COURT FILE NUMBERS	1701-03460	Clerk's Stamp CLERK OF THE COURT FILED MAY 02 2017 JUDICIAL CENTRE OF CALGARY
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	CALGARY	
APPLICANT/RESPONDENT	LEXIN RESOURCES LTD.	
RESPONDENT/APPLICANT	ALBERTA ENERGY REGULATOR	
DOCUMENT	**BOOK OF AUTHORITIES OF LEXIN RESOURCES LTD. ON APPLICATION BY RECEIVER TO INCREASE RECEIVER'S BORROWING CHARGE & EXAMINATION POWERS AND APPLICATION BY LEXIN FOR DIRECTIONS ON DOCUMENTARY REVIEW**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GROIA & COMPANY** **Professional Corporation Lawyers** 365 Bay Street, Suite 1100 Toronto, ON M5H 2V1 Fax: 416-203-9231 **Joseph Groia,** LSUC# 20612J Tel : 416-203-4472 **Bonnie Roberts Jones,** LSUC# 41256L Tel: 416-203-4476	

INDEX

INDEX

CASES	*TAB NO.*
1231640 Ontario Inc., Re, 2007 ONCA 810, 2007 CarswellOnt 7595……………………	*1*
Bank of Montreal v. Shaw Ranches Ltd., 1984 Carswell 556 1984 CarswellBC 556……	*2*
Bell Canada International Inc. Re, 2003 CarswellOnt 4537……………………………	*3*
Catalyst Fund General Partner I Inc. V. Hollinger Inc., 2005 CarswellOnt 2193…………	*4*
General Electric Canada Real Estate Financing Holding…, 2011 ONSC 5741 …………	*5*
Integris Credit Union v. Mercedes-Benz Financial Services, 2016 BCCA 231, 2016 ……	*6*
Lochson Holdings Ltd. v. Eaton Mechanical Inc., 1984 CarswellBC 572, 1984 CarswellBC 572 ……………………………………………………	*7*
Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd., 1975 CarswellOnt 123, 1975 CarswellOnt 123 ……………………………………………………	*8*
Royal Bank v. Vulcan Machinery & Equipment Ltd., 1992 CarswellAlta 287, 1992 CarswellAlta 287 ……………………………………………………	*9*
Servus Credit Union Ltd. v. Trimove Inc., 2015 ABQB 745, 2015 CarswellAlta 2169 ……	*10*
Thompson Bros. (Constr.) Ltd. v. Jay Vee Sandblasting Ltd., 2013 ABQB 670, 2013………	*11*

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Windsor Machine & Stamping Ltd., Re | 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241, [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611 | (Ont. S.C.J. [Commercial List], Jul 27, 2009)

2007 ONCA 810
Ontario Court of Appeal

1231640 Ontario Inc., Re

2007 CarswellOnt 7595, 2007 ONCA 810, [2007] O.J. No. 4561, 13 P.P.S.A.C. (3d) 57, 163 A.C.W.S. (3d) 474, 289 D.L.R. (4th) 684, 37 C.B.R. (5th) 185

IN THE MATTER OF THE BANKRUPTCY OF 1231640 ONTARIO INC. (formerly known as The State Group Limited) OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

THE ROYAL BANK OF CANADA, in its capacity as administrative agent for certain lenders (Appellant) and PRICEWATERHOUSECOOPERS LLP, TRUSTEE OF THE ESTATE OF 1231640 ONTARIO INC., A BANKRUPT and ST. PAUL GUARANTEE INSURANCE COMPANY (Respondents)

K.M. Weiler, K. Feldman, H.S. LaForme JJ.A.

Heard: May 10, 2007
Judgment: November 26, 2007
Docket: CA C45883

Proceedings: affirming *1231640 Ontario Inc., Re* (2006), 23 C.B.R. (5th) 92, 2006 CarswellOnt 4406 (Ont. S.C.J.)

Counsel: Peter H. Griffin, Matthew Sammon for Appellant, Royal Bank of Canada in its capacity as Administrative Agent for Certain Lenders
John D. Marshall for Respondent, St. Paul Guarantee Insurance Company
Alex MacFarlane for Respondent, PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited)

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

X Priorities of claims
X.1 Secured claims
X.1.c Loss of secured status
X.1.c.iii Effect of P.P.S.A.

Personal property security

III Perfection of security interest
III.1 Registration

III.1.d Maintaining perfection
III.1.d.i Changes and amendments
III.1.d.i.A Change of debtor name

Personal property security

III Perfection of security interest
III.1 Registration
III.1.e Errors in completing financing statements
III.1.e.i Wrong or incomplete name of debtor
III.1.e.i.B Miscellaneous

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Loss of secured status — Effect of P.P.S.A

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

Personal property security --- Perfection of security interest — Registration — Maintaining perfection — Changes and amendments — Change of debtor name

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

Personal property security --- Perfection of security interest — Registration — Errors in completing financing statements — Wrong or incomplete name of debtor — Miscellaneous

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

The bank held a first registered general security interest over the personal property of the debtor and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the Bankruptcy and Insolvency Act ("BIA"). A court order appointing P Inc. as interim receiver was issued. Following its appointment, the interim receiver sold the substantial assets of the debtor in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale, the receiver sold the debtor's name triggering s. 48(3) of the Personal Property Security Act ("PPSA"). Both the bank and a subsequent secured creditor had knowledge of the sale of the debtor's name and failed to register a financing change statement. P Inc. subsequently assigned the debtor into bankruptcy and P Inc. was appointed trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received a substantial income tax refund. The bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim with P Inc. as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee. The motion judge held that the appointment order did not have the effect of precluding the bank from maintaining the perfected status of its security interest following the appointment of the interim receiver. The motion judge concluded that the bank's security interest became unperfected. The motion judge found that a s. 47 BIA receiver was not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and s. 20(20(b) of the PPSA. The motion judge held that P Inc. only became a person who represents the creditors of of the debtor upon its appointment as trustee in bankruptcy. Because at that time the bank's security interest was unperfected, it was and remained ineffective against the trustee from that date. The bank appealed.

Held: The appeal was dismissed.

Per Feldman J.A. (LaForme J.A. concurring): The bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b). The motion judge was correct that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) and the term "receiver" should not be read into the legislation. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not a priority contest with any creditor on behalf of unsecured creditors. The effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time. Neither these subsections nor the order appointing the interim receiver had the effect of exempting the bank from the requirement of complying with s 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the bank's security interest was not effective against the trustee in bankruptcy. Because the bank's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was perfected on the date of the appointment of the trustee and its security interest was therefore ineffective against the trustee. The bank lost its priority over the other creditor that also lost its secured standing and they were both unperfected on the date of the appointment of the trustee and both their security interests were therefore ineffective against the trustee.

Per Weiler J.A. (dissenting): The motion judge was correct in holding that the appointment order did not give the bank an implied exemption from complying with the requirement to file financing change statement upon learning that the receiver sold the debtor's name. The bank could have applied to the court to obtain the receiver's consent to lift the stay or to file the requisite PPSA registration. The motion judge erred in concluding that the interim receiver was not a person who represents the creditors of the debtor within the meaning of s. 20(1)(b). In light of the wording of and history of the section, the opinion of scholars, the existing jurisprudence, and having regard to the section as a whole, to related provisions, and to the purpose of the section, P Inc.'s appointment as a s. 47 BIA receiver made it a person who represents the creditors of the debtor. The motion judge was incorrect in concluding that the s. 47 BIA receiver was effectively a representative of the bank alone. The receiver owed a fiduciary duty to all the creditors and had vast powers over the property of the debtor. The motion judge's conclusion that the rights referred to in s. 20(2) were proprietary rights akin to those exercised by the trustee in bankruptcy ignored the fact that the PPSA was not about title to property or rights against the debtor, but was about notice to and priorities between creditors. Pursuant to s. 20(2), the time for determination of priorities was the date of the receiver's appointment, and on that date, the bank had properly perfected its first security interest. The s. 47 BIA receivership did not end when the trustee in bankruptcy was appointed. Although the bank was not exempt from its obligation to file a financing change statement or a fresh financing statement upon learning of the debtor's name change, its failure to do so did not result in loss of its priority. The date for determining the effectiveness in the bank's security interests was when the court appointed the interim receiver and this date for determining priorities did not change with the appointment of the receiver as a trustee in bankruptcy.

Table of Authorities

Cases considered by *K.M. Weiler J.A.* (Dissenting in Part):

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd. (1987), 1987 CarswellOnt 155, 63 C.B.R. (N.S.) 1 (Ont. C.A.) — considered

Canadian Pacific Air Lines Ltd. v. C.A.L.P.A. (1993), 93 C.L.L.C. 14,062, 17 Admin. L.R. (2d) 141, 160 N.R. 321, [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1, 1993 CarswellNat 816, 1993 CarswellNat 1385 (S.C.C.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 75, 2005 CarswellSask 442, 2005 SKQB 294 (Sask. Q.B.) — referred to

Donaghy v. CSN Vehicle Leasing (1992), 4 Alta. L.R. (3d) 40, 4 P.P.S.A.C. (2d) 37, [1992] 6 W.W.R. 70, 14 C.B.R. (3d) 256, (sub nom. *Donaghy (Bankrupt), Re)* 132 A.R. 155, 1992 CarswellAlta 292 (Alta. Q.B.) — referred to

Giffen, Re (1998), 45 B.C.L.R. (3d) 1, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re)* 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re)* 164 W.A.C. 161, 155 D.L.R. (4th) 332, 222 N.R. 29, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Ivaco Inc., Re (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856 (S.C.C.) — referred to

Lefebvre, Re (2001), 2001 CarswellQue 2642, (sub nom. *Lefebvre (Syndic de))* [2001] R.J.Q. 2679 (C.S. Que.) — referred to

Lefebvre, Re (2003), 2003 CarswellQue 446, [2003] R.J.Q. 819, (sub nom. *Lefebvre (Syndic de), Re)* 229 D.L.R. (4th) 697 (C.A. Que.) — referred to

Lefebvre, Re (2004), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 253 (Eng.), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 353 (Fr.), 2004 SCC 63, 2004 CarswellQue 2831, 2004 CarswellQue 2832, (sub nom. *Lefebvre (Trustee of), Re)* 244 D.L.R. (4th) 513, (sub nom. *Lefebvre (Trustee of), Re)* [2004] 3 S.C.R. 326, 7 C.B.R. (5th) 243, 1 B.L.R. (4th) 19 (S.C.C.) — considered

Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée (2004), 2004 CarswellOnt 4973, 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.) — referred to

National Bank of Greece (Canada) c. Katsikonouris (1990), 1990 CarswellQue 118, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* 74 D.L.R. (4th) 197, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* [1990] 2 S.C.R. 1029, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* 50 C.C.L.I. 1, (sub nom. *Panzera v. Simcoe & Erie Cie d'assurance)* [1990] I.L.R. 1-2663, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 115 N.R. 42, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 32 Q.A.C. 25, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* [1990] R.D.I. 715, 1990 CarswellQue 84 (S.C.C.) — considered

PSINet Ltd., Re (2002), 2002 CarswellOnt 211, 30 C.B.R. (4th) 226, 3 P.P.S.A.C. (3d) 208 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135, 85 O.R. (3d) 175 (Ont. C.A.) — referred to

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1991), 1991 CarswellMan 24, 8 C.B.R. (3d) 19, [1991] 6 W.W.R. 764, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (No. 2))* 2 P.P.S.A.C. (2d) 257, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing (Receivership) (No. 2))* 77 Man. R. (2d) 257 (Man. Q.B.) — considered

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1992), [1992] 6 W.W.R. 97, 4 P.P.S.A.C. (2d) 31, 14 C.B.R. (3d) 1, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 81 Man. R. (2d) 247, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 30 W.A.C. 247, 1992 CarswellMan 23, 94 D.L.R. (4th) 611 (Man. C.A.) — referred to

Sperry Inc. v. Canadian Imperial Bank of Commerce (1982), 1982 CarswellOnt 219, 40 O.R. (2d) 54, 2 P.P.S.A.C. 225, 141 D.L.R. (3d) 119, 44 C.B.R. (N.S.) 69 (Ont. H.C.) — referred to

Sperry Inc. v. Canadian Imperial Bank of Commerce (1985), 50 O.R. (2d) 267, 17 D.L.R. (4th) 236, 8 O.A.C. 79, 55 C.B.R. (N.S.) 68, 4 P.P.S.A.C. 314, 1985 CarswellOnt 167 (Ont. C.A.) — considered

Sun Life Assurance Co. of Canada v. Royal Bank (1995), 129 D.L.R. (4th) 305, 1995 CarswellOnt 1168, 37 C.B.R. (3d) 89, 10 P.P.S.A.C. (2d) 246 (Ont. Gen. Div. [Commercial List]) — considered

Thomson v. Canada (Department of Agriculture) (1992), (sub nom. *Thomson v. Canada (Minister of Agriculture))* 133 N.R. 345, 3 Admin. L.R. (2d) 242, (sub nom. *Thomson v. Canada (Deputy Minister of Agriculture))* [1992] 1 S.C.R. 385, (sub nom. *Thomson v. Canada (Deputy Minister of Agriculture))* 89 D.L.R. (4th) 218, 1992 CarswellNat 544, 51 F.T.R. 267 (note), 1992 CarswellNat 651 (S.C.C.) — considered

Toronto Dominion Bank v. Fortin (1978), [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111, 1978 CarswellBC 273 (B.C. S.C.) — referred to

TRG Services Inc., Re (2006), 2006 CarswellOnt 7024, 26 C.B.R. (5th) 203, 11 P.P.S.A.C. (3d) 139 (Ont. S.C.J.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Cases considered by *K. Feldman J.A.*:

Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of) (2006), 25 C.B.R. (5th) 273, 10 P.P.S.A.C. (3d) 191, 2006 CarswellAlta 1036, 2006 ABQB 572 (Alta. Q.B.) — considered

Giffen, Re (1998), 45 B.C.L.R. (3d) 1, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re)* 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re)* 164 W.A.C. 161, 155 D.L.R. (4th) 332, 222 N.R. 29, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — considered

Koval, Re (2003), 48 C.B.R. (4th) 103, 2003 CarswellOnt 5112 (Ont. S.C.J.) — referred to

Lefebvre, Re (2004), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 253 (Eng.), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 353 (Fr.), 2004 SCC 63, 2004 CarswellQue 2831, 2004 CarswellQue 2832, (sub nom. *Lefebvre (Trustee of), Re)* 244 D.L.R. (4th) 513, (sub nom. *Lefebvre (Trustee of), Re)* [2004] 3 S.C.R. 326, 7 C.B.R. (5th) 243, 1 B.L.R. (4th) 19 (S.C.C.) — referred to

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — considered

Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of) (1989), 9 P.P.S.A.C. 7, 57 D.L.R. (4th) 438, [1989] 3 W.W.R. 481, 73 C.B.R. (N.S.) 28, (sub nom. *Paccar Financial Services Ltd. v. Touche Ross Ltd.)* 74 Sask. R. 181, 1989 CarswellSask 32 (Sask. C.A.) — referred to

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1991), 1991 CarswellMan 24, 8 C.B.R. (3d) 19, [1991] 6 W.W.R. 764, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (No. 2))* 2 P.P.S.A.C. (2d) 257, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing (Receivership) (No. 2))* 77 Man. R. (2d) 257 (Man. Q.B.) — considered

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1992), [1992] 6 W.W.R. 97, 4 P.P.S.A.C. (2d) 31, 14 C.B.R. (3d) 1, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 81 Man. R. (2d) 247, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 30 W.A.C. 247, 1992 CarswellMan 23, 94 D.L.R. (4th) 611 (Man. C.A.) — referred to

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

TRG Services Inc., Re (2006), 2006 CarswellOnt 7024, 26 C.B.R. (5th) 203, 11 P.P.S.A.C. (3d) 139 (Ont. S.C.J.) — considered

Statutes considered by *K.M. Weiler J.A.* (Dissenting in Part):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 46 — referred to

s. 47 — considered

s. 47(2)(c) — considered

s. 47.1 [en. 1992, c. 27, s. 16(1)] — referred to

s. 69(1) — referred to

s. 69.3 [en. 1992, c. 27, s. 36(1)] — referred to

s. 70(1) — considered

s. 71 — considered

s. 244 — considered

s. 244(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 12(2) — referred to

s. 20(b)(i) — referred to

Personal Property Security Act, R.S.M. 1987, c. P35
s. 20(b) — referred to

Personal Property Security Act, R.S.O. 1980, c. 375
s. 22(1)(a)(iii) — considered

s. 22(2) — considered

s. 22(3) — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

Pt. V — referred to

s. 1(1) "collateral" — referred to

s. 1(1) "debtor" (a)(ii) — considered

s. 1(2) — referred to

s. 11 — referred to

s. 20 — considered

s. 20(1)(b) — considered

s. 20(1)(c) — considered

s. 20(1)(d) — considered

s. 20(2) — considered

s. 20(2)(b) — considered

s. 20(3) — referred to

s. 30 — referred to

s. 30(1) — considered

s. 30(6) — considered

s. 48(3) — considered

s. 52(2) — referred to

s. 60(1)(a) — considered

Securities Transfer Act, 2006, S.O. 2006, c. 8
Generally — referred to

s. 123(9) — referred to

Statutes considered by *K. Feldman J.A.* and *H.S. LaForme J.A.*:

Assignments and Preferences Act, R.S.O. 1990, c. A.33
s. 7 — considered

s. 8 — considered

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

Generally — referred to

s. 47(1) — considered

s. 47(3) — referred to

s. 47.1(3) [en. 1992, c. 27, s. 16(1)] — referred to

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

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

s. 71 — considered

s. 71(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

Personal Property Security Act, R.S.A. 2000, c. P-7
Generally — referred to

s. 20(a) — referred to

s. 20(a)(i) — considered

s. 20(a)(ii) — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359
s. 20 — referred to

s. 20(b) — referred to

Personal Property Security Act, R.S.M. 1987, c. P35
s. 20(b) — referred to

s. 22 — considered

s. 22(1)(a)(iii) — considered

s. 22(2) — considered

s. 65 — considered

Personal Property Security Act, S.N.B. 1993, c. P-7.1
s. 20(2) — referred to

Personal Property Security Act, S.N.1998, c. P-7.1

s. 21(1) — referred to

Personal Property Security Act, S.N.S. 1995-96, c. 13
s. 21(2) — referred to

Personal Property Security Act, R.S.O. 1980, c. 375
s. 22(1)(a)(iii) — considered

s. 22(2) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

s. 20 — considered

s. 20(1) — considered

s. 20(1)(a) — considered

s. 20(1)(a)(i) — considered

s. 20(1)(b) — considered

s. 20(1)(c) — considered

s. 20(1)(d) — considered

s. 20(2) — considered

s. 20(2)(b) — considered

s. 26(2) — considered

s. 30(6) — considered

s. 48(3) — considered

s. 60 — considered

Personal Property Security Act, R.S.P.E.I. 1988, c. P-3.1
s. 20(2) — referred to

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2
s. 20(2)(b) — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

APPEAL by creditor from decision reported at *1231640 Ontario Inc., Re* (2006), 23 C.B.R. (5th) 92, 2006 CarswellOnt 4406 (Ont. S.C.J.), dismissing creditor's claim to priority under *Personal Property Security Act.*

K.M. Weiler J.A. **(Dissenting in Part):**

Introduction

1 This appeal concerns a priority dispute between two creditors of an insolvent company, The State Group Limited (now 1231640 Ontario Inc. but referred to here as "State"), over funds totalling approximately $5.5 million. The majority of the disputed amount resulted from an income tax refund to State of approximately $4.5 million.

