It is true they could not do this vi et armis or without coming to the Court. But they had only to signify their desire of obtaining possession by an application to the Court, and this application they could make by serving a notice of motion on which an order for possession would be made. In the present case the notice of motion was served on February 27 and the order for possession was made on March 1, and in my opinion the first mortgagees are entitled to the rents as from February 27.

30 The contention that these principles work a hardship or unfairness in circumstances such as those before me was considered at length by Stirling J. in *Re Hoare; Hoare v. Owen*, [1892] 3 Ch. 94. He reached the same conclusion and in the course of his comments said at p. 100:

> If the estate were not in the possession of the Court, one incumbrancer might claim his interest and insist on being regularly paid. Another might suffer his to run in arrear. The estate would be discharged of the one, and remain burdened with the other. Why should it be otherwise when the estate is in the possession of the Court?

31 In the written reply submitted by counsel for the applicant, he argued that:

> In situations involving equitable mortgages such as in *Metro. Amalgam. Estates* case, cited by the Respondent, because the equitable mortgagee does not have a legal estate in the land, he is not entitled to bring an action for possession against the mortgagor in occupation of the mortgaged lands or, apart from express contract between the mortgagor and the equitable mortgagee, the required payment of rent by tenants in occupation.

32 I think counsel is wrong in the suggestion that the *Metro. Amalgam. Estates* case and the others like it are confined in their application to situations involving equitable mortgages. A reading of the court decisions and the comments in the textbooks leads me to the conclusion that the same principles apply whenever a receiver has been appointed to receive rents, on the application of a subsequent mortgagee.

33 Applying the reasoning of the cases to which I have referred, I find that the applicant here, as second mortgagee, has not suffered any impairment of its rights. At any time, from the date of default under its mortgage until the National Bank intervened on 21st November 1979, the applicant could have taken steps to receive rent from the Bestlands Building directly or through a receiver. Had it done so, it would have displaced the respondent. Having failed to take any such action, it cannot now be heard to complain. The obligations of the respondent to account and to recognize the security of the applicant cannot be curtailed. However, the applicant has no prior right to have the net rents received by the respondent between 17th May 1979 and 21st November 1979 paid to it. Its application, therefore, is dismissed.

34 Costs may be spoken to if not agreed.

*Application dismissed.*

End of Document



 

# TAB 2

1975 CarswellOnt 123
Ontario Court of Appeal

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.

1975 CarswellOnt 123, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 9 O.R. (2d) 84

# Robert F. Kowal Investments Limited and Randy Construction Company Limited v. Deeder Electric Limited

Jessup, Lacourcière and Houlden JJ.A.

Judgment: April 23, 1975

Counsel: *H. L. Morphy* and *S. R. Block*, for appellant Monte Denaburg.
*J. G. Reid, Q.C.*, for respondents.
*L. Klug*, for respondent receiver.

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees
**Headnote**
Receivers --- Remuneration of receiver — Remuneration — Priority of fees
Receivers — By court appointment — Winding-up of partnership — Fees and disbursements of receiver — Priorities.
The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. *Boehm v. Goodall*, [1911] 1 Ch. 155 applied. 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. 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. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: 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. In these circumstances the order permitting the receiver to borrow would ordinarily provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.
The second exception is this: 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. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact, that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured

creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, supra, applied, and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding & Engineering Co. Ltd.*, [1912] W.N. 66; *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) (Man. C.A.) applied.

The third exception is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L.D. 12 Eq. 126; *Re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875), 3 Ch. D. 411 at 427; Clark on Receivers, vol. 2, s. 640, p. 1078 applied. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a mortgagee of sums to which he is legally entitled under his charge falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the receiver would be entitled only to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

Appeal from the judgment of Holland J., 13th December 1974.

**The judgment of the Court was delivered by *Houlden J.A.*:**

1 This is an appeal from an order of Holland J. dated 13th December 1974, which declared that Jerry Friedman was entitled, on his discharge as receiver, to priority for $24,043.26 over a land titles charge held by the appellant, the sum of $24,043.26 being the total of payments of principal and interest made by the receiver to the appellant on his charge during the period of the receivership.

2 On 30th November 1971 a charge under The Land Titles Act, R.S.O. 1970, c. 234, was given on the property municipally known as 2010 Jane St. in the Borough of North York. The charge was in the principal sum of $400,000. It was registered in the Office of Land Titles at Toronto on 1st December 1971, as instrument B-306317. By transfer of charge dated 31st December 1971, and registered in the Office of Land Titles at Toronto on 17th January 1972, as instrument B-310301, the charge was transferred to the appellant Monte Denaburg.

3 In February 1972 the premises at 2010 Jane St. were purchased by Robert F. Kowal Investments Limited, Randy Construction Company Limited and Deeder Electric Limited in partnership. On the property there was located a car wash. At the time of the purchase, the three limited companies entered into a partnership agreement with respect to the operation of the car wash.

4 In January 1974 serious differences arose between the partners concerning the management of the business. On 17th January 1974 the defendant Deeder Electric Limited gave notice to the plaintiffs of its desire to terminate the partnership. On 7th February 1974 the plaintiffs issued a writ against Deeder Electric Limited claiming, inter alia, the dissolution of the partnership, the appointment of a receiver and an accounting.

5 By a consent judgment dated 13th March 1974 Wright J. made an order dissolving the partnership and appointing Jerry Friedman as receiver of the partnership affairs. Prior to accepting the appointment, Friedman obtained from the plaintiffs an agreement to be responsible for his fees, costs, charges and expenses in acting as receiver insofar as he was unable to recover them from the assets of the partnership.

6 On 9th May 1974 Goodman J. made a consent order varying the judgment of 13th March 1974. Paragraph 13 of the order of 9th May 1974 provided:

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not

> to exceed prime plus 3 per cent, for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

7 Although para. 13 referred to the "receiver and manager", the original judgment and the amending order appointed Friedman as receiver only of the partnership assets. Pursuant to the authority given by para. 13, the receiver borrowed $25,000.

8 The appellant was not served with notice of any of the foregoing proceedings in the partnership action. However, there is no doubt that shortly after 13th March 1974 the appellant was aware of the appointment of the receiver. From March to September 1974 the appellant received payments on his charge from the receiver in the total amount of $24,043.26.

9 By notice of motion dated 18th October 1974 the receiver applied to the Court for permission to borrow a further $15,000 on the same terms as in para. 13 of the order of 9th May 1974, and for an order that the sum so borrowed and the $25,000 already borrowed should be a first charge on the whole of the undertaking, property and assets of the partnership in priority to the appellant's charge. The appellant was served with notice of this application. On 24th October 1974 Holland J. dismissed the application without written reasons.

10 By notice of motion dated 9th December 1974 the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made and obligations incurred by him. The appellant received notice of this application. On 13th December 1974 Holland J. made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

11 The mortgage payments made by the receiver to the appellant were proper payments for the receiver to have made. If they had not been made, the appellant would likely have taken steps to enforce his security and if this had occurred, the potential recovery of the partners and the unsecured creditors could have been seriously affected. The receiver was, therefore, clearly entitled to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make the payments on the appellant's charge. However, the issue that we are called on to decide is whether the receiver should receive priority over the secured claim of the appellant for the borrowed moneys.

12 The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. In *Boehm v. Goodall*, [1911] 1 Ch. 155, a receiver and manager of a partnership in carrying on a business made payments which the assets of the firm were insufficient to satisfy in full; he brought an application for an order that the partners should personally indemnify him for the balance owing to him. In dismissing the application, Warrington J. said (at p. 161):

> I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.

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. 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. 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. 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. 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.

14 There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: 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. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him.

