Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v Reid-Built Homes Ltd, 2018 ABQB 124

Date:
Docket: 1703 21274
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builders Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, Reid Capital Corp and Emilie Reid

Defendants

- and -

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

Applicants

Reasons for Judgment of the Honourable Mr. Justice Robert A. Graesser

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Introduction and Background

[1] These applications have been brought by creditors of the Reid-Built group of companies, which were placed into receivership on November 2, 2017 as a result of a consent receivership order entered into between the Royal Bank of Canada (Royal Bank) and the various corporations

comprising the Reid-Built group of companies (Reid-Built Group). The Receivership Order followed the template order, but provided that creditors and other affected parties could apply to vary the terms of the order on November 29, 2017.

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

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

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

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

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

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

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

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

Position of the Applicants

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

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

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

[12] Edmonton cites ***Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Park Ltd***, [1995] 23 OR (3d) 781, 32 CBR (3d) 303 (ONSC) [***Hamilton Wentworth***], and ***Toronto-Dominion Bank v Usarco Ltd***, [2001] 196 DLR (4th) 448, 24 CBR (4th) 303 (ONCA) [***Usarco Ltd***], as authorities supporting its position.

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

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

[15] Standard General relies on ***Yorkshire Trust Company v Canusa Construction Ltd***, [1984] 10 DLR (4th) 45, 54 BCLR 75 (BCCA), ***Re Residential Warranty Co of Canada Inc***, 2006 ABCA 293, and ***Re Sulphur Corp of Canada Ltd.***, 2005 ABQB 55.

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

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

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

[18] The Receiver argues generally that it should have priority over claims such as Standard General's on the basis of the exceptions described in ***Robert F Kowal Investments Ltd et al v Deeder Electric Ltd***, [1975] 59 DLR (3d) 492, 9 OR (2d) 84 (ONCA) [***Kowal***], which was applied in ***Royal Bank v Vulcan Machinery & Equipment Ltd***, [1996] 6 WWR 307, 13 CBR (3d) 69 (ABQB) [***Vulcan Machinery***].

[19] The exceptions described in ***Kowal*** are:

> (1) If a receiver has been appointed at the request, or with the consent or approval, of the security holders, the receiver will be given priority;
>
> (2) If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority for charges and expenses properly incurred; or
>
> (3) If the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors. In order to be payments made for the preservation of property, the payments must be made for the benefit of all parties, including secured creditors: ***Vulcan*** at para 33.

[20] The Receiver also raises paramountcy with respect to Standard General's arguments, as it did in relation to Edmonton's property tax claim. The Receiver notes that paramountcy has been dealt with by Lovecchio J in ***Re Sulphur Corp of Canada Ltd***, 2000 ABQB 682, who accepted that orders under the *BIA* would prevail when there was a conflict between the order and the *Builders' Lien Act*.

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

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

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

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

Analysis

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

> RECEIVER'S ACCOUNTS
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> 18. Any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").
>
> ....
>
> FUNDING OF THE RECEIVERSHIP
>
> 21. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $1,500,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowing Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

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

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

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

...

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

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

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

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

Preliminary objection to Edmonton's application

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

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

9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.

9.13 At any time before a judgment or order is entered, the Court may

(a) vary the judgment or order, or

(b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Onus on come-back application

[39] On a comeback application, as was ordered by Hillier J on November 2, the onus is on the initial applicant (here the Royal Bank) to satisfy the Court that the original provisions of the Receivership order are appropriate when the applicant on the comeback application had no notice of the initial receivership application and had no opportunity to make representations about the terms of the order: ***Canada North*** at para 77, ***Re General Chemical Canada Ltd***, [2005] 7 CBR (5th) 102, 2005 CarswellOnt 2010 (ONSC) at para 2.

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

Policy considerations

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

- The super priority is provided for in the template order and should not be challenged;
- The super priority is necessary to protect receivers, as without security for their fees and disbursements, they may be reluctant to take on receiverships; and
- The creditor applying for the receivership should not be left with the entire burden of any portion of the Receiver's fees and disbursements; they should be shared equitably amongst the creditors.

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

CCAA* v *BIA

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

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

[44] Similarly, in ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60, the Supreme Court of Canada noted that the *CCAA* and *BIA* had been amended in 2005, which was consistent with Parliament's "goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency": at para 54.

