

COURT FILE NUMBER	1703-21274	Clerk's Stamp
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	
APPLICANT	THE CITY OF EDMONTON	
RESPONDENT	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.	
DOCUMENT	<b>REPLY BRIEF of the COURT-APPOINTED RECEIVER (Reply to Edmonton Municipal Tax Priority Application)</b>  <i>January 9, 2018</i>  <b>Honourable Mr. Justice R. A. Graesser</b>	
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## I. INTRODUCTION

1. This Brief is submitted on behalf of Alvarez & Marsal Canada Inc. in its capacity as Court-appointed receiver and manager (**Receiver**) 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. (collectively, **Reid Built**).
2. This Brief is submitted in reply to the application of the City of Edmonton (**Edmonton**) seeking to vary unappealed Orders granted by this Honourable Court on November 2, 2017 (the **Receivership Order**), and November 29, 2017 (the **Property Powers Order**).
3. Edmonton's proposed variance of this Court's prior Orders would see its claim for municipal taxes rank ahead of the Receiver's administrative and borrowing charges found in the Receivership Order, and ahead of the Receiver's Property Powers Charge found in the Property Powers Order.
4. There is no Alberta law to support Edmonton's position. Edmonton only cites Ontario law considering Ontario legislation.
5. Indeed, the notion that Edmonton's claim for unpaid municipal taxes subordinates the Receiver's charges is contrary to the Alberta Template Receivership Order which expressly provides that the Receiver's administrative and borrowing charges rank ahead of all other security interests, statutory or otherwise.
6. At the hearing held November 29, 2017, the Receiver's position regarding the Property Powers Charge was clear, and that clarity is reflected in the resulting Order: the Property Powers Charge "ranks in priority to all other charges and claims". The Receiver's oral submissions about the first-ranking super-priority of the Property Powers Charge was not qualified and neither was the language of the Order creating it.
7. Alberta law holds that this Court has the inherent jurisdiction to subordinate tax claims. The Alberta courts have done so repeatedly, and for good reason. If a Receiver's charges are not afforded first-ranking status, there is a risk that receivers will be unwilling to accept court appointments, which would undermine Canada's federal insolvency regime.
8. For these reasons, as expanded below, the Receiver requests the application be dismissed.

## II. BACKGROUND

### ***November 29, 2017, was Edmonton's Chance to Make its Arguments***

9. On November 2, 2017, the Honourable Mr. Justice Hillier granted an order permitting secured creditors affected by the priorities specified in the Receivership Order – including the Receiver's charges complained of in this application – to apply to the Court to vary such priorities by "application made returnable on November 29, 2017" (**Comeback Order**). The Comeback Order stated that application materials in respect of same "shall be filed and served" by November 17, 2017.
10. Edmonton was added to the Receiver's service list on November 20, 2017, and received all materials subsequent to that date. Edmonton was made aware of the November 29 hearing.
11. Edmonton did not file any materials in respect of the November 29 hearing, nor did they make any oral submissions, a hearing at which a principal point of contention was the scope of the Receiver's charges.
12. The appeal periods for the Receivership Order, Property Powers Order, and the Comeback Order have expired. Edmonton did not seek to appeal these Orders, and they cannot do so now.

### ***The Receiver's Prior Oral Submissions***

13. At the November 29, 2017, hearing the Receiver's counsel made oral submissions about the Receiver's mandate with respect to the Reid Built receivership generally. In reply to the submissions of a lienholder seeking to exempt certain assets from the receivership estate, or from the purview of the Receiver's charges, counsel for the Receiver made certain comments about Edmonton's priority for property taxes.
14. Edmonton has excerpted those comments at paragraph 3 of its brief, and they are repeated here for ease of reference:

If the stakeholders in one of these buildings agreed with the receiver that we should be paying the property tax to avoid interest, they agreed that they are a priority, we will, upon agreement, make those payments. It's not for us today to say we've decided unilaterally the City has priority, that the tax amount is right, and that we should pay it. That's what your court officer does, and that's what your court officer has been empowered and entrusted to do, and that is what they will do, going forward, with respect to each project and each property.