2 The priority dispute requires a consideration of the role of a receiver appointed by the court pursuant to s. 47 of the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). It also requires the court to interpret the phrase "a person who represents the creditors of the debtor" in s. 20(1)(b) and the phrase "rights of a person....in respect of the collateral" in s. 20(2)(b) of the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

3 On one side of the priority dispute is the appellant, the Royal Bank of Canada ("the Bank"), which acted as the administrative agent for a syndicate of lenders to State. The loan was secured by a general security agreement. All parties agree that the terms of the general security agreement between the Bank and State cover all the assets of State, including the tax refund. On the other side of the dispute is the respondent, St. Paul Guaranty Insurance Company ("St. Paul"). St. Paul also holds a general security agreement over all of the assets of State, which would include the tax refund. In the middle is PricewaterhouseCoopers Inc. ("PWC"), who acted as both the s. 47 *BIA* receiver and as the trustee in bankruptcy.

4 At this juncture, it may be helpful to provide a brief overview of the priority regime established by the *PPSA*. The *PPSA* creates a regime that enables creditors to record written agreements giving them a security interest in a debtor's property, known as "collateral".[1] A security interest is not enforceable against a third party unless the requirements of the *PPSA* are met.[2] Because multiple secured creditors can acquire security interests in the same collateral, the concept of "perfection" is used to order the priorities among them. The basic rule is that perfected security interests have priority over those that are unperfected. One method of perfection is for the creditor to take actual possession of the collateral.[3] The most common method of perfection, however, is by registration of a financing statement in the Ontario Personal Property Security Registry ("PPSR"). Generally, the first person to register has a first priority secured interest that is effective against third parties, including other secured parties.[4] Perfection may last as long as the period chosen for registration lasts, generally some time longer than the length of the security agreement, or until there is a change affecting the collateral.

5 In this case, the Bank had a first priority secured interest. St. Paul's security interest was registered after the Bank's and thus was subordinate to that of the Bank.

6 On November 14, 2001, the Bank obtained a court order appointing PWC as an interim receiver pursuant to s. 47 of the *BIA* ("Appointment Order").[5]

7 A s. 47 *BIA* receiver is appointed by the court when a debtor is insolvent and a creditor gives notice that it intends to enforce its security pursuant to s. 244 of the *BIA*. The applicant creditor must satisfy the court that the appointment of the receiver is necessary to protect the debtor's estate or the interest of the creditor who sent the s. 244 notice. Thus, the receiving order is not made in the context of an application for a bankruptcy order or in a situation where the debtor seeks to avoid bankruptcy by making a proposal to its creditors. The appointment is for "such term as the court may determine" and allows the receiver to take possession of the debtor's property that is subject to the security interest, to exercise control over it, and to take such action as the appointment order provides. The appointment order usually provides, as this order does, that third parties are prevented from taking or continuing any legal proceedings against the debtor without leave of the court.

8 Pursuant to the Appointment Order allowing it to do so, PWC sold State's name on November 14, 2001. The next day, the name of the debtor company was changed to 1231640 Ontario Inc. Section 48(3) of the *PPSA* provides that if the secured creditor learns that the debtor has changed its name, the secured creditor's interest in the collateral becomes unperfected

unless the secured creditor takes possession of the collateral[6] or files a financing change statement giving the new name of the debtor within thirty days.[7] If the secured creditor fails to file a financing change statement within thirty days, it can reperfect its interest by filing a fresh financing statement.[8]

9 The Bank conceded that it would have been aware of State's name change at least by the time PWC made a second sale of State's assets on December 6, 2001. The Bank did not file, or seek leave of the court to file, a financing change statement within thirty days of becoming aware of the name change, nor did it file a fresh financing statement after that date. St. Paul also filed nothing. The proceeds of the December 6, 2001 sale and a further sale on December 24, 2001 are not in dispute on this appeal.

10 The Appointment Order permitted PWC to assign State into bankruptcy, which it did on January 31, 2002. By this date, the previously perfected security interests of both creditors had become unperfected.

11 Following the assignment into bankruptcy, PWC received the income tax refund owing to State in the amount of approximately $4.5 million. The Bank claimed that it was entitled to the proceeds because when PWC was appointed a receiver on November 14, 2001, it had a properly perfected first security interest. St. Paul contended that the relevant date for determining priorities was the date that PWC was appointed trustee in bankruptcy, *i.e.*, January 31, 2002, and that as of this date, the Bank had lost its priority because it had failed to file a financing change statement as required by s. 48(3) and had also failed to file a fresh financing statement thereafter. PWC sought the direction of the court on the priority issue.

12 Before the motion judge, the Bank argued that it was implicitly exempted from having to file a financing change statement as required by s. 48(3) of the *PPSA* in light of the terms of the Appointment Order. In the alternative, the Bank argued that because its security interest was perfected at the time of PWC's appointment as receiver, it did not lose its priority because a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. Since s. 20(2)(b) provides that "[t]he rights of a person... under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect", the relevant date for determining the priority dispute is the date of the receiver's appointment. At that date, the Bank's security interest was perfected and the Bank's failure to make a further filing when PWC sold State's name did not result in a loss of its priority.[9]

13 The motion judge rejected both of the Bank's arguments. He concluded that the November 14, 2001 court order appointing PWC as interim receiver did not have the effect of exempting the Bank from having to comply with s. 48(3) of the *PPSA* by filing a financing change statement within thirty days of learning that PWC had sold State's name.

14 With respect to the Bank's alternative argument, the motion judge held that PWC, as a receiver under s. 47 of the *BIA*, was not "a person who represents the creditors of the debtor" under s. 20(1)(b) of the *PPSA*, but rather was appointed for the protection of the Bank's interests. He observed that the assets of the debtor did not vest in PWC, nor did the liabilities of the debtor become PWC's liabilities, as is the case with a trustee in bankruptcy. He further held that PWC did not have the authority to settle or compromise liabilities owed to the creditors of the debtor. The motion judge reasoned that the application of the *ejusdem generis* principle of statutory interpretation applied to the interpretation of s. 20(1)(b). He held that "a person who represents the creditors of the debtor" must be of like kind or class as a trustee in bankruptcy or an assignee for the benefit of creditors. Given the distinctions he had observed between a receiver and the representatives specified in s. 20(1)(b), he held that a s. 47 *BIA* receiver is not "a person who represents the creditors of the debtor."

15 Accordingly, the motion judge concluded that pursuant to s. 20(2)(b), the effective date of the appointment of a person with representative status, and the date that the representative's rights in respect of the collateral are to be determined, is the date PWC was appointed as trustee in bankruptcy, namely January 31, 2002. At that time, both St. Paul and the Bank were unperfected secured creditors. Pursuant to the priorities under the *BIA*, as unperfected secured creditors, the Bank and St. Paul were entitled to share rateably in the income tax refund. Since the Bank's claim was for $29 million and St. Paul's was for some $88 million, the result of the motion judge's decision is that St. Paul would be entitled to the bulk of the refund.

The Issues

16 This appeal requires me to consider two issues:

1. Did the Appointment Order implicitly give the Bank an exemption from complying with s. 48(3) of the *PPSA*?

2. Did the Bank's failure to file a financing change statement or fresh financing statement result in a loss of its priority as a secured creditor?

17 On the first issue, like the motion judge, I conclude that the obligation to make filings under the *PPSA* continued and that the Appointment Order did not exempt the Bank from complying with s. 48(3) of the *PPSA*. My colleagues agree.

18 My colleagues and I disagree on the answer to the second question, whether the Bank lost its priority as a secured creditor. The answer depends on the date chosen for the determination of priorities. If, as I conclude, a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, then in light of the combined operation of ss. 20(1)(b) and 20(2)(b), the relevant date for determining the Bank's priority status is the date of the appointment of PWC as interim receiver. On that date, the Bank's security interest was perfected and had priority over that of St. Paul.

19 In answering the second question, it is also necessary to address an alternative argument put forward by PWC. According to PWC, the Bank's priority status had to be determined all over again as of the date PWC was appointed trustee in bankruptcy on January 31, 2002. PWC argues that the s. 47 *BIA* receivership ended when it was appointed trustee in bankruptcy and that the s. 47 *BIA* receiver had no proprietary interest in the disputed assets. I reject PWC's position and conclude that the s. 47 *BIA* receivership did not end with PWC's appointment as trustee and that the Bank retained its priority over the tax refund following State's assignment into bankruptcy by PWC.

Analysis

1. Did the Appointment Order implicitly give the Bank an exemption from compliance with s. 48(3) of the PPSA?

20 The Bank submits that to require it to comply with s. 48(3) of the *PPSA* by filing a financing change statement after it learned PWC sold State's name is inconsistent with the spirit of the Appointment Order, which had the effect of maintaining the existing priorities among creditors. The Bank also submits that exempting it from compliance with s. 48(3) does no injustice to the policy underlying the *PPSA*. The registration regime established by the *PPSA* is intended to provide a means of giving notice to interested parties of existing security interests in the debtor's property so that they can govern their dealings with the debtor accordingly. Interested parties can search the PPSR against the debtor's name for existing registrations against that debtor and its collateral. Although the *PPSA* requires that the debtor's name must appear correctly on a registration in order for that registration to be effective, the policy reason for requiring a secured creditor to maintain the perfection of its security interest disappears on a s. 47 *BIA* receivership. Under that type of receivership, the secured creditor is in the process of enforcing its security and the debtor is deprived of possession of its property and is not in a position to grant further security interests.

21 The Bank further argues that to require it to comply with s. 48(3) would effectively require it to act in a manner that is contrary to the wording of the Appointment Order. The Bank relies on s. 7 of the order appointing PWC, which stays any "legal proceeding, enforcement process, extra-judicial proceeding or other proceeding against or in respect of the Debtor or the Property". Similarly, s. 8 of the Order restrains the enforcement or exercise of certain rights, including registration, against the debtor or the property. The Bank argues that these provisions prevented it from registering a financing change statement.

22 The motion judge rejected the Bank's submissions. He held that even if the Bank was correct that the policy considerations requiring registration were no longer applicable in the circumstances, the court could not override the provisions of the legislation unless there was a legislative gap, which he concluded there was not. Insofar as the Appointment Order was concerned, he held that even if the filing of a financing change statement was a "proceeding" that was stayed under s. 7 or restrained under s. 8, the Bank could have applied to lift the stay and the court would likely have allowed the application. Thus, the terms of the Order did not preclude the Bank from filing the required financing change statement to maintain its perfected status prior to the assignment in bankruptcy.

23 The motion judge's approach was intended to protect the integrity of the registration requirements of the *PPSA*. I agree that nothing in the Appointment Order or in the *PPSA* exempts the Bank from having to comply with the filing requirements of the *PPSA*. As indicated by the motion judge, if the filing of a financing statement was a "proceeding" that was stayed by the Appointment Order, an application to lift the stay would likely have been successful since no other creditor would be prejudiced. The reason that an application to lift the stay would likely be successful even after the expiry of the thirty day period for filing a financing change statement is reinforced by the existence of s. 30(6) of the *PPSA*. That subsection permits re-registration of a security interest that has become unperfected.[10] See *PSINet Ltd., Re*, [2002] O.J. No. 271 (Ont. S.C.J. [Commercial List]).

24 Alternatively, instead of bringing an application to lift the stay for the limited purpose of allowing it to either maintain or to reperfect its security interest, s. 31 of the Appointment Order provides that any interested party may apply to vary or amend the order on seven days notice. The Bank could thus have applied to the court to amend the initial Appointment Order so as to enable the Bank to obtain the receiver's consent to lifting the stay or to filing the requisite *PPSA* registration.

25 I note that the *Standard Template Receivership Order* ("the Model Order") prepared by a subcommittee of the Commercial List Users Committee in conjunction with the Canadian Bar Association Insolvency section contains standard language ordering that all rights and remedies against the debtor, the receiver, or affecting the property are stayed except with leave of the court or "except with the written consent of the Receiver" and further that nothing shall "prevent the filing of any registration to preserve or perfect a security interest." The wording of the Model Order provides further support for my conclusion that the motion judge was correct in holding that the Appointment Order did not give the Bank an implied exemption from complying with the requirement to file a financing change statement as required by s. 48(3) upon learning that PWC had sold State's name.

2. Did the Bank's failure to file a financing change statement result in a loss of its priority as a secured creditor?

26 The resolution of this issue requires me to determine whether a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*, as well as to interpret the meaning of the words "rights of a person" in s. 20(2).

27 For ease of reference, the relevant portions of s. 20 are as follows:

> 20 (1) Except as provided in subsection (3),[11] until perfected, a security interest,
>
> .....
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
>
> .....
>
> (2) The rights of a person,
>
> .....
>
> (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

28 The Bank submits that the motion judge erred in holding that an interim receiver appointed by the court under s. 47 of the *BIA* is not "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. If the receiver is a "person" within the meaning of s. 20(1)(b), then the date for determining the parties' priorities is the date that PWC was appointed as a s. 47 *BIA* receiver. On that date, the Bank had a properly perfected security interest.

29 St. Paul's position is that the motion judge was correct in holding that an interim receiver is not a "person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The trustee in bankruptcy, not the s. 47

BIA receiver, is the representative of the creditors and the date for determining priorities is the date of the trustee's appointment. On that date the Bank did not have a properly perfected security interest. In the alternative, St. Paul agrees with the position of PWC.

30 PWC agrees with the Bank that an interim receiver is a representative of the creditors for the purposes of s. 20(1)(b). However, PWC submits that even if the Bank's security interest was effective as against the interim receiver, once the estate funds vested in the trustee in bankruptcy, the interim receivership ended. The relevant date for determining the effectiveness of the Bank's security interest then became January 31, 2002, when its status as trustee in bankruptcy took effect. As of January 31, 2002, the Bank's security interest was no longer perfected. The Bank responds that the receivership and the bankruptcy are not two separate processes, but one continuous process and that the date for determining priorities did not change when the trustee in bankruptcy was appointed.

31 I first confront the issue of whether a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). In my view, the motion judge erred in concluding that an interim receiver is not such a person. In reaching this conclusion, I am guided by the following considerations:

(a) the relevant principles of statutory interpretation;

(b) the history of the legislative provision and the view of commentators on the meaning of s. 20(1)(b);

(c) the fiduciary role and the powers of the s. 47 *BIA* receiver;

(d) the word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession;

(e) the overall scheme of the *PPSA*, including s. 20 as a whole and s. 30(6); and

(f) the purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed.

32 I now discuss each of these considerations supporting my conclusion that a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). I will then go on to address PWC's alternative argument.

(a) The relevant principles of statutory interpretation

33 Section 20(1)(b) renders any security interest in the debtor's collateral ineffective against "a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy" until that security interest is perfected. All provinces have legislation governing priorities between and among secured and unsecured creditors.[12] However, no other province uses the general words, "a person who represents the creditors of the debtor" as found in s. 20(1)(b) of the Ontario legislation. The *PPSA* does not define "a person who represents the creditors of the debtor". Consequently, resort must be had to ordinary principles of statutory interpretation to determine the meaning of this phrase.

34 The prevailing approach to statutory interpretation is that "the words of an Act are to 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." See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at p. 1; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26. In order to maintain harmony within the scheme of the Act, the same word must consistently be given the same meaning throughout a statute. See Sullivan, *supra*, at p. 163; *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.). The principle is also one of the Drafting Conventions adopted by the Uniform Law Commission of Canada in s. 21(5) and s. 34(2). See Sullivan, *supra*, Appendix I at pp. 619, 623. The ordinary meaning of legislation is "the natural meaning which appears when the provision is

simply read through". See Sullivan, *supra*, at p. 21; *Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) at 735.