15 The priority which is given to a receiver in this type of situation is illustrated by *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1. In that case a building company became involved in serious financial difficulties. Receivers and managers were appointed at the request of debenture holders of the company. The receivers and managers obtained permission to borrow £5,000 by way of a first charge in priority to the security of the debenture holders. Certain proceedings were then taken by unsecured creditors as a result of which an agreement was made whereby unsecured creditors agreed to advance two-thirds and the plaintiff Strapp, who was a debenture holder, agreed to advance one-third of the moneys that the receivers and managers wished to borrow. In due course, the receivers and managers borrowed £1,750 from Strapp and £2,500 from the unsecured creditors. The receivership worked out badly, and in completing certain contracts, the receivers and managers used up all the moneys they had borrowed and, in addition, incurred substantial further indebtedness. The receivers and managers applied for an order that they were entitled to priority for the debts they had incurred not only over the security of the debenture holders, but also over the security held by Strapp and the unsecured creditors for the £4,250 that the receivers and managers had borrowed. This application was dismissed by Vaughan Williams J., but on appeal his decision was reversed and the receivers and managers were granted the priority they had requested. With reference to the position of the persons who had advanced the £4,250, A. L. Smith L.J. said (at p. 11):

> Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred [*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; and *Re Bushell; Ex parte Izard* (1883), 23 Ch. D. 75], applies, and consequently they [the receivers and managers] are entitled to be paid their charges.

16 However, the exception to the general rule enunciated in *Strapp v. Bull*, supra, has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given no notice of the proceedings which led to the appointment of Jerry Friedman as receiver. It was not until after

the indebtedness was incurred that the receiver sought an order giving him priority over the appellant's charge. The first exception to the general rule has, therefore, no application to the facts of this case.

17 The second exception is this: 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. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, supra; and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order: *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding and Engineering Co. Ltd.*, [1912] W.N. 66.

18 The appointment of a receiver in these circumstances is illustrated by *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) 373 (Man. C.A.). In that case, a receiver was appointed of all the undertaking, property and assets of a building company which was in the course of construction of an apartment block. There was a first mortgage on the premises of $1,100,000. Unfortunately, the sale of the building by the receiver did not realize sufficient to pay the first mortgage in full. While admitting that certain disbursements of the receiver were in order and entitled to be paid in priority to its mortgage, the first mortgagee claimed that the balance of the disbursements and the fees of the receiver should not be given priority over the mortgage.

19 Although the judgment makes no mention of whether or not the first mortgagee was served with the motion to appoint the receiver, it would seem that service must have been made on the mortgagee, since Dickson J.A. (as he then was), who delivered the judgment of the Manitoba Court of Appeal, pointed out that the first mortgagee did not appeal the order appointing the receiver. The report does not indicate either whether the secured creditor consented to or approved of the appointment of the receiver. The Court of Appeal for Manitoba held that, the appointment having been made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property, the receiver should be given priority for all his fees and disbursements over the secured creditor. Dickson J.A. said (at pp. 375-76):

> 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?

20 The second exception to the general rule likewise has no application to the facts of this case. Paragraph 13 of the order of Goodman J. of 9th May 1974, quoted supra, created a charge on the whole of the undertaking, property and assets of the partnership. This could have referred only to the equity that the partnership had in the undertaking, property and assets. Prior to the appointment of the receiver, the partners had, of course, no power to create a security having priority to the registered charge of the appellant. Although the court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly notice would have to be given to the appellant of such an application and likely the appellant would have to be made a party to the proceedings: *Allan v. Man. and North Western Ry.* (1894), 10 Man. R. 143.

21 The third exception which should be noted is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision

*Re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875), 3 Ch. D. 411, James L.J. in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.

22 In Clark on Receivers, vol. 2, s. 640, p. 1078, the law on the point is stated in this way:

> By the great weight of authority the claims against, and the indebtedness incurred by a receiver as a result of his administering the affairs, and even conducting the business of an insolvent concern of a private nature, except where absolutely essential to the preservation of its property, cannot be given priority over the claims of mortgagees or lienholders to the corpus of the property in the absence of consent or estoppel affecting said lienees.
>
> However, preservation costs may be absolutely necessary and be allowed against the lienholders. Preservation of the property from destruction, waste or loss, with or without the mortgagee's consent may include putting a person in charge of the property, as a watchman or otherwise, paying necessary repairs on the property and taxes which would prevent a forfeiture, and necessary insurance.

23 Counsel for the respondents and for the receiver argued strenuously that the moneys paid by the receiver to the appellant were necessary costs of preservation of the property and hence should be given priority over the appellant's charge. However, in my opinion, the payments cannot be regarded as a necessary cost of preserving the property. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. The payments in the present case were made primarily for the benefit of the partners, and incidentally for the benefit of the unsecured creditors, but not for the benefit of the appellant. It is true that the appellant received payments on his charge, but the payments were made not to benefit the appellant; rather, they were made to prevent him from taking action to enforce his security.

24 The payments mentioned in the *Regent's Canal* case are the type of payments that in my opinion fall within the scope of payments necessary for the preservation of property for the benefit of all interested parties. If, for example, the wind had blown off the roof of the car wash so that the premises were exposed to the elements, the repair of the roof by the receiver to prevent damage to the interior of the premises would have been for the benefit of all parties; and the receiver would have been entitled to priority over the appellant's charge for moneys expended for this purpose. Again, if the receiver had been obligated to pay taxes to prevent a tax seizure, that would have been for the benefit of all parties, including the appellant. But a payment to a mortgagee of sums to which he was legally entitled under his charge, in my judgment, falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. If the order under appeal is allowed to stand, the appellant will receive little or no benefit from the payments that were made, since the receiver will have priority over his charge for those payments. I do not think, therefore, that the third exception to the general rule has any application to the facts of this case.

25 To sum up, I can see no basis for granting the receiver priority over the appellant's charge for the sum of $24,043.26 paid by the receiver to the appellant.

26 The appeal should be allowed with costs, and the order of Holland J. of 13th December 1974 should be varied by striking out para. 2 thereof.

# TAB 3

1992 CarswellAlta 287
Alberta Court of Queen's Bench

Royal Bank v. Vulcan Machinery & Equipment Ltd.

1992 CarswellAlta 287, [1992] 6 W.W.R. 307, [1992] A.W.L.D. 673, [1992] A.J. No. 1216, 13 C.B.R. (3d) 69, 3 Alta. L.R. (3d) 358

# ROYAL BANK OF CANADA v. VULCAN MACHINERY & EQUIPMENT LTD.

Cairns J.

Judgment: June 5, 1992
Docket: Doc. Calgary 9001-14546

Counsel: *J. Ircandia* and *D. Kohlenberg*, for Royal Bank of Canada.
*J.T. McCarthy, Q.C.*, and *T. Czechowskyj*, for Mitsui and Mitsubishi.
*L. Robinson*, for Price Waterhouse (**receiver**-manager of Vulcan).

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Debtors and creditors
VII **Receivers**
VII.8 Remuneration of **receiver**
VII.8.b Remuneration
VII.8.b.ii **Priority** of **fees**

**Headnote**

**Receivers** --- Remuneration of **receiver** — Remuneration — **Priority** of **fees**

Secured creditors — Realization of security — Secured creditors not being bound by terms of ex parte court order giving **receiver** first charge over all assets of debtor company including their secured assets — Judicature Act, R.S.A. 1980, c. J-1.

**Receivers** — Costs and remuneration — Effect on secured assets of secured creditors — Secured creditors not being bound by terms of ex parte court order giving **receiver** first charge over all assets of debtor company including their secured assets — Judicature Act, R.S.A. 1980, c. J-1.