15. Edmonton takes this submission to mean that the Receiver conceded that Edmonton has a super-priority for its municipal taxes ranking ahead of the Receiver's charges.
16. Edmonton is mistaken.
17. The Receiver did not concede that point, and never would. In the excerpt above, the Receiver's counsel was discussing the relative priority of Edmonton's tax claim against the priority of a lienholder's claim or as against the priority of another secured creditor's claim. The Receiver made no mention of Edmonton's priority with respect to the Receiver's own charges, which the Receiver views as first-ranking by virtue of the plain words of the Receivership Order.
18. With respect to the Property Powers Charge, the Receiver's oral submissions likewise made it clear that the intent of the charge was to secure for the Receiver a first-ranking position:

The key provision is the receiver is hereby authorized and empowered to exercise the property powers including to repair, upkeep, enhance, complete or partially complete an improvement. If I have got a house that needs \$10,000 of work to finish so that I can sell it for 200, I want to do it. If in one of the industrial buildings that ICI has security on, if the furnace goes out this weekend, I want to fix it; I want to maintain the property. That is all I am looking to do. I am not looking to reinvent the wheel. **I am looking to pay necessary incremental charges and not be argued later that, oh, I am subordinate to a creditor, so I am not entitled to those expenditures.** We are not looking to do anything other than the least possible but necessary. [Emphasis added.]<sup>1</sup>

19. There was no mention of the charge being subordinate to any claim by Edmonton. On the contrary, the Receiver's counsel expressly identified the impetus being to avoid subordination by other creditors, which would include Edmonton. The resulting Property Powers Order reflects this reasoning, contrary to Edmonton's construal of the Order's words.

***The Receivership Order Ranks the Receiver's Charges First***

20. The starting point for the analysis of the rank of the Receiver's administrative and borrowing charges are the words of the Receivership Order<sup>2</sup>, which tracks the Alberta Template Order (and the Ontario, British Columbia, and Quebec templates).
21. The Receivership Order, exactly like the template, states that the "Receiver's Charge" and the "Receiver's Borrowings Charge" shall form first-ranking charges (with the borrowing

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<sup>1</sup> November 29, 2017, Proceedings Excerpt (Afternoon Session), page 40, lines 21-24 [Tab 1].

<sup>2</sup> The relevant sections, 18 and 21, are quoted at **Appendix "A"**.

charge subordinate only to the Receiver's Charge), "in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person" (emphasis added).

22. Accordingly, notwithstanding any statutory claim, such as a claim for municipal taxes asserted pursuant to the *Municipal Government Act*, the Receiver's charges are first-ranking.
23. The annotation to the Alberta Template Receivership Order states that "The priority is also appropriate where the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, or where the Receiver has expended money for the necessary preservation or improvement of the Property"<sup>3</sup>. That is precisely the case here: the Receiver has been appointed for the benefit of all of Reid Built's stakeholders, including Edmonton. As such, and as reflected in the Receivership Order, its charges rank first.

#### ***The Property Powers Order Ranks the Property Powers Charge First***

24. The Property Powers Order states that the "Receiver is entitled to and is hereby granted a first charge as against any specific Property so improved by exercise of the Property Powers, where such first charge ranks in priority to all other charges and claims, including lien claims, as against the Property so improved."<sup>4</sup>
25. This plain wording means that the Property Powers Charge ranks first, "in priority to all other charges and claims" including any claim by Edmonton. The language is not qualified. It does not say that the charge ranks in priority to all other charges and claims, *except those of municipal governments or those of tax authorities*.
26. The Property Powers Order amends the priorities and charges in the Receivership Order such that the Receiver's administrative and borrowing charges rank immediately after the Property Powers Charge.

#### ***The Receiver's Position: Its Charges Rank First***

27. The Receiver's position tracks: (a) the Receivership Order, (b) by extension the Alberta Template which has been followed in countless proceedings, and (c) the plain wording of the unappealed Property Powers Order. That is, the Receiver's charges – its administrative

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<sup>3</sup> Receivership Order Explanatory Notes, April 24, 2015, accessed online at: <<https://albertacourts.ca/court-of-queens-bench/commercial-practice>> [Tab 2].

<sup>4</sup> Property Powers Order, dated November 29, 2017, para 3.

charge, borrowing charge, and Property Powers Charge – all rank ahead of Edmonton and all other charges and claims, statutory or otherwise.

28. The reason for this is evident and has been long-recognized by the courts of Alberta: if the court-appointed officer mandated with overseeing a receivership is not given security for its fees and borrowings, despite working for the benefit of all creditors in the receivership, then it is very unlikely that any qualified receiver would accept the mandate in the first place. And if that were the case, then the orderly conduct of insolvency proceedings in Alberta would be jeopardized.