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

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

[47] I recognize that the *CCAA* contemplates liquidation, if restructuring cannot be accomplished. But liquidation is the result of an unsuccessful attempt to save the business. A

reorganization with the hope of emerging from receivership may be the objective of some receiverships under the *BIA*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[60] The Receiver's argument comes out of ***Braid Builders Supply & Fuel Ltd et al v Genevieve Mortgage Corp Ltd***, [1972] 29 DLR (3d) 373, 17 CBR (ns) 305 (MBCA) [***Braid Builders Supply***], where Dickson JA (as he then was) stated at pages 375-376:

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

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

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

> [174] The 1974 Plan further argues that accepting the Walter Canada Group's argument on choice of law would result in a "blanket denial" of all *ERISA* claims against Canadian entities in Canadian courts. In my view, this is an

> exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.

> [175] The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other "chicken little" argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

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

ICI Opt out/lifting the stay application

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

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

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

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

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

[69] The Court in ***General Motors v Tiercon*** noted:

> [18] Where relief from a stay is sought in an insolvency context, whether from an order issued pursuant to the Courts of Justice Act or the Bankruptcy and

> Insolvency Act, R.S. 1985, c. B-3, the Court should consider a balancing of the interests of all affected parties: Toronto Dominion Bank v. Ty (Canada) Inc., [2003] O.J. No. 1552, (2003) 2003 CanLII 43355 (ON SC), 42 C.B.R. (4th) 142 (Ont. S.C.J.) at paragraph 22.

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

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

> [12] The order before me requires leave of the Court and therefore the Court must exercise its discretion in making this determination. In this regard, it seems to me that the burden should be on the party seeking leave to persuade the Court that leave ought to be granted.
>
> [13] In this case, I am of the view that the burden has not been met. There is no viable alternative available to the Receiver as the cost of the one alternative policy is prohibitive and cannot be funded by the receivership. Furthermore, the Facility cannot be operated without insurance coverage. In addition, Economical had renewed the policy to July 1, 2007 and I fail to see that there has been any material change in the risk insured. If anything, I agree with the Receiver that, with its appointment, the risk has diminished. I also note that, although not strictly applicable, guidance may be drawn from the provisions of section 69.4 of the Bankruptcy and Insolvency Act wherein a person affected by the operation of a statutory stay may apply to the court to request that the stay be inoperative. The court may make such a declaration if it is satisfied that the person is likely to be materially prejudiced by the stay or if the court is satisfied that it is equitable on other grounds. If one applies that test to the court imposed stay, neither of those grounds are met by Economical either.

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

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

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

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

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

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

[76] Farley J stated in ***Cumberland Trading Inc***:

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

[77] The Court in ***Scanwood Canada Ltd*** held:

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

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

> [20] Having considered all of the circumstances, including the nature of the real property and the rights and interests of the parties, I find that it is just and convenient that the receiver's mandate extend to all of the real property. The Caisse is a secured creditor no less than the mortgagees. I fail to see any utility or fairness in distinguishing between a conventional mortgagee and a collateral mortgagee. I was not referred to any authority that would. In the case of BNS v. Freure, supra, Blair J. (as he then was) stated that the exercise of the Court's discretion should involve an examination of all of the circumstances, "...including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager." Although the latter case dealt with the appointment of a receiver rather than the scope to be assigned to his or her mandate, in my view, those considerations should still apply.
>
> [21] I find that it is just and convenient that a receiver should be appointed over both the receivables of the corporate debtors and the real property of the individual debtors. While the real property has no connection to the business, I find it to be in the interests of all parties that one person, assigned by the court, operating under an order tailored to the circumstances, and responsible to the court for its actions, should control the process or processes under which the receivables and real property are managed, preserved and ultimately disposed of. This strikes me as convenient to all. It also guarantees transparency and accountability. I agree with counsel for the Caisse that, under a private sale, the mortgagees would be entitled to transfer the real property without providing notice to the Caisse or accounting to it until late in the process. Under a court-appointed receivership, PwC would be required to keep all stakeholders informed of the sale process and would be obliged to seek court approval of any transaction. This would provide all stakeholders with the opportunity to raise any concerns that they have with the receiver, and if need be, to bring these concerns to the attention of the court.

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

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

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

[81] The Court held:

> [27] The court order prevails. Given its breadth, the receiver is and must be entitled to take possession of the liened articles, without prejudice to the claimant's possessory lien claim to be determined at another time. Such an interpretation is consistent with the necessity for the receiver to maintain control over the debtor's assets to ensure their advantageous and orderly disposition for the benefit of all creditors and to avoid duplicative costs that would otherwise arise from multiple sales. The receiver's rights and obligations derive from the court order and not from the debtor as 233 asserts.

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

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

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

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

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

[85] He observed:

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

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

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

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

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

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

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

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

[90] The Court held:

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

[91] It also noted:

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

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

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

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

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

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

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

[98] Such an application will require an analysis of the circumstances of the receivership. If the receivership is under the *CCAA*, or one where a notice of intention to file a proposal to creditors is contemplated, different considerations may apply. But in a case such as ***Integris***, it may well be appropriate to release property (real or personal) from the receivership. Considerations for that will have to develop with the case law.