The plaintiff bank was the principal banker and financier of the debtor company. When the debtor got into financial trouble, the bank tried to resolve the problems but eventually decided to apply for a court-appointed **receiver**. Prior to applying, the bank did not notify any of the debtor's three principal secured creditors. The bank obtained an ex parte order which included a clause that gave the **receiver** a first charge over all of the debtor company's assets including the secured assets of the secured creditors (the "priority clause"). Two of the three secured creditors applied to vary the order to exclude them from the effect of the priority clause.

**Held:**

The application to vary was allowed.

While there was a need for the court-appointed **receiver**, there was no such emergent, unusual, or extraordinary need for the appointment of a **receiver**-manager with a priority clause which had the effect of seriously prejudicing the rights of secured creditors to the point of trammelling their rights.

**Table of Authorities**

**Cases considered:**

*Bank of Montreal v. Shaw Ranches Ltd.* (1984), 51 B.C.L.R. 235, 31 R.P.R. 35, 51 C.B.R. (N.S.) 292 (S.C.) — *considered*

*Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (1991), 5 C.P.C. (3d) 299, (sub nom. *Re Wm. C. Rieger Co. (Receivership)*) 126 A.R. 69 (Q.B.) — *considered*
*Credit foncier franco-canadien v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734 (Alta. S.C.) [affirmed (1966), 56 W.W.R. 623n (Alta. C.A.)] — *referred to*
*Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984), 55 B.C.L.R. 38, 52 C.B.R. (N.S.) 129 (C.A.) — *considered*
*Federal Business Development Bank v. Persic* (1981), 32 B.C.L.R. 75 (C.A.)*referred to Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (C.A.), reversing (1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.) — *considered*
*Oberman v. Mannahugh Hotels Ltd.*, [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.)*considered 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 (C.A.)*considered Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.)*considered Stenner Financial Services Ltd., Re* (1988), 68 C.B.R. (N.S.) 298 (B.C.S.C.) — *considered*

**Statutes considered:**

Business Corporations Act, S.A. 1981, c. B-15 —

s. 95

Judicature Act, R.S.A. 1980, c. J-1 —

s. 13

Securities Act, S.B.C. 1985, c. 83.

**Rules considered:**

Alberta Rules of Court —

R. 387(2)

Application by secured creditors to vary order giving **receiver**-manager first charge over all of debtor's assets including secured assets of secured creditors.

***Cairns J.* (orally):**

1 These are reasons for judgment in the action *Royal Bank and Mitsubishi and Mitsui*. These matters came before the court by way of special chambers hearings on the motions of 1) Mitsubishi Canada Ltd., hereinafter referred to as "Mitsubishi," filed January 10, 1991 and originally returnable February 4, 1991; and 2) Mitsui Machinery Distribution Ltd., hereinafter referred to as "Mitsui," motion filed December 20, 1991 and originally returnable February 20, 1992, wherein the applicants Mitsubishi and Mitsui seek to vary the order of the Honourable Mr. Justice Medhurst dated October 9, 1990, hereinafter referred to as the "Medhurst order" such that neither Mitsubishi nor Mitsui is subject to the first charge, stipulated therein, of the **receiver**-manager for its costs and expenses. In other words, the applicants seek, pursuant to s. 95 of the Alberta *Business Corporations Act* [S.A. 1981, c. B-15] and pursuant to R. 387(2) and pursuant to para. 24 of the order — an order excluding them from the effect of para. 14 of the Medhurst order, which stated:

> 14. Any expenditure which shall be properly made or incurred by the **Receiver** shall be allowed to it in passing its accounts and, together with its remuneration, shall form a charge on the undertaking, property and assets of the Defendant in priority to all security on the undertaking, property and assets of the Defendant presently held by the Plaintiff, or any other party, and all encumbrances subsequent thereto.

and further, for an order excluding them at common law.

2 The issues that I must address are therefore these:

3 1) Should Mitsubishi or Mitsui be bound by the terms of the ex parte Medhurst order wherein the **receiver**-manager of Vulcan Machinery & Equipment Ltd., hereinafter referred to as "Vulcan Machinery," was given a first charge over all the assets of Vulcan Machinery including the secured assets of Mitsubishi and Mitsui? and

4 2) If the answer to issue 1 is in the negative, is there any other reason at law whereby either Mitsubishi or Mitsui or both ought to be liable for all or a portion of the **receiver**-manager's costs, fees, charges and expenditures in priority to the security held by Mitsubishi and Mitsui? and

5 3) If either Mitsubishi or Mitsui or both are liable to the priority of the **receiver**-manager's fees, expenses, charges or expenditures, on what basis are the fees to be allocated to either Mitsubishi or Mitsui or both?

6 The facts of this lawsuit are complex, convoluted and multi-faceted, however, relatively simple as they relate to the granting of the Medhurst order and events subsequent thereto. They may be simply stated as follows: Vulcan Machinery was in the business of sales, rentals and servicing of heavy equipment used in the construction and forestry industries, it having been incorporated in Ontario, and subsequently, registered extra-provincially in Alberta, Saskatchewan, Manitoba and British Columbia, in which provinces it conducted substantial business, having 13 offices and in the order of 170 employees. In other words, it was a substantial ongoing enterprise.

7 The principal banker and financier of Vulcan Machinery was the plaintiff in the within action, Royal Bank of Canada, who, at the time of the Medhurst order, was owed on outstanding loans nearly $14 million by Vulcan and in addition, in 1988, a deferred principal sum of $10 million. The Royal had been Vulcan's banker since 1982 and between then and October 1990, the date of the granting of the Medhurst order, had advanced substantial loans, **received** substantial payments, taken various and sundry forms of security to include, inter alia, fixed and floating charge debentures, pledge agreements, assignments of book debts, assignments of insurance, land mortgages, undertakings, guarantees, hypothecations and the like.

8 The debenture was in the amount of $50 million and provided, inter alia, 1) that the security was enforceable if the debtor, Vulcan, defaulted and, 2) that the bank, upon the security becoming enforceable or crystallizing, could appoint a **receiver** or a **receiver**-manager of the undertaking property and assets charged.

9 Over the course of time and having particular reference to the financial difficulties encountered by the debtor from time to time, the bank and Vulcan entered into loan restructuring agreements in 1986, 1987 and 1988. The object of those exercises was to permit the debtor an opportunity to resolve its financial difficulties. It is also worthy of note that these various security documents between Vulcan and Royal permitted, expressly, Vulcan to grant security and encumbrances to its suppliers to include Komdresco, Mitsubishi and Mitsui, all in the ordinary course of business.

10 Despite efforts by the bank and Vulcan to extricate itself from financial woes, Vulcan was not successful, as a result of which, by letter dated February 14, 1990, the bank provided formal notice to Vulcan of default pursuant to the amended restructuring agreement and gave the debtor 30 days to rectify and remedy the default. The bank did not immediately commence action, or privately appoint by instrument a **receiver** or **receiver**-manager, but rather continued to work with the defaulting debtor in an attempt to resolve the financial difficulties or to effect a sale as a going concern of Vulcan Machinery. In fact, in May 1990, some months after the default, Vulcan retained the accounting firm of Ernst and Young with a view to appraisal and possible sale.

11 By August 1990 the principals of Vulcan, and the Vulcan Group as guarantors, conceded that they were unable to meet the bank's demands and, further, conceded that if the sale were not consummated by mid-September, the debtor would consent to the appointment by the bank of a **receiver**-manager.