### III. LAW AND SUBMISSIONS

#### ***It is Trite Law that Receiver's Charges are First-Ranking***

29. Since 1975, when the Court of Appeal for Ontario released its reasons in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*<sup>5</sup>, receivers' borrowing and administrative charges have been afforded super-priority status. Indeed, so foundational is the principle that the Alberta Template Receivership Order, excerpted above, expressly contemplates the first-ranking position of the receiver's charges. The explanatory note for the Template, also excerpted above, expressly cites *Kowal* to explain why the charges are first-ranking.
30. The Court of Appeal's reasons are worth repeating, as they underscore the importance of ranking the receiver's charges first in cases where, as in this case, the appointment is for the benefit of the debtor's creditors generally:

[...] 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. 375-376):

The Court itself has no funds from which to pay the 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

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<sup>5</sup> *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, 1975 CarswellOnt 123, 21 CBR (NS) 201, 59 DLR (3d) 492, 9 OR (2d) 84 [Tab 3].

secured creditors, for the purpose of preserving the property?<sup>6</sup>

31. *Kowal* is old, good law. The statements and questions above resonate today. This Court has no funds to pay the Receiver, and it would be inequitable for the Royal Bank of Canada, the petitioning creditor, to bear the full burden of the receivership costs when the Receiver has been court-appointed for the benefit of all of Reid Built's stakeholders.
32. In the absence of the protection afforded by the first-ranking charges granted under the Alberta Template and as already granted to the Receiver in this case, there is a risk that receivers would be unwilling to accept court appointments which would chill the marketplace.
33. There is no good reason or Alberta authority to abandon this logic now.

***Alberta Courts Routinely Subordinate Statutory and Secured Claims to Restructuring Charges***

34. The Receiver has identified a number of decisions of this Court, spanning from 2001 to 2017, in which statutory and other security interests, including security interests of the Canada Revenue Agency with respect to unpaid taxes, have been subordinated by the Court to insolvency restructuring charges.
35. ***Hunters Trailer (2001)***. In *Hunters Trailer & Marine Ltd., Re*, for instance, the Court of Queen's Bench exercised its inherent jurisdiction to allow super-priority for administrative costs in a *Companies' Creditors Arrangement Act (CCAA)* proceeding. The Court opined that it was appropriate to grant a super-priority for "the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process"<sup>7</sup> because if such a priority was not granted "the protection of the CCAA effectively would be denied a debtor company in many cases."<sup>8</sup>
36. The rationale here is the same as it was in *Kowal* and as has been reiterated throughout this brief: if the receivership's professional advisors are not given a super-priority for their fees and expenses, they have little incentive to accept the work in the first place, and without professional counsel, it would be very challenging, if not impossible, to conduct the receivership.

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<sup>6</sup> *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, 1975 CarswellOnt 123, 21 CBR (NS) 201, 59 DLR (3d) 492, 9 OR (2d) 84, para 19 [Tab 3].

<sup>7</sup> *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 546, 2001 CarswellAlta 964, para 32 [Tab 4].

<sup>8</sup> *Ibid.*

37. ***Sulphur Corp. (2002)***. Justice LoVecchio’s ruling in *Sulphur Corp. of Canada Ltd., Re* is also apposite as in that proceeding the Court granted a super-priority charge to an interim financier of the insolvent debtor ranking ahead of statutory builders’ liens. Justice LoVecchio held: “This Court has the jurisdiction to grant a charge under the CCAA to secure a DIP [debtor-in-possession] financing which ranks in priority to a statutory lien”<sup>9</sup>.
38. If an interim financing charge can, by Court Order, rank ahead of a statutory builder’s lien, then it stands to reason that the charges afforded a court-officer acting for the benefit of all stakeholders in a receivership can, and should, rank ahead of a statutory property tax lien. To borrow Justice LoVecchio’s words, justice dictates and practicality demands that the Receiver’s charges fall under the super-priority already granted by this Court. To deny these charges their priority would be to frustrate the objectives of court-authorized receiverships.
39. ***Temple City (2007)***. In *Temple City Housing Inc., Re*, Justice Romaine considered the relative priority of the Canada Revenue Agency’s (**CRA**) claim for unpaid tax against an interim financing charge. Justice Romaine followed the Court’s reasoning in *Hunters Trailer* and confirmed that it “is clear that a court in a CCAA proceeding is able to grant a super-priority over existing security interests for DIP financing.”<sup>10</sup>
40. Again, if a CRA claim, established by Federal legislation, can be subordinated by the Court, then it must be the case that Edmonton’s municipal tax claim, enacted pursuant to Provincial legislation, can be subordinated by the Court.
41. Indeed, the Alberta Template Receivership Order (like the Ontario template) has just that effect: the Receiver’s charges therein rank “in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise”<sup>11</sup>. Pursuant to section 348(d) of the *Municipal Government Act*, the unpaid taxes are a lien. By reason of the Receivership Order, read in conjunction with the Property Powers Order, that lien ranks behind the Receiver’s charges.
42. ***Canada North Group Inc (2017)***. *Canada North Group Inc* is the most recent decision identified by the Receiver in which this Court granted an order ranking insolvency charges ahead of statutory tax claims. In *Canada North* Justice Topolinski ruled that an interim financiers’ charge, charge in favor of directors (in a CCAA), and a priority charge for

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<sup>9</sup> *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682, 2002 CarswellAlta 896, para 16 [Tab 5].

