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JUDICIAL CENTRE OF CALGARY

COURT FILE NUMBER	1701-07646
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CONNECT FIRST CREDIT UNION
DEFENDANTS	LREIT HOLDINGS 34 CORPORATION, LANESBOROUGH REAL ESTATE INVESTMENT TRUST, CHARLES K. LOBWEN, trustee of LANESBOROUGH REAL ESTATE INVESTMENT TRUST, ARNI C. THORSTEINSON, trustee of LANESBOROUGH REAL ESTATE INESTMENT TRUST and EARL S. COLEMAN, trustee of LANESBOROUGH REAL ESTATE INVESTMENT TRUST
DOCUMENT	BRIEF OF ARGUMENT OF THE APPLICANT, ALVAREZ & MARSAL CANADA INC. IN ITS CAPCITY AS COURT-APPOINTED RECEIVER AND MANAGER OF LREIT HOLDINGS 34 CORPORATION

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Burnet, Duckworth & Palmer LLP** 2400, 525 - 8 Avenue SW Calgary, Alberta T2P 1G1 Lawyer: David LeGeyt Phone Number: (403) 260-0210 Fax Number: (403) 260-0332 Email address: dlegeyt@bdplaw.com File no.: 64793-2

Hearing before the Honourable Madam Justice Campbell,
on the Commercial List, in Chambers, on
April 17, 2019, commencing at 2:00 pm

TABLE OF CONTENTS

I. INTRODUCTION

1. This is the Brief of Law of Alvarez & Marsal Canada Inc., in its capacity as Court-appointed receiver and manager (the "**Receiver**") of LREIT Holdings 34 Corporation (the "**Debtor**") and of the beneficial interest of Lanesborough Real Estate Investment Trust ("**Lanesborough**") in the Woodland Park property, as described in the Facts section of this Brief of Law.

2. This Brief is filed by the Receiver in support of its Application filed on April 9, 2019 (the "**Receiver Application**") seeking to amend and restate the Consent Receivership Order granted February 28, 2019 (the "**Receivership Order**") to correct and update an incorrect legal description of the land at issue, and to appoint the Receiver as administrator over Condominium Corporation No. 1820957 (the "**Condo Corp.**").

3. This Brief addresses the substantive issues of whether this Court ought to amend the Receivership Order to reflect the accurate legal description of the Debtor's right, title and interest in Woodland Park ("**Woodland Park**"), and to amend the Receivership Order to appoint the Receiver as administrator of the Condo Corp.

II. FACTS

A. The Debtor

4. The Debtor is the legal titleholder and bare trustee over a luxury apartment and townhome development in Fort McMurray, Alberta, commonly referred to as Woodland Park, which is held beneficially for Lanesborough.[1] Woodland Park consists of 32 three bedroom townhomes and a four-story condominium building, which consists of 75 individual condominium units (together, the "**Units**" and each a "**Unit**").[2]

5. On February 28, 2019, Madam Justice Horner granted the Receivership Order appointing the Receiver as receiver and manager of:

(a) all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate;

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[1] Affidavit of Keith Richard sworn June 6, 2017 at para 9 [**Richard Affidavit**].
[2] Affidavit of Kunle Popoola sworn February 21, 2019 at para 10 [**Popoola Affidavit**].

(b) all of the right, title, and interest of the Debtor, and of Lanesborough, in the lands legally described as:

PLAN 0425943
BLOCK 11
LOT 1
CONTAINING 2.25 HECTARES (5.56 ACRES) MORE OR LESS
EXCEPTING THEREOUT ALL MINES AND MINERALS,
(the "**Lands**"); and

(c) all of the right, title, and interest of the Debtor, and of Lanesborough, in all chattels located on the Lands (the "**Chattels**"),

and all proceeds thereof.

(collectively, the "**Property**").

6. Since the Receivership Order was granted it has come to the Receiver's attention that the description of the Lands in paragraph 5(b) above, and in paragraph 2(b) of the Receivership Order, no longer accurately describes the lands of Woodland Park.

7. The title listed in paragraph 5(b) above and in paragraph 2(b) of the Receivership Order was cancelled when Woodland Park was condominiumized, which occurred on or around March 23, 2018[3], after the Receivership Order was originally consented to by the Debtor and Lanesborough. After Woodland Park became a condominium, the legal description was revised to Condominium Plan 1820957 with a separate title for each unit setting out a particular share of the common property.[4]

8. The Debtor began marketing certain Units for sale and sold five (5) Units prior to the Receivership Order. As a result, the Debtor owns 102 out of 107 Units as set out in Appendix "B" of First Report of the Receiver ("**Receiver's Report**").[5]

[3] Popoola Affidavit at para 9.
[4] First Report of the Receiver at para 22 and Appendix "A" [**Receiver's Report**].
[5] Receiver's Report at para 13 and Appendix "B."

B. Resignation of Directors

9. On the date the Receivership Order was granted, February 28, 2019, all three members of the Board of Directors of the Condo Corp. tendered their resignations.[6] As a result of there are currently no members on the Board to manage or govern the Condo Corp.

C. Termination of the Condominium Management Agreement by Shelter

10. On April 1, 2018, the Condo Corp. and Shelter Canadian Properties Limited ("**Shelter**") entered into the Condominium Management Agreement (the "**Condominium Management Agreement**"). The Condominium Management Agreement governs the management of the "common elements" of Woodland Park, including general maintenance. Under the Condominium Management Agreement, Shelter served as Property Manager, a role that included maintaining the common elements of Woodland Park, such as elevators and communal spaces.[7]

11. Following the appointment of the Receiver on February 28, 2019, Shelter tendered 60 days' notice to terminate the Condominium Management Agreement.[8]

12. As a result the Condo Corp is without any management, and the Woodland Park property will be without a manager as of May 1, 2019.

III. ISSUES

(a) Is the Receiver entitled to bring the Application?

(b) Should the Receivership Order be amended to reflect the accurate legal description of the Debtor's right, title and interest in Woodland Park?

(c) Should the Receivership Order be amended to appoint the Receiver as administrator of the Condo Corp. under s. 58 of the *Condominium Property Act*[9]?

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[6] Receiver's Report at para 30.
[7] Receiver's Report at para 14.
[8] Receiver's Report at para 31.
[9] *Condominium Property Act*, RSA 2000, c C-22 [***Condominium Property Act***].

(d) If this Honourable Court appoints the Receiver as administrator over the Condo Corp., which powers and duties should the Receiver have as administrator under the *Condominium Property Act*?

IV. LAW AND ARGUMENT

A. The Receivership Order Contains an Amendment Clause

13. At paragraph 32, the Receivership Order contains a "comeback clause" by granting any "interested party" the right to apply to the Court of Queen's Bench to amend the Receivership Order:

> Any interested party may apply to this Court to vary or amend this Order on not less than 5 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.[10]

14. As the Receiver is an interested party, it has the right to bring an application to this Court to amend the Consent Receivership Order.

15. The Alberta Court of Queen's Bench in *RBC v Reid-Built Homes* recently found that a comeback clause in a receivership order gave the Court jurisdiction to revisit the receivership order in appropriate circumstances.[11] In *Reid-Built Homes*, the Court considered whether one of the parties could bring the application, despite the fact that the application was after the specific comeback date set out in the initial receivership order.[12] In considering whether to allow the comeback application, the Court relied on cases that considered comeback clauses under the *Companies' Creditors Arrangement Act*[13] and under the *Bankruptcy and Insolvency Act*.[14]

16. First, Justice Graesser in *Reid-Built* cited *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, in which Justice Topolinski held that the recourse through the comeback clause in a receivership order could be used "when circumstances change,"[15] but qualified that statement by noting that comeback relief "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question."[16]

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[10] Consent Receivership Order granted February 28, 2019 by the Honourable Justice Horner [**Receivership Order**].
[11] *RBC v Reid-Built Homes*, 2018 ABQB 124 at para 31 [***Reid-Built Homes***] [**TAB 1**].
[12] *Reid-Built Homes* at para 29.
[13] RSC 1985 c C-36.
[14] RSC 1985 c B-3 [***BIA***].
[15] *Reid-Built Homes* at para 32, citing *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para 50 [***Canada North***] [**TAB 2**].
[16] *Canada North* at para 68.

17. Second, Justice Graesser referred to another decision of Justice Topolinski, *Re Garritty*.[17] Section 187(5) of the *BIA* states that the Court "may review, rescind or vary any order obtained by it under its bankruptcy jurisdiction."[18] In *Re Garritty*, Justice Topolinski summarized the principles governing an application under s. 187(5):

> 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.[19]

18. In *Reid-Built Homes*, Justice Graesser also spoke to the absence of a time limit for comeback applications:

> 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.[20]

19. Ultimately, Justice Graesser held that the circumstances permitted the creditors' application under the comeback clause, but in the end, dismissed the creditors' argument to have the super-priority charge changed. On March 25, 2019, the Alberta Court of Appeal allowed the City of Edmonton's appeal on the

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[17] *Garritty, Re*, 2006 ABQB 238 [***Garritty***] [**TAB 3**].
[18] *BIA*, s 187(5) [**TAB 4**].
[19] *Garritty* at para 46.
[20] *RBC v Reid-Built Homes* at para 38.

issue of the priority of the special lien in relation to the receiver's charge, but did not address the issue of whether the comeback clause was used appropriately.[21]

20. Following Justice Graesser's line of reasoning in *Reid-Built Homes*, this Court ought to allow the Receiver's application under the comeback clause to vary the Receivership Order. The amendment regarding the description of the Lands to reflect the correct legal description is simply amending a clerical error which resulted when the legal description of the land changed due to its subsequent condominiumization. With respect to the amendment to appoint the Receiver as administrator over the Condo Corp., circumstances changed when both the Board and Shelter resigned after the Receivership Order was made.

21. This application is made promptly. The Receiver requested a date for the application to be heard shortly after realizing that 1) the Lands were described incorrectly in the Receivership Order, and 2) that administrative aspects of the Receiver's role would be impossible to fulfill without a Board or management company in place.

22. Finally, the Receiver is not aware of any parties that would be prejudiced by amending the Receivership Order.

B. The Receivership Order Ought to be Amended to Reflect the Accurate Legal Description of the Debtor's Right, Title and Interest in Woodland Park

23. Rule 9.12 of the Alberta Rules of Court allows a Court to correct a mistake or error in an order arising from an accident, slip or omission:

> 9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.[22]

24. Because the current description of the Lands in the Receivership Order is now incorrect, this Court ought to amend the Receivership Order to reflect the accurate legal description of the Debtor's right, title and interest in Woodland Park, as set out in Appendix B to the Receiver's Report and Schedule B of the proposed amendments to the Receivership Order.

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[21] *Edmonton (City) v Alvarez & Marsal Canada Inc* 2019 ABCA 109 [**TAB 5**].
[22] Alberta Rules of Court, Alta Reg 124/2010, r 9.12 [**TAB 6**].

C. The Receiver May be Appointed as Administrator Under s. 58 of the *Condominium Property Act*

Section 58 of the Condominium Property Act

25. Section 58 of the *Condominium Property Act* allows the Court to appoint an administrator:

> **58**(1) A corporation or a person having a registered interest in a unit may apply to the Court for appointment of an administrator.
>
> (2) The Court may, on cause shown, appoint an administrator for an indefinite period or for a fixed period on any terms and conditions as to remuneration or otherwise that it thinks fit.
>
> (3) The remuneration and expenses of an administrator appointed under this section are administrative expenses within the meaning of this Act.
>
> (4) An administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders.
>
> (5) An administrator may delegate any of the powers or duties so vested in the administrator.
>
> (6) The Court may, on the application of an administrator or a person referred to in subsection (1), remove or replace the administrator.

Alberta Case Law

26. In *Tataryn v Condominium Plan No 7810994*, the Alberta Court of Queen's Bench considered the issue of who may apply to be an administrator.[23] The Court remarked that s. 58 of the *Condominium Property Act* provides that "a corporation or a person having an interest in a unit" may apply to the Court for the appointment of an administrator.[24]

27. Section 67(1)(b) of the *Condominium Property Act* defines "interested party":

> (b) "interested party" means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.[25]

28. The Court in *Tataryn* clarified that the addition of the word "unit" in the definition of "interested party" calls for a narrow interpretation of the word "interest."[26] The Receiver meets the definition of an "interested party" under s. 67(1)(b) of the *Condominium Property Act*, because the Receivership Order

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[23] *Tataryn v Condominium Plan No 7810994*, 2003 ABQB 810 [***Tataryn***] [**TAB 7**].
[24] *Tataryn* at para 15.
[25] *Condominium Property Act*, s 67(1)(b) [**TAB 8**].
[26] *Tataryn* at paras 15 – 16.

appoints the Receiver as receiver and manager of an owner, and of all of the right, title, and interest of the that owner in the Lands.

29. Another Alberta Court of Queen's Bench decision, *1597130 Alberta Ltd. v Condominium Corp. No 1023241*, stated that the role of an administrator appointed under the *Condominium Property Act* is analogous to that of a court appointed receiver, however, the power and capacity of an administrator granted under the *Condominium Property Act* are not as broad as the wide discretion that a court may have when appointing and empowering a receiver.[27] In *159 Alberta Ltd.*, the Court described the scope of the administrator's position, in the context of a dispute among unit owners with respect to the distribution of certain condominium project expenses:

> Although the role of the Administrator is analogous to that of a court appointed Receiver, the power and capacity of the Administrator is governed by the *Condominium Property Act*. The language set out in s. 58(4) allows the court to give the administrator the powers and duties of the Corporation and is not as broad as the wide discretion the court may have, for example, when appointing and empowering a receiver under the *Judicature Act*.[28]

30. Because the Receiver has already been appointed as receiver and manager of the Debtor and of the beneficial interest of Lanesborough, appointing the Receiver as administrator would be granting the Receiver an extension of its current duties to preserve and protect the property as set out in the Receivership Order, and will allow the Receiver to manage the Condo Corp.

Guidance from Ontario Courts

31. Section 131 of the Ontario *Condominium Act* states:

> **131**(1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43.[29]

32. Alberta courts have not yet laid out a specific test for determining whether an administrator should be appointed. However, Ontario courts have laid out a helpful test for this purpose. In Ontario, courts have outlined five factors to consider in determining whether an administrator should be appointed under s. 131

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[27] *1597130 Alberta Ltd. v Condominium Corp. No 1023241*, 2015 ABQB 698 at para 11 [***159 Alberta Ltd***] [**TAB 9**].
[28] *159 Alberta Ltd* at para 11.
[29] *Condominium Act*, 1998, SO 1998, c 19, s 131 [**TAB 10**].

of the *Condominium Act.* The Court in *Skyline Executive Properties Inc. v Metropolitan Toronto Condominium Corp. No. 1385* considered the following five factors:

> (a) whether there has been established a demonstrated inability to manage the corporation;
>
> (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to the affairs of the corporation;
>
> (c) Whether the appointment of an administrator is necessary to bring order to the affairs of the corporation;
>
> (d) Whether there is a struggle within the corporation among competing groups such as to impede or prevent proper governance of the corporation; and
>
> (e) Where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the corporation.[30]

33. The Court in a more recent Ontario Superior Court of Justice decision, *2308478 Ontario Ltd. v York Region Condominium Corp. No 715* applied the test above, stating that it would not consider one factor to be more or less important than another, and that one factor could overwhelm the rest.[31]

34. With respect to the first factor there is presently a demonstrable inability for the Condo Corp. to manage itself. The Receiver's current powers do not grant it the ability to manage the Condo Corp. and all of the directors have resigned.

35. Regarding the second factor, the resignation of all three Board members without ensuring replacements could arguably constitute mismanagement in relation to the affairs of the Condo Corp.

36. Regarding the third factor, the appointment of an administrator is a necessary step to bring order to the affairs of the Condo Corp. Presently, there is no board of directors to make the important decisions required to manage the Condo Corp. Without a board of directors or a management company in place, the unit owners' investments are seriously compromised. The appointment of an administrator is necessary to ensure a sense of normalcy to the residents and owners, and to bring order to the affairs of the Condo Corp.

37. Regarding the fifth and final factor, appointing an administrator is the only reasonable prospect for bringing order to the affairs of the Condo Corp.

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[30] *Skyline Executive Properties Inc v Metropolitan Toronto Condominium Corp No 1385*, 2002 CarswellOnt 5670 at para 26 [**TAB 11**].
[31] *2308478 Ontario Ltd v York Region Condominium Corp No 715*, 2016 ONSC 6256 at para 17 [**TAB 12**]

38. The Receiver submits that acting as administrator of the Condo Corp. would be in the best interest of the Unit owners and tenants. It would allow the Receiver to fulfill its obligation to preserve and protect the property subject to the Receivership Order.

D. This Court Ought to Provide the administrator with broad powers under the *Condominium Property Act*

39. Subsection 58(4) allows a Court to order which specific duties and powers an administrator has:

> (4) An administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders. [32]

40. In order to reduce administrative expenses for the unit owners of Woodland Park, the Receiver asks this Honourable Court to grant it all of the powers under the *Condominium Property Act* as administrator, but not require it to perform the following duties unless the Receiver deems it necessary:

(a) Hold an annual general meeting pursuant to s. 30 of the *Condominium Property Act*;[33]

(b) Set a budget as required under s. 30 of the *Condominium Property Act*;[34] and

(c) Prepare a reserve fund study as required under s. 23 of the *Condominium Property Regulation*.[35]

41. The reason for seeking the flexibility with respect to the three above requirements is to allow the Receiver to perform duties as administrator that will extend its duties as the Receiver to preserve and protect the property, without imposing a substantial financial burden on the unit owners of Woodland Park.

V. CONCLUSION

42. For all of these reasons the Receiver respectfully submits that this Honourable Court ought to grant the Receiver's Application and grant the orders sought therein, including amending the Receivership Order to reflect the accurate legal description of the Debtor's right, title and interest in Woodland Park and to appoint the Receiver as administrator of the Condo Corp. to manage the affairs of the Condo Corp. The Receiver advises it will undertake these activities if required or desirable.

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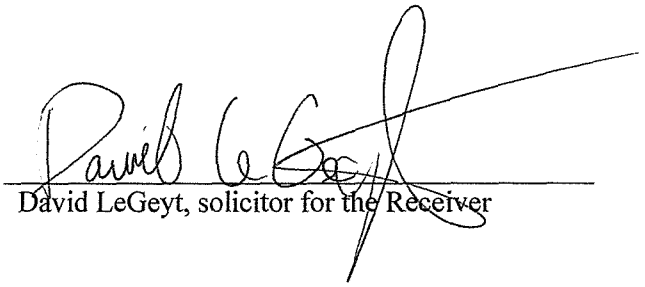
[32] *Condominium Property Act*, s 58(4) [**TAB 13**].
[33] *Condominium Property Act*, s 30 [**TAB 14**].
[34] *Condominium Property Act*, s 30(4)(a).
[35] *Condominium Property Regulation*, AR 168/2000, s 23 [**TAB 15**].

All of which is respectfully submitted this 9th day of April, 2019.

BURNET, DUCKWORTH & PALMER LLP

Per: 

David LeGeyt, solicitor for the Receiver

VI. TABLE OF AUTHORITIES

TAB

1. *RBC v Reid-Built Homes*, 2018 ABQB 124
2. *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550
3. *Garritty, Re*, 2006 ABQB 238
4. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s 187(5)
5. *Edmonton (City) v Alvarez & Marsal Canada Inc* 2019 ABCA 109
6. Alberta Rules of Court, Alta Reg 124/2010, r 9.12
7. *Tataryn v Condominium Plan No 7810994*, 2003 ABQB 810
8. *Condominium Property Act*, RSA 2000, c C-22, s 67(1)(b)
9. *1597130 Alberta Ltd v Condominium Corp No 1023241*, 2015 ABQB 698
10. *Condominium Act*, 1998, SO 1998, c 19, s 131
11. *Skyline Executive Properties Inc v Metropolitan Toronto Condominium Corp No 1385*, 2002 CarswellOnt 5670
12. *2308478 Ontario Ltd v York Region Condominium Corp No 715*, 2016 ONSC 6256
13. *Condominium Property Act*, RSA 2000, c C-22, s 58(4)
14. *Condominium Property Act*, RSA 2000, c C-22, s 30
15. *Condominium Property Regulation*, AR 168/2000, s 23

TAB 1

Original
2018 ABQB 124
Alberta Court of Queen's Bench

Royal Bank of Canada v. Reid-Built Homes Ltd

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

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

Robert A. Graesser J.

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

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

Subject: Civil Practice and Procedure; Insolvency; Property; Public; Tax — Miscellaneous; Municipal

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses

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

receivership — For creditors who may benefit from receivership, super priority is generally appropriate for receiver's fees and disbursements, on expectation that these fees and disbursements will ultimately be fairly apportioned — Receiver's super priority charge was to remain, and it applied to I Corp. and S Ltd. with respect to receiver's fees and borrowing power.