12 The September 17, 1990 deadline was extended to September 24, again to October 1 and again to October 8, 1990 to facilitate a resolve of financial difficulties or a sale, all without success. The sale that was anticipated was to a related company "Vulmac," the shares of which were owned principally by Mr. Ken Knight, the principal of Vulcan

Machinery and also the principal of another company of the Vulcan Group, known as Vulcan Machinery Sales Ltd., and after offers and counteroffers were exchanged, up to and through October 3 and 4, no sale was consummated by October 8, 1990 or at all.

13 On October 5, 1990, a Friday prior to the 1990 Thanksgiving weekend (the Monday, October 8 being a holiday), the two major principals of Vulcan Machinery, Mr. Knight, the president, and Mr. Green, the vice-president and chief financial officer, both resigned their positions with notice to the debtor company with a copy to the bank dated October 5, 1990.

14 It is obvious from the evidence that the resignations shocked representatives of the bank, Vulcan and Price Waterhouse and motivated the order. In addition, Knight wrote also on October 5, 1990 to Vulcan's suppliers, inter alia, Mitsubishi and Mitsui, advising of the facts that 1) no sale of Vulcan had been negotiated, and 2) that he had resigned.

15 In addition, other events occurred on October 5 which are worthy of note. They are: Mr. Steranka of the Royal Bank had several conversations this day with various people to include: a) Mr. Chuck Gerwing, Calgary counsel of Vulcan; b) Mr. Whent, general counsel of Vulcan in Thunder Bay, who first informed him of the resignations of Knight and Green; c) with Mr. Neil McManus, general counsel of one of the secured creditors, Komdresco.

16 In this conversation Mr. Steranka made no mention whatsoever of the already formulated bank plans of obtaining a court-appointed **receiver** with its subject priority clause, and only stated to Mr. McManus, "The Bank would be doing what we consider necessary," reference transcript 8, p. 150, line 8. In fact, McManus specifically mentioned receivership to Mr. Steranka to which Mr. Steranka replied, "I will check with my superiors and we will do whatever is necessary." His explanation for this omission was twofold: 1) he felt the **receiver** would so notify Mr. McManus after the granting of the order and the creditor would then be able to exercise rights of appeal or variation, and 2) "we were in an emergency and it was not a priority to contact McManus." All this despite his admission on cross-examination that he had all the documents to be presented to the court, prior to October 5, 1990. In fact, by September 19, 1990 he had a draft statement of claim, order and application which were reviewed at a meeting of bank officials and solicitors September 20, 1990 and was aware of the priority provisions as to costs and that the pro rata distribution of costs was, according to him, an advantage of going the "court-appointed route."

17 In other words, as he described on cross-examination, reference vol. 19, p. 303, lines 5 and 6: "We had all our ducks in order prior to the receivership, prior to October the 5th." In addition, Mr. Steranka had conversations this day with Mr. Bourbonnais of the Royal Bank Special Loans Division to discuss "modus operandi" and a concern over the "rudderless ship" (being Vulcan) and it was determined that the only course was a court-appointed **receiver**. Further on this day Mr. Steranka had conversations with Mr. McPhedran of Price Waterhouse in conjunction with his retainer as **receiver**-manager and in conjunction with securing the properties, principally in Calgary and Thunder Bay, over the weekend. In fact, the evidence indicated that numerous "drive-bys" were conducted over the weekend October 5-8, 1990 by personnel of Price Waterhouse in Calgary and Thunder Bay and by representatives of the Royal Bank in Calgary.

18 In addition, the bank in response to these continuing financial difficulties and the resignations again demanded payment on its security, which demand, of course, was not satisfied, with the result that the bank deemed it expedient and necessary to apply for what was to become the Medhurst order, which application was made in the early afternoon hours of Tuesday, October 9, 1990.

19 There was, however, an incident of note which occurred at or about 9:00 a.m. October 9, 1990 prior to the application, and that related to a conversation between Mr. Steranka of the bank and Mr. McPhedran of Price Waterhouse, wherein it was conceded by each that "things were quiet at each of Thunder Bay and Calgary" and further that they had each driven by the Calgary property of Vulcan and saw "no activity — everything was quiet." The evidence further indicated that at all branches of Vulcan across Canada there were various branch managers who were responsible people and Mr. Steranka testified on cross-examination that he had no reason to be suspicious of these branch managers, from a theft or misappropriation standpoint, in the face of the resignations of Knight and Green.

20 It is apparent from the evidence that the bank had taken a considerable number of steps in anticipation of an application of a court-appointed **receiver** well in advance of October 5, 1990 to include:

21 1) A meeting in August 1990 between bank officials and Mr. McPhedran of Price Waterhouse Limited respecting its options and possible receivership; and

22 2) A meeting in mid-September between bank officials and Mr. McPhedran wherein it was determined that, in the absence of an acceptable offer, the bank would apply for court-appointed **receiver**. Mr. McPhedran stated in cross-examination that these preparatory meetings merely put Price Waterhouse on stand-by and were standard, normal practice.

23 3) The bank's solicitors in mid-September prepared draft documents including draft statement of claim and draft application, affidavit and order; and

24 4) The bank solicitors obtained, in late September 1990, consent of Price Waterhouse to act as **receiver**-manager if appointed by the court on a subsequent application; and

25 5) The bank's solicitors arranged for agent solicitors in British Columbia, Saskatchewan, Manitoba and Ontario.

26 One step, *however*, which neither the bank nor its solicitors, nor the anticipated **receiver**-manager, Price Waterhouse, took was to notify any of the three principal secured creditors, Komdresco, Mitsubishi or Mitsui, of its plans to place Vulcan in receivership by way of court-appointed **receiver**-manager despite its planning and deliberation prior to and up to October 5, 1990 nor, and this is most germane to my deliberations, did it give any form of notice whatsoever to those secured creditors prior to the granting of the Medhurst order, October 9, 1990, which order, by at least two paragraphs thereof, specifically paras. 14 and 29, had the capability of seriously prejudicing the secured creditors and their security. This order was granted pursuant to s. 13 of the *Judicature Act* [R.S.A. 1980, c. J-1] on an ex parte basis.

27 In addition, I am satisfied on the evidence that the bank knew of these three secured creditors, Komdresco, Mitsubishi and Mitsui, prior to the date of the application such that some form of notice, formal or informal, could have been given to them. Indeed at the hearing, Mr. Ircandia on behalf of the Royal Bank conceded that the Royal knew of Mitsubishi and Mitsui as suppliers, although it did not have a contact person for them, such as was the case with Komdresco and its contact, Mr. McManus. In fact, a review of the affidavit in support of the ex parte application, i.e., that of Mr. Peter Steranka sworn October 9, 1990, alludes, although not specifically to these secured creditors by name, to "numerous classes of claimants including trade creditors."

28 Subsequent to the granting of the Medhurst order, the same was formally served upon the secured creditors, Mitsubishi and Mitsui on or about October 19, 1990 at which time the provisions as to priority for the **receiver's** administration expenses (para. 14) was specifically brought to the attention of Mitsubishi and Mitsui.

29 In addition, it would appear that the three secured creditors knew of the ex parte Medhurst order and the appointment of Price Waterhouse sometime earlier than October 19, 1990 and within a few days of the order having been granted. However, despite that, one thing is clear and uncontradicted; it was granted ex parte Mitsui and Mitsubishi, and upon no notice of any kind or form to them. Mr. Steranka admitted on cross-examination that neither he nor anyone else at the Royal Bank canvassed the secured creditors prior to the appointment nor did he or anyone else at the bank solicit their views or preference in relation to proceeding with a court-appointed **receiver**.