35 Words take their meaning from the context in which they are found. Thus, in interpreting a statutory provision, among the considerations to which the court will have regard are the immediate context of the words in the section, any adjacent and closely related provisions, the Act as a whole, the history of the legislation and other external sources. See Sullivan, *supra*, at pp. 261-62.

(b) Having regard to the history of the legislative provision, a s. 47 BIA receiver is not excluded from being "a person who represents the creditors of the debtor"

36 The predecessor version of the *PPSA* included a receiver in the list of persons who represent the creditors of the debtor. Section 22 of the *Personal Property Security Act*, R.S.O. 1980, c. 375, stated:

> 22 (1) Except as provided in subsection (3),[13] an unperfected security interest is subordinate to,
>
> (a) the interests of a person,
>
> .....
>
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...
>
> .....
>
> (2) The rights of a person under subclause (1)(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the security interest.

The question is, therefore, whether the removal of the word "receiver" from the current version of the Act, and the substitution of the word "includes" for the word "as" indicates that the legislature intended to exclude an interim receiver from the category of persons referred to in the section.

37 In my opinion, the removal of the word "receiver" is not indicative of any legislative intention to exclude receivers appointed under s. 47 of the *BIA* from the category of persons included under s. 20(1)(b). I say this for four reasons.

38 First, the earlier version of the *PPSA* was limitative, not expansive. The use of the word "as" in the phrase "a person who represents the creditors of the debtor *as* assignee ... trustee in bankruptcy, or receiver" meant that only the three categories of persons mentioned were included: see R. McLaren, *Secured Transactions and Personal Property in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1989) at pp. 5-160 to 5-161.

39 What the legislature intended to do and did do in amending s. 20(1)(b) was to expand the category of persons representing the creditors of the debtor. The word "including" in the current legislation is a term of extension. See Sullivan, *supra*, at p. 181; see also *National Bank of Greece (Canada) c. Katsikonouris*, [1990] 2 S.C.R. 1029 (S.C.C.) at 1041, where LaForest J. wrote that the word "including" is normally "designed to enlarge the meaning of preceding words, and not to limit them." Accordingly, the examples that follow the word "including", namely, an assignee for the benefit of creditors and a trustee in bankruptcy, are not meant to be exhaustive. Further, an interpretation of legislation that narrows the scope of general words so that there is nothing but the enumerated items to which they can apply must be rejected. See Sullivan, *supra*, at p. 179. Limiting the meaning of s. 20(1)(b) to an assignee for the benefit of the creditors and a trustee in bankruptcy would leave no other persons to whom the general words, "a person who represents the creditors of the debtor" could apply.

40 Second, there is a presumption against implicit alteration of law. The legislature is presumed not to change existing law or to depart from established practices beyond that which is expressly stated. Failing to explicitly alter the law results in the law remaining undisturbed. See Sullivan, *supra*, at pp. 395-96. The legislature would have had to use more precise language to exclude all receivers from the category of persons "who represent the creditors of the debtor" if it wished to have done so.

41 Third, the commentary of Mr. Fred M. Catzman, Q.C., the former chair of the Attorney General's advisory committee on the *PPSA*, lends some insight into why the term "receiver" was removed from the current legislation. In reference to the previous legislation, he stated that the term "receiver" is a generic term and, in his opinion, whether the receiver represented the interests of the creditors depended on whether the receiver was appointed by court order. If appointed by private agreement, the receiver represented only the interests of the creditor appointing it. See F. M. Catzman *et al.*, *Personal Property Security Law In Ontario* (Toronto: Carswell, 1976) at p. 114. Where, as here, legislative change is preceded by a report of a person or body that has investigated a condition and made a recommendation, the courts are entitled to take judicial notice of it. While the commentary cannot be used as direct evidence of legislative intent, the court may use it to draw inferences about the meaning of particular provisions. See Sullivan, *supra*, at pp. 484-85. Removing the word "receiver" was intended to exclude a privately-appointed receiver, whose role is to protect the interests of a single secured creditor, from the class of persons contemplated by s. 20(1)(b).

42 Fourth, the interpretation of legal scholars with expertise in the particular statute under consideration has become an authoritative source for consideration by courts. See Sullivan, *supra*, at p. 502. The unanimous opinion of academics and other commentators respecting s. 20(1)(b) is that the phrase "a person who represents the creditors of the debtor" is not limited to assignees or trustees in bankruptcy. In *The Ontario PPSA Commentary and Analysis* (Markham, Ont.: Butterworths, 2000) at p. 163, under the heading "Trustee in bankruptcy and other representative creditors", Jacob S. Ziegel and David L. Denomme write in reference to s. 20(1)(b):

> It is clear from the structure of clause (b) that it is not meant to be confined to an assignee for the benefit of creditors and a trustee in bankruptcy but also covers other creditors' representatives.

43 Frank Bennett states in *Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53:

> .... even though there is no reference to a receiver in s. 20(1), it is clear that a court-appointed receiver comes within the subsection... The court-appointed receiver is an officer of the court with fiduciary duties to *all* creditors and the debtor although its appointment was initiated by the secured party.
>
> [Emphasis added.]

Richard McLaren writes in *Secured Transactions and Personal Property in Canada*, *supra*, at p. 5-162:

> A receiver is not listed in the revised Act [R.S.O. 1990, c. P.10] as a type of creditor's representative, but it is likely that court-appointed receivers will still qualify as a representative of creditors. Receiver is a generic term describing a person having the attributes characteristic of a receiver in chancery: one must be an officer judicially appointed and responsible to the court with the object of preserving property pending litigation to decide the rights of the parties. Once appointed by the court, the receiver is answerable to the court and to all interested parties. Given the cited case law decisions on the characteristics of a receiver, a liquidator under the *Winding-Up and Restructuring Act*, the *Business Corporations Act* or the *Bank Act* would qualify as a receiver.
>
> Given that privately-appointed receivers only represent one or some of the creditors and that they are not judicially appointed, it has been held that they do not come within the ambit of s. 20(1)(b). [Citations omitted.][14]

44 I am not aware of any scholarly opinion to the contrary. The unanimous opinion of scholars appears to be that the phrase used in s. 20(1)(b), "a person who represents the creditors of the debtor", is not limited to an assignee or trustee in bankruptcy. Further, in the opinion of two of the authors cited above, the phrase includes a court-appointed receiver.

(c) The fiduciary role and powers of the s. 47 BIA receiver

45 The motion judge concluded that a receiver appointed by the court under s. 47 of the *BIA* is effectively the

representative of the Bank alone. In my opinion, his conclusion on this issue is in error. A s. 47 *BIA* receiver owes a duty to all of the creditors of the debtor.[15] For example, a s. 47 *BIA* receiver was described by Cumming J. in *Ravelston Corp., Re*, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]), aff'd (2007), 85 O.R. (3d) 175 (Ont. C.A.), as an officer of the court, who owes a duty not only to the court, but also to all persons interested in the debtor's assets, property and undertakings. These duties must be carried out honestly and in good faith. The receiver's role, like that of a trustee in bankruptcy, is "that of a fiduciary to all interested stakeholders." He concluded at para. 67:

> A court-appointed receiver under the *BIA* or [*Courts of Justice Act*], as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. [Citations omitted.]

46 In addition to the fiduciary relationship to all creditors, the s. 47 receiver typically has vast powers over the property of the debtor and performs functions similar to those of a trustee in bankruptcy, albeit without relying on a change in the locus of title. The powers of the s. 47 receiver were discussed by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (Ont. Gen. Div. [Commercial List]). At para. 3, Farley J. noted how amendments to the *BIA* in 1992 had affected the rights of secured creditors by the requirement in s. 244 to give notice to the debtor of an intention to enforce its security and to refrain from taking action for ten days, but providing for the remedy of a s. 47 receiver.

47 After quoting the provisions of s. 47, and noting that the interim receivership in *Curragh* had continued for much longer than ten days, Farley J. observed that the object of the s. 47 receivership process appeared to be to maintain the mining property in question, while marketing it with a view to selling it, and that the s. 47 receivership would likely continue until the mine was sold. He concluded that "it would seem that in many practical aspects in these circumstances that the [interim receiver] is functioning as a quasi-receiver and manager/trustee in bankruptcy." He pointed out that the 1992 amendments to the *BIA* dealt more extensively with insolvency as contrasted with bankruptcy and that pre-amendment cases dealing with the powers of the interim receiver had to be analyzed with care.[16] Farley J. concluded that the regime providing for the appointment of a s. 47 *BIA* receiver was flexible and that the court could allow the interim receiver to exercise control over the business in question as opposed to limiting its powers for narrow purposes such as the sale of perishable goods. In addition, he observed at para. 6 that because s. 47(2)(c) allows the interim receiver to apply to the court for directions, "it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case."

48 In deciding whether the s. 47 receiver falls within s. 20(1)(b), it is also relevant to consider that such a receiver has exclusive control over the assets and affairs of the company and, in this regard, the receiver displaces the board of directors and the company's managers: *Toronto Dominion Bank v. Fortin* (1978), 85 D.L.R. (3d) 111 (B.C. S.C.) at 113; *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 75 (Sask. Q.B.). Further, the s. 47 receiver has the power to settle liabilities and can be a successor employer, that is, it can stand in the shoes of the owner towards the employees of the company: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.). In addition, s. 47(2)(c) of the *BIA* empowers the interim receiver to "take such other action as the court considers advisable."

49 Frank Bennett, in *Bennett on Bankruptcy*, *supra*, at p. 119-20, contrasts the appointment of a s. 47 interim receiver with that of receivers appointed in the context of an application for a bankruptcy order under s. 46 or pending the proposal process under s. 47.1 of the *BIA* as follows:

> There does not appear to be any limitation on this appointment. There is no defined end of the interim receivership and the word "interim" is clearly a misnomer of the receiver's powers and duties that are more akin to a court-appointed receiver and manager under provincial legislation.

50 As these cases illustrate, the role played by the s. 47 *BIA* receiver is akin to that of a trustee in bankruptcy in the sense

that the s. 47 *BIA* receiver owes a fiduciary duty to all of the creditors and typically has vast powers over the property of the debtor. Furthermore, as in a bankruptcy, the exercise of the s. 47 *BIA* receiver's powers and duties is overseen by the court to ensure that the creditors of the debtor are not prejudiced.

51 My colleague Feldman J.A. cites the case of *TRG Services Inc., Re*, [2006] O.J. No. 4521 (Ont. S.C.J.), in which it was held that a monitor under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is not a representative of creditors within the meaning of s. 20(1)(b) of the *PPSA*. The role of a court-appointed s. 47 *BIA* receiver stands in sharp contrast to that of a court-appointed monitor. A monitor's powers are limited and a court-appointed monitor does not stand in the shoes of the company nor owe fiduciary duties to creditors. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) at paras. 49-50, leave to appeal to S.C.C. granted, (2007) (S.C.C.).

(d) The word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession

52 A person "who represents the creditors of the debtor" under s. 20(1)(b) must be a person exercising rights, because s. 20(2) refers to the time when "[t]he rights of a person... in respect of the collateral under clause 1(b)" are to be determined. The *PPSA* does not define the word "rights" or the phrase "rights of a person...in respect of the collateral". In my opinion, the word "rights" in the *PPSA* is used more broadly than referring to title alone.

53 The motion judge was of the opinion that the rights referred to in s. 20(2) are proprietary rights akin to those exercised by a trustee in bankruptcy. He concluded that a receiver is not the type of representative of creditors included in s. 20(1)(b) because, unlike with the trustee in bankruptcy, title to the debtor's assets does not vest in a s. 47 *BIA* receiver. In my opinion, the motion judge erred in interpreting the word "rights" in s. 20(2) as meaning proprietary rights limited to the traditional concepts of title and ownership.

54 The motion judge's conclusion ignores the fact that the *PPSA* is not about title to property or rights against the debtor, but is about notice to and priorities between creditors. In *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 28, Iacobucci J. was critical of the British Columbia Court of Appeal's approach to a priority dispute under the B.C. *Personal Property Security Act* because that court "did not look past the traditional concepts of title and ownership." He held that the dispute could not be resolved through the determination of who had title because the dispute was one of priority to the collateral and not ownership in it.

55 As noted by Tamara M. Buckwold and Ronald C.C. Cuming in their article, cited with approval in *Giffen*, *supra* at para. 26, "The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?" (1997) 12 B.F.L.R. 476 at 470:

> The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the [Personal Property Security] Act itself.

56 Other legal scholars have made similar comments. In *2006 Ontario PPSA & Commentary*, (Markham, Ont.: Butterworths, 2006) at p. 3, editors Jennifer G. Legge and Daphne J. MacKenzie explain that "neither the application [of the Act] nor priority contests among creditors with an interest in personal property collateral are governed by title." In his *2008 Annotated Ontario Personal Property Security Act*, *supra* at p. 247, Richard McLaren states in regard to the general priority rules that are to be applied if no other provision of the Act is applicable: "The general priority scheme set up in s. 30(1) disregards the pre-Act law and its reverence for legal title in collateral."[17] By focusing on where title was held in interpreting s. 20(1)(b), the motion judge ignored the overall context of the *PPSA*.

57 I am of the opinion that the phrase "rights of a person" in s. 20(2) refers to the entitlement of the person under s. 20(1)(b) to exercise its powers, such as the power to take possession of the debtor's assets. In *Giffen, Re*, *supra*, Iacobucci J. held at para. 34 that the right to possession is a right to property or a proprietary right under the *BIA*. He stated: "In my opinion, the bankrupt's right to use and possession of the car constitutes 'property' for the purposes of the *BIA*..."[18]

58 This interpretation of "rights of a person" in s. 20(2) is also in harmony with the use of the phrase "rights" in other sections of the *PPSA*, as well as scholarly comment on the word "rights" as used in the *PPSA* context.

59 Although title to a debtor's property does not vest in a receiver, s. 60(1) of the *PPSA* states:

> 60. (1) Nothing in this Act prevents,
>
> (a) the parties to a security agreement from agreeing that the secured party may appoint a receiver or receiver and manager and, except as provided by this Act, determining the *rights* and duties of the receiver and manager by agreement [Emphasis added.]

As the word "rights" is specifically used in relation to receivers in s. 60(1), the argument that "person" in s. 20(2) must have proprietary rights akin to those of a trustee in bankruptcy cannot succeed.

60 Zeigel and Denomme also discuss the word "rights" in relation to one of the prerequisites for attachment under s. 11 of the *PPSA*: that the debtor have "rights" in the collateral. See *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 124-27. They begin by saying that the section merely states the obvious, namely, that if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor. One subheading asks the question: "Is it sufficient that the debtor only has a 'power' to transfer rights in the collateral?" The authors conclude that the power to vest a good title in the goods of a third party is a sufficient right to create a security interest. They also ask the question whether anything turns on the distinction between "power" and "rights" and conclude at p. 127 that nothing turns on the distinction:

> "Rights" is used elliptically in paragraph [11(2)(c)] to describe collateral to which the secured party's security interest is capable of attaching, and is not concerned with the purity of the debtor's title.

61 In addition, under s. 1 of the *PPSA*, a "debtor" is defined as: "a person who ... owns or has rights in the collateral, including a transferee of or a successor to a debtor's interest in collateral." The construction of this definition makes it clear that the word rights has a broader meaning than ownership.

62 I would adopt the same approach to interpreting the word "rights" in s. 20(2). In my opinion, the phrase "a person who represents the creditors of the debtor" is not limited to persons with the same proprietary rights in the collateral as an assignee for the benefit of creditors and a trustee in bankruptcy, but includes a receiver appointed by the court pursuant to s. 47 of the *BIA* who has the right to take possession of the collateral and the right to sell it. If "rights" in s. 20(2) were read as only referring to ownership rights, then the phrase "including" in s. 20(1)(b) would have no significance because only the named representatives hold title in the debtor's collateral. My interpretation of the word "rights" in s. 20(2) as referring to the receiver's rights to possess and sell the debtor's collateral gives effect to the phrase "including" in s. 20(1)(b).

(e) The overall scheme of the PPSA including s. 20 as a whole and s. 30(6)

63 In *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 170-71, Ziegel and Denomme consider what happens when a properly perfected security interest becomes unperfected, or in other words, when it lapses. After noting that the current s. 20 does not deal with the question of what happens to a lapsed registration, the authors say that the question would have been resolved in favour of the secured party whose perfected interest had lapsed, for a number of reasons. One reason is that under the pre-PPSA statutes, the lapsed registration did not affect the validity of pre-lapse interests. The underlying reason was that priority between competing consensual interests was determined on the basis of a reliance theory. The authors then consider what the approach to priorities would be under the current s. 20(1)(b). They note that one of the arguments in favour of not giving any effect to the lapsed interest is to protect the integrity of the registration system. In opposition to this position, they note that in ss. 20(1)(c) and (d),[19] the general rule that a security interest is not effective until perfected only applies where there is a transferee for value who does not know of the security interest at the time of the transfer.

64 The authors conclude that the argument in favour of subordinating lapsed interests in determining priorities so as to

protect the integrity of the registration system is further undermined by s. 30(6) of the *PPSA*.[20] Under that section, a secured creditor may reperfect a security interest in the debtor's collateral that was perfected but has become unperfected. The effect of reperfecting is to restore the secured creditor to the position it had prior to becoming unperfected, subject only to the rights of a person acquired during the period of unperfection. There is no time limit for reperfecting in s. 30(6) and Ziegel and Denomme consider the reperfection requirement to be little more than a formality that "might as well be dispensed with." These provisions show that when a previously perfected security interest lapses, the integrity of the registration system is not the ultimate value to be protected.