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

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

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

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

Table of Authorities

Cases considered by *Robert A. Graesser J.*:

Bank of Montreal v. Peri Formwork Systems Inc. (2012), 2012 BCCA 4, 2012 CarswellBC 10, 85 C.B.R. (5th) 80, 8 C.L.R. (4th) 79, 314 B.C.A.C. 240, 534 W.A.C. 240, 346 D.L.R. (4th) 495 (B.C. C.A.) — considered

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373, 1972 CarswellMan 9 (Man. C.A.) — considered

Breiger Holdings Ltd. v. Thorne Riddell Inc. (1980), [1980] 5 W.W.R. 108, 34 C.B.R. (N.S.) 244, 1980 CarswellMan 10 (Man. Q.B.) — considered

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

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

Canada North Group Inc (Companies' Creditors Arrangement Act) (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103, [2018] 2 W.W.R. 731 (Alta. Q.B.) — considered

Canadian Imperial Bank of Commerce v. Wildflower Productions Inc. (2001), 2001 BCCA 159, 2001 CarswellBC 409, 87 B.C.L.R. (3d) 1, 197 D.L.R. (4th) 92, 150 B.C.A.C. 25, 245 W.A.C. 25, 2 P.P.S.A.C. (3d) 147 (B.C. C.A.) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc. (1984), 55 B.C.L.R. 38, (sub nom. *Winmil Holidays Co., Re)* 10 D.L.R. (4th) 572, 52 C.B.R. (N.S.) 129, 1984 CarswellBC 569 (B.C. C.A.) — considered

Evans v. Sports Corp. (2011), 2011 ABQB 478, 2011 CarswellAlta 1318, 85 B.L.R. (4th) 313, 47 Alta. L.R. (5th) 254, [2012] 3 W.W.R. 209, 523 A.R. 80 (Alta. Q.B.) — referred to

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

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd. (2010), 2010 ABQB 798, 2010 CarswellAlta 2806, 514 A.R. 132, 90 C.B.R. (5th) 216 (Alta. Q.B.) — considered

Garritty, Re (2006), 2006 ABQB 238, 2006 CarswellAlta 382, 21 C.B.R. (5th) 237, 62 Alta. L.R. (4th) 68, (sub nom. *Garritty (Bankrupt), Re)* 398 A.R. 100, (sub nom. *Garritty (Bankrupt), Re)* 398 A.R. 123 (Alta. Q.B.) — considered

General Chemical Canada Ltd., Re (2005), 2005 CarswellOnt 210, 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) — referred to

General Motors Corp. v. Tiercon Industries Inc. (2005), 2005 CarswellOnt 4156, 35 R.P.R. (4th) 268 (Ont. S.C.J.) — considered

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd. (1995), 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, (sub nom. *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.)* 23 O.R. (3d) 781, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List]) — followed

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 964, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — referred to

Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp. (2016), 2016 BCCA 231, 2016 CarswellBC 1462, 37 C.B.R. (6th) 1, 85 B.C.L.R. (5th) 10, (sub nom. *Integris Credit Union v. All-Wood Fibre Ltd.)* 387 B.C.A.C. 196, (sub nom. *Integris Credit Union v. All-Wood Fibre Ltd.)* 668 W.A.C. 196, [2016] 10 W.W.R. 287 (B.C. C.A.) — considered

Lewis Estates Communities Inc. v. Brownlee LLP (2013), 2013 ABQB 731, 2013 CarswellAlta 2547 (Alta. Q.B.) — referred to

Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630, 1984 CarswellBC 572, 53 C.B.R. (N.S.) 177 (B.C. C.A.) — considered

Medican Holdings Ltd., Re (2013), 2013 ABQB 224, 2013 CarswellAlta 513, 16 B.L.R. (5th) 327 (Alta. Q.B.) — referred to

Paniccia Estate v. Toal (2012), 2012 CarswellAlta 48, 2012 ABQB 11, 90 C.C.L.T. (3d) 310, 57 Alta. L.R. (5th) 124, 16 C.P.C. (7th) 18, [2012] 6 W.W.R. 162, 521 A.R. 73 (Alta. Q.B.) — referred to

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABCA 293, 2006 CarswellAlta 1354, 25 C.B.R. (5th) 38, [2006] 12 W.W.R. 213, (sub nom. *Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of))* [2006] I.L.R. I-4552, 65 Alta. L.R. (4th) 32, 275 D.L.R. (4th) 498, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 417 A.R. 153, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 410 W.A.C. 153 (Alta. C.A.) — considered

Respec Oilfield Services Ltd., Re (2010), 2010 ABQB 277, 2010 CarswellAlta 830, 68 C.B.R. (5th) 189, 28 Alta. L.R. (5th) 239, 17 P.P.S.A.C. (3d) 148 (Alta. Q.B.) — referred to

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

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

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

Scanwood Canada Ltd., Re (2011), 2011 NSSC 189, 2011 CarswellNS 564, 966 A.P.R. 34, 305 N.S.R. (2d) 34, 84 C.B.R. (5th) 57 (N.S. S.C.) — considered

Strathcona (County) v. Hansen (2014), 2014 ABCA 17, 2014 CarswellAlta 27 (Alta. C.A.) — referred to

Sulphur Corp. of Canada Ltd., Re (2002), 2002 ABQB 682, 2002 CarswellAlta 896, 35 C.B.R. (4th) 304, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152 (Alta. Q.B.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Temple City Housing Inc., Re (2007), 2007 ABQB 786, 2007 CarswellAlta 1806, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274 (Alta. Q.B.) — considered

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

Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

Village Green Lifestyle Community Corp., Re (2007), 2007 CarswellOnt 654, 27 C.B.R. (5th) 199, 45 C.C.L.I. (4th) 302 (Ont. S.C.J.) — considered

Walter Energy Canada Holdings, Inc., Re (2017), 2017 BCSC 709, 2017 CarswellBC 1166, 48 C.B.R. (6th) 62 (B.C. S.C.) — considered

Waquan v. Canada (Attorney General) (2016), 2016 ABQB 280, 2016 CarswellAlta 893, 37 Alta. L.R. (6th) 422, 92 C.P.C. (7th) 220 (Alta. Q.B.) — referred to

Yorkshire Trust Co. v. Canusa Construction Ltd. (1984), 54 B.C.L.R. 75, 52 C.B.R. (N.S.) 63, 10 D.L.R. (4th) 45, 1984 CarswellBC 564 (B.C. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 31(1) — considered

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

s. 187(5) — considered

s. 243(1) — considered

s. 243(6) — considered

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

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

Generally — referred to

s. 54 — considered

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

Generally — referred to

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

Generally — referred to

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

Generally — referred to

s. 348 — considered

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

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 9.12 — considered

R. 9.13 — considered

R. 9.14 — considered

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

Robert A. Graesser J.:

Introduction and Background

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

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

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

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

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

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

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

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

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

Position of the Applicants

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

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

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

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

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

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

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

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

> 54(1) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may

order the appointment of a receiver on any terms and on the giving of any security or without security, as the court considers appropriate.

(2) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, on the giving of any security or without security, as the court considers appropriate, appoint a trustee

(a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and

(b) with power, on approval of the court, to complete or partially complete the improvement.

(3) Mortgage money advanced to the trustee as the result of any of the powers conferred on the trustee under this section takes priority over all liens existing at the date of the appointment of the trustee.

(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

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

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

19 The exceptions described in *Kowal* are:

(1) If a receiver has been appointed at the request, or with the consent or approval, of the security holders, the receiver will be given priority;

(2) If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority for charges and expenses properly incurred; or

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

20 The Receiver also raises paramountcy with respect to Standard General's arguments, as it did in relation to Edmonton's property tax claim. The Receiver notes that paramountcy has been dealt with by Lovecchio J in *Sulphur*

Corp. of Canada Ltd., Re, 2002 ABQB 682 (Alta. Q.B.), who accepted that orders under the *BIA* would prevail when there was a conflict between the order and the *Builders' Lien Act*.

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

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

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

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

Analysis

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

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

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

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

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

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

. . .

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

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

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

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

Preliminary objection to Edmonton's application

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

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

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

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

(a) vary the judgment or order, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Onus on come-back application

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

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

Policy considerations

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

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

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

CCAA v BIA

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

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

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

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

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

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

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

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

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

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

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

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

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

54 The use of templates is highly desirable. They provide consistency in practice and are a great convenience for the bar and the bench. However, they do not have the force of law, except when the provisions mirror the law as determined

by applicable statutes and binding authorities. Templates are not statutory or regulatory forms. They are a starting point for crafting an appropriate order.

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

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

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

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

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

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

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

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

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

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

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

and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.

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

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

ICI Opt out/lifting the stay application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76 Farley J stated in *Cumberland Trading Inc*:

> [11] Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor qua

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

77 The Court in *Scanwood Canada Ltd* held:

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

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

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

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

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

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

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

81 The Court held:

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

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

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

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

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

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

85 He observed:

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

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

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

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

> [41] In my view the exceptions provided for in Kowal are not engaged here. From the outset of the application, the Appellants took the position that they wanted no part in the receivership. Prior to the court application, BHL engaged in correspondence with KPMG in an attempt to have the Receiver give up the property without a court application. The Receiver also had early notice of MBFS's interest in the Trucks.
>
> [42] The most telling circumstance weighing in favour of excluding the Trucks from the receivership is that the Appellants have priority over Integris with respect to the Trucks pursuant to their PMSI's. To allow the Trucks to remain under the receivership would grant the Receiver, and indirectly Integris who must indemnify the Receiver's losses, priority over the Appellants.
>
> [43] By virtue of the lease or conditional sale agreements, All-Wood had only possessory interests in the Trucks. The Appellants retained the proprietary rights. All-Wood had only the right to possess and use the Trucks, on certain terms and conditions as set out in the agreements. The Receiver could not acquire a greater interest than All-Wood held.

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

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

90 The Court held:

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

91 It also noted:

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

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

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

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

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

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

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

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

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

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

Priority issues

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

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

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

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

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

> (1) If the receiver has been appointed at the request, consent or approval of the security holders; or
>
> (2) If the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; or
>
> (3) If the receiver has expended money for the necessary preservation or improvement of the property.

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

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

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

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

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

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

> [61] As to Mitsubishi and exception 3, and this is the most difficult of the six analyses I have had to conduct, I have again considered the arguments of counsel and the evidence submitted. Despite the fact that the receiver manager performed services such as employee retention, changing locks, inventory lists, hiring Mr. 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 *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984), 10 D.L.R. (4th) 572 (B.C. C.A.):

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

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

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

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

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

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

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

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

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

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

Standard General

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

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

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

124 The Court dealt with *Kowal* as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must

> accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

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

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

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

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

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

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

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

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

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

Edmonton

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

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

145 Blair J stated at 794:

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

146 However, Blair J stated at 795:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ICI

159 My conclusion with respect to ICI is the same as it is to Standard General. In the absence of circumstances that allow them to lift the stay or opt out of the Receivership, I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. The same holds true for the Borrowing Power. The

Receiver may (for example) borrow to pay off claims ranking in priority to ICI, or for maintenance or improvements to the properties. The cost of any borrowings will have to be apportioned fairly at the end of the process so there is no free ride for any creditor.

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Order accordingly.

TAB 2

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

2017 CarswellAlta 1631, 2017 ABQB 550, [2017] A.W.L.D. 4936, [2017] A.W.L.D. 5003,
[2018] 2 W.W.R. 731, 283 A.C.W.S. (3d) 214, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

AND In the Matter of a Plan of Arrangement of Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd (Applicants)

J.E. Topolniski J.

Heard: August 11, 2017
Judgment: September 11, 2017
Docket: Edmonton 1703-12327

Counsel: Darren R Bieganek, Q.C., for Monitor, Ernst & Young
George F Body, for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue
Jeffrey Oliver, for Business Development Bank of Canada
Stephanie A Wanke, for Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Subject: Income Tax (Federal); Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.v Miscellaneous
Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice

service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

RULING on Canada Revenue Agency's motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National for unremitted source deductions.

***J.E. Topolniski J.*:**

Introduction

1 This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1] (*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

2 Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which subordinate its deemed trust claims arising under the *Income Tax Act (ITA)* [2], *Canada Pension Plan Act* [3] *(CPP Act)*, and *Employment Insurance Act* [4] *(EI Act)* (collectively, the Fiscal Statutes) [5].

3 CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot

be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

4 In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

5 For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

6 No surprise given the nature of the proceedings, matters have unfolded quickly.

7 The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

8 The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

9 On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

10 On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

11 On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

12 By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

13 Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

14 Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

15 On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

16 Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

17 On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508 (Alta. Q.B.)). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The CCAA and Judicial Decision Making

18 The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

19 The *CCAA* process "creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all." [7]

20 When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival. [8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, *Sun Indalex Finance, LLC v. United Steelworkers*, [9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. [10]

21 The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail. [11] Typically, this requires balancing multiple interests.

22 *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in *Century Services*, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring. [12]

23 The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in *Century Services*:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question

> is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit [13].

24 In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play. [14]

A Brief History of Deemed Trust Litigation

25 While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with *Royal Bank of Canada v. Sparrow Electric Corp.* [15]

26 The contest in *Sparrow Electric* was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act* [16] and the Alberta *Personal Property Security Act.* [17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to *Sparrow Electric*, Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

27 The next noteworthy case is *First Vancouver Finance v. MNR*, [18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

28 The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

> a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);
>
> b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);
>
> c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and
>
> d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in *Sparrow Electric*) (at para 27-28).

29 The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

> . . . to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

30 *First Vancouver* was considered in the 2007 decision, *Temple City Housing Inc (Companies' Creditors Arrangement Act)*, [19] and again in June 2017 in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*. [20]

31 In *Temple City*, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

32 Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

33 The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

34 Next is the seminal decision in *Century Services*, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA).[21] Despite the different deemed trust at issue, *Century Services* is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

35 *Rosedale Farms* concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of *Temple City*. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

36 I will return to the conflicting views expressed in *Temple City* and *Rosedale Farms* in the context of the priority analysis.

The Statutory Provisions

37 The relevant statutory provisions are set out below. All emphasis is mine.

38 *CCAA* s 2(1) defines the term, "secured creditor" as including:

> **a holder of . . . a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

39 *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

40 The *EI Act* and *CPP Act* cross-reference these definitions.

41 The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 *CCAA* s 37, previously s 18.2, reads:

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") . . . .

43 *ITA* ss 227(4) and (4.1) read:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada,** any enactment of a province or any other law, **where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid** to Her Majesty in the manner and at the time provided under this Act, **property of the person and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust **is deemed**

(a) *to be held*, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, *in trust for Her Majesty whether or not the property is subject to such a security interest*, and

> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> **and is property beneficially owned by Her Majesty** notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

44 *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

45 With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

46 The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

47 The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

48 The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause. [22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

49 CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

50 Recourse through the comeback clause is available when circumstances change. As explained in *Pacific National Lease Holding Corp., Re*:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. [23] [emphasis added]

51 Likewise, in *Re Royal Oak Mines Inc*, Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring. [24]

52 Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause. [25]

53 An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence. [26]

54 Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

55 Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of *Re Algoma Steel Inc*,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

56 Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*.[28]

57 Next, I will discuss service and timing concerns.

Service

58 It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence.[29]

59 As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

60 Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

61 Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

62 CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

63 The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

64 Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

65 The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

66 These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

67 In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, *Algoma Steel* supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

68 While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question." [30]

69 Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

70 CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

71 The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

72 Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

73 I turn next to who bears the onus.

The Onus

74 The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding." [31]

75 In *General Chemical Canada Ltd., Re*, [32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

76 In contrast, in *Re Target Canada Co*, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied." [33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

77 Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

78 I now turn to the substantive priority issue.

Who has priority?

79 It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

80 Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

81 CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act . . . property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

82 CRA asserts that these words take it beyond a mere secured creditor because they do not just *deem* the Crown to be the owner of the interest, but rather, says that it *is* the owner.

83 This is the same position CRA advocated in *Temple City*, where Romaine J distilled these features of tax deemed trusts from *First Vancouver* :

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and

- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

84 Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*. [34]

85 Moir J in *Rosedale Farms* disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in *First Vancouver* was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted. [35]

- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust. [36]

- Reliance on the *ITA* definition of "secured interest" is misguided. [37]

86 Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in *First Vancouver* . However, as I read *Temple City*, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

87 *Rosedale Farms* is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment . . . and includes a ... deemed or actual trust ... ."

88 Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

89 For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

90 It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

91 *ITA* s 227(4.1) opens with these words:

> **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law**, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty notwithstanding any security interest in such property . . . . [emphasis added] (Notwithstanding Provision)

92 CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in *Century Services* (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

93 While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

94 CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] . . . is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

95 The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

96 In *Thibodeau v Air Canada*,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "*only* when the existence of the conflict, in the restrictive sense of the word, *cannot be avoided by interpretation*"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

97 Further, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
> >
> > (P. -A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
> >
> > As in any statutory interpretation exercise . . . courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative scheme** (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co.***, at para. 102. [emphasis added]

98 Deschamps J observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

99 She also quoted with approval the reasons of Doherty JA in *Elan Corp v Comiskey*[42] (Doherty JA was dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

100 In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[43]

101 In *Indalex*, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> . . . case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. [44]

102 The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

103 Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

104 Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

105 Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

106 Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> . . . priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

107 CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": *First Vancouver* at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

108 The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

109 CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

110 The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

111 It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

112 I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority *only* to those charges necessary for restructuring. 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.

113 A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

114 For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Order accordingly.

Footnotes

1 RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

2 RSC, 1985, c 1 (5th Supp) 6.

3 RSC 1985, c C-8.

4 SC 1996, c 23.

5 Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.

6 RSC 1985, c B-3.

7 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 77, [2010] 3 S.C.R. 379 (S.C.C.).

8 *Century Services* at paras 15, 17.

9 *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205, [2013] 1 S.C.R. 271 (S.C.C.).

10 ***Indalex*** at para 105.

11 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.) at 140, (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.).

12 *Century Services* at paras 64-66.

13 ***Century Services*** at para 70.

14 *Century Services* at paras 65 and 70.

15 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) .

16 *SC 1991, c 46.*

17 SA 1988, c P-4.05.

18 *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720 (S.C.C.).

19 *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274 (Alta. Q.B.), leave to appeal denied *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 43 C.B.R. (5th) 35 (Alta. C.A.).

20 *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.).

21 *RSC 1985, c E15.*

22 *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para 5; *Comstock Canada Ltd., Re*, 2013 ONSC 4756, 4 C.B.R. (6th) 47 (Ont. S.C.J.) at para 49; *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.); *CanaSea PetroGas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283 (Ont. S.C.J.) at paras 13-14.

23 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) at para 30.

24 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para 28.

25 *Re CanaSea PetroGas Group Holdings Ltd.*

26 *Elias v. Hutchison* (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.) (at para 6), (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.), aff'd (1981), 121 D.L.R. (3d) 95, 37 C.B.R. (N.S.) 149 (Alta. C.A.); *Christiansen v. Paramount Developments Corp.*, 1998 ABQB 1005 (Alta. Q.B.) (at para 24), (1998), 8 C.B.R. (4th) 220 (Alta. Q.B.); *Fitch v. Official Receiver* (1995), [1996] 1 W.L.R. 242 (Eng. C.A.); *Lyall, Re* (1991), 8 C.B.R. (3d) 82 (B.C. S.C.).

27 *Algoma Steel Inc., Re*, [2001] O.J. No. 1994 (Ont. S.C.J. [Commercial List]), leave to appeal refused, (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.).

28 At para 14.

29 *Concrete Equities Inc., Re*, 2012 ABCA 266 (Alta. C.A.) at paras 19, 24.

30 *Muscletech*, at para 5.

31 *Royal Oak*, at para 28.

32 *General Chemical Canada Ltd., Re* (2005), 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) at para 2.

33 *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.) at para 82.

34 *Temple City*, at para 13.

35 *Rosedale Farms*, at para 39.

36 *Ibid*, para 35.

37 *Ibid*, para 29.

38 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21.

39 *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.).

40 *Thibodeau* at para 92.

41 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.).

42 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.) at para 57.

43 Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.

44 ***Indalex*** at para 59.

TAB 3

2006 ABQB 238
Alberta Court of Queen's Bench

Garritty, Re

2006 CarswellAlta 382, 2006 ABQB 238, [2006] A.W.L.D. 1799, [2006] A.J. No. 351, 21 C.B.R. (5th) 237, 398 A.R. 100, 398 A.R. 123, 62 Alta. L.R. (4th) 68

In the Matter of The Proposal of Gordon Gerard Garritty

In the Matter of The Proposal of Peter William MacDonald

J.E. Topolniski J.