30 The security claimed by the two applicant secured creditors, Mitsubishi and Mitsui, is as follows:

31 1) as to *Mitsubishi*

32 a) it held individual conditional sales agreements on specific units of heavy equipment supplied to Vulcan Machinery; and

33 b) in addition, there was a priority agreement between Mitsubishi and the Royal Bank embodied in a subordination letter August 4, 1988 from Royal Bank to Mitsubishi; and

34 c) in addition, as at September 27, 1990, prior to the Medhurst order, and resulting from negotiations between Mitsubishi and Vulcan Machinery, Mitsubishi had a voluntary surrender agreement from Vulcan as to specific machinery of Mitsubishi all as set forth in the voluntary surrender and Sched. A attached thereto, all attached as Ex. B to the Hasagawa affidavit sworn January 7, 1991.

35 Following advice of the Medhurst order, Mitsubishi demanded its equipment by letter of October 26, 1990 (that is to say, within one week of formal notice), and again by solicitors' letters December 11 and 13, 1990, at which time Mitsubishi also advised as to an application to vary the Medhurst order, the subject application now before me. By that time, specifically December 12, the **receiver**-manager, Price Waterhouse, had reported to the creditors, inter alia, that the **receiver**-manager was aware that Mitsubishi wished to realize on its security outside the administration of the receiverships by taking possession of its security and further that there was no apparent residual equity in the assets, the subject of the Mitsubishi security.

36 2) The security as it related to Mitsui was founded on its claiming an interest in 13 units of equipment on the basis of a verbal floor plan arrangement, and, in addition, possession having been garnered by it on or about September 21, 1990 prior to the **receiving** order of Mr. Justice Medhurst.

**The law**

37 I have been referred to several authorities by counsel herein for which I am grateful and I feel it appropriate to review and comment on these authorities.

38 1. *Oberman v. Mannahugh Hotels Ltd.*, [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.).

39 This case involved an application by a **receiver** to determine priorities of claims against proceeds realized from the sale of property. The **receiver**-manager had been appointed on application of a second **mortgagee** by the court on the consent of the first **mortgagee**. The property was ultimately sold, also by consent, and a dispute arose as to whether or not the first **mortgagee** ought to take a secondary position to the **receiver's** fees. The position of the first **mortgagee** was that the **receiver** must look to the equity of the defendant.

40 Mr. Justice Wilson, after discussing the facts and the positions of the parties, stated at p. 187 [C.B.R.]:

> And certainly, where the **receiver** acts under an appointment by the court, he may not (in the absence of an agreement for indemnity) look to the party at whose instance that order was made, even where the appointment, as here, was made with the consent of all the interested parties: *Boehm*, supra and *Johnston v. Courtney*, [1920] 2 W.W.R. 459 (B.C.C.A.). The reason for this is that a **receiver** so appointed is not the agent of any party, including the one whose initial request led to his appointment, but rather he is an officer of the court, and in the discharge of the responsibilities entailed by such appointment he is prima facie to be looked upon as the arm of the court in that behalf: see also *Braid Bldrs. Supply & Fuel Ltd. v. Genevieve Mtge. Corpn.* (1972), 17 C.B.R. (N.S.) 305 at 305, 29 D.L.R. (3d) 373 (Man. C.A.), per Dickson J.A. (as he then was):
>
> > In the performance of his duties the **receiver** is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the **receiver's** remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B.D. 67 (D.C.).
>
> And he continued at pp. 307-308:

> The argument is that a **receiver** can only **receive** his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 (C.A.); *Re Glasdir Copper Mines Ltd.; English Electro-Metallurgical Co. Ltd. v. Glasdir Copper Mines Ltd.*, [1906] 1 Ch. 365 (C.A.). It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a **receiver**; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. 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 the 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.

Further at p. 189 Wilson J. stated:

> And see *Credit Foncier Franco-Can. v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734, affirmed 56 W.W.R. 623n (Alta. C.A.), where Kirby J. at p. 743 accepted the opinion of Smith L.J. in *Strapp v. Bull, Sons & Co.*, supra, at p. 9, that:
>
> > Now, it seems to me that so far as the general law is applicable to the position of the **receivers** and managers, it is not in dispute. It is laid down in *Batten v. Wedgwood Coal & Iron Co.* (1884), 28 Ch. D. 317, and in *Re Bushell; Ex parte Izard* (1883), 23 Ch. D. 75 (C.A.), by Sir George Jessel; and nobody on the one side or the other quarrels with the law which was there enunciated, that the **receivers** and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed **receivers** and managers, and they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property.

And further at p. 189 Wilson J. stated:

> The situation may be otherwise where the **receiver** was appointed by the creditor himself pursuant to the terms of the debenture or other security signed by the debtor ...

And further at p. 190 Wilson J. stated:

> Prima facie, then, the **receiver** is entitled to enter upon the discharge of his responsibilities secure in the knowledge that his costs and disbursements, including fees paid to solicitors necessarily engaged by the **receiver** (*Re Sil-Van Consol. Mining etc. Co.; Can. Trust Co. v. Sil-Van Consol. Mining etc. Co.* (1957), 23 W.W.R. 142 (B.C.)) will rank above all claims except those set apart by the order appointing him or otherwise entitled to rank ahead of the **receiver** himself ...

41 2. *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (C.A.).

42 In this case a third **mortgagee** brought foreclosure proceedings and applied for and obtained a **receiving** order with no notice and thus, ex parte, the Federal Business Development Bank who held both the first and second mortgage. The **receiver** expended moneys in the renovation of the hotel. The property sold, and an application was brought to fix priorities. It was held at trial [(1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.)] that the **receiver's fees** took **priority**. However, on appeal, it was reversed and no priority for the **receiver's** fees was granted.

43 The headnote, which accurately reflected the decision, read in part [D.L.R.]:

Since the FBD Bank was not a party to the third mortgage foreclosure proceedings and did not **receive** notice of the application for the appointment of the **receiver** and, therefore, did not consent to the expenditure by the **receiver**, the **receiver** could not be given priority over it, unless the expenses incurred by the **receiver** were necessary for the preservation or improvement of the property.

44 In this case Hinkson J.A speaking for the court stated at p.632 and following:

It is fundamental that a person is not to be bound by a court order of which he has no notice. In the Lochson foreclosure proceedings the Federal Business Development Bank was not named as a respondent nor, as I have indicated, did it have notice of the application. That then is the starting point in these proceedings, namely, that the Federal Business Development Bank cannot be bound by the order made by the Honourable Judge Stewart.

And further at p. 632 Hinkson J.A. stated:

As the **receiver** and the Canadian Imperial Bank of Commerce are unable to rely upon the order made by Judge Stewart on August 10, 1978, it has been necessary to fall back on the position at common law in order to sustain the priority granted by Judge Tyrwhitt-Drake.

And further at p. 633 Hinkson J.A. stated:

In my opinion, the issue is to be resolved on the basis of the decision of the Ontario Court of Appeal in *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84, 21 [C.B.R. (N.S.)] 201. In that case a secured creditor **received** no notice of the application to appoint a **receiver** and the issue arose as to whether or not and upon what basis the secured creditor could become bound by the acts of the **receiver** so that the **receiver** would be entitled to priority over the secured creditor. Mr. Justice Houlden, in delivering the judgment of the court, made reference to *Clark on Receivers*, 3rd ed., vol. 1, s. 22, p. 25, and quoted from that text at p. 496 D.L.R., p. 88 O.R. of the judgment, as follows:

> 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 lienholder, 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 the creditors in general. 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. 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.

I understand that statement to express the position at law.

Then, Mr. Justice Houlden continued at p. 496 D.L.R., p. 88 O.R.:

> There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: 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. One would ordinarily expect that in these circumstances the order permitting the **receiver** to borrow would clearly provide that the security given by the **receiver** for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of his appointment, the **receiver** will have priority for charges and expenses properly incurred by him.