65 As mentioned, s. 30(6) of the *PPSA* also contains an exception. The exception is "...that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period." Use of the generic word "person" encompasses legal entities other than a secured or unsecured creditor. See Ziegel and Denomme, *supra*, at p. 259. Since the word "rights" in the *PPSA* has a broader meaning than proprietary rights and is to be given a consistent meaning throughout the *PPSA*, the reference to "rights in all or part of the collateral during the period when the security interest was unperfected" includes the rights in the collateral acquired by the s. 47 *BIA* receiver to take possession of a debtor's property and to sell it. On my interpretation of s. 30(6), if St. Paul had attempted to reperfect its security interest by registering a fresh financing statement after the appointment of PWC as a s. 47 *BIA* receiver, the exception would apply because the s. 47 *BIA* receiver acquired rights in the collateral, namely the right to possession of all present and future money and the right to sell the debtor's assets on behalf of all creditors and distribute the proceeds. Thus, my interpretation of s. 20(1)(b) is consistent with the interpretation of rights in the collateral under other sections of the *PPSA*.

(f) The purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed

66 The purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the creditors at the time "a person who represents the creditors of the debtor" is appointed. This conclusion flows from the Supreme Court's rulings on the relationship between provincial security interest legislation and federal bankruptcy legislation.

67 One of the clearest and most trenchant explanations of s. 20(1)(b) and its relationship to the *BIA* is found in Anthony Duggan and Jacob Ziegel's commentary on the decision of Iacobucci J. in *Giffen, Re*, *supra*. See "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007) 57 U.T.L.J. 227 at 231-34. In that case, Telecom Leasing Canada Ltd. ("TLC") leased a car to B.C. Tel, who leased it to its employee, Carol Giffen. Leases of more than one year are subject to the B.C. *PPSA* irrespective of who has title and even though the lease does not secure payment or performance of an obligation. Neither TLC nor B.C. Tel filed a financing statement. Giffen went bankrupt. Even though Giffen did not have title to the car, the Supreme Court held that pursuant to the B.C. *PPSA*, title to the car vested in the trustee in bankruptcy.

68 Commenting on this decision, Duggan and Ziegel state:

> The *PPSA* registration requirements serve a publicity function. "Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral." From this perspective, s. 20(b)(1) of the *PPSA* presents a puzzle: the trustee in bankruptcy is not in the position of an innocent third party, he does not rely on the register for the purpose of any dealings with the debtor, and so he is not prejudiced by a secured party's failure to perfect a security interest. Therefore, why should an unperfected security interest be ineffective against him? According to *Giffen, Re*, [1998] 1 S.C.R. 91, the answer relates to the rights of execution creditors and the like. *PPSA* s. 20(a) provides that an unperfected security interest is subordinate to execution creditors. An execution creditor may be prejudiced by an unperfected security interest, and *PPSA* s. 20(a), provides a remedy by giving the execution creditor priority over the secured party. If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70. In effect, "the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings." *PPSA* s. 20(b)(i) is a kind of *quid pro quo*. It compensates unsecured creditors for the loss of their priority rights under s. 20(a) by giving the corresponding priority to the trustee in the trustee's capacity as the creditors' representative. *In summary, the purpose of the PPSA s. 20 (b)(i) is "to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security*

> *interests which they enjoyed prior to the bankruptcy of the debtor."*
>
> .....
>
> In *Giffen, Re*, Justice Iacobucci put the case for *PPSA*, s. 20(b)(i) in fairness terms: when the debtor becomes bankrupt the execution creditor loses the priority it previously had over unperfected security interests but this is offset by giving priority to the trustee instead. However, the justification can by expressed in economic terms. The thinking goes like this: Bankruptcy creates a common pool problem, which bankruptcy law addresses by substituting a mandatory system of collective debt collection for the individual first-come, first-served debt collection system that operates outside bankruptcy. *Creditors' relative entitlements should be the same inside bankruptcy as they are outside bankruptcy because otherwise there will be incentives for individual creditors to use the bankruptcy laws opportunistically.*
>
> [Citations omitted; emphasis added.]

69 The rationale given by Duggan and Ziegel in relation to bankruptcy applies equally whenever "a person who represents the creditors of the debtor" is appointed. When the s. 47 *BIA* receiver was appointed in this case, it was because the Bank was about to enforce its security. At that time, the Bank had a properly perfected security interest. An execution creditor would not have had any priority vis-à-vis the Bank. Because the Appointment Order stayed any actions, the execution creditor would have lost any priority it had over unperfected security interests as of the commencement of the receivership, subject to the stay being lifted by the court. Whether the *BIA* stay is imposed automatically under s. 69.3 or by court order under s. 47, the effects of the stay and the considerations it engages are similar. To prevent insolvency as well as bankruptcy laws from being used opportunistically, creditors' relative entitlements should be the same as they were immediately prior to the time "a person who represents the creditors of the debtor" was appointed.

70 Duggan and Ziegel then address the second question raised in *Giffen, Re*, namely, whether s. 20(1)(b) of the *PPSA* is in conflict with the *BIA* because of the principle of bankruptcy law that a trustee has no greater claim to property than the debtor herself had. Iacobucci J. held that the principle is not an inflexible one and that the provinces are competent to modify it as long as the modifications are not in conflict with the provisions of the *BIA*.

71 In *Giffen, Re*, Iacobucci J. did not directly address the issue of whether a conflict exists between then s. 20(b)(i) of the B.C. *PPSA* and bankruptcy policy that a trustee has no greater claim to property than the debtor had. However, he provided a clue to his thinking at para. 52 of his reasons where he approved a statement from *Donaghy v. CSN Vehicle Leasing*, [1992] 6 W.W.R. 70 (Alta. Q.B.), to the effect that the issue is not ownership of the property but priority to it. Duggan and Ziegel state:

> From a bankruptcy perspective, what matters is not the rights a creditor may have had against the debtor herself to the disputed asset but, rather, the creditor's rights against other creditors at the moment of bankruptcy: "it is a question of priority, not property." In other words, the flaw in TLC's argument was that it focused on the wrong attribute of the property right its security interest gave it. The question is not whether TLC could have enforced its security interest against Giffen just before she went bankrupt but, rather, whether TLC would have had a priority over an execution creditor at the same point. Section 20(1)(a) of the *PPSA* determines the answer to the second question, and *bankruptcy policy dictates that bankruptcy law should preserve the parties' relative entitlements.* If this is the real meaning of the principle at stake, there is no conflict between *PPSA* s. 20(1)(b), and the bankruptcy laws. On the contrary, the provision reinforces bankruptcy policy. [Emphasis added.]

72 I take Duggan and Ziegel's reference to bankruptcy policy and bankruptcy law to be a reference to insolvency policy and law as well. Inasmuch as the purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the parties at the time "a person who represents the debtors of the creditor" is appointed, the Bank's priority status falls to be determined at the time PWC was appointed as receiver under s. 47 of the *BIA*.

73 The purpose of s. 20 of the *PPSA* is to permit a person who takes over control of the assets or business of the debtor to distribute those assets in an orderly fashion in accordance with the existing priorities. It is for this reason that s. 20(2) determines the rights of the representative as of the date from which her status takes effect. Determining priorities at the

commencement of the distribution process when the receiver assumes control over the debtor's assets is in keeping with the goals of the legislation.[21]

Conclusion on whether PWC is "a person who represents the creditors of the debtor" and the date on which the determination of priorities should be made

74 Giving effect to the unique wording of Ontario's *PPSA*; the history of the section; the opinion of scholars; existing jurisprudence holding that the role of a s. 47 *BIA* receiver is similar to that of a trustee in bankruptcy; and having regard to the section as a whole, to related provisions of the *PPSA*, as well as to the purpose of the section, I conclude that PWC's appointment as a s. 47 *BIA* receiver made it "a person who represents the creditors of the debtor" within s. 20(1)(b). Pursuant to s. 20(2)(b), the time for determination of priorities is thus "the date from which the person's representative status takes effect." PWC's representative status took effect on the date of its appointment under the Appointment Order, namely November 14, 2001. On that date, the Bank had a properly perfected first security interest.

PWC's alternative argument: did the relevant date for determining priorities change when the trustee in bankruptcy was appointed?

75 I must also address PWC's submission that its status as interim receiver under s. 47 of the *BIA* effectively ended when it became trustee in bankruptcy on January 31, 2002 and that the relevant date for the purpose of determining the relative effectiveness of the Bank's security as against PWC is no longer the date on which PWC became the interim receiver, but is now the date on which it became the trustee in bankruptcy. PWC submits that because of the intervening bankruptcy, it is no longer in possession of any of the assets of State in its capacity as receiver and thus it has no interest in the assets that are subject to the Bank's security. Thus, it argues that the Bank's secured interest is no longer effective against it in its capacity as trustee in bankruptcy because that interest became unperfected prior to the assignment into bankruptcy by operation of s. 48(3) of the *PPSA*.[22]

76 There are five considerations that lead me to reject PWC's submission that the date for assessing the effectiveness of the Bank's security interest was the date of the assignment into bankruptcy:

(a) the s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed;

(b) the date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift;

(c) the date when the respective security interests of the parties come into conflict is the date of the Appointment Order;

(d) the policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security; and

(e) giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty.

77 I now discuss each of these factors in turn.

(a) The s. 47 BIA receivership did not end when the trustee in bankruptcy was appointed

78 PWC submits that the s. 47 *BIA* receivership and the bankruptcy of State are two separate judicial proceedings and that when PWC was appointed trustee in bankruptcy on January 31, 2002, the s. 47 *BIA* receivership ended. According to PWC, the Bank's priority status must therefore be reassessed as of January 31, 2002 when it became trustee in bankruptcy.

79 PWC cites no authority for its proposition and, in my view, its position that the receivership ended upon the bankruptcy is not supported by the jurisprudence or by the terms of the Appointment Order. The effect of bankruptcy on the authority of a court-appointed receiver depends on the circumstances. See *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.). The court's brief endorsement (per Blair, Robins and Krever JJ.A.) states:

> The appellants submitted that on the occurrence of the bankruptcy the court-appointed receiver was deprived of jurisdiction to deal with the property of the bankrupt. We do not accept this argument and agree with Hughes J. who held that the activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy not so appointed can co-exist in the absence of conflict of interest and of jurisdiction.

80 PWC's submission also ignores the wording of the Appointment Order, which is silent as to when PWC's receivership ends. There is no evidence before us that PWC has passed its final accounts as interim receiver thereby bringing its receivership to an end. More importantly, the Appointment Order specifically contemplates that PWC's receivership will continue after assigning State into bankruptcy. The order appointing PWC as interim receiver gave it broad powers, including the power to make an assignment in bankruptcy and to act as trustee.[23] Under s. 3 of the Order, PWC had the right to "take possession and control of the Property ... and all receipts ... arising out of or from the Property" of the Debtor. It was also given the power in s. 3(f) "to receive and collect *all monies* and accounts *now owed or hereafter owing* to the Debtor in respect of the Property". [Emphasis added.] The property of the debtor would include receivables such as an income tax refund.

81 Further, s. 3(p) of the Appointment Order gives PWC as interim receiver the power to enter into arrangements with any trustee in bankruptcy, including an occupation agreement, and the power to lend money to the trustee, not exceeding $250,000 unless increased by the court. For the interim receiver to be in a position to lend money to the trustee in bankruptcy as contemplated by the Appointment Order, the s. 47 receiver must necessarily continue to exercise possession and control over the assets. I note that almost a year after the trustee was appointed, on December 19, 2002, the s. 47 BIA receiver transferred the amount of $1,180,243.72 (proceeds from the third asset sale) from its account to the account of the trustee in bankruptcy. The s. 47 BIA receiver then distributed $950,000 to the Bank.

82 Thus, in this case, the role of the s. 47 *BIA* receiver and that of the trustee in bankruptcy were intended to be complimentary.[24] The process envisaged was that the interim receiver would realize all of State's assets and take possession of them, and would continue to act in conjunction with the trustee in bankruptcy. Accordingly, the receivership and the bankruptcy were not two separate and distinct procedures.

(b) The date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift

83 PWC submits that the appointment of a s. 47 *BIA* receiver did not "crystallize" the rights of the parties who had a claim against the assets of State.

84 Contrary to PWC's submission, when a secured party acts to realize on its security, that is generally the date on which to apply priority rules. Richard McLaren in *The 2008 Annotated Ontario Personal Property Security Act*, *supra*, at p. 246, states in reference to s. 30:

> A general issue which may arise through the course of the application of the priority rules is the date upon which the priority dispute will be determined. Generally, this will be the date where a secured party acts to realize upon its security.

This passage was also in an earlier version of McLaren's text and was quoted with approval in *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* (2004), 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.).

85 PWC relies on the Model Order referred to above (see para. 25), which expressly permits the filing of registrations under provincial personal property regimes, in support of its position that the appointment of a s. 47 *BIA* receiver is not the date that triggers the application of priority rules. However, at the time the events in the case at bar occurred, the practice in Ontario was to interpret the stay of proceedings in receivership orders to include a stay of any action on the part of a secured creditor to reperfect its security through registration of a financing statement.[25] A secured creditor whose interest had become unperfected could not reregister its interest without leave of the court. Thus, at the relevant time, the practice was to consider the appointment of a s. 47 *BIA* receiver as a triggering event. The effect of PWC's submission is to suggest that the 2004 procedural change to the standard form template receivership order has retrospective substantive implications.

86 The change in practice does not affect the fact that the appointment of a s. 47 *BIA* receiver continues to result in a court-ordered stay of all actions and that this appointment still affects the enforcement rights of unsecured creditors. In that sense, the date of the appointment of the s. 47 *BIA* receiver is a triggering event and the date of the receiver's appointment can still be used to determine priorities.

(c) The date when the respective security interests of the parties came into conflict was the date of the Appointment Order

87 In *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.), aff'g (1982), 40 O.R. (2d) 54 (Ont. H.C.), Morden J.A. dealt with a priority conflict between a bank, whose security interest had become unperfected through a lapse in registration, and an inventory supplier, whose security interest was also unperfected. After resolving the priority issue on the basis of which creditor's interest had attached first, Morden J.A. expressed his view on a different basis for coming to the same conclusion. He stated at para. 35:

> ...I think that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests came into conflict. This would appear to be March 14, 1980, when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest. The issue arose at that time — what right did the bank have against Sperry to enforce its security?

The step the bank took on March 14, 1980 to enforce its interest in the collateral was the appointment of a private receiver pursuant to its general security agreement.

88 In this case, the Bank acted to realize upon its security by giving a s. 244 notice and by asking the court to appoint a s. 47 *BIA* receiver pursuant to its general security agreement. The effect of the Bank's act was to have all actions against the debtor stayed by court order. The question of the Bank's right to enforce its security over all of the assets of the debtor arose at that time. The asset sales in November and December merely converted those assets into proceeds which could be distributed according to the priorities over them when the receiver was appointed. I am not aware of any authority that suggests that the date for determining priorities should be the date when funds owing to a debtor are actually received.

(d) The policy of the BIA is not to interfere with the rights of secured creditors in realizing upon their security

89 The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security. Frank Bennett, in *Bennett on Creditors' and Debtors' Rights and Remedies*, 4th ed. (Toronto: Carswell, 1994) states at p. 703: "The trustee in bankruptcy acquires title to the assets of the bankrupt subject to the rights of secured creditors." Similarly, at p. 416 of *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2006), Lloyd W. Houlden and Geoffrey B. Morawetz state:

> The policy of the *BIA* in the case of bankruptcy is not to interfere with secured creditors except in so far as it may be necessary to protect the estate as to any surplus on the assets covered by the security.
>
> . . . . .
>
> No leave is necessary for a secured creditor to proceed to realize upon its security...

90 The statutory stay of proceedings contained in s. 70(1) of the *BIA* specifically excepts "the rights of a secured creditor", as does s. 71, which vests the property of the bankrupt in the trustee. If the debtor gives notice of his intention to make a proposal, the stay imposed by s. 69(1) does not apply where the secured creditor has given notice of its intention to enforce its security under s. 244(1) more than ten days before the proposal.

91 In light of my earlier comments about the Supreme Court's decision in *Giffen, Re*, it is also important to observe that *Giffen, Re* does not justify using the date of the bankruptcy, rather than the date of the receivership, as the necessary reference date for determining priorities for the significant reason that the wording of the Ontario legislation is different from that considered by the Supreme Court in *Giffen, Re*. The B.C. provision the Supreme Court was asked to interpret read: "A security interest ... in collateral is not effective against ... a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy." The B.C. legislation, unlike Ontario's *PPSA*, does not refer to "a person who represents the creditors of the debtor." Section 20(2)(b) of the Ontario *PPSA* further specifies that the rights of the creditor's representative are to be "determined as of the date from which the person's representative status takes effect" while the B.C. legislation forces an inquiry as to whether the security interest was perfected at the date of the bankruptcy. This different legislative language means that the decision in *Giffen, Re* cannot be applied to set the date of the bankruptcy, rather than the date of the receivership, as the starting point.[26]

92 The importance of the wording of the applicable provincial legislation in determining parties' rights in a bankruptcy is highlighted by the decision of *Lefebvre, Re*, [2004] 3 S.C.R. 326 (S.C.C.). In *Lefebvre* [*Lefebvre, Re*, 2001 CarswellQue 2642 (C.S. Que.)], the bankruptcy judge and the majority of the Quebec Court of Appeal [2003 CarswellQue 446 (C.A. Que.)] had applied *Giffen, Re* to two priority disputes, the facts of which were indistinguishable from those considered in *Giffen, Re*. Writing for the court, Lebel J. allowed the appeal and held at para. 40 that the Quebec courts had given *Giffen, Re*:

> ...a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. ... [T]he provincial legislation itself defined the nature of the respective rights of lessors and trustees. ... As has already been mentioned, the *Civil Code of Quebec* does not provide for a similar consequence for failure to publish the rights out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal.