Judgment: March 28, 2006 *
Docket: Edmonton 03-111606, 03-111519

Counsel: Brian D. Rhodes, John I. McLean for Kingsway General Insurance Company
Kent Rowan for Deloitte & Touche Inc.
Douglas N. Tkachuk for Gordon Garritty, Peter MacDonald
Vivian R. Stevenson for One Stop Insurance Services Ltd., John Devich, George Raymond

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.e Appeal from order approving or rejecting proposal
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Appeal from order approving or rejecting proposal
Debtors were directors and officers of bankrupt home warranty companies — Creditor was insurance underwriter of home warranty policies brokered or administered by companies — Creditor brought claims against debtors and companies for alleged miscellaneous breaches — Debtors filed notices of intention to make proposals to all unsecured creditors — Creditor did not find out about notices of intention until immediately prior to vote of creditors — Creditor allegedly requested that trustee adjourn vote on proposals — Vote proceeded as scheduled, proposals were accepted by unsecured creditors and court orders were issued approving proposals — Creditor brought application to rescind orders — Application dismissed — Creditor's proper remedy was to pursue annulment of orders rather than recission — Governing legislation was broadly drafted to allow annulment where injustice was created by continuing proposal — Definition captured procedural flaws such as notice non-compliance complained of by creditor — Recission would expose post-proposal creditors and other innocent third parties dealing with debtors to unnecessary risk — Annulment provided post-proposal parties protections which recission would not if unsecured creditors decided not to re-approve proposals.

APPLICATION by creditor to rescind orders approving two bankruptcy proposals.

Topolniski J.:

I. Nature of the Application

1 A contingent creditor applies to rescind Orders of the Registrar approving two *Bankruptcy and Insolvency Act* (*BIA*) [1] proposals made to unsecured creditors. Through no fault of its own, the creditor did not have notice of the

proposals until well after the creditors' meetings. It was not until the day before issuance of the Order approving one of the proposals had been granted and the other proposal was en route to court for approval that the creditor became aware of the proceedings. The creditor also asks for a direction that the trustee in bankruptcy administering the Proposals call a new meeting of creditors, accept its claim and register its vote on the proposals.

2 The applications are made pursuant to s. 187(5) of the *BIA*. Preliminary concerns about standing, jurisdiction, and process have been raised.

II. Background

A. General

3 Gordon Garritty and Peter MacDonald (collectively the Debtors) filed Notices of Intention to make proposals to their unsecured creditors in the spring of 2005 (Proposals). Garritty and MacDonald were directors and officers of two now bankrupt companies, Residential Warranty Company of Canada Inc. (RWC) and Residential Warranty Insurance Services Ltd. (RWI) (collectively the Companies), which operated a home warranty business in Alberta and British Columbia.

4 The Applicant, Kingsway General Insurance Company (Kingsway), was an insurance underwriter of home warranty policies brokered or administered by the Companies.

5 Kingsway's contingent claim arises from a series of transactions detailed in a broadly drafted Amended Statement of Claim, which it filed in the British Columbia Supreme Court in June 2004, prior to the Proposals being made (BC Action). The Amended Statement of Claim is comprised of 125 paragraphs over 42 pages. It contains allegations of breach of contract, fraud, conversion, breach of trust, and breach of fiduciary duty. The Debtors, the Companies and certain other of their employees are the defendants in the lawsuit.

6 Kingsway found out about the Proposals from the Companies' then interim receiver, Deloitte & Touche LLP. By then, the creditors had voted on the Proposals. The application for court approval of MacDonald's Proposal was to be heard the next day, while the application for court approval of Garritty's Proposal (Garritty Motion) was scheduled for about a month later. Kingsway did not seek an adjournment of the MacDonald Proposal, which was approved the following day. Kingsway's lawyer, who is from British Columbia, subsequently advised the trustee administering the Proposals (Trustee) that he would be retaining local counsel to either seek an adjournment or to oppose the upcoming Garritty Motion if the Trustee did not agree to the adjournment by the next day. He also expressed Kingsway's view that its claim, based on fraud, was unaffected by the Proposals in any event.

7 As events unfolded, the Trustee never responded to the adjournment request and no one appeared on Kingsway's behalf at the Garritty Motion. The Trustee's lawyer was unaware of Kingsway's adjournment request and intended appearance and, therefore, did not advise the Registrar of such. The Registrar approved the Garritty Proposal. Two weeks passed before Kingsway contacted the Trustee to ask what had happened on the Garritty Motion. It was not for another month that it filed the Notices of Motion relating to the present Applications. After another four months, it sent the Trustee proofs of claim by which it claimed as a secured creditor in both Proposals. It amended its proofs of claim on the eve of these Applications, to claim as an unsecured creditor. The Trustee disallowed all of Kingsway's claims and Kingsway appealed the disallowances. The appeals are extant, but as yet unscheduled.

8 The Debtors oppose Kingsway's Applications on the basis that: (1) Kingsway is unaffected by the Proposals and it should not be allowed to interfere; and (2) a s. 187(5) review is unavailable in these circumstances and, even if it were, the Applications should be stayed until Kingsway has proved its claim. The largest proven creditor, Canada Revenue Agency (CRA) joins in the Debtors' opposition to the Applications. It regards the Applications as procedural manoeuvring that, if successful, will do nothing to improve the return available to the creditors.

B. Chronology of Events

9 The following is the chronology of events relevant to these Applications:

2003	
August	Kingsway terminates contractual relations with the Companies.
2004	
April	Kingsway complains to the British Columbia Financial Institutions Commission (FICOM) about the Companies' alleged wrongdoings. FICOM suspends RWI's broker license, reinstating it three weeks later on conditions, one of which is payment of $3,100,000.00 in trust for premiums allegedly owed to Kingsway. Garritty surrenders his broker's license.
June 16	Kingsway starts the BC Action and a parallel lawsuit in Alberta that it does not advance.
Early July	RWC pays Kingsway $3,092,612.50.
August 30	The defendants in the BC Action defend and counterclaim seeking damages of approximately $195,000.00. Some time later, Kingsway demands document production in the BC Action.
November 30	This Court appoints Deloitte & Touche LLP the interim receiver of the Companies (IR) in the context of a minority shareholder's oppression action.
2005	
January	Kingsway amends the BC Statement of Claim to allege further wrongdoing.
February 23	MacDonald files a Notice of Intention to make a *BIA* Division I Proposal to his unsecured creditors. The Statement of Affairs lists $308,003.00 in total debt, comprised of $272,000.00 CRA debt, $1.00 Kingsway debt, and the balance owed to miscellaneous creditors. Kingsway's mailing address is listed as c/o Owen Bird, defence counsel in the BC Action.
March 3	Garritty files a Notice of Intention to make a *BIA* Division I Proposal to his unsecured creditors. The Statement of Affairs lists $701,002.00 in total debt. Unsecured debt is $407,002.00, comprised of $337,500.00 CRA debt, $1.00 owed to Kingsway, and the balance owed to miscellaneous creditors. No address is listed for Kingsway.
March 15	MacDonald's creditors vote in favour of the Proposal. CRA attends the meeting.
March 24	Garritty's creditors vote in favour of the Proposal. CRA and a minority shareholder, Eco Pharm Holdings Ltd, attend the meeting.
April 4	The IR informs Kingsway's counsel, Mr. Rhodes, about the Proposals. It is unclear if Kingsway was aware of the application to sanction MacDonald's Proposal the following day.
April 5	Registrar Smart grants an Order sanctioning MacDonald's Proposal. The Trustee tells Rhodes that he will send him the Proposal documents.
April 15	Rhodes faxes the Trustee asking for the documents, stating: > We understand that your clients, Peter MacDonald and Gordon Garritty have filed proposals in bankruptcy. Given that allegations of fraud have been alleged in Kingsway's Action, by virtue of the *Bankruptcy and Insolvency Act*, Kingsway's Action survives your clients' bankruptcy. > ... > We are in the process of scheduling a meeting with Deloitte & Touche to discuss Kingsway's Action. In order to make an informed decision with respect to discussions with Deloitte & Touche about Kingsway's action, we require a copy of the proposals your clients filed in the bankruptcy proceedings.
April 18	Rhodes receives the Proposal documents. (I note that the Order approving MacDonald's Proposal was not in the package of material sent that day and it is unclear if Kingsway had actual notice of this Order before April 26.)
April 26	Rhodes advises the Trustee as to Kingsway's position on the lack of notice it received of the creditors' meetings and its general objection to the Proposals, and seeks adjournment of the Garritty Motion.
April 27	Rhodes faxes the Trustee confirming his discussion of the day before, stating:

	If you are not prepared to consent to an adjournment we will have local counsel appear and advise the court that we just became aware of the matter and of concerns we have relating to lack of notice to Kingsway and the fraudulent conduct of the debtor. Please confirm by April 28{th} that you will adjourn the hearing for at least two weeks and will provide the requested information.
April 28	The Trustee does not respond to the adjournment request. The Companies file Notices of Intention to make Proposals to their creditors.
May 3	The Garritty Motion proceeds with CRA and Eco Pharm in attendance. Eco Pharm unsuccessfully applies for standing and an adjournment. CRA supports the Proposal and Registrar Wachowich grants the Order.
May 19	Kingsway learns the outcome of the Garritty Motion and that there is no appeal of the Order. The Trustee concedes to Rhodes that he could not say if the Court was informed of the adjournment request.
May 28	The Companies are deemed bankrupt. Deloitte & Touche LLP is their trustee in bankruptcy.
June 7	Kingsway's forensic accountant calculates the amount that remains owing to Kingsway from the Companies is $3,786,606.00.
June 16-21	Kingsway files the Notices of Motion relating to the present Application and serves them on MacDonald and Garritty.
Late June	After receiving certain financial information from the Companies' trustee in bankruptcy, Kingsway's forensic accountant determines that $11,292,224.00 (over and above the monies already paid by RWC), plus additional amounts for unliquidated damages, is still owing from the Companies.
October 7	Kingsway delivers proofs of claim to the Trustee by which it claims as a secured creditor for approximately $11,200,000.00. Appended to both claims is a copy of the Amended Statement of Claim in the BC Action and three Affidavits.
Mid-October	Kingsway obtains a transcript of the Garritty Motion.
October 20	The Debtors seek to have these Applications heard before the various applications brought by Kingsway in the Companies' bankruptcies, including its appeal of Deloitte & Touche's disallowance of its trust claim for approximately $11,200,000.00.
November 7-25	The Trustee disallows Kingsway's proofs of claim and Kingsway appeals the disallowances.
2006	
January 22	Kingsway amends its proofs of claim to claim as an unsecured creditor owed approximately $11,200,000.00.
January 23 - February 23	These Applications are adjourned for submissions from CRA. The Trustee provides a Report to the Court.

III. Analysis

A. Jurisdiction - Registrar or Judge

10 One member of the Court should not vary or rescind the order of another unless the circumstances mandate it; for example, where the person making the initial order died or is unavailable because of an extended illness or absence. [2] Only the parties' consent or exceptional circumstances warrant one member of the Court varying an order made by another. These Applications are to review orders made by Registrars Smart and Wachowich, both of whom are alive, well and working.

11 The authorities conflict about whether the Registrar's jurisdiction includes reviewing final orders, but they agree that it extends to hearing applications concerning orders they have granted, particularly orders made within their jurisdiction in the first instance. [3] Most also agree that the Registrar may hear a contested application under s. 187(5).

12 In *247178 Alberta Ltd., Re*,[4] Registrar Funduk considered his jurisdiction to conduct a s. 187(5) review of an order that he had made. He concluded that the then equivalent of s. 192 of the *BIA*, which sets out the Registrar's powers, is one of inclusive rather than exclusive jurisdiction. While he found that he had the jurisdiction to set aside his own orders, he determined that the nature of the order in question in that case precluded him from doing so as it was a final order which could only be appealed, something which was beyond his jurisdiction. In reaching this conclusion, he applied the Alberta Court of Appeal's decision in *Elias v. Hutchison.*[5]

13 Registrar Cook in *Fackler v. Patterson*[6] dealt with the issue of his jurisdiction in the context of a contested application to annul a receiving order that he had granted. After reviewing case authority, he decided that his jurisdiction permitted him to hear the application.

14 A contested application to rescind a proposal was brought before a Registrar in *Foster's Fashions Ltd., Re*,[7] A challenge to the Registrar's jurisdiction in that case was summarily dismissed.

15 In *Dimant, Re*,[8] Steele J. ruled that a contested application for review of an order discharging a bankrupt under what is now s. 187(5) of the *BIA* was not available because it should have been made to the Registrar.[9]

16 Madam Justice Bielby in *Christiansen v. Paramount Developments Corp.*[10] took jurisdiction on a contested s. 187(5) review of a Registrar's order, observing that, but for the parties' consent, it would have been before the Registrar. However, the contrary view was expressed in *MacCulloch Estate, Re*,[11] a case where an application to set aside a Registrar's order was brought jointly by way of an appeal and under s. 187(5).

17 My view is that these Applications should have been brought before Registrars Smart and Wachowich, who have jurisdiction to hear contested applications under s. 187(5). Their jurisdiction should be determined in this instance not by the fact that it is a contested motion for review, but rather by the scope of s. 187(5) and the nature of the application *per se*.

18 However, given the exceptional circumstances of this case, I find it appropriate for me to hear the Applications. The parties indicate that, if the matters are remitted to the Registrars, appeals from their decisions are inevitable. As the case manager, any such appeals would be assigned to me and my assuming jurisdiction simply fast-forwards the process. It does not deprive the Debtors of any substantive rights. As appeals from a Registrar are true appeals, not appeals *de novo*, the parties do not have a second "kick at the can".[12]

B. Standing

19 Kingsway submitted amended proofs of claim as an unsecured creditor after the Debtors advanced the argument in written submissions on these Applications that Kingsway had no standing since the Proposals were made to unsecured creditors and Kingsway was claiming as a secured creditor.

20 The *BIA* does not limit the number of amendments to proofs of claim that a creditor can make, whether last minute or otherwise. Accordingly, the timing of the amendment does not rob Kingsway of standing. There may be circumstances where repeated amendments constitute an abuse of the process. Here, the Debtors and CRA contend that Kingsway's claims are "like shifting sands". That does not equate to an allegation of abuse of process.

C. Trustee Error, Notice and Adjournment Request

21 A trustee in bankruptcy is:

> (i) required to know the provisions of the *BIA*, and ignorance is no excuse for non-compliance with the law;[13]

(ii) an officer of the court obliged to make full and frank disclosure to the court and to present the facts in a dispassionate and non-adversarial manner in every court proceeding; [14]

(iii) obliged to look after all parties' interests; and

(iv) required to avoid entering into the fray between competing stakeholders. [15]

22 The Debtors' Statements of Affairs prepared in connection with their Proposals list Kingsway as a creditor owed $1.00. Although s. 50.4 of the *BIA* [16] requires that a trustee send every known creditor a copy of any Notice of Intention to make a Proposal within five days of its filing, that was not done here. The Trustee sent the material only to creditors with claims valued at more than $250.00.

23 As a proposal constitutes substantial interference with creditors' rights, all statutory provisions must be complied with strictly. [17] In his post-Application Report, the Trustee contended that he complied with this requirement as it was his understanding, based on advice he received, that Kingsway did not have an enforceable debt. As such, it was not a "creditor" entitled to notice. He suggested that if Kingsway had attended the creditors' meetings, he would have refused to allow it to vote on that basis.

24 The provisions of s. 121 of the *BIA* govern the provability of claims in a proposal and who is a "creditor". Section 121(1) provides that:

> 121(1) All debts and liabilities, present or future, to which the Bankrupt is subject on the day on which the Bankrupt becomes bankrupt or to which the Bankrupt may become subject before the Bankrupt's discharge by reason of any obligation incurred before the day on which the Bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

25 A trustee's duty is to assess claims following the process outlined in s. 135:

> 135(1) The trustee shall examine every proof of claim or proof of security and the grounds therefore and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, a proved claim to the amount of its valuation.

26 Kingsway's claim is contingent, but that does not remove Kingsway from the list of "every known creditor" that is entitled to receive notice under s. 50.4. Indeed, it is that notice which starts the process for proving a claim and determining who is entitled to participate at creditors' meetings.

27 The Trustee's conclusion that Kingsway was not a "creditor" entitled to notice because its claim was at the early stages of litigation and there was no enforceable debt presumed that a contingent claim cannot be "proved" within the meaning of the *BIA*. It also resulted in the Trustee bypassing the necessary steps for assessing the claim under s. 135. Neither the Trustee's conclusion nor the decision to bypass the process in s. 135 was proper.

28 In any event, it is difficult to reconcile the Trustee's position with his actions at the relevant time. If he did not consider Kingsway to be a "creditor" entitled to a s. 50.4 notice, why do the Statements of Affairs show Kingsway as a creditor owed $1.00 and why did the Trustee send notice of MacDonald's Proposal to Kingsway, even if to the wrong address?

29 Trustee error is one factor which the courts consider in deciding whether to grant relief to a creditor who did not receive notice of a *BIA* proceeding to which it was entitled. It does not necessarily result in upsetting an order. Every

case is fact driven. The factors considered on an application to rescind a *BIA* order include: (i) the degree of debtor and trustee misconduct; (ii) the likely effect on the voting of other creditors if they had knowledge of the contingent claim; (iii) the likely effect on the granting of the initial order if notice been given; and (iv) safeguarding public confidence in the bankruptcy system and the administration of justice generally.

30 There are a number of notable authorities which deal with non-compliance with *BIA* notice requirements. Most do not relate specifically to proposals, but the courts' reasoning is helpful nevertheless.

31 In *Flexi-Coil Ltd. v. Dutch Industries Ltd.*, [18] the trustee failed to send statutory notice of proposal proceedings to two contingent creditors. One of them learned about the creditors' meeting and sent a representative. The trustee, having accepted the debtor's statement that contingent claims were "all covered off", turned the representative away. There was some discussion about the contingent claims at the meeting. In allowing the excluded creditor's appeal of the order approving the proposal, the Saskatchewan Court of Appeal criticized the debtor for not disclosing the true state of affairs and the trustee for reporting that he had made detailed and careful inquiry into liabilities of the debtor when it was apparent that he had not. The court indicated that it considered the proceedings fundamentally flawed as the notice requirement applied to contingent and unliquidated claims in a proposal, stating that: [19]

> Since the procedure in s.135 of the Act applies to such claims the trustee must carry out its statutory duties under that provision... Furthermore an application of this nature should be brought by the trustee before application is made for approval of the proposal: *Re Cadillac Explorations Limited (No.2)* (1985), 51 C.B.R. (N.S.) 178 (B.C.S.C.). A debtor cannot avoid the application of these provisions by failing to make full disclosure of contingent claims in the first place.

32 The court also expressed concern about commercial morality and the potential that knowledge of the contingent claim could have caused other creditors to reconsider their vote.

33 *Gaucher, Re* [20] concerned a contested application for an order approving a proposal where the debtor's major creditor was unaware of the process until after the creditors' meeting and a favourable vote. The court refused to sanction the proposal.

34 In *Lofchik, Re*, [21] the trustee mailed notice of the creditors' meeting to all of the creditors. A creditor with a significant claim who would have voted against the proposal did not receive the notice. The court held that the trustee did all that was legally required and that failure of the creditor to receive the notice did not affect approval of the proposal by the other creditors.

35 The complaining creditor in *Merrick, Re*, [22] did not have notice of the bankrupt's discharge application. At the time of the bankruptcy, the creditor was a contingent claimant, but later proved his claim. Doherty J. held that it would be unfair to set aside the discharge order for a wide variety of reasons. The facts in *Merrick, Re* were dramatically different than those here. Nonetheless, the case includes a useful discussion concerning the considerations on an application of this sort, including the need for evidence that the order would have been any different had the creditor opposed the discharge.

36 Like the creditor in *Merrick, Re*, the complaining creditor in *Kornis, Re* [23] did not have notice of the bankrupt's discharge application. The creditor successfully appealed the Registrar's refusal to review the discharge order. The court found that fault for the want of notice lay largely, if not solely, with the trustee, and also expressed concern about the bankrupt's apparent misconduct.

37 In *Dell Chemical & Marketing Ltd. v. Heinz*, [24] a creditor did not receive notice of the bankrupt's assignment into bankruptcy or application for discharge despite the trustee having been told of its claim. Burrows J. granted an order under s. 187(5) rescinding the bankrupt's discharge, but stayed it for two months to allow the trustee to make submissions if it chose to do so.

38 The Registrar in *Newbrook, Re*[25] refused a trustee's accounts where it was apparent that the trustee was less than diligent in discharging its duties to creditors in administering a proposal. Among other acts of trustee misfeasance, the court found that the trustee had pressed forward with a court application to approve a proposal knowing that two major creditors did not have notice of the meeting and would not have approved the proposal.

39 The consequence of the Trustee's non-compliance with the s. 50.4 notice requirements in the present case was the denial of Kingsway's ability to:

(i) present its proofs of claim for the Trustee's assessment;

(ii) protest the Trustee's conclusion that the claims were unprovable;

(iii) ask for an adjournment of the creditors' meetings to prove its claims;

(iv) ask that its vote be marked as objected to and held subject to the outcome of an appeal, and[26]

(v) oppose the application to sanction MacDonald's Proposal.

40 It is irrelevant to this stage of the inquiry that Kingsway may have succeeded only in having the Trustee assess its proofs of claim under s. 135.

41 The Trustee's failure to advise his lawyer about the adjournment request in relation to the Garritty Motion is also troubling, but in light of Kingsway's want of explanation for its failure to attend court, less so than it might otherwise have been.