Pausing there for a moment, in my opinion the **receiver** and thus the Canadian Imperial Bank of Commerce do not fall within the first exception.

Then Mr. Justice Houlden continued to discuss a second exception, and he said this at p. 497 D.L.R., p. 89 O.R.:

> The second exception is this: 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.

Mr. Meyer, on behalf of the Canadian Imperial Bank of Commerce, sought to come within the second exception. But Mr. Justice Houlden, after stating that to be a second exception, said this at p. 499 D.L.R., p. 91 O.R., in discussing it:

> Although the Court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly, notice would have to be given to the appellant [I interpolate — the secured creditor] of such an application and likely the appellant would have to be made a party to the proceedings.

Now, on the facts of the present case, if that be the situation, then clearly the second exception has no application because no notice was given to the Federal Business Development Bank, nor was it made a party to the proceedings.

The third exception discussed by Mr. Justice Houlden is the situation where the **receiver** has expended money for necessary preservation or improvement of the property.

Further at p. 635, Mr. Justice Hinkson stated:

> An analysis of the three exceptions indicates that with regard to the first and second, the secured creditor must either apply for, consent to, or approve of, the appointment of a **receiver** or have notice under the second exception. The third exception, it seems to me, deals with a different type of situation, really one where there are circumstances which require the **receiver** to do something to preserve the property in an emergency situation where there is not time to come to the court beforehand and give notice to the creditors beforehand of what he intends to do, and thus obtain the approval of the court, and so he comes to the court after the event and in appropriate circumstances the court will approve the action of the **receiver** in those circumstances.
>
> In my opinion on the facts of the present case, the **receiver** does not come within the third exception.
>
> 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 mortgages [sic] or lienholders without the sanction of such **mortgagees** or lienholders. It seems to me that that is the principle that applies in these circumstances.

45 3. *Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.)

46 In this case the bank applied ex parte for the appointment of a **receiver**-manager respecting the defendant. There were statutory claimants, Workers' Compensation Board and Revenue Canada, who continued to press their claims after learning of the appointment. Costs were incurred by the **receiver**-manager and the issue was one of priority. The headnote in part read [C.B.R.]:

> As the **receiver**-manager proceeded to incur the expenses of preservation and realization with the knowledge that Revenue Canada and W.C.B. intended to press their claims, it must be taken to have assumed the risk that the court

might be powerless to ensure reimbursement even though it was acting on behalf of the court. Consequently, the **receiver**-manager could not have priority over W.C.B. or Revenue Canada.

47 In this case, Mr. Justice D.C. McDonald stated at pp. 230-231:

3. *The claim of the receiver-manager for fees and certain disbursements*

Coopers claims **priority** for its **fees**, and for certain costs of preservation and realization. I have earlier indicated that those fees and disbursements totalled $159,406.52. In addition, in order to finance the process of preservation and realization, Coopers made borrowings of approximately $105,000.

If Revenue Canada and the W.C.B. had been given notice of the application by the bank to a master of this court for the appointment of Coopers as **receiver**-manager, and had not opposed the appointment, Mr. Bondar might have succeeded in persuading me that by the application of one principle or another Revenue Canada and the W.C.B. should be precluded from asserting their statutory trust and charge respectively. I need not speculate as to what principle might properly be applied to achieve that result. The fact is that the bank made its application ex parte, without notice to Revenue Canada or the W.C.B. Since then, the bank and the **receiver** have been aware that neither Revenue Canada nor the W.C.B. intended to retreat from their respective statutory redoubts. Yet Coopers proceeded to incur the expenses of preservation and realization, and must be taken to have assumed the risk in doing so that, although it acted on behalf of the court, the court might be powerless to ensure that it would be reimbursed for its outlay or paid fees for its services.

Consequently, the claim of Coopers for priority over the claims of the W.C.B. and Revenue Canada fails.

48 4. *Bank of Montreal v. Shaw Ranches Ltd.* (1984), 51 B.C.L.R. 235, 31 R.P.R. 35, 51 C.B.R. (N.S.) 292 (S.C.).

49 The second **mortgagee** in an action applied, ex parte, for a **receiver**-manager on no notice or participation by the first **mortgagee** although the first **mortgagee** had supported an earlier application for a **receiver**-manager which had been denied. The **receiver**-manager claimed **priority** for **fees** over the first **mortgagee**. The court held that the **receiver**-manager was not entitled to a priority over the plaintiff as the plaintiff was not present or represented at the time of appointment and the **receiver**-manager had failed to discharge its onus upon it to prove acquiescence, consent or approval by the plaintiff to its appoint ment or subsequent actions.

50 The court in this case distinguished both *Oberman*, due to consent, and the decision of the British Columbia Court of Appeal in *Federal Business Development Bank v. Persic* (1981), 32 B.C.L.R. 75, where the court found acquiescence and therefore an exception to the *Kowal* decision.

51 5. *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 (C.A.).

52 I have quoted extensively from this case in my review of the *Lochson* case and thus I intend to refer again only to a portion of the headnote which accurately and succinctly sets forth the decision [C.B.R., pp. 201-202]:

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. Clark on **Receivers**, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: 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. [One would ordinarily expect that] in these circumstances the order permitting the **receiver** to borrow would [clearly] provide that the security given by the **receiver** for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the **receiver** will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.

> The second exception is this: 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. In such a case, also, one would expect that an order permitting borrowing by the **receiver** would make it clear before the fact, not after the fact [as was attempted in the present case], that the **receiver** could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.* ... and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order ...
>
> The third exception [which should be noted] is this: if the **receiver** has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors ... In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the **receiver** has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a **mortgagee** of sums to which he is legally entitled under his charge falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the **receiver** would be entitled only to priority over the [moneys] of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

53 6. *Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (November 6, 1991), Doc. Calgary 9101-13199 (Q.B.), [1982] A.W.L.D. 081, unreported decision of Mr. Justice Peter Power [now reported at 5 C.P.C. (3d) 299, (sub nom. *Re Wm. C. Rieger Co. (Receivership)*) 126 A.R. 69].

54 Similar to the instant case, this case involved an application by creditors to vary an ex parte order with respect to a priority clause which required creditors to pay a portion of the fees and expenses of a **receiver**-manager. The order appointing the **receiver**-manager had a similar provision to para. 14 of the Medhurst order which read, in part, in para. 22, as follows:

> The **receiver's** fees shall be paid from the assets of the estate of the Defendant, including the assets secured by parties other than the Plaintiff, on a basis proportionate to the amount of time spent by the **Receiver** in relation to the secured asset ...

In addition, the **receiver** was to maintain separate accounting records in order to ultimately attribute costs and expenses.

55 The debtor company, a substantial farm implement dealership, had experienced financial difficulties and had closed its doors ap proximately one week prior to the application for the order. The order was granted with the cooperation of the debtor company, however, on no notice to any of the creditors, other than Alberta Opportunity Co. ("A.O.C.") who had **received** notice, a draft of the order, but who did not appear on the application. It was the suggestion of counsel for the company that cl. 22 be inserted. It was also of record that none of the creditors, with the exception of A.O.C., were aware of the bank's proceedings or the application, August 15, 1991, for the ex parte order and, further, that A.O.C. did not, prior to it being granted, consent to or approve the order.

56 The day following the granting of the order, the same was forwarded to creditors together with a letter bringing attention to the priority paragraph.

57 Paragraph 23 of the order gave interested parties the right to apply to vary, and the motion was launched approximately seven weeks after granting of the order, and after the **receiver** had stepped in and incurred substantial expenses in protecting, reviewing and insuring assets, and maintaining staff.