93 *Lefebvre* thus makes it clear that *Giffen, Re* cannot be applied generally without regard to the statutory context.

94 To interpret s. 20(2)(b) in a manner that shifts the reference point for the determination of priorities from the date the Bank acted to realize on its security by appointing a s. 47 *BIA* receiver to the date the trustee in bankruptcy was appointed interferes with the enforcement process and is not consonant with bankruptcy policy.

(e) Giving effect to PWC's position would undermine the purpose of s. 20 of the PPSA and lead to commercial uncertainty

95 Finally, to read the reference point for determining priorities between the representative of the creditors and the secured creditor as changing in the way that PWC suggests undermines the purpose of s. 20 which, as I have indicated, is to preserve the priorities as they stood at the time "a person who represents the creditors of the debtor" was appointed. From a practical point of view, changing the date for determining priorities would lead to commercial uncertainty. As noted by Winkler J. in *Sun Life Assurance Co. of Canada v. Royal Bank* (1995), 10 P.P.S.A.C. (2d) 246 (Ont. Gen. Div. [Commercial List])), the purpose of the *PPSA* registration regime is to impart order and certainty to commerce. To reverse priorities in the middle of the distribution process when there has been no change in the receiver's control over the assets is completely contrary to the goals of the legislation.

Conclusion

96 Although the Bank was not exempt from the obligation to file a financing change statement or a fresh financing statement upon learning of State's name change, its failure to do so in this case did not result in a loss of priority. In my

opinion, the date for determining the effectiveness of the Bank's security interest is November 14, 2001, when the court appointed PWC as interim receiver. This date for determining priorities did not change with the appointment of PWC as trustee in bankruptcy.

Disposition

97 For the reasons I have given, I would allow the appeal, set aside the order of the motion judge, and in its place provide the following direction to PWC:

> That the security granted by State to the Bank as Agent is fully effective as against PWC with respect to the Estate Funds (as defined in PWC's notice of motion and attached report) and that PWC act in the administration of the Estate accordingly.

98 With respect to costs, I note that no award of costs was made to the Bank or to St Paul at first instance as this was a novel issue and the costs of PWC were ordered to be paid out of the estate. I would make the same order here.

***K. Feldman J.A.*:**

1 When the appellant bank sought the appointment of an interim receiver of the debtor company, it held a perfected security interest over the assets of that company. However, during the receivership the appellant allowed its registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*") to lapse. The appellant did not re-perfect its security interest before the interim receiver assigned the debtor into bankruptcy, following which, a significant tax refund came into the debtor's estate.

2 The appellant asserts priority under ss. 20(1)(b) and 20(2)(b) of the *PPSA* over the tax refund and some other undistributed funds, on the basis that the date when the receiver was appointed is the date for determining priority, and on that date, the appellant's security interest was perfected. In contrast, the trustee in bankruptcy says that the relevant date for determining priority is the date of the assignment into bankruptcy. Because on that date the appellant's security interest was unperfected as against the trustee, the appellant ranks as an unsecured creditor, *pari passu* with other unsecured creditors.

3 The motion judge dismissed the appellant's claim. For the reasons that follow, I agree with the motion judge and would dismiss the appeal.

Background

4 The appellant held a first registered general security interest over the personal property of State, the debtor, and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A court order appointing the respondent, PricewaterhouseCoopers Inc. ("PWC"), as interim receiver was issued on November 14, 2001. Following its appointment, the interim receiver sold the substantial assets of State in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale on November 14, 2001, the receiver sold State's name triggering s. 48(3) of the *PPSA*, which provides:

> Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

5 On January 31, 2002, in accordance with the terms of the order appointing it as interim receiver, PWC assigned the debtor into bankruptcy and PWC was appointed the trustee in bankruptcy of the debtor's estate. Following the assignment,

the trustee in bankruptcy received an income tax refund of $4.325 million from the Canada Revenue Agency.

6 Before the date of the debtor's assignment into bankruptcy (and before the third sale of assets) both the appellant bank and St. Paul Guarantee Insurance Company ("St. Paul"), a subsequent secured creditor, had knowledge of the sale of the debtor's name and failed to register a financing change statement. Therefore, both of their secured debts had become unperfected in accordance with s. 48(3).[27]

7 Following the debtor's assignment into bankruptcy, the appellant bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim, which included a secured claim in the amount of $20 million, with PWC as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the appellant bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee.

8 The motion judge reached the following conclusions:

1. An interim receiver appointed under s. 47(1) of the *BIA* is not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*.

2. The order appointing the interim receiver, which contemplated that interested parties could move for a lift of the stay it imposed, did therefore not have the effect of precluding the appellant from maintaining the perfected status of its security interest following the appointment of the interim receiver.

3. A court has no jurisdiction to override provisions of the *PPSA*, including s. 48(3), and the appellant's security interest became unperfected in accordance with that section.

4. As an alternative to its argument that the interim receiver is a person who represents the creditors of the debtor, the appellant argued before the motion judge that it held a perfected security interest in the income tax refund and other amounts on the basis that the interim receiver took possession of those funds "on behalf of" the appellant upon its appointment at the behest of the appellant. The motion judge rejected that argument and held that s. 26(2) of the *PPSA* has no application to the facts of this case, as the interim receiver did not take possession of the income tax refund on behalf of the appellant bank.[28]

5. PWC only became a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* upon its appointment as trustee in bankruptcy. Because at that time the security interest of the appellant was unperfected, it was and remains ineffective against the trustee from that date.

Issues

9 My colleague has identified two issues for determination on this appeal:

1. Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?

2. Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

The resolution of the second issue requires a determination of whether an interim receiver appointed under s. 47(1) of the *BIA*, although not referred to by name in ss. 20(1)(b) and 20(2)(b), is "a person who represents the creditors of the debtor" within the meaning of these provisions. It also requires a determination of the purpose and effect of ss. 20(1)(b) and 20(2)(b).

10 During the applicable period, ss. 20(1) and 20(2) of the *PPSA* read as follows:

20(1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the *Creditors' Relief Act* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy

(c) in chattel paper, documents of title, securities, instruments or goods is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) *under clause (1) (b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect*

(b) .

[Emphasis added.]

11 In his submissions, counsel for the appellant characterized the effect of ss. 20(1)(b) and 20(2)(b) to be that when a representative of creditors is appointed, "the music stops" under the *PPSA*, meaning that the priority rights of all parties are frozen for the purpose of distribution of the estate of the debtor.

12 The appellant's position is that an interim receiver, appointed by the court under s. 47(1) of the *BIA*, is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The appellant submits that upon the appointment of the interim receiver, the priority interests of all creditors of the debtor are frozen and the interim receiver is to

distribute the assets or proceeds of the assets of the debtor, no matter when they are realized or distributed, in accordance with the respective priority positions of the creditors as of the date of the receiver's appointment.

13 To the extent that the security interest of a secured creditor may become unperfected under s. 48(3) of the *PPSA* following the appointment of a representative of creditors, submits the appellant, this post-appointment event has no bearing on the secured creditor's priority for the purpose of the distribution of assets of the debtor's estate. Or, put another way, the effect of the order appointing the interim receiver was to exempt the appellant from the requirement of complying with s. 48(3). Consequently, the fact that the appellant failed to file a financing change statement before the date of the debtor's assignment into bankruptcy and the appointment of the trustee in bankruptcy did not affect the appellant's entitlement to continue to be paid from the assets of the estate in accordance with its priority position as it stood on the date of the appointment of the interim receiver, at which time its security interest was perfected.

14 I summarize my reasons for rejecting the appellant's position as follows. First, although an interim receiver may represent the creditors of the debtor for some purposes, it is not "a person who represents the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" should not be read in to these subsections. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not in a priority contest with any creditor on behalf of unsecured creditors. The purpose of these subsections is to allow the representative of creditors to defeat unperfected security interests on behalf of unsecured creditors whose rights to collect outstanding debts from the debtor are statutorily stayed, such as on bankruptcy or assignment for the benefit of creditors. Unlike on a bankruptcy or assignment for the benefit of creditors, creditors' priority rights are not statutorily stayed on a receivership. Although such rights may be stayed by the order appointing the receiver, a creditor may apply to lift the stay in order to commence or continue proceedings to collect its debt.

15 Second, the effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time, or, in the words of appellant's counsel, to "stop the music". Neither these subsections nor the order appointing the interim receiver had the effect of exempting the appellant from the requirement of complying with s. 48(3). Consequently the appellant's security interest became unperfected by its failure to file a financing change statement within the time period specified by s. 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the appellant's security interest is not effective against the trustee in bankruptcy.

Analysis

Issue 1: Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the PPSA?

16 The motion judge found that the order appointing the receiver did not exempt the appellant from complying with s. 48(3), nor did the stay provisions of the order prevent the appellant from seeking to lift the stay in order to file a financing change statement. My colleague concludes that the motion judge was correct on this issue and I agree. In my view, the consequence of this conclusion is that the appellant's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b).

Issue 2: Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

(i) Subsection 20(1) of the PPSA

17 Subsection 20(1) prescribes the effect of perfection of a security interest in collateral in relation to other claims against the same collateral and defines the rules for determining priority between the holder of an unperfected security interest and others with a claim to, or an interest in, the collateral. Under s. 20(1)(a), an unperfected security interest "is subordinate to" perfected security interests in the same collateral as well to the interests of lienholders and of unsecured creditors who have seized the collateral through legal processes.

18 In contrast, under ss. 20(1)(b), (c) and (d), an unperfected security interest "is not effective" against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy, and against certain transferees of the debtor's property. The different language is used because s. 20(1)(a) orders the priority among secured creditors and other creditors with a realized interest in the collateral, while under ss. 20(1)(b), (c) and (d), an unperfected security interest is treated as an unsecured interest as against the named persons.

19 In order to interpret the meaning and scope of the term "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, one must examine the language of ss. 20(1)(b) and 20(2)(b), since both clauses work together, as well as the purpose of the provisions, which I will discuss later in these reasons.

20 Clause 20(1)(b) states that a security interest in collateral, until perfected, "is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy." Before this provision was amended in 1989, it provided that an unperfected security interest in collateral was ineffective against three named representatives: a trustee in bankruptcy, an assignee for the benefit of creditors and a receiver. See *Personal Property Security Act*, R.S.O. 1980, c. 375, s. 22(1)(a)(iii). While in amending the provision the legislature specifically removed the reference to a "receiver", it also added the term "including", which now precedes "assignee for the benefit of creditors" and "trustee in bankruptcy". The appellant argues that because the legislature used the word "including", the removal of the reference to a "receiver" does not indicate an intention by the legislature to exclude receivers from the ambit of the provision.[29]

21 I disagree. The legislature's removal of a receiver from s. 20(1)(b) means the appellant cannot succeed without showing that an interim receiver is a "person who represents the creditors of the debtor" in the sense that fits the language and purpose of both ss. 20(1)(b) and 20(2)(b). There is no question that, in carrying out its functions and duties, an interim receiver can act in a representative capacity on behalf of some or all of the creditors.[30] The issue in this case is whether an interim receiver is the type of representative of creditors that is referred to in these two clauses.

(ii) A receiver does not obtain the debtor's proprietary interest in the collateral

22 The first relevant difference between a receiver and a trustee in bankruptcy or an assignee for the benefit of creditors is that a receiver does not obtain the debtor's proprietary interest in the collateral. In their text *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005), Professors Cuming, Walsh and Wood, at pp. 441-42, begin their discussion of the interface between s. 20 of the *PPSA* and the *BIA* by explaining that the vesting of the debtor's personal property in the trustee in bankruptcy under s. 71(2) of the *BIA* gives the trustee the independent status to defeat unperfected security interests in that property under s. 20:

> The *PPSA* provides that a security interest is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy. The effect of this is to give to the debtor's trustee in bankruptcy an independent status to defeat unperfected security interests in personal property that vests in the trustee as provided by *BIA* [sub]section 71(2). [Citations omitted.]

23 The two creditors' representatives named in s. 20(1)(b) share an important characteristic: by virtue of statute (s. 71 of the *BIA* and ss. 7 and 8 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33), upon their respective appointments, the proprietary rights of the debtor in the collateral vest in these representatives.

24 Section 71 of the *BIA* provides:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

25 Sections 7 and 8 of the *Assignments and Preferences Act* provide:

> 7. Every assignment made under this Act for the general benefit of creditors, if the property is described in the words "all my personal property that may be seized and sold under execution and all my real estate, credits and effects", or in words to the like effect, vests in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except such as are by law exempt from seizure or sale under execution, subject, however, as regards land, to the *Registry Act* and the *Land Titles Act*.
>
> 8. Every assignment for the general benefit of creditors, whether it is or is not expressed to be made under or in pursuance of this Act and whether the assignment does or does not include all the real and personal estate of the assignor, vests the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and the assignment and the property thereby assigned is subject to all the provisions of this Act, and the same applies to the assignee named in the assignment.

26 As a result, these representatives hold the debtor's proprietary interest in the collateral. This is to be contrasted with the role and legal status of a receiver, whether privately or court-appointed. I will discuss court-appointed receivers because in this case, PWC is a court-appointed receiver and a court-appointed receiver has statutory authority.

27 One important difference between a court-appointed receiver and a trustee in bankruptcy (or assignee for the benefit of creditors) is that a receiver obtains its powers from an order of the court. These powers allow the receiver to administer the business and assets of the debtor, and to effect a sale of the debtor's assets pursuant to a vesting order of the court. However, the debtor's property rights in the assets, whether the debtor has full or partial title or merely a right of possession, do not devolve onto the receiver as they do onto a trustee in bankruptcy by statute under s. 71 of the *BIA*. As the motion judge stated at para. 29:

> The appointment of an Interim Receiver does not vest the assets of the debtor in the Interim Receiver, as in the case of a Trustee in Bankruptcy, nor do the liabilities of the debtor become liabilities of the Interim Receiver whereas, in the case of a bankruptcy, the liabilities become liabilities of the bankrupt estate to be administered and, subject to the rights of secured creditors, paid or compromised by the Trustee out of the assets of the bankrupt estate.

28 The receiver is solely an administrator accountable to the court and to all stakeholders in the receivership, appointed to ensure that the debtor's assets are realized in an orderly manner and for the maximum realizable value, and then to distribute the proceeds to creditors and other claimants in accordance with their respective priorities. It is in that way that a receiver may represent creditors. As the motion judge pointed out, a debtor could retain possession and remain in business during a receivership, and, subject to the terms of the order appointing the interim receiver, could borrow additional funds and create additional security that would continue after the termination of the receivership. In some circumstances the debtor could retain the business following the discharge of the receiver. The debtor is not stripped of all of its interest in the collateral upon the appointment of an interim receiver.

29 The fact that ss. 20(1)(b) and 20(2)(b) deal with proprietary rights is reflected in the language and effect of s. 20(2)(b) which states:

> 20(2) The rights of a person,
>
> . . . . .
>
> (b) under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

The effect of s. 20(2) is to define the time from which the rights of statutory lienholders under s. 20(1)(a)(i) and of representatives of creditors under s. 20(1)(b) are to be determined. The effective timing of the other rights under ss. 20(1) (a), (c) and (d) is built into the description of those rights. (See para. 10 above for the relevant provisions.)

30 However, the wording of s. 20(2)(b) also tells us that s. 20(1)(b) has conferred "rights ... in respect of the collateral" on the representative of creditors and that those rights are to be determined "as of" the effective date of the representative's appointment. Although the term "rights", standing alone, is used in s. 60 of the *PPSA* to mean the right to take administrative steps, "rights ... in respect of the collateral" are rights that indicate a proprietary or priority interest in the collateral that entitles the holder of such rights to be paid out of the proceeds of that collateral in accordance with its priority.

(iii) A receiver does not assert the claim of the unsecured creditors against competing security interests

31 A trustee in bankruptcy, unlike a receiver, represents the creditors in another way beyond administering the estate: the trustee holds the debtor's proprietary interest in the assets on behalf of the unsecured creditors. As Iacobucci J. stated in *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 41 (referring to the Saskatchewan Court of Appeal decision in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481 (Sask. C.A.), at 490):

> [T]he trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests."

32 Consequently, a trustee occupies a priority position for the purpose of distribution of the proceeds of the debtor's estate. In that sense, a trustee in bankruptcy is in competition with other creditors for its priority position among creditors, and its rights in the collateral are in competition with the rights of other creditors in the collateral. In contrast, a receiver is not in competition with creditors and has no priority position itself because any rights it has in the collateral are administrative but not proprietary. It is merely an administrator who pays out the proceeds to the creditors, both secured and unsecured, if there are sufficient funds, in the order of their priority.