42 As a general principle, trustees in bankruptcy should advise the court of any adjournment request where the person requesting the adjournment does not appear in person. In cases such as this, where a vocal and objecting creditor fails to appear after saying that it will, a warning bell should sound prompting the trustee to inquire if the non-appearance is by misfortune or design.

43 The Trustee's lawyer, Mr. Tkachuk, was unaware of the adjournment request. Had he known, I expect that the application would have unfolded quite differently, although in the end the result might have been the same. Presuming that matters would have unfolded as they usually do when a party fails to appear after saying that it will, I expect that Tkachuk would have told the Registrar about the adjournment request and tried to raise Rhodes to find out what was happening. He would have provided the Registrar with disclosure of the discussions with Kingsway and, armed with that information, the Registrar would have decided whether to proceed in Kingsway's absence. If Rhodes could not be reached, the Registrar might have considered adjourning the application. If he was contacted, I think it fair to speculate that the Registrar would have refused an adjournment. I reach this conclusion because of Kingsway's failure to explain even at the hearing of the present Applications why it did not attend the hearing before the Registrar.

44 The degree to which the process is tainted by want of notice in the context of the Garritty Proposal is less clear-cut than in MacDonald's. Actual notice casts a different light on the situation. Kingsway had the opportunity to appear but, for some unexplained reason, it chose not to do so. As a result, I am hesitant to conclude that Kingsway should be permitted to rely completely on the Trustee's non-compliance with the statutory notice provision.

D. Process

1. Rescission under Section 187(5) - Governing Principles

45 Section 187(5) of the *BIA* provides that:

187(5) Every court may review, rescind or vary any order obtained by it under its bankruptcy jurisdiction.

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. [27]

(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. [28]

(iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order. [29]

(iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded. [30]

(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. [31]

(vi) The court should resort to its s. 187(5) jurisdiction if it is just and expedient in the control of its own process. [32]

(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. [33]

(viii) The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted. [34]

47 The definition of "rescission" is "to make void, annul, cancel, repeal or revoke". [35]

48 The result of rescission of a bankruptcy order, assignment (into bankruptcy), or order discharging a person from bankruptcy are clear — the person is either in or out of bankruptcy. There is a return to the pre-order or pre-assignment *status quo*. The effect of rescission of an order approving a proposal is not so readily apparent. If the order is annulled in the dictionary sense, as compared to the *BIA* sense, which carries specific legal consequences, a suspended state is created. The proposal exists, as does the stay against enforcement triggered on filing a Notice of Intention to File a proposal. The debtor is not deemed bankrupt by virtue of the order being refused. The question is whether this suspended state can be lifted without causing injury to others.

2. Annulment vs. Rescission

49 There are many reported s. 187(5) cases reported in the literature, but only *Amertek Inc., Re* [36] and *Divell, Re* [37] deal specifically with applications to rescind orders sanctioning a proposal. In both, the court considered the impact of s. 63, which contemplates annulment of a proposal and therefore deemed bankruptcy if there is default in the performance of any provision in a proposal, if it appears to the court that the proposal cannot continue without injustice or undue delay, or because the court's approval was obtained by fraud.

50 In *Amertek Inc., Re*, the application was made under s. 187(5) to rescind and under s. 63 to annul. The court observed that the argument for annulment as the proper approach was a "powerful" one, but did not expressly find that it was the only approach. Instead, the court held that the criteria had not been met for either application. Killeen J. observed that "the court should not twist s. 187(5) out of shape in a misguided effort to do more than s. 63(1) permits". [38]

51 The court in *Divell, Re* went the extra step of finding that annulment, not s. 187(5) rescission, was the proper approach for setting aside a sanction order. There, the application made under s. 187(5) followed a successful appeal of the Registrar's order rejecting an application to annul a proposal on the ground that it could not proceed without injustice because of default in performance. The Registrar gave the debtor a short period in which to cure the default,

failing which the annulment order would issue. On appeal, the court found that the Registrar was without jurisdiction to do that.

52 In refusing the rescission application, Registrar Ferron concluded that s. 187(5) is not available to undo an order approving a proposal, essentially finding that he could not effect a return to the pre-order status quo without creating an intolerable situation. He commented that: [39]

> When an order is rescinded the consequences is to place the party affected by the order in the position of and with the status held prior to the order having been made. It is as if the order had not been made...
>
> This proposal is in default...If I were asked to annul the proposal (and if I had the jurisdiction), I would have had no hesitation in applying s. 63. The effect of such a declaration would be to terminate the proposal and to deem the insolvent person a bankrupt.
>
> If, on the other hand, I rescind the Order as I am asked to do, the insolvent person returns to the position which he was in immediately before the approval of the proposal by the court and after the acceptance of the proposal by creditors. The proposal would still be extant and the s. 69 stay still in place: There is no deemed bankruptcy. The trustee could not administer the proposal because the approval of the court would have been set aside nor would there be a bankruptcy to administer. Transactions which might have occurred in the interim between the approval of the proposal and any rescission of the order of approval would be in jeopardy (and section 62(2) would not apply). The situation would be intolerable both for the debtor and the creditors. To avoid that situation, s. 63 of the Act specifically sets out the procedure to be followed in the event of default...

53 The *Divell, Re* approach concludes that rescission of an order approving a proposal creates an intolerable legal limbo, but must the same considerations apply where the reason for setting aside the sanction order is want of fairness in the process, as here?

54 In cases of default, like *Divell, Re*, the debtor has succeeded in making a compromise with his creditors, but for any number of reasons has failed to carry it out and, presumably, the creditors have not agreed to let the default pass unnoticed or to amend the compromise. In such situations, fault lies solely with the debtor, as it does with debtor fraud. Consequently, annulment and the deemed bankruptcy that it brings may be a fitting end. The debtor is no longer considered worthy of access to statutorily sanctioned debt compromise facilities. The same consideration does not come into play where, as here, the process is flawed and that flaw is the result of the trustee's actions, not the debtor's.

55 While there may be creditors so opposed to the proposal that they would be pleased to have a deemed bankruptcy on annulment visited on the debtor, there are other possible scenarios. As is seemingly the case here, the excluded creditor may be undecided about whether it wants that result. Others may want to participate in the proposal. In such situations, annulment seems unnecessarily harsh and counterproductive to the goals of the parties and the long-standing recognition enshrined in the BIA [40] that debt compromise should be considered before resorting to bankruptcy.

56 Bankruptcy courts often are called on to be pragmatic problem-solvers. To that end, many decisions are made a on a case-by-case basis applying not a legalistic approach, which is considered to be unhelpful, [41] but one that is sensitive to commercial realities and business efficacy. Where necessary to effect a remedy or to fill gap in the *BIA*, courts will exercise their inherent jurisdiction. However, pragmatism must yield to a principled approach if prejudice to creditors or third parties may result or if *stare decisis* so demands.

57 The *BIA* is commercial legislation and in recognition of the realities of commerce, it specifically provides for the protection of persons who transact business with a party who is the subject of *BIA* proceedings. Section 63(2), which concerns the annulment of proposals, offers specific protection for post-proposal transactions. It provides that:

63(2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the proposal, and notwithstanding the annulment of the proposal, a guarantee given pursuant to the proposal remains in full force and effect in accordance with its terms.

58 Similarly, there is protection for post-bankruptcy transactions in s. 99, which states:

99(1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

59 Another example is found in s. 199, which requires undischarged bankrupts to disclose their status to those with whom they transact business. Section 199 reads:

199 An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of five hundred dollars or more from any person or persons without informing such persons that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

60 In addition to these provisions, the short appeal period set out in *BIA General Rules* 30-31 is designed to quickly bring finality for the benefit not only of the debtor, but also those with whom he conducts business.

61 The Debtors in the present case undoubtedly have transacted business since the Orders approving their Proposals were made some 10 months ago. The effect of trying to return to the pre-Order status quo and allow correction of the process can place some of the persons with whom they transacted business at risk. There is no guarantee that the Proposals, whether as presently drafted or otherwise, would be approved if revisited by the creditors and the Court. If they were not, deemed bankruptcy without the protections afforded by the *BIA* on annulment would result, exposing intervening creditors to an eventuality that they might not reasonably have foreseen. Even though Court approval of the Proposals is not a guarantee of successful performance, the very existence of the Orders may have been a factor considered by some creditors in assessing whether to do business with the Debtors. Rescission of the Orders might also result in proceedings to set aside intervening transactions as preferences or settlements under the *BIA* or other legislation. Were the Applications brought earlier, this risk might have been minimized and, perhaps, a more practical solution than annulment would have been available.

62 Quite apart from post-Proposal transaction concerns, it is questionable whether s. 187(5) should be available at all as a means of rescinding orders approving a proposal given the broadly drafted annulment provisions in s. 63. Section 63 expressly contemplates annulment where the proposal cannot continue without injustice, the very stuff of Kingsway's complaint - because the process is flawed, a substantial injustice results.

63 The issue of overlapping remedies, one specific and the other general, was flagged but left unresolved in *Amertek Inc., Re*. The court did caution, however, that s. 187(5) should not be twisted out of shape in a misguided effort to do more than s. 63(1) permits. [42]

64 Courts in a handful of reported decisions have indicated their reluctance to employ s. 187(5) relief where there is an alternate specific remedy provided by the *BIA*. Such cases are, however, in the minority. The vast number of s. 187(5) cases do not expressly address this issue.

65 A review of the jurisprudence indicates that s. 187(5) is sometimes used as a multi-purpose tool, notwithstanding the availability of an alternate remedy such as annulment or appeal. The rationale appears to be that s. 187(5) provides an expedient means to advance the ends of justice and avoid the costs of appeal. [43]

66 The court in *Hogg, Re* [44] rejected a s. 187(5) review in favour of annulment where the issue was a discharge order involving debtor fraud, a ground of annulment specifically enumerated in s. 180(2). The court referred to *De Grandpré, Re*, [45] a factually similar case where the same conclusion was reached.

67 At the trial level in *Manitoba (Workmen's Compensation Board) v. Claus*, [46] another case of alleged debtor fraud on discharge, Bastin J. compared what is now s. 180 and s. 187(5) and concluded that: [47]

> When parliament provided in s. 137(2) [now s. 150(2)] of the Act that a discharge could be annulled on the ground of fraud, it is a reasonable conclusion that the power given to the court by s. 144(5) [now s. 157(5)] to "review, rescind or vary any order made by it" would not include an order granting a discharge. Furthermore, it would not be consistent with the purpose of the legislation, which is to enable an insolvent debtor to make a fresh start, that after he had been granted an unconditional discharge he should remain indefinitely liable to be returned to a condition of bankruptcy.

68 On appeal, [48] the Manitoba Court of Appeal declined to provide appellate guidance on the issue, stating: [49]

> We will assume, but without deciding, that the court has a discretion under sec. 144(5) of the *Bankruptcy Act*, RSC, 1952, ch. 14, to rescind an order of discharge from bankruptcy in circumstances where fraud on the part of the bankrupt is not present. Even on that assumption we do not believe, on the facts of this case, such discretion should be exercised in favour of rescission of the order of discharge.

69 As observed in L.W. Houlden and C.H.. Morawetz, *Bankruptcy and Insolvency Law of Canada*, [50] s. 187(5) is available to revoke an order of discharge where other provisions of the *BIA* do not apply to the factual circumstances. This explains why s. 187(5) is resorted to in many cases concerning procedural non-compliance in bankruptcy discharge cases. Annulment is not available, except for cases of fraud or non-compliance with the bankrupt's duties under the *BIA*. [51] The same observation does not apply to annulment of a proposal. Section 63 is broadly drafted to allow annulment where injustice is created by continuing the proposal, thereby capturing procedural flaws like notice non-compliance.

70 In my view, s. 187(5) is not available for rescission here of the Orders approving the Debtors' Proposals because of statutory notice non-compliance. First, it would expose post-Proposal creditors and other innocent third parties with whom the Debtors have transacted business to unnecessary risk; and, second, because the *BIA* provides for a specific alternate remedy in s. 63. In the final analysis, despite the harsh result of annulment, it is the proper recourse.

71 Kingsway has not sought annulment of the Proposals. All parties are entitled to consider their positions. Should Kingsway choose to apply for annulment, one small consolation is that a good part of the work done to argue the merits of these Applications can be recycled. From the Debtors' perspective, another consolation is that if Kingsway prevails and annulment is ordered, they can make another proposal to their creditors if they are so inclined. There will be additional costs, but the process can begin afresh on proper notice. Any injustice is rectified and, by then, perhaps, Kingsway will have "proven" its claim within the meaning of the *BIA*.

3. Review vs. Appeal

72 *Debtor, Re*,[52] is often quoted for the proposition that the very existence of s. 187(5) evidences Parliament's intention that a bankruptcy judge is not *functus officio* on making an order. In speaking of s. 375 of the *Insolvency Act 1986*, which is similar to s. 187(5) of the *BIA*, Millett J. in that case remarked that:

> .... Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made upon the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of fresh evidence, whether or not such evidence might have been obtained at the time of the original hearing. The matter is one of discretion, and where the evidence might and should have been obtained at the original hearing that will be a factor for the court to take into account; but the rationale of the rule in ***Ladd v. Marshall***, that there should be an end to litigation and that a litigant is not to be deprived of the fruits of a judgment except on substantial grounds, has no bearing in the bankruptcy jurisdiction. The very existence of section 375 is inconsistent with such a rationale.

73 Outside of Alberta, the jurisprudence is inconsistent as to the applicability of s. 187(5) to final orders. For example, in *Traders Finance Corporation Ltd. v. Garage Morrissette et Fils Ltee*,[53] the Quebec Superior Court held that it is limited to interlocutory matters.[54] *Manitoba (Workmen's Compensation Board) v. Claus*[55] is cited for the same proposition.

74 A creditor in *Bryden, Re*[56] asked for a second time to have the bankrupt's order of discharge rescinded under s. 157(5) (now s. 187(5)). In rejecting his application, the court commented that the section does not provide an option to change a final order unless there is a fundamental change in circumstances or new evidence that would, or should have led to a different result at that time. Fulton J. observed that:[57]

> It is true that on the face of them the words of s. 157(5) are wide and the power to review is unrestricted. But the principle is well established that, a court having once dealt with a matter, that matter cannot be reopened in that same court, unless there is some fundamental change in circumstances between the time of making the original disposition and the time when the review is sought, or unless it can be shown that there is evidence or are facts now known which were not known at the time of the original disposition and which, had they been known, would or should have led to a different result at that time. As I see it, it is precisely because of such a possibility — some change in the circumstances of the bankrupts, perhaps, or some new evidence coming to light which would make it unjust to maintain the original order — that Parliament enacted the provision in question. But I find nothing in that provision, or in the inherent nature of bankruptcy matters, which leads me to believe that Parliament intended by its enactment to set aside or override the principle of *res judicata* which has been a longstanding principle of our law.

75 The issue in *Strachan, Re*[58] was whether s. 187(5) was available to reopen a conditional order of discharge on the ground of financial hardship. Henry J. commented that in furtherance of the objects of the *BIA* and avoiding the cost of appeal, s. 187(5) should be available to adduce new evidence or to draw the court's attention to a material argument or point of law that was overlooked in first instance.

76 The court in *Swanborough, Re*[59] ruled that the intent of the section was very broad and, in giving effect to that intent, set aside a consent receiving order. *Bryden, Re* was distinguished on the basis that, given the consent, there was no determination on the merits and thus no "final order". The desired outcome in *Swanborough* was to right the perceived wrong of allowing a consent order to stand where the Registrar accepted that the self-represented bankrupt signed the order while suffering from "mental fatigue" and had understood that bankruptcy was inevitable and that signing the order was to his advantage. I note that although the application was made under s. 187(5), it could have been brought under s. 181 to annul the bankruptcy on the ground that the receiving order ought not to have been made.

77 In *Bardyn, Re*,[60] a motion to annul or rescind a bankrupt's discharge was made some eight years after the fact. The court refused to annul the discharge because of concerns of prejudice, relying instead on s. 187(5) to right the wrong

caused by lack of notice to a significant creditor. The court's solution to avoid having the bankruptcy system brought into disrepute was to impose a retroactive six-month suspension of the discharge.

78 I turn now to the Alberta perspective. In *Elias v. Hutchison*,[61] Waite J. described the remedy under s. 157(5) (now s. 187(5)) as "in itself in the nature of an appeal". He went on to say:[62]

> However, if I am wrong on the technical procedural aspect of his matter and obliged therefore to deal with the application under s. 157(5) [now s. 187(5)] on its merits, that portion of the application would still be dismissed. The power under s. 157(5) has been described as one that should be 'sparingly exercised' ... as 'a matter of indulgence, and must be carefully guarded' ... It is clear that in Canada the power under s. 157(5) should only exercised if there is new evidence of a substantial nature. Evidence that is merely corroborative of material formerly before the court is insufficient. I would add to that that the exercise of the jurisdiction on the ground of new material should not be made if that material was known or could have been known by reasonable diligence at the time of the first application...

79 McGillivray C.J.A., speaking for the Court of Appeal, did not go so far. He stated:[63]

> While the language of this section is broad, it seems to me that it is designed to permit of a judge to deal with continuing matters in the bankruptcy so as not to be bound by an earlier decision if faced by changing circumstances. Thus, while a judge might approve the appointment of a trustee, he at a future date might alter that order by appointing more than one trustee or removing a trustee. He might refuse a discharge to a bankrupt but later, having regard to circumstances then existing, vary that order so as to permit of a discharge on terms and he might again at a future date vary that order. Similarly, the manner of remuneration might from time to time be subject to variation and review. Against this, however, there is that type of case where a final adjudication has to be made. The claim of one class of creditors over another has to have priority. The question whether a particular piece of property forms part of the bankrupt's estate, the validity of the claim or the amount of the claim are all matters which should be the subject of a final adjudication in respect of which an appeal with leave would lie, but surely, adjudication of claims of that sort cannot be the subject of repeated applications. There have been cases where an order disallowing a creditor's claim has been reviewed, but new evidence was available and it was apparently very cogent evidence, but I am of the view that by and large claims capable of final determination should not be the subject of repeated applications. The learned authors of Houlden and Morawetz, *Bankruptcy Law of Canada* in their 1980 revision of an earlier text in dealing with this subject say this [p. 7-9]:
>
> > The power given by Sec. 157(5) can only be applied in respect of judgments on interlocutory matters and not where a final judgment dealing with the rights of the parties has been given; in the latter type of situation an appeal under Sec. 163 is the proper remedy. A judgment dismissing a petition for a receiving order is a final judgment and an appeal under Sec. 163 not an application under Sec. 157(5) is the appropriate recourse: ***Traders Finance Corpn. Ltd. v. Garage Morrissette et Fils Ltée***, [1960] Que. S.C. 712, 1 C.B.R. (N.S.) 267.

80 In *Alexander, Re*,[64] and *247178 Alberta Ltd., Re*,[65] Registrar Funduk commented that McGillvray C.J.A.'s observations appear to be like the approach taken to Alberta Rule of Court 390, a similarly worded provision allowing review and variation of orders in civil actions. He found that the nature of the relief granted must be considered rather than the method by which it was granted in order to determine if the order was final or interlocutory. If the latter, then s. 187(5) could apply.[66]

81 Clarke J. acknowledged the limitation on s. 187(5) imposed by *Elias* in *Northlands Cafe Inc., Re*,[67] but expressed concern that the court had not been referred to the earlier Quebec Court of Appeal case of *Duclos v. Coulombe*,[68] which ruled that a s. 187(5) review is available even where an order is under appeal. In the end, Clarke J. found that he did not have to decide on the substantive issue of whether s. 187(5) can only be relied on for interlocutory matters because the evidence did not satisfy the grounds for conducting a review under that section in any event.

82 *Elias* is not referred to in *Dell Chemical & Marketing Ltd.* and *McQuade, Re*, each of which involved the exercise of the s. 187(5) jurisdiction in relation to a final order. I observe that in each of these cases there was no alternative statutory remedy and the cases could have easily been decided by exercise of the court's inherent jurisdiction to "gap fill".

83 Kingsway urges that the Court of Appeal, in using the words "by and large claims capable of final determination should not be the subject of repeated applications", left the door open to reconsideration of a final order under s. 187(5) if cogent new evidence is available to warrant intervention. This statement followed the observation that the court was aware of reconsideration applications of final matters on cogent new evidence. Rather than validate the practice, the court instead referred to a passage from *Holden and Morowetz*, which clearly limits s. 187(5) to interlocutory matters.

84 Having found for other reasons that annulment is the appropriate mechanism to set aside the Orders approving the Debtors' Proposals in the present case, I need not strictly decide whether s. 187(5) is available in terms of final orders. An appeal in this case could in any event be problematic given third party prejudice concerns and the fairly stringent test for leave to appeal. [69]

IV. Conclusion

85 The Applications to set aside the Orders of Registrars Smart and Wachowich approving the Debtors' Proposals to their unsecured creditors are denied. Kingsway is at liberty to apply for alternate relief. Scheduling of any such application(s) may be spoken to at the next case management meeting.