58 Mr. Justice Power stated at p. 7 [p. 304 C.P.C.] and following of the unreported decision as follows:

> I recognize that when the court takes the step of appointing a **receiver** the obligation then is clear that the court must protect the **receiver** by way of ensuring that the **receiver** will be paid for all of its reasonable costs in undertaking that particular task. That principle is clearly set out in *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 (C.A.) by Smith L.J. where he says:
>
> > ... and nobody on the one side or the other quarrels with the law ... that the **receivers** and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed **receivers** and managers, and that they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property ...

Mr. Justice Power then referred to, firstly, the *Credit foncier franco-canadien v. Edmonton Airport Hotel Co.* case [(1966), 55 W.W.R. 734 (Alta. S.C.)] and secondly, the *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* case [(1984), 55 B.C.L.R. 38, 52 C.B.R. (N.S.) 129 (C.A.)] to the same effect that the court must protect the **receiver** court appointed.

59 And then at p. 8 [p. 305 C.P.C.], Justice Power continued:

> Reference is made to the decision of Houlden J.A. in *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 (C.A.), where Houlden J.A. stated that as a general rule the court should not subject the security of a prior secured creditor to liability for fees and disbursements incurred by a **receiver**; however, he listed the following three exceptions to the general rule:
>
> 1. If the **receiver** has been appointed at the request of or with the consent or approval of holders of security.
>
> 2. If the **receiver** has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors.
>
> 3. If the **receiver** has expended money for the necessary preservation or improvement of the property.
>
> Reference has been made to the decision of McDonald J., in *Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.), and in that particular case, the court held the appointment of the **receiver** had been ex parte and without notice to the interested creditors and that the **receiver** knew that the creditors would not consent to the extraordinary expenditures. Where the rights of the interested creditors are affected, the requirement of notice cannot be waived unless exceptional physical emergency dictates immediate action after the **receiver** is duly appointed.
>
> From the facts put before the court by counsel, it is clear that Rieger was in financial difficulty, that the doors of the farm implement operation were closed. That a receivership order could have been granted advising all creditors that the assets were to be protected by way of a **receiver** order being put in place. That on proper notice, the **receiver** would be seeking a specific order to protect him for fees and expenses. And that this application would be made a reasonable period of time after the receivership order was granted. In this case, that did not happen.

And further at p. 10 [pp.306-307 C.P.C.], Mr. Justice Power said:

> In any event, the creditors did not realize that the method of allocating costs and expenses by the **receiver** was going to affect them financially on a proportionate basis that most of the creditors found unacceptable. The court is in full agreement with the statement made by the British Columbia Court of Appeal in *Lochson Holdings v. Eaton Mechanical Inc.* [supra]. At p. 632, specifically, the court states:
>
> > It is fundamental that a person is not to be bound by a court order of which he has no notice.
>
> In this case, I am satisfied there was sufficient time to get prior court approval of the proposed extraordinary source of remuneration being sought by the **receiver**. I am satisfied that the cost allocation schedule and the formula in

para. 22 of the receivership order has the effect of depriving the secured creditors of a substantial portion of the benefit to which they are entitled.

Further at p. 12 of the unreported decision [p. 308 C.P.C.], Mr. Justice Power stated:

The exceptions that the court has to look at with respect to the appointment of the **receiver** include: (1) the **receiver** has been appointed at the request or with the consent or approval of the holders of security. I am satisfied from the material put before the court that the **receiver** was not appointed at the request or with the consent, approval, or acquiescence of any of the secured creditors with the exception of the fact that Alberta Opportunity Company was aware that the receivership order was going to be applied for but indicated it did not approve of the order.

Secondly, that the **receiver** has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors. In my opinion, the secured creditors had no need to have their goods and equipment protected as they were perfectly prepared to remove them from the premises of Rieger to a place of safekeeping the majority of which had their own distribution network and dealers throughout the province and could have disposed of this farm implement equipment and parts without the intervention of a **receiver**.

The third condition, the **receiver** has expended money for the necessary preservation or improvements of the property. In my view, the position of the secured creditors is that the preservation of their property by the **receiver** was not an activity which was initiated at the request of the secured creditors nor was it something that was done with the acquiescence of the secured creditors.

It is my opinion that there is no basis at law for enforcing the provisions of para. 22 of the receivership order as against the secured creditors. Facts of this case do not establish that there is any basis for an exception to the fundamental rule that a party not be bound by an order granted on an application in respect to which it had no notice. The **receiver** has not discharged its burden of establishing such an exception but rather the evidence establishes that the factual basis needed for the application of the exception to the fundamental rule is not present in this case.

60 7. *Re Stenner Financial Services Ltd.* (1988), 68 C.B.R. (N.S.) 298, a decision of the British Columbia Supreme Court.

61 Stenner, a mutual fund dealer, failed to comply with regulations under the British Columbia Securities Act [S.B.C. 1985, c. 83] and, accordingly, the British Columbia Securities Commission applied ex parte for an order appointing a **receiver**. The order included a priority clause. The court was not obliged to rule on the priority question in view of a prior assignment, however stated at p. 2 of the report:

— that I make the passing comment that on the basis of such cases as *Robert F. Kowal Investments v. Deeder Electric Ltd.* (1975) 59 D.L.R. (3rd) 492, I would have been prepared in spite of the non-notification of the Canadian Imperial Bank of Commerce, to uphold the priority accorded the **receiver** on the basis that in my view,

1. The **receiver** was appointed to preserve or realize assets for the benefit of all interested parties including the secured creditor; or

2. That the **receiver** has expended monies for the necessary preservation of the property to the benefit of all parties.

In other words, he would have held, if so obliged, to grant the priority on exceptions 2 and 3 of *Kowal* despite no service, due to the emergent nature of the proceeding and need for the order.

62 8. *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.*, supra, a decision of the British Columbia Court of Appeal.

63 In this case, the registrar of travel agents was appointed a **receiver** with respect to a travel agent. On a subsequent application, the **receiver** applied for a first charge provision, which latter applica tion was opposed by a debenture holder

on the basis of no acquiescence on the initial application by the debenture holder and, secondly, on the basis of an indemnity provided by the **receiver**.

64 In my view, this case has no application to the case at bar as it did not deal with an ex parte application for a **receiver** with the priority clause inserted at time of application, but rather was a case envisaged by Mr. Justice Power in *Rieger*, supra, that is to say, two-stage application; the second stage, for the priority, which was upheld in chambers, and on appeal in the *P.R.D.* case.

65 The respective positions of the two major litigants on this application, Mitsubishi and Mitsui on the one hand, and Royal Bank on the other, are as follows.

66 Mitsubishi and Mitsui submit (a) that they ought not to be bound by an order adversely affecting them on which they **received** no notice, that is to say, an ex parte order; and (b) that they do not fall within any of the three exceptions enumerated in the *Kowal* case, supra, in that, (1) they did not consent, approve of or acquiesce in the order and the priority clause, but rather showed no intent to retreat (to use the words of Mr. Justice McDonald, in the *Canadian Aero-Marine* case, supra) against the order by simply demanding their security after the **receiver**-manager inquired as to (i) validity, and (ii) equity or the security held; and (2) they did not **receive** notice and therefore exception 2 of *Kowal* does not apply; however, even if it does, they derived no benefit from the services of the **receiver**-manager, but rather his services and conduct were a detriment to Mitsubishi and Mitsui or, at the very best, a balance; and (3) that they do not fall within exception 3 of *Kowal* as no moneys were expended to necessarily preserve or maintain their security and, therefore, they ought not to be obliged to satisfy any of the **receiver**-manager's fees, charges or expenses, either pursuant to para. 14 of the order, or at common law on the exceptions of *Kowal*.