33 In *Giffen, Re*, Iacobucci J. discussed the purpose and effect of s. 20 of the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359-which is the counterpart of s. 20 of the *PPSA* but with slightly different wording. He explained that the reason why the *PPSA* provides that a trustee in bankruptcy defeats an unperfected security interest is because, before bankruptcy, an unsecured creditor can take steps to obtain and enforce a judgment against the debtor through execution proceedings that will rank ahead of an unperfected security interest under s. 20(1)(a)(i). However, once bankruptcy occurs, "all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims." *Giffen, Re*, *supra* at para. 39. As Anthony Duggan and Jacob Ziegel explain when discussing *Giffen, Re* in their article, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 U.T.L.J. 227 at 231: "If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70."

34 In *Giffen, Re*, *supra* at para. 39, Iacobucci J. adopted the following statement by Professor Cuming in his article entitled "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 Can. Bus. L.J. 17 at 27-28:

> In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the B.C. *PPSA* to attack the unperfected security interest.

And at para. 41, Iacobucci J. agreed with the conclusion of the Saskatchewan Court of Appeal at p.490 of *Paccar* that: "It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest."

35 In their discussion of *Giffen, Re*, Professors Duggan and Ziegel, *supra* at 231-34, explain how bankruptcy law works

with the *PPSA* to preserve creditors' relative priority entitlements post-bankruptcy. The authors comment that Iacobucci J.'s decision in *Giffen, Re* confirms "the complementary relationship between the federal bankruptcy statute and the provincial PPSAs": *supra* at 249.

36 It follows from *Giffen, Re* that a receiver is not intended to be included as a "person who represents the creditors of the debtor" for the purpose and therefore within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*. The reasons for this conclusion are: (a) unlike in a bankruptcy, a receiver, including a court-appointed interim receiver, does not stand in for unsecured creditors in a priority contest with any other creditor; (b) a receiver is not the "repository of enforcement rights" of unsecured creditors with any status to "attack the unperfected security interest" (*Giffen, Re, supra*, at para. 39); and (c) in a receivership, unlike in a bankruptcy, there is no statutory stay causing execution creditors to lose their priority and ability to realize on their debt.

(iv) Personal Property Security Acts of other provinces

37 The conclusion that a receiver is not a person who represents the creditors of the debtor under s. 20 is also consistent with the correlative sections of the Personal Property Security Acts of the other common law provinces.[31] The comparable provisions in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland do not include a receiver.[32] Only the relevant sections of the Manitoba and Ontario Acts formerly referred to a receiver, but both have since been amended to remove this reference.

38 The Manitoba statute contained a provision with language identical to the previous version of the Ontario section, R.S.O. 1980, c. 375, which read:

> 22(1) [A]n unperfected security interest is subordinate to
>
> (a) the interest of a person
>
> . . . . .
>
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...
>
> 22(2) The rights of a person under sub-clause 1(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest.

Manitoba's replacement provision does not use the term "includes", but instead lists only two representatives of creditors, neither of which is a receiver.[33]

39 The Manitoba courts considered the effect of the former wording of s. 22 in the context of a court-appointed receivership in the case of *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (Man. C.A.). The court had appointed a receiver of the debtor trucking company at the request of a secured creditor, Roynat. Another secured creditor, Paccar, had a prior purchase-money security interest in some of the trucks, but had inadvertently failed to renew its *PPSA* registration and was unperfected on the date of the appointment of the receiver. Paccar sought an extension of time to re-perfect its security under s. 65 of the Manitoba *PPSA*, which provided that when an extension is granted "the rights of other persons accrued up to the time of the registration of the order made under this section are not affected by the order." The receiver opposed Paccar's motion. It took the position that on its appointment as a receiver, by operation of ss. 22(1)(a)(iii) and 22(2), it had accrued the rights referred to in s. 65.

40 In the Court of Queen's Bench, Scollin J. rejected the position of the receiver. He explained that even though a receiver was referred to in s. 22, the rights and interests of a receiver are not the same as those of a trustee in bankruptcy. He concluded at 768 that:

> [T]he provisions of s. 22 can be sensibly reconciled with the provisions of s. 65 by recognizing that the only rights of the creditor which should be subordinated to the interest and rights of the receiver are those which necessarily conflict with

> the due exercise of the rights of the receiver as representative of the creditors in executing the mandate of the court. The status of a receiver does not bring with it a cornucopia of rights.... Beyond his mandate, the receiver has no status. Unless his rights or interests are affected, no issue of subordination even arises. In this case he has demonstrated no diminution of his rights or interest and no prejudice to any creditor. To recognize the substantive security interest of Paccar causes no injustice or prejudice to the receiver or to other creditors and permits full recognition of and harmony between ss. 22 and 65 of the Act. Absent prejudice, the receiver's rights or interest do not extend to defeating an application which, but for his appointment, would be effective to relieve against an inadvertent lapse.

41 The Court of Appeal dismissed the appeal. Twaddle J.A. acknowledged that Scollin J. may have been correct in his view, distinguishing a trustee in bankruptcy from a receiver, that while a trustee in bankruptcy does acquire a priority property right on appointment, a receiver does not. However, he said he was not required to decide the issue because he could dismiss the appeal based on his interpretation that s. 22 did not defeat the remedial effect of s. 65. He stated at p. 615:

> An order made under s. 65 re-perfects the security interest as though it had never lapsed, subject only to the rights of those who have dealt with the debtor in the meantime and who would be prejudiced by permitting the order under s. 65 to have retroactive effect.

42 In my view, Scollin J.'s analysis of the rights of a receiver was correct and consistent with the conclusion reached on the appeal. Furthermore, his understanding was given full effect when s. 22 was repealed and replaced in Manitoba in 1993 with the new provision that excludes a receiver from its ambit. As mentioned above, the equivalent statutory provisions of the other common law provinces do not make reference to a receiver.

(v) The effect of a court-ordered stay

43 Other case law has also considered the issue of re-perfecting a security interest following the appointment of a receiver or of a monitor under s. 11.7 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. This case law arises because when a receiver (or monitor) is appointed, unlike in a bankruptcy, the debtor does not lose all rights and interest in the collateral and the rights of creditors are not statutorily frozen. Although an order appointing a receiver will normally stay all proceedings against the interests of the debtor, the court can always lift the stay to allow a creditor to take certain steps to enforce its rights or perfect its security against the debtor, subject to considering competing rights acquired by other creditors in the interim.

44 Subsection 30(6) of the Ontario *PPSA* provides:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Using s. 30(6), a secured creditor with a security interest that is originally perfected by registration but becomes unperfected, can re-perfect by registration and regain its priority standing as against all other creditors except as against someone who "acquired rights in all or part of the collateral" while the creditor's security interest was unperfected.

45 As was decided in *Roynat*, supra, on appointment, a receiver does not acquire any rights in the collateral that are in competition with the rights of any creditor. In other words, a receiver does not obtain the right to receive any portion of the proceeds of the estate of the debtor. Consequently, a secured creditor whose security interest had been perfected at some point but was unperfected on the date of the appointment of a receiver may re-perfect under s. 30(6) and retain its priority, regardless of the appointment of a receiver in the interim, by obtaining a lift-stay order from the court, if necessary.

46 For example, in *TRG Services Inc., Re* (2006), 26 C.B.R. (5th) 203 (Ont. S.C.J.) at paras. 53-59, C. Campbell J. held that a monitor under the *CCAA* is not a representative of creditors within s. 20(1)(b) of the *PPSA*. He stated that "[t]he fact

that the Initial Order envisaged the Monitor assessing claims as between creditors does not grant it any legal entitlement to or over the assets of the debtor": *TRG Services Inc., Re, supra* at para. 57. C. Campbell J. allowed the appeal from the decision of the monitor who had refused to allow a secured creditor to perfect its security after the *CCAA* order. He concluded that there was nothing in the *CCAA* that would permit the exercise of any jurisdiction to disallow registration and that s. 20(1)(b) did not apply for the reasons quoted.

47 Similarly, in *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)* (2006), 25 C.B.R. (5th) 273 (Alta. Q.B.), Richter was first a monitor of the debtor, Kodiak, under the *CCAA* and subsequently, receiver-manager of Kodiak appointed by the court to carry out a sale of its assets. Brookside was a secured creditor of Kodiak whose registration under the Alberta *PPSA* was defective. Consequently, both before and on the date of the appointment of the receiver, Brookside's security interest was unperfected.

48 Brookside registered a financing change statement on the day the receiver was appointed and sought leave of the court to lift the court-ordered stay and validate that registration *nunc pro tunc*. Richter, as Kodiak's receiver, took the position that Brookside's security interest was ineffective against it. As in this case, the receiver argued that its role was similar to a trustee in bankruptcy and it should therefore have the same tools as those provided to trustees in bankruptcy by the *PPSA*

49 The first issue before the *Brookside* court was "whether a receiver should be seen as entitled to the same priority as is granted to a trustee in bankruptcy by s. 20(a)(i) of the *PPSA*": *supra* at para. 13. The second question was whether the stays under both appointment orders should be lifted to allow Brookside to validate its registration *nunc pro tunc*. The application judge made the important observation that the second issue would not arise if a receiver is the same as a trustee under s. 20(a)(i) because, in that event, Brookside's unperfected security interest would be ineffective against the receiver and "Brookside's attempted correction of its registration after the date of the Receivership Order *could not improve its position*": *supra* at para. 14. [Emphasis added.]

50 The application judge concluded on the first question that because s. 20(a)(i) of the Alberta *PPSA* refers only to a trustee in bankruptcy, it cannot be interpreted to also refer to a receiver.[34] He then went on to decide the second question. He concluded that there would be no prejudice to the debtor or any of the other creditors by allowing Brookside to perfect its security as of the date of the receivership, because had the *CCAA* and receivership orders not been made, Brookside could have perfected at any time. Since s. 20(a)(i) did not apply, there was no reason why the secured creditor could not register under the *PPSA*. Nor was there any purpose in precluding the *ex post facto* registration.

51 As these cases demonstrate, in a receivership, because a creditor's right to take steps against the debtor is stayed not by any legislative directive, but rather by virtue of the terms of the order appointing the receiver, such a stay can be lifted by the court to allow a secured or unsecured creditor to pursue its rights against the interests of the debtor in appropriate circumstances, including obtaining judgment or asserting a lien, and to effect relevant registrations. This includes registrations under s. 30(6) of the *PPSA* to regain priority for the purpose of distribution of the debtor's assets by the receiver.

52 In fact, the new Standard Template Receivership Order of the Commercial List — which is to be used when a receiver is appointed by the Superior Court of Justice — clearly excepts registrations under the *PPSA* from the effect of the stay. Paragraph 9, which contains the stay order, specifically provides that nothing in that paragraph prevents "the filing of any registrations to preserve or perfect a security interest". This paragraph clearly describes the understanding of the bench and bar that the "music" does not stop on the appointment of a receiver because the ongoing need to register and to perfect security is recognized and acknowledged. There would be no cause or purpose in doing so if priorities were frozen on the date of the order.

53 There is nothing in the *PPSA* that says that it stops being applicable at any time. In particular, s. 20 does not prevent ss. 48(3) or 30(6) from continuing to apply and to have effect. It does not freeze priority positions but just states the consequences of non-perfection at a point in time. There is no legislated freezing of priorities, or anything that "stops the music" in a receivership, other than the court order creating it which provides for the ability to seek and obtain a lift-stay order. Consequently, the result the appellant seeks to achieve — the freezing of priority positions — does not occur in a receivership. Nor are the unsecured creditors left in a position where they are necessarily precluded from taking further steps to enforce their rights against the interest of the debtor. Therefore, when a receiver is appointed, the unsecured creditors do not need s. 20(1)(b) to level the playing field for them as against unperfected security interests. A receiver is not a "repository

of enforcement rights" like a trustee in bankruptcy; nor do unsecured creditors need to rely on a receiver to attack unperfected security interests

54 In a bankruptcy, not only does the debtor have no further interest in the collateral, but also the priority rights of creditors are "frozen", as stated by Iacobucci J. in *Giffen, Re*, *supra* at para. 39 by virtue of s. 71 and s. 69.3(1) of the *BIA*,[35] the latter of which provides:

> Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

55 Consequently, in a bankruptcy, the effect of ss. 20(1)(b) and 20(2)(b) together with the *BIA* is that a security interest in collateral that is unperfected on the date of bankruptcy is ineffective against the trustee throughout the bankruptcy, and that unperfected status cannot be cured in relation to the trustee. Similarly, a security interest that is perfected on the date of bankruptcy is effective against the trustee and remains effective because the bankrupt estate is frozen and the debtor no longer has any interest in the collateral for the purposes of registration.

(vi) Trustee's alternative argument

56 The trustee in bankruptcy argued on this appeal that even if the receiver is "a person who represents the creditors of the debtor" under s. 20(1)(b), because the appellant bank's security interest was unperfected on the date when the trustee in bankruptcy was appointed, its security interest was ineffective against the trustee under the express words of s. 20(1)(b). The appellant's position was that once priorities were frozen on the appointment of the interim receiver, they remained frozen on the appointment of the trustee. My colleague has concluded that the interim receivership never terminated, that the tax refund came to the interim receiver, and that the sections operate from and relate back to the original date when PWC was first appointed as interim receiver, at which time the appellant's security interest was perfected.

57 In respect of the trustee's position, I agree that the appellant's security interest is ineffective against the trustee. As I have explained, ss. 20(1)(b) and 20(2)(b) should not be read to apply to a receiver for two reasons. Unlike a trustee in bankruptcy and an assignee for the benefit of creditors, a receiver does not obtain the debtor's rights in respect of the collateral and is therefore not in a priority contest with any creditor on behalf of unsecured creditors. Also, in a receivership, the debtor maintains its rights in the collateral. Second, unlike in a bankruptcy, creditors' rights are not frozen on a receivership by statute. Those rights may be stayed by the court order appointing the receiver, but as in the order in this case, the stay can be and often is lifted in order to allow a creditor to register to maintain its perfected status — for example, under s. 48(3) — or to re-perfect under s. 30(6). As already noted, the new standard form of order for a court-appointed receiver no longer includes any stay of a creditor's right to perfect or re-perfect its security interest. The only purpose for a creditor to perfect or re-perfect after a receiver is appointed is to maintain its priority during the receivership.

58 The motion judge found, in accordance with the record and the position of the trustee, that the tax refund came into the hands of PWC as trustee in bankruptcy. The interim receiver assigned the debtor into bankruptcy in accordance with the order appointing it, at which time the provisions of the *BIA* applied, including s. 71. It was not disputed, either before the motion judge (see para. 59 of his reasons) or on this appeal, that the property of the debtor passed to the trustee on the date of the bankruptcy. Section 20(1)(b) of the *PPSA* says that an unperfected security interest is ineffective against a trustee in bankruptcy. The court is required to give effect to that specific statutory provision.

Conclusion

59 I agree with the motion judge that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* and the term "receiver" should not be read in to the legislation. Because the appellant's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was unperfected on the date of the appointment of the trustee and its security

interest is therefore ineffective against the trustee.

60 The unfortunate result for the appellant, and apparent windfall for St. Paul, is that the appellant loses its priority over St. Paul, and even though St. Paul also lost its secured standing, they rank *pari passu* as unsecured creditors in the bankruptcy. This result flows from the fact that both were unperfected on the date of the appointment of the trustee and both their security interests are therefore ineffective against the trustee.

61 I would dismiss the appeal with costs to the trustee and to St. Paul out of the estate. I would fix those costs in the amount of $15,000 each, inclusive of disbursements and G.S.T.

***H.S. LaForme J.A.*:**
I agree.

Appeal dismissed.

Footnotes

1 Section 1(1) of the *PPSA* defines "collateral" as "personal property that is subject to a security interest".

2 Under s. 11(1) of the *PPSA*, a security interest is not enforceable against a third party unless the requirements of the *PPSA* for "attachment" are met. Attachment occurs when: (1) the creditor takes possession of the collateral or enters into a written security agreement with the debtor; (2) the agreement is signed by the debtor; and (3) the agreement contains a description of the collateral enabling it to be identified. In addition, "value" or consideration for the agreement must be given by the creditor and the debtor must have "rights" in the collateral.

3 A security interest in investment property may now be perfected by control of the collateral under subsection 1 (2). *Securities Transfer Act, 2006*, S.O. 2006, c. 8, s. 123(9).

4 There are a number of exceptions to the general priority rules contained in s. 30 with which we are not concerned. One exception is a Purchase Money Security Interest (PMSI) in inventory.

5 Unless otherwise indicated, where the term "receiver" is used in these reasons, it is used to refer to an interim receiver appointed by the court under s. 47 of the *BIA*.

6 The motion judge held that the refund was a receivable that was not capable of being possessed. This aspect of the motion judge's decision is not under appeal. I make no comment as to the correctness of the motion judge's conclusion.

7 Section 48(3) reads:
(3) Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

8 A financing change statement cannot be used to reperfect a lapsed security interest. A fresh financing statement is required. See s. 52(2) of the *PPSA*.

9 The relevant provisions of s. 20 provide:
20 (1) Except as provided in subsection (3), until perfected, a security interest,
(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
.....

(2) The rights of a person,

. . . . .

(b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

10 Section 30(6) reads:
Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

11 The exception in subs. (3) is not relevant on this appeal.

12 The most common formulation is: "A security interest... in collateral is not effective against (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or (ii) a liquidator appointed under the *Winding-up Act (Canada)* if the security interest is unperfected at the date that the winding-up order is made..." as found, for example in Manitoba's *Personal Property Security Act*, C.C.S.M. c. P. 35, s. 20(b).