V. Costs

86 If the parties cannot agree on costs, they may speak to the issue on the earliest of either June 30, 2006 or the conclusion of Kingsway's further application(s), concerning the Orders sanctioning the Proposals.

Application dismissed.

Footnotes

* A corrigendum issued by the court on April 26, 2006 has been incorporated herein.

1 R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27.

2 See: The Annotation to *Traders Finance Corporation Ltd. v. Garage Morrissette et Fils Ltee*, [1960] C.S. 712, 1 C.B.R. (N.S.) 267 (C.S. Que.), in which the author suggests that there will be situations where there is good reason to attend on another judge, citing as an example *Pehlke, Re* (1939), [1940] 1 D.L.R. 657, 21 C.B.R. 159 (Ont. C.A.), where the judge who made the original order had died.

3 *247178 Alberta Ltd., Re*, [1984] A.J. No. 535 (Alta. Q.B.). There is some dispute about whether an order made outside of the Registrar's jurisdiction can be reviewed by the Registrar. The Quebec Court of Appeal held that a Registrar has jurisdiction to review any order that he or she has made, whether valid or invalid: *Poulin, Re* (1937), 64 Que. K.B. 543 (Que. K.B.) at paras. 13 to 14, (1937), 19 C.B.R. 289 (Que. K.B.) . However, in *MacCulloch Estate, Re* (1992), 113 N.S.R. (2d) 367, 13 C.B.R. (3d) 201 (N.S. T.D.), the court found that the Registrar's ability to review was limited to circumstances where the initial order was validly made. *Poulin* was not referred to.

4 See footnote 3.

5 (1981), 27 A.R. 1, 37 C.B.R. (N.S.) 149 (Alta. C.A.).

6 (1948), 14 C.B.R. (N.S.) 152 (Ont. Bktcy.) at paras. 2-3.

7 (1984), 53 C.B.R. (N.S.) 183 (Ont. S.C.).

8 (1980), 118 D.L.R. (3d) 568, 31 O.R. (2d) 371, 36 C.B.R. (N.S.) 67 (Ont. S.C.).

9 The court did, however, grant a concurrent application to appeal.

10 (1998), 234 A.R. 149, 8 C.B.R. (4th) 220, 1998 ABQB 1005 (Alta. Q.B.) at para. 13.

11 See footnote 3 at C.B.R. p. 211

12 s. 192(2) of the *BIA* allows the powers and jurisdiction of a Registrar to be exercised by a judge at any time.

13 *Bryant Isard & Co., Re* (1923), 4 C.B.R. 41, 24 O.W.N. 597 (Ont. S.C.).

14 *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511, 46 C.B.R. (4th) 195 (Ont. S.C.J.); affirmed (2004), 3 C.B.R. (5th) 204 (Ont. C.A.).

15 *Engels v. Richard Killen & Associates Ltd.* (2002), 35 C.B.R. (4th) 77, 60 O.R. (3d) 572 (Ont. S.C.J.) at para.150, affirmed (2004), 69 O.R. (3d) 183, 48 C.B.R. (4th) 68 (Ont. C.A.).

16 s. 50.4(6) requires that every know creditor be given notice of any Notice of Intention to make a Proposal within five days of its filing.

17 *Davis, Re* (1924), 27 O.W.N. 131, 5 C.B.R. 182 (Ont. Bktcy.))

18 (1998), 163 Sask. R. 241, 2 C.B.R. (4th) 207 (Sask. C.A.).

19 footnote 18 at para. 14.

20 (1961), 4 C.B.R. (N.S.) 33 (C.S. Que.).

21 (1998), 1 C.B.R. (4th) 245 (Ont. Bktcy.).

22 (1989), 73 C.B.R. (N.S.) 85 (Ont. Bktcy.).

23 (1984), 54 C.B.R. (N.S.) 160 (Ont. S.C.)

24 (2001), 22 C.B.R. (4th) 60, 2001 ABQB 57 (Alta. Q.B.).

25 (1998), 7 C.B.R. (4th) 231 (B.C. S.C.).

26 s. 108 of the *BIA* provides:
108(1) The chairman of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

(2) Notwithstanding anything in this Act, the chairman may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

27 *Elias v. Hutchison* (1980), 27 A.R. 13, 12 Alta. L.R. (2d) 241, 35 C.B.R. (N.S.) 30 (Alta. Q.B.), leave to appeal refused (1981), 27 A.R. 1, 37 C.B.R. (N.S.) 149 (Alta. C.A.); *Lyall, Re* (1991), 8 C.B.R. (3d) 82 (B.C. S.C.).

28 *Northlands Cafe Inc., Re* (1996), 192 A.R. 211, 44 C.B.R. (3d) 170 (Alta. Q.B.).

29 *Swanborough, Re* (1980), 33 C.B.R. (N.S.) 281 (Ont. S.C.).

30 *Canadian Imperial Bank of Commerce v. Backman* (2001), 102 A.C.W.S. (3d) 876 (Ont. Bktcy.) [2001 CarswellOnt 284 (Ont. Bktcy.)] at para. 62.

31 *Izod, Re* (1897), [1898] 1 Q.B. 241, 67 L.J.Q.B. 111 (Eng. C.A.); *Debtor (No.446 of 1918), Re* (1919), [1920] 1 K.B. 461, 89 L.J.K.B. 113 (Eng. C.A.).

32 *Quinn, Re* (1989), 72 C.B.R. (N.S.) 80 (Ont. S.C.) at para. 5.

33 *Merrick, Re*, footnote 22.

34 *Strachan, Re* (1980), 34 C.B.R. (N.S.) 136 (Ont. S.C.).

35 *Black's Law Dictionary*, 8th ed. (St. Paul, Minn.: West, 2004), p. 1332: "...2. To make void, to repeal or annul <rescind the legislation.> ..."; *The Dictionary of Canadian Law*, 3rd ed. (Scarborough, Ont.: Thomson Carswell, 2004), p.1134 defines it by reference to the word "revoke", which means "To annul, cancel, repeal, rescind".

36 (1998), 4 C.B.R. (4th) 23 (Ont. Bktcy.).

37 (1996), 41 C.B.R. (3d) 178 (Ont. Bktcy.).

38 footnote 36 at para. 44

39 footnote 37 at paras. 5 to 7.

40 As evidenced by the requirement in s. 170 that trustees in bankruptcy must consider whether a proposal to creditors was a viable alternative to bankruptcy in making their recommendation to the court on a bankrupt's discharge application.

41 *A. Marquette & fils Inc. v. Mercure* (1975), [1977] 1 S.C.R. 547 (S.C.C.), at 556.

42 footnote 36 at para. 44

43 *Strachan, Re* (1980), 34 C.B.R. (N.S.) 136 (Ont. S.C.).

44 (2005), 12 C.B.R. (5th) 20, 2005 MBQB 109 (Man. Q.B.).

45 (1969), 15 C.B.R. (N.S.) 262 (C.S. Que.)

46 (1969), 5 D.L.R. (3d) 755 at 756, 68 W.W.R. 282 (Man. Q.B.), aff'd (1969), 69 W.W.R. 79, 5 D.L.R. (3d) 755, 14 C.B.R. (N.S.) 4 (Man. C.A.).

47 footnote 46 at D.L.R. p. 759

48 See footnote 46.

49 See footnote 46 at (1969), 69 W.W.R. 79 (Man. C.A.), at 80.

50 3rd ed. (Toronto: Carswell, 1992), H§26

51 Examples include *Dell Chemical & Marketing Ltd. v. Heinz*, footnote 24, where Burrows J. allowed an application to rescind a bankruptcy discharge where a creditor did not have notice of the assignment into bankruptcy or of the application for discharge, and the trustee was told of the claim; *Kornis, Re*, footnote 23; and *McQuade, Re* (1997), 201 A.R. 317, 47 C.B.R. (3d) 285 (Alta. Q.B.). In *McQuade, Re*, the aggrieved creditor appealed the discharge order and subsequently sought leave to amend its notice of motion for an order allowing the receipt of new evidence on appeal and an order directing remission of the matter for reconsideration by the Registrar on the basis of the new evidence. The creditor was properly served with notice of the discharge hearing, but either did not receive it or, through inadvertence, did not bring it to the attention of its

staff member having carriage of the matter. The bankrupt failed to disclose certain conduct akin to misrepresentation to his trustee and through the trustee to the Registrar. Madam Justice Bielby ruled that substantial injustice resulted because the Registrar was not informed of the bankrupt's misconduct before granting him discharge from bankruptcy and remitted the matter to the Registrar for reconsideration under s. 187(5). See also *Christiansen v. Paramount Developments Corp.*, footnote 10, where a complex and curious fact pattern lent itself to rescission of a receiving order under s. 187(5) rather than annulment. *MacCulloch Estate, Re*, footnote 11, involved notice non-compliance and an application made jointly as an appeal and under s. 187(5) to set aside a Registrar's order vacating certain judgments.

52 (1992), [1993] 1 W.L.R. 314 (Eng. Ch. Div.), at 318-319.

53 [1960] C.S. 712, 1 C.B.R. (N.S.) 267 (C.S. Que.).

54 *Houlden & Morawetz*, footnote 50 at I§40.

55 See footnote 46.

56 (1975), 21 C.B.R. (N.S.) 166 (B.C. S.C.).

57 footnote 56 at pp 168-169.

58 See footnote 43.

59 See footnote 29.

60 (2005), 14 C.B.R. (5th) 163 (Ont. S.C.J.).

61 See footnote 27 at (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.), at 248.

62 See footnote 27 at (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.), at 247.

63 See para. 27 at (1981), 27 A.R. 1 (Alta. C.A.) at para. 31.

64 (1986), 75 A.R. 387, 62 C.B.R. (N.S.) 99 (Alta. Q.B.).

65 See footnote 3.

66 There, the application was to set aside an absolute discharge from bankruptcy premised on the mistaken belief that the conditions of a conditional order of discharge were satisfied. The bankrupts opposed the application on the ground that it was a final order and thus outside the purview of s. 187(5). Registrar Funduk found that the "absolute order of discharge" was simply a procedural order to update the record by acknowledging that the bankrupts had complied with the condition imposed on them by the court, not a decision based on the merits that would thus be a "final order". Accordingly, it was a proper subject of s. 187(5) proceedings

67 See footnote 28 at para. 6.

68 (1946), 28 C.B.R. 110 (Que. K.B.).

69 *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41 (Alta. C.A.) at paras. 9-12.

TAB 4

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Authority of the Courts

R.S.C. 1985, c. B-3, s. 187

s 187.

Currency

187.

187(1)Seal of court

Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

187(2)Court not subject to be restrained

The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

187(3)Power of judge in chambers

Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

187(4)Periodical sittings

Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

187(5)Court may review, etc.

Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

187(6)Enforcement of orders

Every order of a court may be enforced as if it were a judgment of the court.

187(7)Transfer of proceedings to another division

The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

187(8)Trial of issue, etc.

The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

187(9)Formal defect not to invalidate proceedings

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

187(10)Proceedings taken in wrong court

Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

187(11)Court may extend time

Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

187(12)Court may dispense with certain requirements respecting notices

Where in the opinion of the court the cost of preparing statements, lists of creditors or other material required by this Act to be sent with notices to creditors, or the cost of sending the material or notices, is unjustified in the circumstances, the court may give leave to omit the material or any part thereof or to send the material or notices in such manner as the court may direct.

Amendment History

1992, c. 1, s. 20; 1992, c. 27, s. 66; 2004, c. 25, s. 87

Currency

Federal English Statutes reflect amendments current to February 28, 2019
Federal English Regulations are current to Gazette Vol. 153:6 (March 20, 2019)

TAB 5

2019 ABCA 109, 2019 CarswellAlta 511

2019 ABCA 109
Alberta Court of Appeal

Edmonton (City) v. Alvarez & Marsal Canada Inc

2019 CarswellAlta 511, 2019 ABCA 109

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

Marina Paperny J.A., Sheila Greckol J.A., and Ritu Khullar J.A.

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

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

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

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal

Headnote

Bankruptcy and insolvency
Municipal law

Appeal from the Order of The Honourable Mr. Justice R.A. Graesser Dated the 21st day of February, 2018 Filed the 11th day of April, 2018 (2018 ABQB 124, Docket: 1703 21274)

Per curiam:

Introduction and Standard of Review

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

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

Background

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

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

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

Issues on appeal

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

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

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

Analysis

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

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

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

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

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

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

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

13 In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors — a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that, as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

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

1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;

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

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

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

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

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

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

17 In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in *CCM Master Qualified Fund v blutip PowerTechnologies*, 2012 ONSC 1750, where it was noted that in *CCAA* proceedings, "professional services are provided . . . in reliance on super priorities contained in initial orders". [1] We agree with the observation of Brown J at para 22 that:

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

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

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

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

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

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

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

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

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

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

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

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

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

Footnotes

1 *First Leaside Wealth Management Inc (Re)*, 2012 ONSC 1299 at para 51.

TAB 6

Alta. Reg. 124/2010, s. 9.12

s 9.12 Correcting mistakes or errors

Currency

9.12Correcting mistakes or errors

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

Currency

Alberta Current to Gazette Vol. 115:04 (February 28, 2019)

End of Document

TAB 7

2003 ABQB 810, 2003 CarswellAlta 1432, [2003] A.J. No. 1238, 126 A.C.W.S. (3d) 1036

2003 ABQB 810
Alberta Court of Queen's Bench

Tataryn v. Condominium Plan No. 7810994

2003 CarswellAlta 1432, 2003 ABQB 810, [2003] A.J. No. 1238, 126 A.C.W.S. (3d) 1036

Gordon Tataryn (Respondent / Applicant) and The Owners: Condominium Plan No. 7810994, Diversified Management Southern, Cindi Ryan and Doug Wavrock (Applicants / Respondents)

Coutu J.

Heard: July 18, 2003
Judgment: September 26, 2003
Docket: Calgary 0201-20829

Counsel: Todd R. Dear for Respondent, Mr. Tataryn
Edwin W. Daskalchuk for Applicants, The Owners: Condominium Plan No. 7810994, Cindi Ryan
Bruce A. Millar, Q.C. for Applicants, Diversified Management Southern, Doug Wavrock

Subject: Contracts; Property; Public
Related Abridgment Classifications
Real property
X Condominiums
X.13 Practice and procedure
X.13.a Parties
Statutes
II Interpretation
II.3 Rules of interpretation
II.3.i Uniformity
Headnote
Sale of land --- Condominiums — Practice and procedure — Parties
Statutes --- Interpretation — Rules of interpretation — Uniformity

***Coutu J.*:**

1 Mr. Tataryn filed an Originating Notice of Motion on December 11, 2002 seeking a court order to appoint an administrator to manage The Owners: Condominium Plan No. 7810994 (known as the Georgian Village) in place of the Georgian Village Board of Directors. In that Motion, he also seeks a court order appointing an investigator to review any improper conduct and to replace the current property manager, Diversified Management Southern. The Georgian Village and the other Respondents brought a Motion (amongst others) to strike Mr. Tataryn's Originating Notice of Motion on the basis that Mr. Tataryn has no standing under the ***Condominium Property Act***, R.S.A. 2000, c. C-22 to bring his Motion.

FACTUAL BACKGROUND:

2 Before I address the law, I will outline some of the facts. Mr. Tataryn is not a legal or equitable owner of any condominium unit in Georgian Village. However, he is the property manager for the Georgian Rental Pool (the "Pool") which is an association of various owners of condominium units of the Corporation who pool income and split expenses. The Pool itself is not the registered owner of any condominium units. Further, before Diversified Management Southern

was hired to manage the Georgian Village, Mr. Tataryn's company, Dawn Management, held the management contract. Mr. Sieb, on behalf of Diversified, alleges that the contract with Dawn Management was not renewed because Georgian Village was not satisfied with the management service.

3 On September 12, 2002, Mr. Tataryn was elected as a Director of the Georgian Village Board. The ***Condominium Property Act*** (s. 28(10)), allows a non-owner to be a director as long as 2/3 of the membership of the board of directors are unit owners or mortgagees. At that meeting, Mr. Tataryn and Ms. Fisette had the proxy votes of owners in the Rental "Pool".

4 At the meeting some owners maintained that Mr. Tataryn and Ms. Fisettte could not exercise the voting rights of their proxies as the Rental Pool owners owed monies to the Georgian Village. However, due to the uncertainty of the legal position, the proxies were counted in the vote. The officer for Georgian Village deposes that after the meeting, the Georgian Village received legal advice that Mr. Tataryn's election as a director was invalid as the proxies from the owners in the Rental Pool, which Mr. Tataryn (and Ms. Fisette) exercised in the vote for the directors and related matters, were not valid as the Rental Pool owners owed contributions which had been assessed on their units.

5 The Georgian Village By-law #37 provides that no owner is entitled to vote at any general meeting unless all contributions payable in respect of his unit have been duly paid to the date of such vote. Further, s. 26(5) of the ***Condominium Property Act*** provides that an owner is not entitled to vote if (a) any contribution payable in respect of the owner's unit, or (b) any other obligation owing to the Corporation in respect of the owner's unit or common property, is in arrears for more than 30 days prior to the day that the power of voting may be exercised.

6 The Georgian Village decided that the election of directors was invalid and a general meeting of the owners was required to conduct a new election. Consequently, an Extraordinary General Meeting was held on December 12, 2002 to re-elect a new Board of Directors. Mr. Tataryn was not re-elected.

7 Mr. Tataryn maintained that the election was valid and that he is a properly elected director. The day before the general meeting, on December 11, 2002, Mr. Tataryn filed his Originating Motion and affidavit in support.

8 The Originating Notice of Motion basically recites the applicable sections of the ***Condominium Property Act*** and refers to improper conduct, providing no specifics. The Affidavit in support is vague as to what constitutes the improper conduct, but it appears that Mr. Tataryn's position is that he was validly elected as a director and that the Georgian Village wrongfully prevented him from exercising that role . He contests amounts owed by the rental pool and suggests he asked for information and did not receive it.

9 It appears that it was agreed by counsel that cross-examinations on affidavits of all parties would be held on March 7, 2003. However, on March 6, 2003, Mr. Tataryn's counsel faxed a letter to the other counsel stating that examinations would not proceed as he intended to have the Court deal with a matter concerning an affidavit.

10 On March 11, 2003, counsel for Mr. Wavrock filed a Motion to strike the claim against him on the basis that it discloses no cause of action.

11 On March 11, 2003, counsel for Diversified Management and Mr. Wavrock filed a Motion for an order finding Mr. Tataryn in contempt for not attending at examinations and striking his Motion for contempt. That Motion also seeks an order requiring Mr. Tataryn to post security for costs, striking Mr. Tataryn's Motion as he has no standing and striking the claim as against Diversified Management and Doug Wavrock on the grounds that it is frivolous and vexatious.

12 On April 2, 2003, counsel for The Owners: Condominium Plan No. 7810994 and Ms. Ryan filed a Motion seeking an order striking out Mr. Tataryn's Motion as disclosing no cause of action, solicitor and client costs finding Mr. Tataryn in contempt of court and striking his Motion for contempt, seeking security for costs and striking Mr. Tataryn's claim on the grounds that Mr. Tataryn has no standing or the action is frivolous and vexatious.

13 On July 18, 2003, these applications were heard by me in special chambers. I requested that counsel file written briefs on specific areas of law. The last of these briefs was filed on August 15, 2003.

ISSUE NO. 1:

14 The first issue is whether, under the ***Condominium Property Act***, Mr. Tataryn has standing to file a motion for the relief he requested.

ANALYSIS OF THE LAW AND DECISION:

15 Section 58(1) of the ***Condominium Property Act***, provides that "a corporation or a person having an interest in a unit" may apply to the Court for the appointment of an administrator. Section 58 does not define what is meant by "having an interest in a unit". Sections 66 and 67 of the ***Act*** govern the procedure for bringing *any* application under the ***Act***. It sets out that the application shall be by originating notice and s. 67(1)(b) defines "interested party". It defines an "interested party" as being an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit".

16 Counsel for Mr. Tataryn argued that under s.58, any person having an "interest" in the broad sense of the word could apply to have an administrator appointed. I disagree. The words in the act are "interest in a unit"- not just an "interest" in the sense of a "concern". The rule of statutory interpretation is that meaning should be given to every word as it is presumed the word adds something which would not be there if the word was left out. In my view, the addition of the word "unit" calls for a narrow interpretation of the word " interest".

17 Further, it would not make logical sense that in s. 58, a broader category of applicants could apply to appoint an administrator, being the "ultimate" relief under the ***Act***, yet applications under s.67 for more "minor" relief would be restricted to persons who basically have a legal or equitable interest in a unit. In my view, the intention of ss. 58, 66 and 67 is to restrict who can bring motions for relief concerning a condominium complex. That makes sense. Otherwise, any person "off the street" could put the owners of a complex to the expense of litigation or the costs of appointment of an administrator. The broad interpretation would lead to absurdity.