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

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

Priority issues

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

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

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

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

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

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

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

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

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

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

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

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

> [15] So, I go back to what Mr. Justice Houlden said with respect to the common law position, namely that a Court under such circumstances has no power to authorize expenses for improving or making additions to the property for carrying on the business of the defendant at the expense of prior mortgagees or lien holders without the sanction of such mortgagees or lien holders. It seems to me that that is the principle that applies in these circumstances

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

> [61] As to Mitsubishi and exception 3, and this is the most difficult of the six analyses I have had to conduct, I have again considered the arguments of counsel and the evidence submitted. Despite the fact that the receiver manager performed services such as employee retention, changing locks, inventory lists, hiring Mr. Mclvor (a former employee of Vulcan) dealing with landlords and ensuring that no restraints or seizures occurred, liquidating furniture, ensuring equipment, attending warranty work and service work, attending to statutory claims, dealing with parts over which Mitsubishi had no security, and other miscellaneous matters, none of these activities, in my view, benefited, on balance, Mitsubishi and were conducted by Price Waterhouse knowing of Mitsubishi's position that it simply wanted its goods back and wanted nothing to do with Price Waterhouse in its capacity as receiver-manager of Vulcan and would have, subject to Price

> Waterhouse inquiring as to the validity and equity of their security, applied for and likely been exempted from the receivership order had it received notice. On a strict wording of the third Kowal exception being: "The receiver has expended money for the necessary preservation and improvement of the property."

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

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

[112] In ***Terra Nova Management***, the Court considered whether the receivership was necessary in the first place and noted that the British Columbia Court of Appeal had "restated" the ***Kowal*** exceptions. The Court cited ***Re Winmil Holidays Co Ltd***, (1984) 10 DLR (4th) 572, (BCCA):

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

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

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

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

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

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

[118] Topolniski J considered the super priority issue in ***Canada North***. There, Canada Revenue Agency challenged the Receiver's super priority charge, claiming that its security interest should rank ahead of the Receiver's charges. Topolniski J distinguished between CRA's

statutory deemed trust, which she described as a security interest, and "proprietary interests" such as those under a mortgage registered against property.

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

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

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

Standard General

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

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

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

[124] The Court dealt with ***Kowal*** as follows:

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

[125] I conclude that ***Yorkshire Trust Co*** and ***Peri Formwork Systems Inc*** have no significant bearing here, as the Receiver was appointed under the *BIA* and not the *Builders' Lien Act* or under the *Judicature Act* powers. The Court in ***Peri Formwork Systems Inc*** implicitly recognized that there is a statutory power under the *CCAA* to give the priority sought by the

Receiver, but found that the *CCAA* had no application to the case because those proceedings were at an end. It follows that if a Receiver under the *CCAA* could have such powers and priorities (that could prevail over the BC *Builders' Lien Act*) a Receiver appointed under the *BIA* could have the same powers and priorities.

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

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

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

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

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

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

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

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

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

[132] In ***Temple City Housing Inc (Companies' Creditors Arrangement Act)***, 2007 ABQB 786, Romaine J concluded that the *CCAA* permitted the Court to give priority over CRA deemed trust claims to debtors in place financing, holding:

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

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

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

> including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

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

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

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

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

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

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

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

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

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

Edmonton

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

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

[145] Blair J stated at 794:

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

[146] However, Blair J stated at 795:

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

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

> (b) pay all debts of Courtcliffe Parks which [it] deems necessary or advisable to properly operate, manage and sell the business of Courtcliffe Parks and all such payments to be allowed Deloitte Touche Inc. in passing its

> accounts and shall form a charge on the Assets in priority to the mortgage;
>
> ...

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

> [39] The City's claim with respect to realty is quite straightforward. Section 382 puts the City's claim ahead of all others except the Crown. As stated by Sherstobitoff J.A. in Canadian Commercial Bank, supra at p. 251, "the Court will not permit or approve any action on the part of its officer [the receiver] which has the effect of changing the rights of competing creditors . . . " This is precisely what the City says has happened. I agree with Sherstobitoff J.A. that the court will not permit such conduct. The same result is dictated by consideration for other interested parties. Levy and Ursaco should not be prejudiced by the City's claim increasing because of accretion of penalties and interest.

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

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

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

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

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

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

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

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

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

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

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

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

ICI

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Heard on the 29th day of November, 2017 and the 9th day of January, 2018.
Dated at the City of Edmonton, Alberta this 21st day of February, 2018.

Robert A. Graesser
J.C.Q.B.A.

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