13 Subsection (3) deals with purchase-money security interests, and its exception is not relevant here.

14 McLaren goes on to comment that the 1992 amendments to the *BIA* brought with them regulation of receivers where a debtor is insolvent. He observes that federal bankruptcy legislation has increased the control and accountability of these privately-appointed receivers. He raises the possibility that in light of these statutory changes, privately-appointed receivers will also be held to be representatives of the creditors within the meaning of s. 20(1)(b) of the Act. Ziegel and Denomme, *supra*, query at p. 163 whether Ontario law would recognize a category of creditors' representatives who do not owe their status to statutory authority. In this case, we are not concerned with a privately-appointed receiver but a court-appointed interim receiver who derived his status from the *BIA*.

15 If in fact PWC is acting as a representative of the Bank alone, it seems it would have been under a duty to apply to the court to lift the stay to permit it to register a financing change statement on behalf of the Bank.

16 For example, the decision in *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (Man. C.A.), discussed by Feldman J.A., not only deals with differently worded legislation, it is a case decided under the *BIA* prior to the 1992 amendments creating the s. 47 *BIA* interim receiver.

17 Section 30(1) reads:
30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:
1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

18 Iacobucci J. also considered the meaning of the phrase "rights in goods" in s. 12(2) of B.C.'s *PPSA* dealing with leased goods. He concluded that a lessee had a proprietary interest in such goods (at para 36):
I note that s. 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Section 12(2) states explicitly that a debtor has <u>rights in goods</u> leased to the debtor...when he obtains possession of them in accordance with the lease. [Emphasis in original.]

19 For ease of reference, ss. 20(1)(c) and (d) read:
20 (1) ...until perfected, a security interest,
. . . . .
(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20 Section 30(6) reads:
(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

21 The importance of control is emphasized in Ontario's new *Securities Transfer Act, 2006* (*STA*), S.O. 2006, c.8 which came into force on January 1, 2007 together with related *PPSA* amendments. In addition to registration and perfection, a new, third, method of perfecting a security interest is by control of the security which can include an intangible interest. John Cameron, in his article on the *STA*, 22 B.F.L.R. 309-352 at 321, states, "As the Comment notes, obtaining 'control' means a secured party has taken whatever steps are necessary to place itself in a position where it can have the securities sold, without further action by the owner." The secured party need not have exclusive control over the security. Other secured parties can have a concurrent right and a debtor can retain rights in the security.

22 I acknowledge that in some cases, a secured creditor's failure to comply with s. 48(3) during a s. 47 *BIA* receivership could result in a loss of that party's priority depending on the nature of the court order appointing the interim receiver. The role of the s. 47 *BIA* receiver is very much defined by the terms of the court order appointing the receiver and the common law describing its role. As Farley J. noted in *Curragh, supra*, at para. 6, the regime providing for the appointment of a s. 47 *BIA* receiver is a flexible one and the court is empowered to give directions to the interim receiver that can meet the practical demands of any given case. If then, for example, the court did not order a stay of all actions on the appointment of a s. 47 *BIA* receiver, then this would affect the extent to which the particular s. 47 *BIA* receiver qualifies as "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). Also, if for some reason the s. 47 receivership ended before there was any priority conflict, then the failure to reregister could well have consequences following the debtor's emergence from receivership. In other words, the significance of a failure to reregister will depend on a number of relevant factors in each case.

23 Other powers included the following: to take control of the property to preserve, protect, and liquidate it; to manage and carry on the business; to purchase or lease machinery; to receive and collect all money "now owed or hereafter owing" to the debtor; to execute transfers, conveyances, leases, bills of sale, or other documents respecting the property in the name and on behalf of the debtor; to report to, meet with and discuss with secured and unsecured creditors of the debtor deemed appropriate including offers and expressions of interest received; to apply for any vesting orders in order to convey the property; to register a copy of the Order appointing it and "any other Orders obtained by the Interim Receiver in respect of the Property against title to any or all property comprised in the Property" and; to sell, convey, or mortgage the property out of the ordinary course of business and without compliance with Part V of the *PPSA* (Ontario), or providing any other notice which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, with the approval of the Court.

24 I am under the impression that, as here, the same person often acts as a s. 47 *BIA* receiver and trustee in bankruptcy. Based on my interpretation of their roles, namely, that a s. 47 receiver owes a fiduciary duty to the creditors of the debtor and its function is similar to that of a trustee in bankruptcy, a trustee in bankruptcy is not a third party vis-à-vis the s. 47 receiver who also represents those same creditors. Thus, I see no conflict in the same person fulfilling both roles. To hold otherwise and to open the door to a

potential for conflict between the role of the s. 47 receiver and a trustee in bankruptcy would result in the same person ordinarily not being able to fulfill both roles with attendant increased expense, duplication of effort, and delay.

25 A proceeding is any step that must be taken before a creditor or the creditor's representative can enforce its rights and may include the delivery of a copy of a certificate: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 26.

26 McLaren, *supra*, at p. 172, in discussing s. 20(1)(b) and *Giffen*, writes that the wording of the B.C. Act on debtor security interests is very different from Ontario's s. 20(1)(b).

27 Nor did either re-perfect under s. 30(6) of the *PPSA*, discussed below.

28 Subsection 26(2) of the *PPSA* provides that a "security interest in collateral in the possession of a person, other than the debtor, the debtor's agent or a bailee mentioned in subsection (1), is perfected by, (a) issuance of a document of title in the name of the secured party; (b) possession on behalf of the secured party; or (c) registration." No appeal was taken from this finding.

29 Whether a particular representative of creditors, other than a receiver, may be included in s. 20(1)(b) need not be decided in this case.

30 Although a court-appointed receiver owes duties to the court and to the creditors in respect of the proper conduct of the receivership (see for example *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.) at paras. 28-30), it is interesting to compare ss. 47(3) and 47.1(3) of the *BIA*. Under the first subsection, an interim receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of the creditor who sought the appointment, while under the second subsection, the receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of one or more creditors or the creditors generally. The difference may impact on the particular receiver's duties as a representative of creditors.

31 In Quebec there is a different regime. See *Lefebvre, Re*, [2004] 3 S.C.R. 326 (S.C.C.) at paras. 19-40, where the Supreme Court of Canada discusses the regime in Quebec.

32 See *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 20(b); *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 20(a); *Personal Property Security Act*, S.S. 1993, c. P-6.2, s. 20(2)(b); *Personal Property Security Act*, C.C.S.M. c. P35, s. 20(b); *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s. 21(2); *Personal Property Security Act*, S.N.B. 1993, c. P-7.1, s. 20(2); *Personal Property Security Act*, R.S.P.E.I. 1988, c. P-3.1, s. 20(2); *Personal Property Security Act*, S.N.L. 1998, c. P-7.1, s. 21(1).

33 The equivalent provision of Manitoba's statute now reads:
20. A security interest
. . . . .
(b) in collateral is not effective against
(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or
(ii) a liquidator appointed under the *Winding-up Act* (Canada) if the security interest is unperfected at the date that the winding-up order is made.
Personal Property Security Act, C.C.S.M. c. P.35.

34 The judge is referring only to ss. 20(a)(i), not 20(a)(ii), which also lists a liquidator under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

35 Section 71 of the *BIA* is set out above at para. 24. Section 69.4 of the *BIA* allows the court to declare that sections that freeze rights do not apply to a particular creditor if that creditor is likely to be materially prejudiced by the continued operation of the sections or it is otherwise equitable to make such a declaration. It is unlikely that this section could be used to assist an unperfected secured creditor because such a person is always going to be prejudiced by the operation of s. 20(1)(b) of the *PPSA*. As this court has held

in *Ma, Re* (2001), 143 O.A.C. 52 (Ont. C.A.) at paras. 2 and 3, 'The role [of the courts under s. 69.4] is one of ensuring that sound reasons, consistent with the scheme of the [*BIA*] exist for relieving against the otherwise automatic stay.... [L]ifting the automatic stay is far from a routine matter.' [Citations omitted.] In most instances, a lift stay is ordered under s. 69.4 where (a) the proceeding in respect of which the lift is requested is one in relation to which the debtor's liability would not be released by an order of discharge from bankruptcy, or (b) where the bankrupt "is a necessary party for the completed adjudication" of the relevant proceeding: see *Koval, Re* (2003), 48 C.B.R. (4th) 103 (Ont. S.C.J.) at para. 6.

End of Document

TAB 2

1984 CarswellBC 556
British Columbia Supreme Court

Bank of Montreal v. Shaw Ranches Ltd.

1984 CarswellBC 556, [1984] B.C.W.L.D. 841, [1984] B.C.W.L.D. 905, [1984] B.C.W.L.D. 963, [1984] B.C.W.L.D. 969, 25 A.C.W.S. (2d) 13, 31 R.P.R. 35, 51 B.C.L.R. 235, 51 C.B.R. (N.S.) 292

BANK OF MONTREAL v. SHAW RANCHES LTD. et al.

Robinson L.J.S.C.

Heard: January 10, 1984
Judgment: February 1, 1984
Docket: Kamloops No. 5637

Counsel: *J.E. Broadway*, for plaintiff.
R.J. Sewell, for defendant Willowdale Holdings Ltd.
K. Repstock, for receiver-manager Deloitte and Company.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees

Headnote

Receivers — Remuneration of receiver — Remuneration — Priority of fees

Receivers — Remuneration — First mortgagee not acquiescing, consenting, or approving appointment of receiver-manager by second mortgagee — First mortgagee having priority over receiver-manager in receiver-manager's claim for fees.

The plaintiff bank, holder of a first mortgage in the amount of $470,000, applied for a final order of foreclosure. The second mortgagee, owed $325,000 under its charge, applied for an extension of the redemption period. The property was valued at $925,000. The receiver-manager was previously appointed by court order on the application of the second mortgagee. Although the first mortgagee had supported an earlier application for appointment of a receiver, it did not participate when the receiver-manager in question was appointed. The receiver-manager applied to be added as a defendant and claimed priority over the plaintiff for its fees, disbursements and any operating deficit.

Held:

Extension of redemption period granted; receiver-manager added as defendant but not entitled to priority over plaintiff for its fees.

As between the mortgagees, the equities in favour of the second mortgagee prevailed and a six-month extension was granted. The receiver-manager was granted an order adding it as a party defendant but was denied priority over the plaintiff as the plaintiff was not present or represented at the time of the appointment. The receiver-manager failed to discharge the onus upon it to prove acquiescence, consent or approval by the plaintiff to its appointment or subsequent actions.

Table of Authorities

Cases considered:

Bank of Montreal v. Yukon Drafting Services Ltd. (1983), 46 B.C.L.R. 286 (Y.T.C.A.) — *referred to*

Br. Power Traction & Lighting Co., Re, [1906] 1 Ch. 497 — *considered*

Can. Permanent Mtge. Corp. v. Dan-ail Const. Co., B.C.C.A., Vancouver No. CA820313, 17th June 1982 (not yet reported) — *referred to*

Fed. Bus. Dev. Bank v. Persic (1981), 32 B.C.L.R. 75 (C.A.) — *referred to*

Kowal (Robert F.) Invt. Ltd. v. Deeder Elec. Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.) — *referred to*

Lochson Hldg. Ltd. v. Eaton Mech. Inc.; Fed. Bus. Dev. Bank v. Lochson Hldg. Ltd.; Fed. Bus. Dev. Bank v. Marrick Dev. Corp. (1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.) — *considered*

Man. Securities Comm. v. C.I.B.C., 30 C.B.R. (N.S.) 80, [1979] 2 W.W.R. 526, (sub nom. *Re Showcase Realty Ltd.*) 96 D.L.R. (3d) 58, varied [1979] 6 W.W.R. 464, 106 D.L.R. (3d) 679 (Man. C.A.) — *considered*

Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd., 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487, 4 Man. R. (2d) 312 (Q.B.) — *considered*

Woburn Hldg. Ltd. v. Union S.S. Ltd., B.C.S.C., Darling L.J.S.C., Vancouver, 25th February 1975 (unreported) — *considered*

Application by second mortgagee for extension of redemption period in foreclosure action by plaintiff first mortgagee; application by receiver-manager appointed by second mortgagee to be added as party defendant and claiming priority over plaintiff for fees.

***Robinson L.J.S.C.*:**

1 The plaintiff bank seeks a final order of foreclosure. It holds the first mortgage. The second mortgagee, Willowdale Holdings Ltd., whose mortgage arises from its status as unpaid vendor, seeks an extension of the redemption period. Finally, the receiver-manager, appointed by court order, seeks to be added as a defendant in the action and claims priority over the plaintiff bank, with respect to fees, disbursements and any deficit from operations from the property under foreclosure. The amount for which priority is claimed appears to me to be $23,513.

2 The appointment of the receiver-manager took place on 22nd March 1983 as a result of an order of McEachern C.J.S.C. The order is unexceptional in form, or substance, except that it has no provision for responsibility as to payment for its fees and disbursements or, for that matter, any deficit arising from operations carried on by the receiver-manager,

on or about the lands and premises under foreclosure. At the time of making the order appointing the receiver-manager, the first mortgagee bank was not present or represented. The issue as to the timing and extent of the knowledge of the Bank of Montreal as to the appointment of the receiver-manager is canvassed in two of the affidavits. One is by the account manager of the Bank of Montreal and the relevant paragraphs read as follows:

> 11. THAT I am advised by my solicitor, John Edward Broadway, that he did not receive any notice of the application either, and that the first time he became aware of the application was in a telephone conversation with Robert J. Sewell, solicitor for Willowdale on March 25th, 1983, at which he as [sic] advised that the Receiver had been appointed and that the appointment was granted during a Pre-Trial Conference which was being held in the Willowdale action.
>
> 12. THAT the first contact which I have had with the Receiver was on July 8th, 1983 during a telephone conversation with Norman Kennedy of Deloitte, Haskins & Sells.
>
> 13. THAT I have spoken with Norman Kennedy on other occassions [sic] during which time we have generally discussed the operation of the ranch. At no time has he requested that I provide formal Bank of Montreal approval for decisions made by the Receiver. Both he and I had discussed the fact that the Bank of Montreal could not provide such approval, as the Bank of Montreal was not a party to the Court Order providing for the Appointment of the Receiver.
>
> 14. THAT the first written correspondence which I received from the Receiver is the correspondence dated October 3rd, 1983, which is attached as Exhibit "B" to my Affidavit sworn December 16th, 1983.
>
> 15. THAT subsequent to receiving the letter as aforesaid, I advised the Receiver that as he was appointed in the action commenced by Willowdale, the Bank would not accept any responsibility for his fees and disbursements.

3 The affidavit filed on behalf of the receiver-manager recites the following:

> 11. I am advised by my solicitor, Mr. Eric. G. Chamberlist of the firm of Hope, Heinrich & Hansen, that he has been advised by the solicitor for Willowdale Holdings Ltd., Mr. Robert J. Sewell of the firm of Shrum, Little & Hebenton, that the Bank of Montreal was aware of the appointment of Deloitte Haskins & Sells Limited as Receiver-Manager pursuant to the Order described in paragraph 7 above ...
>
> 21. Mr. Ron Howse of the Bank of Montreal in Kamloops was apprised of all developments and decisions on a current basis and has concurred with all steps taken by Deloitte Haskins & Sells Limited in its stewardship of the Subject Properties.

4 During the hearing before me, I was advised by counsel for the second mortgagee, Willowdale, that an earlier application had been made by it in June 1982, for the appointment of a receiver, and that the application was supported by the first mortgagee bank, but that the application was denied.

5 The authorities presented to me emanating from Manitoba and Ontario are somewhat difficult to reconcile. The receiver-manager relies on *Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd.*, 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487, 4 Man. R. (2d) 312 (Q.B.), where Wilson J. of the Manitoba Queen's Bench held, in the words of the headnote that:

> A receiver appointed by the court is not entitled to look to the party at whose instance he was appointed for payment of his fees and disbursements. However, the court will permit a receiver to recover his fees and disbursements out of the property under his administration. Such a right of indemnity is not limited to the equity of the debtor in the property after satisfaction of the claims of secured creditors.

The basis of his reasoning which invites much sympathy is found in the following words extracted from *Man. Securities Comm. v. C.I.B.C.*, 30 C.B.R. (N.S.) 80 at 87-88, [1979] 2 W.W.R. 526, (sub nom. *Re Showcase Realty Ltd.*) 96 D.L.R.

(3d) 58, varied [1979] 6 W.W.R. 464, (sub nom. *Man. Securities Comm. v. Showcase Realty Ltd.*) 106 D.L.R. (3d) 679 (Man. C.A.):

> A court-appointed receiver and manager is entitled to his fees and disbursements to be taxed by the court. He must rank behind the various trust funds, but ahead of the bank ...
>
> The receiver-manager is entitled to his taxed costs and disbursements in this case in priority of the bank's right of set-off as it would be grossly unfair to have him perform the work without remuneration.

6 And at p. 189 from *Re Br. Power Traction & Lighting Co.*, [1906] 1 Ch. 497 at 505:

> The law as to the position of a manager appointed by the Court, where no special provision is made for meeting expenses and liabilities incurred by him, is not disputed, and is, indeed, beyond dispute. It is, on the one hand, his duty to carry on the business, and for that purpose to enter into proper contracts on his own responsibility, and it is, on the other hand, his right to be indemnified out of the assets against expenses and liabilities properly incurred in the execution of his duty.

And at p. 190:

> Prima facie, then, the receiver is entitled to enter upon the discharge of his responsibilities secure in the knowledge that his costs and disbursements, including fees paid to solicitors necessarily engaged by the receiver (*Re Sil-Van Consol. Mining etc. Co.; Can. Trust Co. v. Sil-Van Consol. Mining etc. Co.* (1957), 23 W.W.R. 42 (B.C.)) will rank above all claims except those set apart by the order appointing him or otherwise entitled to rank ahead of the receiver himself.