18 The rule of statutory interpretation is it is presumed that the legislature uses language carefully and consistently, so that within a statute the same words have similar meaning. **Construction of Statutes , Sullivan and Driedger 4th Edition**. In my view, the intention of the legislators was that "a person having an interest in a unit" under s. 58 should have a similar meaning as "registered interest in a unit" as defined by s. 67(1)(b). The ***Act*** does not define "an interest" in a unit. However, s. 1(3) of the ***Act*** provides that when an expression used in the ***Act*** is not defined, it has the same meaning as may be assigned to the expression in the ***Land Titles Act***. I find that "interest" means at least a registerable interest, *i.e.*, a legal or equitable interest as used with respect to an interest in land under various sections of the ***Land Titles Act***.

19 I find that Mr. Tataryn is not an owner, a registered mortgagee or a person who has a registerable or a registered interest in a unit. The rental 'Pool' which Mr. Tataryn manages is not the registered owner of any condominium units. Further, Mr. Tataryn's pleadings and evidence fail to show that his Motion is brought on behalf of those owners.

20 Therefore, Mr. Tataryn has no standing under s. 58 to apply for an order appointing an administrator.

21 Under s. 67, *unless Mr. Tataryn is a "member of the board"* he has no standing. Mr. Tataryn has standing to bring the motion as a "member of the board" if his election as a director was valid. Section 67(1)(b) clearly states that a member of the board is an "interested party" who can bring an application. If his election was valid, then at the time of filing the motion he was a member of the board and has status to bring the motion.

22 However, in this action that issue is in dispute. Mr. Tataryn maintains his election was valid. In my view, the application to strike based on s.67 is premature. After examination of Mr. Tataryn has been completed, I grant leave to

the Applicants to reapply to strike, if they so choose. I do so as an examination of Mr. Tataryn was scheduled and he did not appear at the examination. Perhaps, if he had, the Applicants would have the evidence required to argue that his election was invalid.

23 This matter was heard as a special application. At this point all that was before the Court was conflicting affidavit evidence, the accuracy of which has not been tested by cross-examination or by putting documents (such as alleged overdue Rental pool contributions) to the witness. For example, on the one hand, I have affidavits filed on behalf of the Applicants alleging that contributions were owed by the Rental Pool owners on the date of the election, and allegations they were in fact paid after the election. However, I was not referred to any cross-examination to test the validity of the allegations. Similarly, in Mr. Tataryn's affidavit he appears to contest the outstanding contributions, but no cross examination of him has taken place. Even if contributions were outstanding, the effect of that under the law was not argued. In short, I lack the evidence to decide on the validity of the election.

24 In reviewing the affidavits on this file, I am concerned with the delay on this file and that the parties are incurring substantial legal expenses regarding issues which are relatively straightforward and could, I believe, be determined by arguing points of law, once examinations are conducted. This may result in a large costs award against the losing party.

25 I am also concerned with the lack of co-operation in getting to the heart of this matter. So let me be clear as to how this will proceed. I order that within two months of this date, examinations on the main cause of action and the affidavits be held. In my view, there is no need to have two separate examinations. Further, at such examination the Applicants can explore the basis, if any, of any security for costs application. Again, I am of the view that such application is premature. However, because the lack of evidence is due to Mr. Tataryn not appearing at the examinations, I grant leave to the Applicants to reapply after examinations.

OTHER ISSUES:

26 The Applicants applied for an Order finding Mr. Tataryn in contempt of court for not attending at examinations. At the hearing counsel for the Applicants frankly conceded that his case in that regard was weak, however he submitted that his client should get solicitor client costs for the last minute cancellation. I find that the evidence is lacking for a finding of contempt of court. However, in view of the late cancellation and the affidavits deposing that counsel did spend billable time preparing for examinations, I award party and party costs to those parties whose counsel did prepare for the examination, to be payable forthwith and in any event of the cause. Taking into account this was the first cancellation, I do not believe the circumstances justify departure from the usual rule that party and party costs are awarded.

27 Having reviewed the Originating Notice of Motion and affidavit in support, I frankly have no idea what the action is as against Ms. Ryan or Mr. Wavrock. There is no relief claimed against Mr. Wavrock, only relief against his employer, Diversified, requesting termination of any and all contracts between Georgian Village and Diversified. In any event, Diversified would be responsible for the acts of Mr. Wavrock, and, in examinations confirmed they take no issue with that. As for Ms. Ryan, she is named in the style of cause yet there is no allegation or mention of Ms. Ryan in the Motion. In fact the Motion claims no relief as against her. Ms. Ryan was not even a member of the board between September and December of 2002. Lastly, there is no direction or determination requested from the court concerning Ms. Ryan.

28 In short, I find the motion discloses no cause of action against them and I strike the action as against those parties, with party and party costs. As I mentioned earlier, the motion and affidavit are vague as to the relief Mr. Tataryn is seeking, but it appears he is of the view his election as a director is valid. He also seeks an investigation into the business affairs of Georgian Village and seeks other relief. However, even if he is successful in his motion, I find that he would be entitled to no relief as against Ms. Ryan and Mr. Wavrock.

29 As for the security for costs application, as I stated earlier there is a lack of evidence to support such an application. Further, I was not provided with any draft Bill of Costs or told what amounts were being requested. I realize that since Mr. Tataryn failed to appear at the examination the Applicants did not have the chance to explore if the "action is

frivolous and vexatious" or if he is in fact a "nominal Plaintiff" or if Mr. Tataryn has sufficient property to answer the costs of the action (Rule 593). These orders are discretionary and there is a lack of information to decide if it is "just and reasonable" to order security for costs.

30 The costs of this application shall be costs in the cause.

TAB 8

Alberta Statutes
Condominium Property Act
Miscellaneous

R.S.A. 2000, c. C-22, s. 67

s 67. Court ordered remedy

Currency

67.Court ordered remedy

67(1) In this section,

(a) **"improper conduct"** means

(i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

(ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii.1) the conduct of an owner that is oppressive or unfairly prejudicial to the corporation, a member of the board or another owner,

(iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or

(v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

(b) **"interested party"** means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.

67(2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

(a) direct that an investigator be appointed to review the improper conduct and report to the Court;

(b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;

(c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;

(d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;

(e) award costs;

(f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

67(3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

Amendment History
2009, c. 53, s. 40(7); 2014, c. 10, s. 45

Currency
Alberta Current to Gazette Vol. 115:04 (February 28, 2019)

TAB 9

2015 ABQB 698
Alberta Court of Queen's Bench

1597130 Alberta Ltd. v. Condominium Corp. No. 1023241

2015 CarswellAlta 2039, 2015 ABQB 698, [2016] A.W.L.D. 139, 260 A.C.W.S. (3d) 175, 51 C.L.R. (4th) 235

1597130 Alberta Ltd., Plaintiff and Condominium Corporation No. 1023241, Defendant

Master L.A. Smart, In Chambers

Judgment: November 3, 2015
Docket: Edmonton 1303-03946

Counsel: Ronald Haggett, for Plaintiff
Patty Ko, for Three unit holders
Sigurd Delblanc, for Two unit holders

Subject: Contracts; Property
Related Abridgment Classifications
Real property
X Condominiums
X.3 By-laws
X.3.d Miscellaneous
Headnote
Real property --- Condominiums — By-laws — Miscellaneous
Plaintiff owned 16 of 22 residential units in condominium development and was court-appointed administrator of defendant — Plaintiff owned unit 1 and unit 2 that it considered to be common property of condominium — No residential unit was located in unit 1 and none of administrative or construction expenses incurred were spent on unit 1 — As work was completed and deficiencies rectified on condominium development ongoing inspections disclosed further issues — Based on inspection additional fire safety deficiencies had to be rectified — Plaintiff estimated that total project costs would be $2,815,160 to obtain occupancy and have all matters in order to provide for turnover to owners — Plaintiff proposed to assess each of residential condominium units based on assigned unit factors — Unit owners took position that any assessment had to include unit factors assigned to all units resulting in applicant being proportionally responsible for unit factors attributed to units 1 and 2 in addition to its residential units — Plaintiff brought application for order addressing basis upon which they could assess owners expenses incurred and to be incurred pursuant to order of appointment — Assessment based on unit factors was legally correct method of assessment — To direct assessment on basis other than unit factors would in effect be amendment to by-laws, which did not provide alternate basis upon which to assess contributions — Conclusion might stall work needed to rectify deficiencies so administrator was authorized to convene meeting of owners to consider alternatives for resolution and for consideration of such resolutions including special resolutions.

APPLICATION by plaintiff for order addressing basis upon which they could assess owners expenses incurred and to be incurred pursuant to order of appointment.

***Master L.A. Smart, In Chambers*:**

Introduction

1 This matter arises out of the development of a 24 unit condominium complex in Hinton, Alberta which has gone very wrong. The primary issue that I've been asked to address is the basis upon which 1597130 Alberta Ltd (Applicant) in its capacity as the court appointed Administrator of Condominium Corporation No. 1023241 (Condo Corp.) may assess the Owners the expenses incurred and to be incurred pursuant to the Order of appointment.

Background

2 The original developer Anago Enterprises Ltd commenced construction and while owner sold units 19 and 22. On March 18, 2011 the Applicant became registered owner of all of the other units pursuant to an Order Confirming Sale. Thereafter, the Applicants units were sold to 1520786 Alberta Ltd through an agreement of sale that closed September 1, 2011. 1520786 proceeded to take steps to complete the development and while owner sold units 11, 12, 15 and 17. An Occupancy Permit was granted for the property on March 30, 2012 but following an occupancy inspection was subsequently revoked in correspondence from Superior Safety Codes Inc. on July 23, 2012 and pursuant to an Order under the *Safety Codes Act* of the same date. No steps were taken to complete the necessary work to re-establish Occupancy. Caplink the administrator of the Applicant's mortgage obtained a Project Budget to determine the work necessary to obtain occupancy and other minor work necessary to complete construction of the remaining unsold units. That budget estimated a cost of $304,575.

3 Notice was given that 1520786 had effectively abandoned the development advising that there was no insurance on it and that utility services may be discontinued. On March 18, 2013 the Applicant was appointed Administrator of the Condo Corp. by Order of this Court pursuant to the provisions of the *Condominium Property Act*, RSA 2000, c.C-22. It was anticipated that the work would be completed in a timely fashion although the Order provided for extension if necessary on or before June 30, 2013. In retrospect it would have been desirable to provide for regular reporting to the Owners but it did not.

4 As work was completed and deficiencies rectified ongoing inspections disclosed further issues resulting in the extension of the Order four additional times, the last being on July 8, 2015. The Administrator has reported that the costs incurred to August 8, 2015 are $1,410,422.25. Furthermore, based on an inspection on December 8, 2014 additional fire safety deficiencies must be rectified. The Administrator now estimates that the total project costs will be $2,815,160 to obtain Occupancy and have all matters in order to provide for a turnover to the Owners.

The Issue

5 The Applicant/Administrator owns 16 of the 22 residential units. It also owns Unit 1 which is described in the Condominium Plan as "assigned by the developer for future re-division" and Unit 2 being common property surrounding the building currently under construction. Despite holding legal title to Unit 1 and Unit 2 the Applicant says that it has always considered these units as common property of the subject condominium. Unit 1 has an assigned unit factor of 4232 of 10,000 and Unit 2, one unit factor. No residential unit is located on or within Unit1 and none of the administrative or construction expenses incurred to date, or budgeted to be spent on completion, have been, or will be, attributable to Unit 1.

6 In the light of the foregoing, the Administrator proposes to assess each of the residential condominium units based on their assigned unit factors over the unit factors assigned to those residential units being 5767 unit factors. The owners of Units 11, 12, 15, 19 and 20 (Individual Owners) take the position that any assessment must include the unit factors assigned to all units resulting in the Applicant being proportionally responsible for the 4233 unit factors attributed to Units 1 and 2 in addition to its residential units.

Discussion

7 The *Condominium Property Act* provides for the appointment of an administrator under section 58 that reads as follows:

(4) an administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders.

8 Paragraph 6 of the Order appointing the Applicant as Administrator provides as follows:

(6) The remuneration of, and expenses incurred by, the Applicant, including expenses incurred to inspect the Premises or to determine the costs of obtaining occupancy, whether incurred before or after the date of this Order, and all professional fees, and legal fees and disbursements on a solicitor-client basis, shall be administrative expenses of the Condominium Corporation, and the Condominium Corporation shall indemnify the Applicant for all expenditures made, or liabilities incurred, in carrying out the powers authorized by this Order.

9 The Order provides that the Administrator is to be indemnified by the Condo Corp. and it now in effect seeks to recover funds expended and to be expended pursuant to that indemnity. In order for the Condo Corp. to raise funds to satisfy the indemnity it must make an assessment against the Owners. Although the Order does not expressly provide for an assessment to be levied by the Administrator, it is implicitly a necessary requisite to give effect to the obligation to indemnify.

10 Section 39 (1) of the *Condominium Property Act* provides that a condominium corporation has the power to raise amounts by levying contributions on the owners in proportion to the unit factors of the owners perspective units, or if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units. The Bylaws of this Condo Corp. are those set out in Appendix 1 of the *Act*. Those Bylaws do not provide an alternative basis upon which to assess contributions.

11 The Applicant argues that levying contributions in that manner creates an unfair and unjust result as it is the residential units that solely benefit from the work completed and to be completed. *Francis v. Condominium Plan No. 8222909*, 2003 ABCA 234 (Alta. C.A.) addressed the capacity of condominium corporations to levy assessments other than by way of unit factors. The capacity issue was addressed by the amendments to the Act which now allows for assessments to be levied on another basis, however, absent an authorizing bylaw, the conclusion that the scheme of the *Act* does not permit a court to impose what it considers to be fair on a case-by-case basis remains sound. Although the role of the Administrator is analogous to that of a court appointed Receiver the power and capacity of the Administrator is governed by the Condominium Property Act. The language set out in s. 58 (4) allows the court to give the administrator the powers and duties of the Corporation and is not as broad as the wide discretion the court may have, for example, when appointing and empowering a receiver under the Judicature Act. To direct an assessment on a basis other than unit factors would in effect be an amendment to the Bylaws. The *Act* permits amendments by special resolution at a duly convened meeting of the Owners.

Conclusion

12 Despite my inclination to agree that it is unfair in this case that the assessment be based on unit factors that method of assessment is nonetheless the legally correct one. Recognizing that my conclusion may practically stall the work needed to rectify the deficiencies and finalize construction, it may be desirable to convene a meeting of the Owners to consider alternatives for resolution of this impasse. Accordingly, in the absence of a Board of Directors, I authorize the Administrator to convene a meeting of the Owners for such a purpose and for consideration of such resolutions including special resolutions as may be presented.

Order accordingly.

TAB 10

Ontario Statutes
Condominium Act, 1998
Part IX — Enforcement (ss. 130-137)

S.O. 1998, c. 19, s. 131

S 131.

Currency

131.

131(1)Administrator

Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43.

Proposed Amendment — 131(1)

131(1) ***Administrator***

Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if subject to the regulations at least 120 days have passed since a turn-over meeting has been held under section 43.

2015, c. 28, Sched. 1, s. 113 [Not in force at date of publication.]

131(2)Grounds for order

The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners.

131(3)Contents of order

The order shall,

(a) specify the powers of the administrator;

(b) state which powers and duties, if any, of the board shall be transferred to the administrator; and

(c) contain the directions and impose the terms that the court considers just.

131(4)Application for direction

The administrator may apply to the court for the opinion, advice or direction of the court on any question regarding the management or administration of the corporation.

Amendment History

2000, c. 26, Sched. B, s. 7(7), item 3

Currency

Ontario Current to Gazette Vol. 152:10 (March 9, 2019)

End of Document

TAB 11

2002 CarswellOnt 5670
Ontario Superior Court of Justice

Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385

2002 CarswellOnt 5670, [2002] O.J. No. 5117, 17 R.P.R. (4th) 152

Skyline Executive Properties Inc., Front Street Properties Inc., Jacob Aboudi, Ezra Aharon, Ampayer Properties Inc., Daniel Avidor, Oren Balaban, Moshe Becher, Mordechai Ben-Ami, Sholmit Ben Shahar, David Ben Shahar, Micahel Burdin, Boris Burdin, Malka Chesner, Yecheskel Chesner, Avraham Cohen, Aviram Cohen, Mordechai Cohen, Miriam Cohen, Tsion Elyasaf, Cohava Elyasaf, Varda Feldman, Mordechai Civon, Yoav Hammer, Chanita Jackson, Joseph Jackson, David Karny, Roni Karny, Marco Libsker, Yana Manelis, Ya'Acov Manelis, Dalhia Martin, Moshe Molcho, Atalia Molcho, Yaffe Monefa, Levia Moore, Mordechai Moore, Dalia Munz, David Munz, Miriam Perl, Asher Perl, Noa Renert, Adam Renert, Dina Rolel, Igor Dyakov, Menashe Rosenfeld, Amit Rotem, Henryk Rottenberg, Drora Rottenberg, Yehudith Shapir, Ilana Shnabel, Jacob Tajtelbaum, Naomi Tajtelbaum, Michaeli Uri, Yehezkei Yehuda, Dina Yehuda, Amos Wolfson, and Oded Zucker, Applicants and Metropolitan Toronto Condominium Corporation No. 1385, Ian Waldron, Ayesha Kahn, Michael Waring and Patrick Lall, Respondents

Hoilett J.

Heard: October 2-3, 2002
Judgment: December 20, 2002 *
Docket: 02-CV-228486 CM2

Proceedings: affirmed (2003), 2003 CarswellOnt 5050 (Ont. C.A.); additional reasons at (2003), 2003 CarswellOnt 5105 (Ont S.C.J. [In Chambers]); varied (2003), 2003 CarswellOnt 5050 (Ont. C.A.)

Counsel: Robb Heintzman for Applicant/Respondents by Counter-Application
Mark Arnold for Respondents/Applicants by Counter-Application
David Nakelsky for two respondents
R.B. Moldaver, Patricia Conway for Intervenor, MTCC No. 1280

Subject: Contracts; Property; Civil Practice and Procedure
Related Abridgment Classifications
Real property
X Condominiums
X.6 Condominium corporation
X.6.i Interim administrators
Real property
X Condominiums
X.13 Practice and procedure
X.13.i Costs
Headnote
Sale of land --- Condominiums — Condominium corporation — Interim administrators

S Inc. owned and managed 94 out of 189 units comprising condominium corporation and was engaged in leasing out those units for relatively short terms, creating hotel environment — Other unit owners complained that S Inc.'s business changed character of building from private single family residential accommodation to one more like hotel — S Inc. applied for injunctive relief restraining condominium corporation and its board of directors from enforcing one of condominium rules prohibiting use of building for any purpose other than private single family residence — Application was dismissed and court proceeded to address issues in counter-application which contended that impugned rule was wholly within proper and reasonable exercise of authority of condominium corporation and wholly consistent with its declaration and Condominium Act — Counter-application also sought appointment of administrator to help alleviate tensions in building — Counter-application granted — Where impugned provisions are not clearly unreasonable and contrary to legislative scheme, court should show deference to rules deemed appropriate by board of directors — State of disequilibrium on condominium corporation was caused by tension between two groups with different interests — S Inc.'s interests were principally commercial and group was largely absentee landlords whose concerns regarding atmosphere in building were far less immediate than counter-applicants' concerns — Evidence indicated good cause to view S Inc.'s long-term intent with suspicion — Accordingly, appointment of administrator was warranted.

COUNTER-APPLICATION by condominium corporation and board of directors for determination as to validity of provision in declaration and for appointment of administrator.

***Hoilett J.*:**

1 The original application brought for, among other things, certain injunctive and declaratory relief has been abandoned, Accordingly, the issues here addressed are those raised in the counter-application. I have reproduced following the issues as framed in the supplementary factum of the counter applicant:

> 1. Does the provision in Article 111(1)(a) of the Declaration that the condominium building "shall be occupied and used only as a private single family residence and for no other purpose" prohibit Skyline from leasing their residential units for short term hotel-like use because such use is contrary to the use contemplated by the Declaration? (para. 16 s Factum)
>
> 2. Is Rule "E" of the Rules and Regulations of 1385, which prohibits commercial and/or transient use, including tenancies shorter then (sic) six months duration within the condominium building, reasonable and consistent with Article 111(1)(a) of the Declaration and the Condominium Act, R.S.O. 1998, c19, s.58? (see para. 20 s Factum)
>
> 3. Should this court appoint an administrator pursuant to Section 131 of the Condominium Act 1998, with the power to administer the aforesaid Order and Declaration of this Court? (see para. 31 s Factum)
>
> 4. Does the conduct of Skyline amount to conduct that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the condominium corporation? (see para. 37, s Factum)

The counter-applicant seeks an affirmative response in respect of the issues numbered (1) and (2) and the relief contemplated by the legislation referenced in the issues numbered (3) and (4).

2 One collateral issue is raised on this application and that is whether or not intervenor status should be granted to MTCC 1280, represented by Mr. Moldaver, whose interests are, in substance, congruent with those of the counter-applicant. I shall briefly address this issue at the conclusion of these reasons.