<sup>10</sup> *Temple City Housing Inc., Re*, 2007 ABQB 786, 2007 CarswellAlta 1806, para 14 [Tab 6].

<sup>11</sup> Alberta Template Receivership Order, para 20; Ontario Template Receivership Order, para 18 [Tab 7] [emphasis added].



administrative fees were all “critical to a successful restructuring”<sup>12</sup> and ranked ahead of the CRA’s claim for unremitted source deductions. Notably, Justice Topolinski concluded that: “**it is the Court’s order that sets the priority of the charges at issue.**”<sup>13</sup>

43. In addition to these Alberta decisions, the Receiver has identified a recent Ontario Commercial List decision confirming the necessity and primacy of the receiver’s charges. In *CCM Master Qualified Fund v. blutip Power Technologies*, Justice D. M. Brown (now of the Court of Appeal for Ontario), highlighted the certainty required of the receiver’s charges and noted that the same rationale for the charges applies to both CCAA proceedings and receiverships: paragraphs 18-23.<sup>14</sup> The Receiver submits that Justice Brown’s reasoning in *CCM* is more persuasive than the Ontario cases cited by Edmonton, which precede *CCM* and are inconsistent with Alberta law and the practicalities of receiverships.

#### ***Edmonton Misreads the Property Powers Order***

44. At paragraphs 18-20 of its brief, Edmonton analyzes the words of the Property Powers Order. Its analysis is incorrect, if understandable. The flaw appears to stem from its interpretation of the word “where” in paragraph 3 of the Property Powers Order, reproduced in whole as follows:

The Receiver is entitled to and is hereby granted a first charge as against any specific Property so improved by exercise of the Property Powers, **where** such first charge ranks in priority to all other charges and claims, including lien claims, as against the Property so improved. [Emphasis added.]

45. Edmonton takes the clause “where such first charge ranks in priority to all other charges and claims”, to mean that the Property Powers Charge ranks first only in the case that it is shown to rank ahead of all other existing charges and claims.
46. Based on Edmonton’s analysis of the *Municipal Government Act*, the Property Powers Charge does not rank ahead of its special lien for unpaid taxes so the charge is not first-ranking. This construal misunderstands the clause and disconnects with the Receiver’s stated intention for the charge.
47. The words “where such first charge” are intended to tie the words immediately thereafter to the words immediately preceding, with no limiting effect on the charge itself. It is still a “first charge”. The word “and” could just as easily have been used instead of “where” – the

<sup>12</sup> *Canada North Group Inc*, 2017 ABQB 550, 2017 CarswellAlta 1631, para 104 [Tab 8].

<sup>13</sup> *Canada North Group Inc*, 2017 ABQB 550, 2017 CarswellAlta 1631, para 112 [Tab 8] [emphasis added].

<sup>14</sup> *CCM Master Qualified Fund Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750, 2012 CarswellOnt 3158, paras 18-23 [Tab 9].

intended effect would be the same: the charge is first-ranking, notwithstanding any other charges or claims including, by necessary implication, Edmonton's tax claim.

***Federal Legislation Trumps Provincial Legislation in Cases of Conflict***

48. A final point. Besides the Alberta and Ontario precedents cited herein, the obvious rationale for the first-ranking status of the Receiver's charges, and the plain wording of sections 18 and 21 of the Receivership Order, which create the Receiver's administrative and borrowing charges, the fact that the Receivership Order and the Property Powers Order were issued pursuant to the Federal Bankruptcy and Insolvency Act suggests that any conflict between their terms and the terms of Provincial legislation such as the *Municipal Government Act* must be resolved in favor of the Receivership Order pursuant to the doctrine of federal paramountcy.
49. In other words, reading section 348 of the Provincial *Municipal Government Act* with sections 18 and 21 of the Receivership Order, results in the diminishment of the scope of section 348: taxes due to a municipality take priority over the claims of every person except the Crown, but are subject to the Receiver's charges pursuant to the Receivership Order as amended by the Property Powers Order.

**IV. CONCLUSION AND RELIEF SOUGHT**

50. For the reasons stated herein, the Receiver respectfully requests the Court's dismissal of Edmonton's application, with costs to the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5<sup>th</sup> DAY OF JANUARY, 2018.



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## APPENDIX A

### SECTIONS 18, 21 OF RECEIVERSHIP ORDER, DATED NOVEMBER 2, 2017

#### RECEIVER'S ACCOUNTS

18. Any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").

[...]

#### FUNDING OF THE RECEIVERSHIP

21. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$1,500,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowing Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

[...]