67 On the other hand, the Royal Bank submits that, while there was no prior notice, the secured creditors ought to share in payment of a portion of the **receiver**-manager's fees, costs, expenses and charged in that Mitsubishi and Mitsui (1) acquiesced in the order or by its delay in moving to vary, approved thereof and thereby took a benefit; and, (2) despite lack of service, the matter was so emergent, so unusual, so extraordinary that exception 2 of *Kowal* ought to be extended to include Mitsubishi and Mitsui in that the **receiver**-manager preserved and realized for the benefit of all creditors, including Mitsubishi and Mitsui; and (3) that they ought to share in the costs of expenses of the **receiver**-manager on exception 3 to *Kowal* in relation to moneys expended for the preservation and maintenance of Mitsubishi and Mitsui security.

68 As I stated earlier, I must in this action address three issues.

69 The first issue is: Should either Mitsubishi or Mitsui be bound by the terms of the ex parte Medhurst order wherein the **receiver**-manager of Vulcan Machinery & Equipment, namely, Price Waterhouse, was given a first charge over all the assets of Vulcan, including the secured assets of Mitsubishi and Mitsui? I have no difficulty with the theories expounded to me as follows: (1) I recognize the necessity that a court-appointed **receiver**-manager must be protected by the court in conjunction with its fees, expenses, charges and costs properly incurred in the administration of the estate on behalf of all creditors. (2) I also recognize and am in full and total agreement with the principles so aptly stated in the *Lochson* case wherein the British Columbia Court of Appeal stated, and Mr. Justice Power adopted in *Rieger* that: "It is fundamental that a person is not to be bound by a court order of which he has no notice."

70 In my opinion, while there may have been a need, indeed an urgent need, for the court-appointed **receiver**, there was, in my opinion, however, no such emergent, unusual or extraordinary need for the appointment of a **receiver**-manager *with the priority clause* (s. 14) such as to justify the so-called "double-barrelled" order as granted therein, which order, with the priority clause contained therein, had the effect of seriously prejudicing the rights of secured creditors such as Mitsubishi and Mitsui to the point of trammelling their rights. It is all well and good to argue that these parties had rights to apply to vary on a subsequent application; however that, in my view, puts the onus on entirely the wrong party.

71 I make these comments recognizing that the Royal Bank in this case on October 5 and October 9, 1990 was most concerned as to its secured position. However, it had, in my view, several options available to it which would have "stemmed the tide" and at the same time not adversely affected others' rights. While not necessarily exhaustive, those options included: (1) on October 5, 1990, on the resignation of Knight and Green, it could have appointed a **receiver** such as Price Waterhouse, who was ready to "swing into action," as indeed it did so by the evidence of the drive-bys, such appointment being private and by way of instrument as it was authorized by its debenture to do. That, of course, would have been short-term relief but effective nonetheless; or (2) it could have applied October 5 or October 9 for a **receiver**-manager only, leaving for another day and upon proper notice the question of the priority. This, of course, was suggested by Justice Power in *Rieger*; or, (3) it could have applied, giving informal notice to the secured creditors, as is often done in this jurisdiction; or (4) it could have formally applied on short notice, pursuant to R. 548, on the Tuesday or Wednesday, October 9 or 10; or (5) it could have given an informal notice or indication in August or September 1990 to the secured creditors of an anticipated application, that is to say, it could have informed the secured creditors that in the event of no sale or resolve of financial difficulties they intended to apply for a **receiver**-manager with the priority clause. This is also a step, or was also a step taken in the *Rieger* case, as decided by Justice Power, qua A.O.C.

72 *Instead* the Royal Bank took none of these steps, but rather, applied and obtained the Medhurst order, appointing Price Waterhouse as **receiver**-manager with the priority clause which, nearly two years later, has resulted in this long and no doubt expensive chambers application which has lasted seven days and resulted in countless hours of preparation, including days and days of cross-examination on affidavits, comprising some 20 volumes and approximately 1,750 pages of exhibits, all of which could have been avoided in large measure by notice to those parties adversely affected, being the applicants herein Mitsubishi and Mitsui.

73 The applicants would have me say that lack of notice herein was deliberate and deceitful and that service was avoided to facilitate the order. However, I do not go that far, although my comments will make it obvious that lack of notice has given rise to this rather difficult motion.

74 Having said all of that, and in specific response to the first issue to be addressed, it is my opinion that there can be no justification at law for enforcing the provisions of para. 14 of the Medhurst order as against those challenging secured creditors, Mitsubishi and Mitsui.

75 As to issue 2 which is, is there any other justification at law whereby either Mitsubishi or Mitsui or both ought to be liable for all or a portion of the **receiver**-manager's costs, charges and expenses in priority to its security?

76 To succeed then, on this application, the Royal Bank has the onus to establish that the secured creditors, Mitsubishi and Mitsui or either of them, fall within the *Kowal* exceptions or, as otherwise stated, the common law position. I intend to deal with each creditor and the three exceptions individually commencing with Mitsui.

77 As to exception 1 of *Kowal*, I have considered the matter and I am satisfied on the evidence that Mitsui neither consented, approved of nor acquiesced in the order respecting priority. On the evidence, it maintained its position throughout that it had possession of its property, other than through what it says was intervention by the **receiver**-manager, and it wanted nothing to do with the **receiver**-manager whatsoever.

78 As to exception 2, this exception is not available in argument to the bank in view of no service. However, if I am wrong in that, and there are circumstances whereby despite lack of service an unusual, emergent, extraordinary situation might arise (and I am hard pressed to envisage such a situation what with the viable options available) where a secured creditor might be liable for fees ex parte. There was in this case no such situation, and further, no benefit accrued to the creditor, Mitsui.

79 As to exception 3, there were, in my judgment, no moneys expended to maintain or preserve the security of Mitsui; however, if there were, they were moneys either not properly expended, or if properly expended, on property over which

they had no entitlement. In the result, Mitsui is liable for none of the **receiver**-manager's fees pursuant to para. 14 of the Medhurst order or at common law.

80 As to Mitsubishi and exception 1 in respect of consent, approval, application for the order or acquiescence, I have reviewed the evidence and I am satisfied thereon that Mitsubishi "stood fast" in its resolve that all it wanted was its equipment and that it would "go away."

81 That conclusion is reached by me notwithstanding the fact of two sales by the **receiver**-manager on behalf of Mitsubishi, in my view, on a case-by-case contract basis, for which the **receiver**-manager, Price Waterhouse, was paid a commission or a fee or recovered on the equity therein or otherwise derived a pecuniary benefit or at least the Royal Bank did. And despite the fact that the **receiver**-manager expected to **receive** proposals from Mitsubishi and despite the fact that Mitsubishi knew the **receiver** was incurring costs and despite the fact it knew on or about October 19, 1990 of the so-called priority clause. It remained steadfast in its position as is evidenced by its letter, October 26, 1990, to the **receiver**-manager demanding its goods and its solicitor's letters, December 11 and 13, 1990, threatening an application to vary the Medhurst order, and for the return of its goods.

82 As to exception 2 in Mitsubishi for the reasons stated respecting Mitsui is aforesaid. Similarly Mitsubishi does not fall into this category or exception.

83 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."

84 It is my opinion, somewhat reluctantly, that no liability attaches to Mitsubishi.

85 In the result then, Mitsubishi, too, is exonerated from payment of the **receiver**-manager's fees, either pursuant to para. 14 of the Medhurst order or at common law.

86 As to issue 3, as to apportionment and allocation, that issue need not be addressed in view of my rulings aforesaid.

*Application allowed.*