3 The following factual background frames the issues raised in this counter-application:

4 109 Front Street East. Toronto, is a building located at the southeast corner of the intersection of Front Street East and Jarvis Street. It comprises two condominium corporations, namely, MTCC 1280 and MTCC 1385, the respondent (applicant-by-counter-application) in the present application. Affiliated with the residential units are commercial and

recreational units. Skyline Properties Inc., the other corporate applicants and a number of individual unit owners (respondents by counter-application), all under the name "Skyline", which owns, operates or manages a total of some 94 (more or less) units of the 189 units comprising MTCC 1385. The tension between the parties arises out of the fact that "Skyline" has been engaged in the business of leasing out those units for which it has management responsibilities for relatively short terms creating a type of transient population, akin to an hotel or apartment hotel. The complaints in this application contend that the business engaged in by Skyline is such as to change the entire character of the building from one bearing the hallmarks of "private single-family" residential accommodation to one more akin to an hotel.

5 The issues in this matter first came up before Swinton J. on May 9, 2002, when the original applicants herein sought injunctive relief, restraining MTCC 1385 and the Board of Directors from enforcing Rule "E". Rule "E", which is reproduced at Tab "B" of the Application Record of the Respondents/Applicants by counter-application, date-stamped May 8, 2002 provides, in part, as follows:

> **E. Owners and Tenants**
>
> 1) For the purposes of Article III(1) of the Declaration, the phrase "private single-family residence" shall specifically prohibit:
>
> (a) any "commercial" use within the units, including, but without limiting the general meaning, any of the following:
>
> (i) the carrying on of a business;
>
> (ii) hotel or boarding or lodging house use;
>
> (iii) the disposition of an owner's or tenant's right to occupy the residential unit whereby the party or parties acquiring such interest or right is or are entitled to use or occupy the unit on a transient use basis or under any arrangement commonly known as time sharing;
>
> (b) any "Transient" use of the units, including, but without limiting the general meaning, more than one (1) short-term use or occupancy of a particular unit, including any such use or occupancy by persons other than the registered owner or licensee of the unit with the exception of *bona fide* guests of the Owner, for a period of less than six (6) months in any particular period of twelve (12) consecutive months.

6 The second of two notes following paragraph (1), *supra* furnishes what may be viewed as something of an interpretive guide. It provides as follows:

> Note...
>
> Note: With reference to section (b) of this rule, every owner is fully entitled to lease his or her residential unit for single period of less than six months in any particular period of twelve consecutive months. As an example, a retired couple who chose to spend four or five months in the south could lease their home for the period of their absence. As another example, a business person assigned for a three- or four-month contract to a location outside the city could lease his or her home during the period of the assignment.
>
> (my emphasis)

7 Section E, 6) provides as follows:

> As noted in Section D (*Common Elements and Residential Units*), each residential unit shall be used as a private single-family dwelling unit and for no other purpose...

8 Section (10) provides as follows:

(10) A lease or tenancy shall be for an initial term of not less than one (1) year except that a lease may be for an initial term of less than one (1) year when, upon the expiration of the term, it is the *bona fide* intention of the Owner to promptly thereafter complete a sale of the unit. All tenancies for units shall be writing.

(ref. Tab B of Motion Record of the Respondent, applicant by counter application, *supra*)

9 Swinton J. in an endorsement, dated May 13, 2002, dismissed the application; concluding that while the applicants had met the low threshold of a serious issue to be tried, they had failed to satisfy the court in respect of the two other important criteria, namely, that they would suffer irreparable harm not compensible in damages and that the balance of conveniences was in their favour. Swinton J's full endorsement is to be found at Tab 4, H of the respondent's counter-application record, date-stamped August 26, 2002.

10 As of the date of this hearing, all the leases for units managed under the Skyline umbrella were, reportedly, for no less than six (6) months. The character of the publicity engaged in by Skyline historically, however, is consistent with the kind of advertisement engaged in by those engaged in the hotel or "near-hotel" kind of business. Concerns are raised by the respondents/applicants by counter-application respecting the sincerity of Skyline in its recent compliance with the 6-month minimum term in relation to its long-term intentions. The following seeming factual inconsistency forms the basis of the above concern.

11 Mr. Bluetrich, president of Skyline at the material time, swore in his affidavit, dated April 23, 2002, in support of the application for injunctive relief, that; at paragraph 22:

. . .

22. Had I known at the time that Skyline and the other owners purchased the units in Phase II that the rental period for units could be restricted in order to preclude the use of such units as extended stay accommodation, I would never have purchased the units or committed the individual investors to making an investment in them.

and at paragraph 69:

69. If Skyline is restricted to leasing the units which it manages on behalf of individual unit owners for a period of no less than 6 months Skyline's business with respect to Phase II will collapse. Based on my experience in the extended stay industry, Skyline cannot maintain occupancy rate at a level of 15-20% if it is restricted to rental periods of 6 months or more. The units at Phase II represent approximately 60% of all the suites managed by Skyline Suites. This means that if the Six-Month Rule is implemented, at any given time, Skyline Suites will be unable to lease more than half of the units it manages. In addition, the rental rates for longer period leases will be considerably lower than the rates that may be charged for shorter stays. Vacant units do not attract revenues for either the unit or owners, who depend on revenues derived from rentals to cover the carrying costs of their units, or for Skyline Suites, whose primary source of income is management fees it earns based on owners' rental revenue.

(ref. Application Record, Volume 1, dated-stamped May 1, 02, Tab 2)

12 Notwithstanding the portrait of doom contained in Mr. Bluetrich's affidavit of April 23, 2002, Skyline subsequently entered into ten (10) Agreements of Purchase and Sale for condominium units at 109 Front Street East. Those agreements, spanning the dates April 30, 2002 to July 29, 2002, represented a face value of $2,780,400.00. Although not formally made exhibits, copies of the agreements were filed with the court during argument, without protest. Each of the agreements of purchase and sale, with one exception, has appended to it a Schedule "A" which contains, among others, the following three paragraphs, in similar or identical language:

. . .

> The Vendor agrees to provide Skyline Executive Suites Inc. with a Power of Attorney for Voting Purposes to permit Skyline Executive Suites Inc. to vote on behalf of the Vendor at all meetings of MTCC No. 1385. Said Power of Attorney shall be subject to any mortgagee rights.
>
> The Vendor warrants she has not given any Powers of Attorney to any person, party or group of persons associated with or with concerns of any nature in the building and Management of MTCC No. 1385.
>
> The Vendor agrees not to participate in any legal proceedings whatsoever against the Purchaser or any of its related companies regarding MTCC 1385 save and except for matters regarding this Agreement of Purchase and Sale and to provide written proof of this to the Purchaser.
>
> (Ref. Schedule "A" to the Agreement of Purchase and Sale, dated July 17, 2002 and represented by a purchase price of $215,800.00)

13 The above ten (10) agreements of purchase and sale were entered into not only in the light of Mr. Blutrich's affidavit of April 23, 2002, but also in the broader context of a number of emanations from the court which, in my view, represents a view contrary to that being argued by Skyline. Among those emanations was the judgment of Madam Justice E.M. Macdonald rendered September 6, 2001 in *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*, [2001] O.J. No. 3512 (Ont. S.C.J.). The application before E. Macdonald J., as framed by her, was "for a declaration that rules E (1)(b) and E(10) of Metro 1280 are invalid and unenforceable and contrary to section (sic) 3 and 29 of the *Condominium Act, R.S.O.*, (1990) C.26". The rules are summarized at p.3 of Macdonald J.'s decision as follows:

> House rule E (1)(b) prohibits the occupancy of a unit for more than one period of less than six months in any particular period of 12 consecutive months.
>
> House rule E (10) requires that the initial term of any lease shall be for a period of not less than one year, except where the owner intends to complete a sale of the unit upon the expiry of the lease, in which case the lease may be for a term of less than one year.

E. Macdonald J. dismissed the application, citing with approval the following recent decisions of our Court: *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle* (1994), 44 R.P.R. (2d) 55 (Ont. Gen. Div.), Lissaman J.; *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, [2001] O.J. No. 2785 (Ont. S.C.J.); and the decision of the Ontario Court of Appeal in *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.). Although more detailed reference is made to those authorities later in these reasons, suffice it to say, they have been consistent in endorsing the kind of rules here in issue.

14 Among the factors relevant to the ultimate resolution of the issues raised on this application are the reasonable expectations of purchasers of units in the condominium complex. The Disclosure Statement, required under the Condominium Act, is one document which speaks to that issue. The following is indicated at page 4 of the Disclosure Statement, under the heading; "MARKETING OF BLOCK UNITS":

> The Declarant is marketing some of the units in one or more blocks to investors and, under the caption "LEASING OF UNSOLD UNITS";
>
> The Declarant reserves the right to lease any unsold units in any of the Proposed Corporations

15 At page 7, 3 (h), "The Declaration", appears the following:

> . . .
>
> **h)**

Occupation and Use of Units

Except as otherwise set out in the Declaration each Dwelling Unit shall be occupied and used only as a private single family residence and in accordance with the condominium's Declaration, by-laws, and rules... The Declarant shall be entitled to maintain certain units as model suites, and may maintain project/customer service offices, displays and signs in certain units and on the common elements until all units owned by the Declarant in any of the Proposed Corporation have been sold.

. . .

i)

Leasing of Units

No owner shall be entitled to lease any unit unless a covenant obliging the tenant to comply with the Condominium Act, the declaration, the by-laws and all rules of the Condominium (in the form prescribed by the Declaration) is first delivered to the Corporation. ...No owner is released from any of his obligations with respect to the unit in consequence of any lease.

16 Another document relevant to the reasonable expectations of a prospective purchaser is the "Proposed Declaration" which reads, in part, as follows:

ARTICLE III UNITS

(1) Occupation and Use - The occupation and use of the units shall be in accordance with the following restrictions and stipulations:

(a) ..., each of the Dwelling Units...shall be occupied and used only as a private single family residence and for no other purpose,...

17 At the risk of oversimplifying the submissions of counsel for the applicant/respondent by counter-application, I think, it may be briefly summarized. Mr. Heintzman contends among other things, that the rules (in issue are unreasonably restrictive in nature and they do violence to the fundamental right of a property owner to deal freely with his/her property. Further, all the leases now held or managed by Skyline are for a minimum term of six (6) months. It is further contended that prospective purchasers were on notice that block purchases for investment purposes were contemplated and the practice engaged in by Skyline is wholly consistent with that prior knowledge. In any event, there is no direct evidence of what the reasonable expectations of prospective purchasers were. Concerning the request for the appointment of an administrator and for the oppressive remedy relief, Mr. Heintzman submits, that there are no circumstances warranting those extraordinary remedies. Mr. Heintzman, notwithstanding his argument that the cases before Lissaman and E. Macdonald JJ. are distinguishable, has invited this court to find that *MTCC 850 v. Oikle and Skyline v. MTCC 1280*, *supra* were wrongly decided.

18 Counsel for the respondents, applicants by counter-application, argues that the impugned rule is wholly within the proper and reasonable exercise of authority of the Condominium Corporation and wholly consistent with its Declaration and the *Condominium Act*. Mr. Amold contends further, that what Skyline is doing is, in fact, an attempt at "blockbusting" and that it is patent from its course of conduct that Skyline design is to take over the board of the Condominium with a view to changing the whole character of the building, Skyline's entering into ten (10) agreements of purchase and sale in the immediate wake of the posture it assumed before Swinton J. betrays its more sinister designs. Recent decisions of this Court, Mr. Amold contents, add weight to his argument. The appointment of an administrator, Mr. Amold submits, would serve to bring some order and stability to the disquiet that now prevails.

19 Counsel for the applicant, respondent by counter-application, has cited a number of cases, none of them in my view, directly on point except for the decision of Molloy J. in *Metropolitan Toronto Corp. No. 1170 v. Zeidan*, *supra*, canvassed more fully later in these reasons. Some of the authorities were directed to what constituted "residential" use and some to the distinction between "term" and "user". Mr. Heintzman's contention that Lissaman J. and E. Macdonald J., in the applications before them, were concerned with the validity of "rules" as opposed to Declarations, which, he submits, is the case here, is not a contention which in my view, can, in the context of this case prevail. Read intelligently, it defies logic as to why the result in the present case should be any different from that arrived at in the application before E. Macdonald J. Recognizing, however, the distinctions to be made between the various elements comprising the framework for the governance of a Condominium corporation, Molloy J., in *Zeridan*, *supra*, illuminated those distinctions. It is useful first, however, to view Molloy J's judgment in the context in which she framed the issue she had to address, because with the greatest respect to counsel for Skyline, he has too narrowly framed the scope of Molloy J.'s judgment. Her framing of the issue she had to decide, is, in my opinion, apropos the main issue I have been asked to determine. Molloy J. stated the issue as follows, at page 85, paragraph 16 of her reasons:

> I therefore conclude that determining whether Glen Grove's business can be characterized as an apartment-hotel is not useful to the analysis I must engage in. The issue I must determine is whether this particular use of the subject units by the respondents altered their characterization as "residential dwelling units" within the meaning of the By-law, and hence the Declaration.

20 Although Molloy J. at paragraph 23 of her reasons, concluded that the use made of the units by Zeidan and Glen Grove was a use permitted by the City of Toronto Zoning By-Law, a criterion set by the Condominium Corporation; and not in breach of s.15 of the Condominium Declaration, she stated the following conclusion at paragraph 39 of her reasons for judgment:

> The use of the units in question as accommodation for short-term transient guests is a use that does not violate the declaration, which requires the units to be used "as residential dwelling units". The fact that a particular use complies with the declaration is not, however, the end of the matter. Otherwise, s.29(1) would serve no purpose. The board is empowered under that provision to impose rules governing the use of units in specified circumstances. Indeed, it is quite common for condominium Boards to impose rules restricting the use of units in certain ways. Common examples are rules dealing with fire safety issues or pets. The fact that a rule cannot be inconsistent with the declaration does not mean that it cannot impose restrictions that go beyond what is provided in the declaration, as long as those restrictions are consistent with what is in the declaration. Here, the declaration requires that the units be used as residential dwelling units. Rule 7.01 [read Rule "E"] does not prevent the use of units as residential dwelling units; nor does it permit a use that is other than residential. All it does is narrow the range of residential uses that will be permitted. Further, it is not sufficiently restrictive as to negate or fundamentally alter the right of owners to lease their units to tenants generally. In my opinion, Rule 7.01 is not inconsistent with anything in the Condominium Declaration and is consistent with the characterization of the units as residential.

21 Molloy J., at *paragraph 36* of her reasons outlines what, in my opinion, is an intelligent and integrated approach to interpreting the *Condominium Act*, at least in so far as it relates to the issues here raised.

> Mr. Spears also submitted that a rule is invalid if it deals with subject matter that could have been in the condominium declaration, even where the declaration does not actually deal with the subject. Provisions restricting owners and affecting units may be found in four sources; (1) the Condominium Act; (2) the condominium declaration; (3) the by-laws of the condominium corporations; and (4) house rules passed by the condominium board. Each of these sources of restrictions is part of a hierarchy, with the *Act* at the top and the house rules at the bottom. No provision in any given category can be inconsistent with a provision higher up in the hierarchical chain. Thus, restrictions in all categories must be consistent with the *Act*; by-laws must be consistent with the declaration and house rules must be consistent with all of the restrictions above it. This does not mean, however, that the

hierarchical structure necessarily prevents a house rule from dealing with a subject matter that could have been dealt with elsewhere in the hierarchy.

22 Molloy J. then went on to conclude that Rule 7.01 was validly passed by the board and that the respondents were acting in contravention of the rule. In reaching her conclusion, Molloy J. canvassed many of the authorities cited by the parties before me. The decision of E. Macdonald J. in *Skyline v. MTCC No. 1280*, *supra*, had, of course. not yet been handed down. Central to Molloy's judgment also was the decision of the Ontario Court of Appeal in *York Condominium Corp. No. 382 v. Dvorchik*, *supra*, the essential gravamen of which is captured in the following excerpt from the reasons of Finlayson J.A.:

> In the absence of such unreasonableness [i.e. what is "clearly unreasonable and contrary to the legislative scheme"], deference should be paid to the rules deemed appropriate by a board ... There are, undoubtedly, different approaches the board could have taken to regulate the keeping of pets owned by residents, and it may be that the "25 pound rule" is not the best rule or the least arbitrary. But this does not make it an unreasonable one. The threshold for overturning a board's rules reasonably made in the interest of owners is a high one, ... (paras. 5-6).

23 The above words of the Court of Appeal bears repeating and are apposite the present circumstances.

24 The deference to the condominium board's decisions which the Court of Appeal indicates is appropriate would be a sufficient ground, in my opinion, for responding affirmatively to the first two issues raised in this counter-application. There is, however, one other compelling reason for so doing. Stripped of unnecessary legal casuistry, the fundamental issue faced by my colleagues Lissaman, E. Macdonald and Molloy JJ. is, in substance, the same issue raised in the present application. There is a certain concordance in those three judgments. In such circumstances, it seems to me, the court should not seek to find, in strained analogy a reason to bring dissonance to the otherwise reasoned concordance of the court. There should be compelling reasons for so doing. No such reasons are, in my opinion, to be found in the many authorities cited. The reasons reaching the conclusion I have concerning issues 1 and 2 are all the more compelling when one considers that, to do otherwise would produce the somewhat anomalous result of having two condominium corporations, MTCC 1280 and MTCC 1385 sharing, what is to all intent and purposes, common space, and governed by identical rules, discordantly interpreted by the same court. Such a result would lend unnecessary credit to the observation that "the law is an ass".

25 I turn next to the third issue raised, and that is whether or not the present circumstances are such as to warrant the appointment of an administrator, provided for under s.131 of the Act, reproduced following:

> 131.(1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43. 1998, c.19, s.131(1); 2000, c.26, Sched. B, s.7(7)
>
> (2) The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interest of the owners
>
> (3) The order shall,
>
> (a) specify the powers of the administrator;
>
> (b) state which powers and duties, if any, of the board, shall be transferred of the administrator; and
>
> (c) contain the directions and impose the terms that the court considers just.
>
> (4) The administrator may apply to the court for the opinion, advice or direction of the court on any question regarding the management or administration of the coporation.

26 It appears, based on counsel's submissions, that s.131 of the Act is yet to be invoked in Ontario. The British Columbia Supreme Court, however, has had occasion to deal with the province's comparable legislation. Harvey J. in *Lum v. Strata Plan VR519* [2001 CarswellBC 637 (B.C. S.C.)] in paragraph 11 of his reasons, suggested the following factors to be taken into consideration by the court:

. . .

11. In my view after reviewing the authority available, bearing upon the question, factors to be considered in exercising the Court's discretion whether the appointment of an administrator is in the best interest of the strata corporation include:

(a) whether there has been established a demonstrated inability to manage the strata corporation,

(b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,

(c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,

(d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,

(e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

In addition, there is always to be considered the problem presented by the costs of involvement of an administrator.

27 In addition to the factors canvassed at paragraph 11, *supra*, Harvey J. went on to endorse the comments of Huddart J. (as the then was) in *Cook v. Strata Plan N-50*, [1995] B.C.J. No. 2882 (B.C. S.C.), to the general effect that "...the democratic government of the strata community should not be overridden by the Court except where absolutely necessary". It is clear from the language employed by Harvey J. that it was not his intent to create an exhaustive list.

28 Apart from the factors of cost and regard for the democratic government of a [condominium] corporation, which are probably ever present, factors (c), (d) and (e) of the five factors enumerated by Harvey J. are, in my opinion, arguably relevant in the present application. Briefly summarized, there exists a state of disequilibrium in the condominium corporation, precipitated by the obvious tension between two distinct groups having divergent interests. On the one hand, we have the owner-occupied units whose interest lies in proserving what they perceive as an atmosphere whose dominant characteristics are those of a "private single-family" dwelling. That, they maintain, is consistent with their reasonable expectations when they purchased their units, as it is with Rule "E", which represents a proper exercise of the condominium corporation's jurisdiction. On the other hand, we have the group, represented by Skyline, whose interests are principally commercial. That group are essentially absentec landlords, many of them overseas. In other words their concerns relating to the prevailing atmosphere in the condominium complex is far less immediate.

29 There is merit, in my view, in the submission by counsel for the counter-applicants that there is good cause to view with suspicion the long-term intent of the counter-respondents notwithstanding their present compliance with the 6-month minimum rule. The reason being the patent inconsistency between the posture of the counter-respondents before Justice Swinton and their subsequent venture into the acquisition of an additional ten (10) condominium units; or more precisely, the entering into agreements of purchase and sale, which included d clause clearly aimed at silencing potential opposition to Skyline's interests.

30 For all the foregoing reasons, therefore, I am of the opinion that the circumstances warrant the appointing of an administrator, pursuant to s.131 of the *Condominium Act*. If counsel are unable to agree on the term of such an

appointment, or on the scope of his/her mandate, I am prepared to meet with counsel in an attempt to resolve that issue. I am also prepared to endorse Mr. Hyman, Q.C. the administrator proposed by Mr. Arnold, unless Mr. Heintzman is able to show reasonable cause why Mr. Hyman should not be approved.

31 I shall not deal with this issue relating to the oppression remedy sought by the counter-applicants because I view it as an alternative remedy to the appointment of an administrator. I am also of the view that the case for the appointment of an administrator is more compelling.

32 Finally, I turn to the question of the intervenor status sought by counsel for MTCC 1280. That question, in my view, ought to be dealt with on a practical common sense basis rather than on the basis of some abstract and academic dissertation. The appearance of counsel for MTCC 1280 was mostly a formality. She made very brief submission essentially adopting Mr. Amold's position. The reason for MTCC 1280's interest was, of course, patent because, to all intent and purposes, the issues raised were, in substance, a reprise of the issues canvassed before E. Macdonald J. The intervenor status of MTCC 1280 is therefore recognized.

33 The counter-applicant shall have its costs of these proceedings, concerning which, if counsel are unable to agree, I shall entertain their written submissions within forty-five (45) days of the date of these reasons, which written submissions shall be exchanged for comment before submission to be me.

34 In the result therefore, an order shall issue in accordance with the foregoing reasons.

Order accordingly.

Footnotes

* Additional reasons at 2003 CarswellOnt 5105 (Ont. S.C.J. [In Chambers]); affirmed 2003 CarswellOnt 5050 (Ont. C.A.).

TAB 12

2016 ONSC 6256
Ontario Superior Court of Justice

2308478 Ontario Ltd. v. York Region Condominium Corp. No. 715

2016 CarswellOnt 19335, 2016 ONSC 6256, 274 A.C.W.S. (3d) 199

2308478 ONTARIO LTD. (Applicant) and YORK REGION CONDOMINIUM CORPORATION NO. 715 (Respondent)

G. Dow J.

Heard: October 4, 2016; November 24, 2016
Judgment: December 9, 2016
Docket: CV-16-550261

Counsel: M. Gosia Bawolska, for Applicant
Safia J. Lakhani, for Respondent

Subject: Corporate and Commercial; Property

Related Abridgment Classifications

Real property
X Condominiums
X.6 Condominium corporation
X.6.i Interim administrators
Real property
X Condominiums
X.13 Practice and procedure
X.13.i Costs

Headnote

Real property --- Condominiums — Condominium corporation — Interim administrators

Owner of industrial condominium (condo) unit (owner) operated business out of unit — Owner was dissatisfied with condo's management by Board of Directors (board), including alleged failure to maintain adequate reserve fund, and had brought two actions against it — Board did nothing in response to 2011 reserve fund study recommending immediate eight per cent increase in reserve fund contributions and failed to address double and unauthorized parking which prevented snow removal contractors from properly clearing lot — In 2013, board replaced property management company and retained parking authority to tag illegally parked vehicles and security company to conduct weekly visits — In 2014, board spent $217,600 on roof repairs — In 2016, board adopted 2015 reserve fund study recommendations to set aside $71,000 — Owner brought application under s. 131 of Condominium Act for order appointing administrator, alleging board and directors failed to fulfill statutory mandate to act in best interests of condo — Application dismissed — Application would have had greater success had it been brought in 2013 — Applicant's failed to identify individual or entity to be administrator — Cases where administrator was appointed involved situations significantly more grave — Board was active and did not have significant debt — Board had adopted recommendation of most recent reserve funds study which should avoid reserve fund issues in future — Board was capable of making decisions and was proceeding with business of corporation — Situation had not reached point where board was doing nothing or market value of unit holder's investment was compromised or was about to be compromised — While actions of board were substandard in past, board's three-year term was up in December 2016.

Real property --- Condominiums — Practice and procedure — Costs

Owner of industrial condominium (condo) unit (owner) operated business out of unit — Owner was dissatisfied with condo's management by Board of Directors (board), including alleged failure to maintain adequate reserve fund, and had

brought two actions against it — Board did nothing in response to 2011 reserve fund study recommending immediate eight per cent increase in reserve fund contributions and failed to address double and unauthorized parking which prevented snow removal contractors from properly clearing lot — In 2013, board replaced property management company and retained parking authority to tag illegally parked vehicles and security company to conduct weekly visits — In 2014, board spent $217,600 on roof repairs — In 2016, board adopted 2015 reserve fund study recommendations to set aside $71,000 — Owner's application under s. 131 of Condominium Act for order appointing administrator was dismissed without prejudice to further application — Owner sought costs of $32,066.22, inclusive of HST and disbursements, on substantial indemnity basis — Owner was awarded costs fixed at $2,500 inclusive of fees, HST and disbursements — Board's formal offer to settle required execution of full and final release if accepted and presumably barred any future claims, resulting in applicant being relieved of consequences of Rule 49.10 given decision that application was dismissed without prejudice to new and further application — Efforts of applicant clearly resulted in board improving its performance and fulfilling its obligations to act in best interests of unit holders — Legal costs of board would no doubt be partially borne by owner through its payment of common elements fees — Section 131 of Courts of Justice Act gave court discretion to determine by whom and to what extent costs shall be paid and Rule 57.01(2) specifically provided for awarding costs against successful party.

APPLICATION by condominium unit owner for appointment of administrator to replace board of directors.

***G. Dow J.*:**

1 The applicant seeks an order appointing an administrator pursuant to section 131 of *The Condominium Act*, 1998, S.O. 1998 c.19 alleging the existing Board of Directors are not acting in the best interests of the corporation. The defendant opposes the motion.

Background

2 The applicant is a corporation operating under the business name Creative Kitchen Gallery Inc. ("Creative Kitchen") with a show room in Unit 1 of 166 Bullock Drive, Markham, an industrial-retail building with 36 condominium units. The common elements are managed and governed by the respondent. There are five directors, last elected by the 18 different unit owners in November, 2013. The principal of the applicant, Steve Torok, (following purchase of Unit 1 December 14, 2011) sought a position on the Board of Directors at that time given his concerns detailed below but was not elected. In fact, it is clear there is conflict between he and of the respondent Board of Directors, which has resulted in two other court actions referred in the evidence before me, being:

> a) a Statement of Claim issued December 24, 2014 by Mr. Torok and his corporation against the respondent and the five directors for property damage, business interruption, loss of profit, breach of contract, aggravated and punitive damages;
>
> b) a Small Claims Court Action for punitive damages against Mr. Torok arising from an alleged assault of the respondent's property manager on August 8, 2014, apparently in the afternoon which makes the Special Board Meeting Minutes of August 8, 2014 commenced at noon and adjourned at 1:15 pm authorizing the action confounding. The explanation for this from the respondent is the Board of Directors meeting was held immediately after the incident occurred and/or the inclusions of the word "afternoon" in the Minutes is inaccurate.

3 The applicant focused on two examples on how the respondent Board of Directors had failed to fulfill its (Section 27) statutory mandate to act in the best interests of the condominium corporation. The first is the failure to maintain an adequate reserve fund with regard to and in response to a reserve fund study identifying maintenance issues, particularly the roof. The second aspect is a failure to properly address parking issues.

4 Regarding the reserve fund, the applicant points to the statutorily mandated Reserve Fund Study report by First Condo Group Limited dated July 6, 2011. It forecast anticipated expenditures of $704,609.00 and a shortfall of $433,871.00 by May 31, 2012 and recommended an immediate 8% increase in reserve fund contributions. However, the

cover letter of the report states: "The current reserve fund balance and proposed contributions are adequate to cover any potential major repairs or replacements".

5 In 2012-2014, little or no money was spent doing any capital repairs or maintenance.

6 On January 6, 2014 the applicant reported a water leak and damage with repairs and damage with repairs which cost $4,359.52. By May 21, 2014, the City of Markham building department had served a Property Standards Order on the respondent with regard to the condition of the roof and by late 2014 roof repairs had been conducted following receipt of an estimate from Proteck Roof and Sheet Metal for $261,900.00 plus HST. The year-end May 31, 2015 financial statements of the respondent indicate $217,600.00 was paid for roof repairs.

7 The draft Entuitive Reserve Fund Study report dated November 17, 2015 indicates more than $3 million would be required over the next 30 years (or more than $100,000.00 per year) and the need to raise those funds from common elements monthly fees.

8 The evidence regarding parking irregularities is based upon observations of double parking, blocking fire routes and unauthorized parking in the visitors lot. This resulted in amongst other things, the inability of the snow removal contractors to properly clear the lot as required.

9 The inactivity of the Board of Directors through its property manager and failure to properly maintain the property including maintaining the reserve fund has changed more recently and before this Application was issued April 5, 2016. The steps taken include:

a) adoption of the Entuitive report recommendations to set aside $71,000.00 for that fiscal year with rate of inflation increases at the January 22, 2016 board meeting;

b) the repair to the roof commenced with the quotation in June, 2014 with work done and $217,600.00 paid before May 31, 2015 as reflected in that year-end's financial statement;

c) replacement of the property management company in the Fall of 2013;

d) the respondent retaining Ontario Parking Authority to tag illegally parked vehicles in the lot and a security company being retained to conduct weekly visits.

Analysis

10 The parties agree the five factors to consider are outlined in *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*, [2002] O.J. No. 5117 (Ont. S.C.J.) which are:

a) whether there has been established a demonstrated inability to manage the corporation;

b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to the affairs of the corporation;

c) whether the appointment of an administrator is necessary to bring order to the affairs of the corporation;

d) whether there is a struggle within the corporation among competing groups such as to impede or prevent proper governance of the corporation; and

e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the corporation.

11 Regarding the first factor of demonstrating an inability to manage the corporation, my observation and conclusion is that this application would have had greater success had it been returnable in or about August, 2013, that is, before

the more recent activity by the respondent Board of Directors to take the steps listed above. As repeated by Justice D. Brown (as he then was) in *Bahadoor v. York Condominium Corp. No. 82* [2006 CarswellOnt 7608 (Ont. S.C.J.)], 2006 CanLII 40487, referencing the comment of Justice Hoilett in *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*, *supra* the Court should utilize the provisions of Section 31 "only as a last resort" given the Act contemplates the unit owners should govern their own affairs. Were this the only factor to consider, I would not grant the relief sought.

12 Regarding the second factor of demonstrated substantial misconduct or mismanagement or both in the affairs of the corporation, the position of the applicant is that his actions, which preceded issuance of this Application prodded the respondent's Board of Directors to begin taking the steps that they were required to take and the more recent attention and activity to the affairs of the respondent should not be in their favour. I agree with this position. Were this the only factor to consider, I would be inclined to grant the relief sought.

13 Regarding the third factor of appointment of an administrator as a necessary step to bring order to the affairs of the corporation, the applicant's position is weakened by not having identified the individual or entity to be the administrator along with their qualifications to do so. This was raised when initial submissions were made on October 4 and attempted to be remedied by providing a Supplementary Affidavit of Steve Torok on November 24 that contained the resumes of two individuals that appeared to be qualified and willing to be administrators.

14 In the case law relied upon by the applicant where an administrator was appointed, the situation for the condominium corporation was significantly more grave in my view. It is important to note the current Board of Directors for the respondent is active and that the financial affairs of the respondent is not one of any significant debt. Further, they have adopted the recommendation of the most recent reserve funds study which should avoid that occurring in the future. Were this the sole factor considered, I would not grant the application.

15 Regarding the fourth factor and the struggle within the corporation among competing groups such as to impede or prevent proper governance, I interpret this to be more at the Board of Directors level such that the ability of the Board of Directors to make decisions and take necessary steps is being frustrated. That is not the case in this situation before me. Here the Board of Directors has been capable of making decisions and is proceeding with the business of the corporation. The applicant may not be satisfied with or in favour of those decisions (or the speed with which they are being made) but the situation has not reached a point where, in my view, the activity of the Board of Directors has stopped or the market value of each unit holder's investment, including that of the applicant, has been seriously compromised or is about to be seriously compromised. Were this the sole factor, I would not grant the application.

16 Regarding the final factor and the appointment of an administrator as the only reasonable prospect for bringing order, I am again guided by the comments of Justice D. Brown (as he then was) in *Bahadoor v. York Condominium Corp. No. 82*, *supra*, and (at paragraph 26) that "good reason must be shown why unit owners should not manage their corporation's affairs through an elected Board of Directors. Self-governance is the norm; administrators are the exception". While I would conclude the actions of this Board of Directors has been substandard in the past, I would also note the evidence that they were elected by the unit owners in November, 2013 for a three year term and I was provided a copy of the Notice of Annual General Meeting to proceed on December 6, 2016 in the Supplementary Affidavit of Steve Torok. Were this the only factor to consider, I would not grant the relief sought.

17 Overall, while I would not consider one factor to be more or less important than another and that one factor could overwhelm the rest, it is my conclusion that this application should be and is dismissed. However, it should also be stated that it is dismissed without prejudice to a new and further Application on new and additional evidence in order to ensure the activity and attention to the best interests of the unit holders continues rather than any resumption of the inactivity noted in 2011-2013.

Costs

18 Counsel for the applicant submitted a bill of costs indicating actual time and fees to be charged to her client to be $30,385.00 plus HST (of $3,950.05) and disbursements of $1,164.67 for total of $35,499.72. If successful, counsel sought costs on a substantial indemnity (90%) level or by my calculation, $27,346.50 plus HST of $3,555.05 and disbursements of $1,164.67 for a total of $32,066.22.

19 This compared to the respondent's bill of costs indicating counsel was charging her client $14,596.00 plus HST of $1,897.48 and disbursements of $1,124.16 for a total of $17,617.64. I also reviewed, with the consent of applicant's counsel, the respondent's formal offer to settle of July 5, 2016 proposing settlement on a without costs basis (that the application be dismissed) until July 12, 2016 with partial indemnity costs to be paid to that date and substantial indemnity costs thereafter. The offer also required execution of a full and final release if accepted subsequently and was open for acceptance until the commencement of the hearing.

20 The requirement to execute a full and final release (which in my view, bars any future claim) results in the applicant being relieved of the consequences of Rule 49.10 given my decision that the application is dismissed is without prejudice to a new and further application on new and additional evidence. Alternatively, I would rely on my discretion under that Rule as well as Rule 57.01 and Section 131 of the *Courts of Justice Act* R.S.O. 1990 c. C.43. It seems clear the efforts of the applicant resulted in the respondent Board of Directors improving its performance and fulfilling its obligations to act in the best interests of the unit holders. Further, I take note of the fact that the legal costs of the respondent will no doubt be partially borne by the applicant through its payment of common elements fees. Not only does section 131 of the *Courts of Justice Act* provide discretion to determine by whom and to what extent costs shall be paid but rule 57.01(2) specifically provides for awarding costs against a party that has been successful. As a result, I would award and fix costs payable by the respondent to the applicant in the amount of $2,500.00 inclusive of fees, HST and disbursements.

Application dismissed.

TAB 13

Alberta Statutes
Condominium Property Act
Administration of Corporation

R.S.A. 2000, c. C-22, s. 58

s 58. Appointment of administrator

Currency

58.Appointment of administrator

58(1) A corporation or a person having a registered interest in a unit may apply to the Court for appointment of an administrator.

58(2) The Court may, on cause shown, appoint an administrator for an indefinite period or for a fixed period on any terms and conditions as to remuneration or otherwise that it thinks fit.

58(3) The remuneration and expenses of an administrator appointed under this section are administrative expenses within the meaning of this Act.

58(4) An administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders.

58(5) An administrator may delegate any of the powers or duties so vested in the administrator.

58(6) The Court may, on the application of an administrator or a person referred to in subsection (1), remove or replace the administrator.

Amendment History

2008, c. 43, s. 2(3)

Currency

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TAB 14

Alberta Statutes
Condominium Property Act
Meetings of the Corporation

R.S.A. 2000, c. C-22, s. 30

s 30. Annual general meetings

Currency

30.Annual general meetings

30(1) The first annual general meeting of the corporation must be convened by the board no later than 12 months after the registration of the condominium plan.

30(2) Subsequent annual general meetings must be convened annually no later than 15 months after the immediately preceding annual general meeting.

30(3) Subject to the regulations, written notice of an annual general meeting must be provided to each owner and any mortgagee who has given written notice under section 26(3) no less than 14 days prior to the day on which the meeting is to be convened.

30(4) Subject to the regulations, the corporation shall

(a) prepare financial statements, in accordance with Canadian generally accepted accounting principles, for the corporation's preceding fiscal year, an annual report on the reserve fund and an annual budget for the corporation's fiscal year that immediately follows the corporation's preceding fiscal year, and

(b) no less than 14 days prior to the day on which the annual general meeting is to be convened, provide copies of the financial statements, an annual report on the reserve fund and the annual budget to each owner and any mortgagee who has given written notice under section 26(3).

Amendment History

2014, c. 10, s. 21

Currency

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TAB 15

Alberta Regulations
Condominium Property Act
Alta. Reg. 168/2000 — Condominium Property Regulation
Part 2 — Capital Replacement Reserve Fund

Alta. Reg. 168/2000, s. 23

s 23. Reserve fund study, report and plan

Currency

23.Reserve fund study, report and plan

23(1) The corporation must retain a qualified person to carry out a study of the depreciating property for the purposes of determining the following:

Proposed Amendment — 23(1) opening words

23(1) The corporation must retain a reserve fund study provider to carry out a study of the depreciating property for the purposes of determining the following:

Alta. Reg. 256/2018, s. 8(a)(i) [To come into force July 1, 2019.]

(a) an inventory of all of the depreciating property that, under the circumstances under which that property will be or is normally used, may need to be repaired or replaced within the next 25 years;

Proposed Amendment — 23(1)(a)

(a) an inventory of all of the depreciating property that, under the circumstances under which that property will be or is normally used, may need to be repaired or replaced within the next 30 years or a time period longer than 30 years;

Alta. Reg. 256/2018, s. 8(a)(ii) [To come into force July 1, 2019.]

(b) the present condition or state of repair of the depreciating property and an estimate as to when each component of the depreciating property will need to be repaired or replaced;

(c) the estimated costs of repairs to or replacement of the depreciating property using as a basis for that estimate costs that are not less than the costs existing at the time that the reserve fund report is prepared;

(d) the life expectancy of each component of the depreciating property once that property has been repaired or replaced.

23(2) In carrying out the reserve fund study under subsection (1), the qualified person must also do the following:

Proposed Amendment — 23(2) opening words

23(2) In carrying out the reserve fund study under subsection (1), the reserve fund study provider must also do the following:

Alta. Reg. 256/2018, s. 8(b)(i) [To come into force July 1, 2019.]

(a) determine the current amount of funds, if any, included in the corporation's reserve fund;

Proposed Addition — 23(2)(a.1)-(a.4)

(a.1) conduct an on-site visual inspection of all visible components of the depreciating property;

(a.2) interview the members of the board;

(a.3) interview, to the extent the reserve fund study provider considers necessary, the manager or managers for the corporation, if any, any employees of the corporation or manager, or any other person;

(a.4) review relevant documents, including the condominium plan, construction documents and maintenance records;

Alta. Reg. 256/2018, s. 8(b)(ii) [To come into force July 1, 2019.]

(b) recommend the amount of funds, if any, that should be included in or added to the corporation's reserve fund in order to provide the necessary funds to establish and maintain or to maintain, as the case may be, a reserve fund for the purposes of section 38 of the Act;

(c) describe the basis for determining

(i) the amount of the funds under clause (a), and

(ii) the amount in respect of which the recommendation was made under clause (b).

23(3) On completing the reserve fund study under this section, the person who carried out the study must prepare and submit to the board a reserve fund report in writing in respect of the study setting out the following:

(a) the qualifications of that person to carry out the reserve fund study and prepare the report;

(b) whether or not the person is an employee or agent of or otherwise associated with the corporation or any person who performs management or maintenance services for the corporation;

Proposed Amendment — 23(3)(b)

(b) a signed statement that the person is a reserve fund study provider and no grounds of disqualification under section 21.1 or 21.2 apply;

Alta. Reg. 256/2018, s. 8(c) [To come into force July 1, 2019.]

(c) the findings of the reserve fund study in respect of the matters referred to in subsections (1) and (2);

(d) any other matters that the person considers relevant.

23(4) On receiving the reserve fund report under subsection (3), the board must, after reviewing the reserve fund report, approve a reserve fund plan

(a) under which a reserve fund is to be established, if one has not already been established, and

(b) setting forth the method of and amounts needed for funding and maintaining the reserve fund.

23(5) A reserve fund plan approved under subsection (4) must provide that, based on the reserve fund report, sufficient funds will be available by means of owners' contributions, or any other method that is reasonable in the circumstances, to repair or replace, as the case may be, the depreciating property in accordance with the reserve fund report.

23(6) Notwithstanding that a reserve fund plan has been approved under subsection (4), the corporation must provide to the owners for the owners' information copies of that approved reserve fund plan prior to the collection of any funds for the purposes of those matters dealt with in the reserve fund report on which the approved reserve fund plan was based and that are to be carried out pursuant that report.

23(7) Until such time that a corporation has approved a reserve fund plan under subsection (4) and has met the requirement under subsection (6) so as to be eligible to collect funds in respect of the reserve fund, the corporation may, notwithstanding subsection (6), collect or otherwise receive funds for a fund that is similar in nature to a reserve fund and may make expenditures from and generally continue to operate that fund.

Amendment History
Alta. Reg. 108/2004, s. 10(20); 181/2017, s. 7

Currency
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