7 Because of the reliance placed on the *Oberman* decision by counsel for the receiver-manager, there must be recited two further extracts (at p. 185):

> I should add that all parties to the receivership proceedings (if I may so refer to the action instituted by the credit union) consented to that order, as did counsel for the respective creditors here represented.

And at p. 191:

> It is likewise as to the several orders to approve the receiver's borrowings, all of these pronounced with the consent of the bank, and all of them reserving the question of the priority of the charge upon the estate in support of the debt so created "for the determination and order of this court".

8 Although, then, the first mortgagee bank in the *Oberman* decision reserved its right to argue priorities in due course, it was at all times aware of the appointment and as I read these extracts, consented to the appointment and consented to subsequent orders approving borrowings by the receiver.

9 *Lochson Hldg. Ltd. v. Eaton Mech. Inc.; Fed. Bus. Dev. Bank v. Lochson Hldg. Ltd.; Fed. Bus. Dev. Bank v. Marrick Dev. Corp.* (1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.), a decision of Tyrwhitt-Drake L.J.S.C. approves generally the principle of the *Oberman* decision, but because Tyrwhitt-Drake L.J.S.C. was faced with an order which specifically spelled out priorities, did not dwell in detail upon the *Oberman* decision.

10 At the appellate level in British Columbia, in *Fed. Bus. Dev. Bank v. Persic* (1981), 32 B.C.L.R. 75, the rather differing views of Manitoba and Ontario are considered by Anderson J.A. in quoting extensively from the *Oberman* case and then from *Robert F. Kowal Invt. Ltd. v. Deeder Elec. Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.). He quotes from the main thrust of that decision as follows [p. 81]:

> If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order

> permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of, his appointment, the receiver will have priority for charges and expenses properly incurred by him.

11 Anderson J.A. then finds for priority for the receiver-manager, for the following reasons, at p. 81:

> In the case on appeal, while the respondent did not consent to the appointment of the receiver at the outset, it not only acquiesced in his dealing with all of the assets after 21st May 1978 but actively encouraged the receiver-manager to continue his efforts which ultimately resulted in the sale of the hotel to Red Lion Management. In such circumstances, it cannot be doubted that the receiver-manager was entitled to a first charge over all the assets. This was one of the exceptions envisaged by Houlden J.A. in the *Kowal Invts.* case.

12 In this case, I then hold with reluctance against the receiver-manager. I do not consider the fact that the mortgagee bank supported an earlier application for appointment of a receiver by the second mortgagee can be taken to be proof of subsequent acquiesence or consent. There was no participation whatsoever by the bank at the hearing before the chief justice when the appointment of the receiver-manager was made (as appears to have been the situation in *Oberman*). In the end result I am faced with somewhat conflicting affidavits as to the alleged acquiesence or participation by the bank in the subsequent actions by the receiver-manager. Weighing them as best I can, and placing an onus of proof on the receiver-manager, I am not satisfied that such onus has been discharged, so as to prove acquiesence, consent or approval, as was the case in *Fed. Bus. Dev. Bank v. Persic*, supra.

13 I grant the order adding the receiver-manager as a party defendant.

14 There remains then, for decision, the application by the defendant Willowdale Holdings Ltd. for an extension of time of the redemption period which presently has an expiry date of 14th December 1983. As of that date there is owing to the petitioner, Bank of Montreal, the sum of approximately $470,000. The defendant Willowdale Holdings Ltd. holds a second mortgage in the amount of $375,000 with interest at 10 per cent per annum from 15th October 1980. The Bank of Montreal holds a judgment in the total amount of $827,306.49, of which the mentioned first mortgage amount of approximately $470,000 forms a part. The judgment is registered against the lands and premises which are the subject of the foreclosure. An appraisal of the property as of 8th August 1983 indicates the total value to be $925,000.

15 In considering the equities arising from a situation such as this, counsel for the foreclosing bank relies upon the very careful judgment in *Woburn Hldg. Ltd. v. Union S.S. Ltd.*, B.C.S.C., Vancouver, 25th February 1975 (unreported), a decision of Darling L.J.S.C. The essence of his reasoning is found in the following extracts:

> In addition to the *Nanny v. Edwards* (1827), 4 Russ. 124, 38 E.R. 752, and *Campbell v. Holyland* (1877), 7 Ch. D. 166, cases, Mr. Kershaw cited the unreported decision of McTaggart L.J.S.C. in *Ambassador Dev. Corp. of Can. Ltd. v. Frisan Ent. Ltd.*, B.C.S.C., No. 1911-73, 6th May 1974 (unreported). The learned judge there held on the facts that the defendant had not shown that there was a reasonable prospect of payment within the extended period being sought and that any probability of payment was more speculative than real. In dismissing the motion, his judgment concludes with these words: "At best, the equities are equal and if so the law prevails."
>
> Mr. Kewshaw [sic] cited an additional case, *Everson v. Hodgson*, 14 Sask. L.R. 158, [1921] 1 W.W.R. 825, 60 D.L.R. 594 (K.B.), referred to by McTaggart L.J.S.C. in the *Ambassador* case. There, Embury J. held that the principles by which a court is guided in extending the time would appear to be: (1) that there must be ample security; and (2) that the mortgagor has a reasonable probability of obtaining the moneys wherewith to pay the mortgage debt. At p. 827, the learned judge had this to say: "The Court leans towards indulgence where it can be granted to one without injury to the other." With respect, I suggest this is another way of saying that the court's discretion will be exercised one way or the other dependent upon where the equities on balance lie between the parties.

16 To similar effect, is *Can. Permanent Mtge. Corp. v. Dan-ail Const. Co.*, B.C.C.A., Vancouver No. CA820313, 17th June 1982 (not yet reported).

17 There can be little question but that there is, on the basis of the appraisal before me, sufficient value by way of security for the amount outstanding and payable to the first mortgagee. The matter is undoubtedly complicated by the existence of the judgment sitting behind the second mortgagee (the unpaid vendor) which judgment is in favour of the bank, but, on balance between the equities of the first and second mortgagee, I consider that the equities in favour of the second mortgagee should prevail.

18 The affidavit material in support of the application for extension of time, filed on behalf of the respondent Willowdale refers to a probable increase in beef prices in 1984 and further refers to reduced interest rates; although these are somewhat speculative probabilities, they should be taken into account, as well as the obvious difficulties in marketing ranch property during the winter months. Under all the circumstances and taking into account the position of both the first and second mortgagees, and applying principles as typified by *Bank of Montreal v. Yukon Drafting Services Ltd.* (1983), 46 B.C.L.R. 286 (Y.T.C.A.), and in particular, the substantial excess of the appraised value over the first mortgagee's claim in its capacity as first mortgagee, I conclude that the redemption period, under these circumstances, should be extended to 14th June 1984, upon condition that the second mortgagee (the applicant for extension herein) pay the sum of $8,000 to be applied on arrears and delinquencies of property taxes assessed and owing against the lands and premises under foreclosure. In the event that such delinquencies and/or arrears have been paid by the first mortgagee bank, the said sum of $8,000 shall be paid to the bank. If the payment is not made within 30 days from the date of these reasons, the order absolute of foreclosure shall be granted to the first mortgagee bank, without further application, but subject to the filing of affidavit material proving the failure or neglect of payment of the said sum.

19 Costs of these applications to the first mortgagee bank.

Order accordingly.

End of Document

TAB 3

2003 CarswellOnt 4537
Ont. S.C.J. [Commercial List]

Bell Canada International Inc., Re

2003 CarswellOnt 4537, [2003] O.J. No. 4738, 126 A.C.W.S. (3d) 790

IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THECANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, as amended (the "CBCA")

Farley J.

Heard: October 29, 2003
Judgment: October 30, 2003
Docket: 02-CL-4553

Counsel: John T. Porter, Derrick C. Tay, Alan B. Merskey for BCI
Christine Snow for Directors of BCI
James H. Grout for Monitor
W. Grant Worden for BCE
J.L. McDougall, Q.C., Michael D. Schafler for Peter Legault
Frederick L. Myers for Horizon
Robert Staley for Hicks, Muse, Tate & Furst Inc., Davivo International Ltd.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Business associations

VI Changes to corporate status
VI.1 Amalgamations and takeovers
VI.1.b Takeovers
VI.1.b.iii Miscellaneous

Headnote

Business associations --- Changes to corporate status — Amalgamations and takeovers — Takeovers — Miscellaneous issues

C Ltd. considered two bids for its shares — C Ltd. elected to accept bid by corporation H — Monitor scrutinizing bid process wrote report stating sale process conducted fairly and openly — Minority shareholder told monitor he had party interested in submitted higher bid, but no offer was received — BCI Inc. brought motion for order authorizing BCI Inc. to enter into voting agreement with H to vote its 75.6 per cent interest in common shares of C Ltd. in favour of sale agreement between C Ltd. and H — Order issued that BCI Inc., if authorized by its board, could enter into voting agreement with H, which obligated it to vote in favour of sale agreement — Report of monitor in proceedings of this nature is evidence — Monitor, as officer of court, not necessarily barred from being cross-examined — Court officers may be examined or cross-examined in unusual circumstances — Motion would have been better supported by affidavit, but given limited nature of relief sought, it was not fatal that only monitor's report provided — Motion granted subject to determination by board and management of whether it was in best interests of BCI Inc. to vote in favour of sale agreement.

Table of Authorities

Cases considered by *Farley J.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) — considered

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — referred to

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — considered

s. 189 — referred to

s. 189(3) — referred to

s. 190 — referred to

s. 192(1) "arrangement" — referred to

s. 192(3) — referred to

MOTION by corporation for order authorizing it to enter into voting agreement with another corporation to vote its interest in common shares in third corporation in favour of sale agreement.

***Farley J.*:**

1 [1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

(b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the "Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

2 [2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early June

2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

3 [3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

4 [4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process - which it appears it was not - and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

5 [5] At paragraph 28 of its report, the Monitor stated:

> 28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

6 [6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
>
> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

7 [7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 [8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) at para. 5; *Anvil Range Mining Corp., Re*, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil Range Mining Corp.* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:
>
>> As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs
>>
>> of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.
>
> The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper "*Canadian Airlines - The Last Tango in Calgary*"by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

9 As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 [9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing

with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

11 [10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion - and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

12 [11] At para. 30 of its report, the Monitor has advised the Court and the parties:

> 30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution to the BCI Stakeholders. (emphasis added)

13 As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

14 [12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

15 [13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

16 [14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

Order accordingly.

End of Document

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hallstone Products Ltd. v. Canada (Customs & Revenue Agency) | 2005 CarswellOnt 7227, [2005] O.T.C. 1050, 140 C.R.R. (2d) 233, 20 C.P.C. (6th) 51, [2005] O.J. No. 5296, 144 A.C.W.S. (3d) 647 | (Ont. S.C.J., Dec 12, 2005)

2005 CarswellOnt 2193
Ontario Superior Court of Justice

Catalyst Fund General Partner I Inc. v. Hollinger Inc.

2005 CarswellOnt 2193, [2005] O.J. No. 2191, 133 C.R.R. (2d) 1, 139 A.C.W.S. (3d) 861, 255 D.L.R. (4th) 233, 8 B.L.R. (4th) 95

Catalyst Fund General Partner I Inc. (Applicant) and Hollinger Inc. (Respondent)

Application under s. 229 of the Canada Business Corporation Act R.S.C. 1985 c.C-44, as amended.

C. Campbell J.

Heard: April 25-26, 2005
Judgment: May 31, 2005
Docket: 04-CL-5441

Counsel: Peter Griffin, Monique Jilesen for Inspector
Ken Jones for Catalyst
W.A. Kelly, Q.C., Arthur Jacques for Hollinger Inc.
Edward L. Greenspan, Q.C., Vanessa Christie for Lord Black
Michael Code for David Radler
David Wingfield for Peter White
Harry Burkman for Arbus
Markus Koehnen for Receiver for Ravelston

Subject: Corporate and Commercial; Constitutional; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Business associations

III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.iii Investigation orders
III.3.e.iii.B Powers of inspector

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.f Life, liberty and security
XI.3.f.i General principles

Headnote

Business associations — Specific corporate organization matters — Shareholders — Shareholders' remedies — Investigation orders — Powers of inspector

Audit committee of corporation requested that board of directors of corporation launch investigation into payments by officers to companies controlled by officers — Board of directors, including officers, refused to launch investigation — Court appointed inspector to investigate alleged wrongdoing by officers — Officers were facing regulatory investigation by securities commission and potential criminal investigation in United States and maintained that testimony under oath in Canada would inevitably result in inability to rely on protection against self-incrimination contained under American constitution — Inspector brought motion for order to examine officers under oath — Motion granted — Officers did not discharge burden of establishing constitutional exemption to providing response to inspector's inquiry — Officers were obligated to answer questions — Officers were in charge of corporation and other related companies during period of time for which they were mandated in law and morality to account to public shareholders for activities — Protection authorized by statute under which inspector was appointed together with discretion court could offer by way of assistance meant that adequate safeguards against self-incrimination of officers were in place — Any objection to answering specific questions of inspector on basis of potential for self-incrimination would be subject to review by court before answer was required — Any questioning by inspector could be afforded in camera privilege if requested — No Canadian court had yet quashed subpoena or excused witness from compelled testimony for reason that predominant purpose of inquiry was to incriminate witness.

Constitutional law — Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — General principles

Audit committee of corporation requested that board of directors of corporation launch investigation into payments by officers to companies controlled by officers — Board of directors, including officers, refused to launch investigation — Court appointed inspector to investigate alleged wrongdoing by officers — Officers were facing regulatory investigation by securities commission and potential criminal investigation in United States and maintained that testimony under oath in Canada would inevitably result in inability to rely on protection against self-incrimination contained under American constitution — Inspector brought motion for order to examine officers under oath — Motion granted — Officers did not discharge burden of establishing constitutional exemption to providing response to inspector's inquiry — Officers were obligated to answer questions — Officers were in charge of corporation and other related companies during period of time for which they were mandated in law and morality to account to public shareholders for activities — Protection authorized by statute under which inspector was appointed together with discretion court could offer by way of assistance meant that adequate safeguards against self-incrimination of officers were in place — Any objection to answering specific questions of inspector on basis of potential for self-incrimination would be subject to review by court before answer was required — Any questioning by inspector could be afforded in camera privilege if requested — No Canadian court had yet quashed subpoena or excused witness from compelled testimony for reason that predominant purpose of inquiry was to incriminate witness.

Table of Authorities

Cases considered by *C. Campbell J.*:

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, 121 C.R.R. (2d) 1, [2005] 2 W.W.R. 605, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — considered

British Columbia (Securities Commission) v. Branch (1995), [1995] 5 W.W.R. 129, 4 B.C.L.R. (3d) 1, 7 C.C.L.S. 1, 38 C.R. (4th) 133, 123 D.L.R. (4th) 462, 97 C.C.C. (3d) 505, 180 N.R. 241, 27 C.R.R. (2d) 189, [1995] 2 S.C.R. 3, 60 B.C.A.C. 1, 99 W.A.C. 1, 1995 CarswellBC 171, 1995 CarswellBC 638 (S.C.C.) — followed

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2000), 2000 CarswellOnt 1947, (sub nom. *Royal Trust Corp. of Canada v. Fisherman)* 49 O.R. (3d) 187, 46 C.P.C. (4th) 388, 76 C.R.R. (2d) 153 (Ont. S.C.J.) — considered

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2000), 2000 CarswellOnt 4072 (Ont. S.C.J.) — referred to

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), 2001 CarswellOnt 2139, 2001 CarswellOnt 2140, 274 N.R. 195 (note), (sub nom. *Royal Trust Corp. of Canada v. Bogatin)* 153 O.A.C. 196 (note) (S.C.C.) — referred to

Consolidated Enfield Corp. v. Blair (1995), 87 O.A.C. 265, 1995 CarswellOnt 1067 (Ont. Div. Ct.) — considered

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2005), 2005 BCSC 400, 2005 CarswellBC 621 (B.C. S.C.) — considered

États-Unis c. Ross (1995), 41 C.R. (4th) 358, (sub nom. *United States c. Cuenca)* [1995] R.J.Q. 1680, (sub nom. *United States of America v. Ross)* 100 C.C.C. (3d) 320, 1995 CarswellQue 11 (Que. C.A.) — followed

Ferguson v. Imax Systems Corp. (1984), 44 C.P.C. 17, 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188, 1984 CarswellOnt 155 (Ont. Div. Ct.) — referred to

First Investors Corp., Re (1988), (sub nom. *Associated Investors of Can. Ltd., Re)* [1988] 5 W.W.R. 65, (sub nom. *First Investors Corp. & Associated Investors of Can. Ltd., Re)* 87 A.R. 273, (sub nom. *Associated Investors of Can. Ltd., Re)* 59 Alta. L.R. (2d) 334, (sub nom. *Associated Investors of Can. Ltd., Re)* 52 D.L.R. (4th) 168, 1988 CarswellAlta 87 (Alta. C.A.) — referred to

Johnson v. British Columbia (Securities Commission) (1999), 1999 CarswellBC 987, 67 B.C.L.R. (3d) 145, 64 C.R.R. (2d) 275 (B.C. S.C. [In Chambers]) — referred to

Johnson v. British Columbia (Securities Commission) (2001), 2001 BCCA 597, 2001 CarswellBC 2164, [2001] 10 W.W.R. 635, 94 B.C.L.R. (3d) 233, 206 D.L.R. (4th) 711, 158 B.C.A.C. 69, 258 W.A.C. 69 (B.C. C.A.) — referred to

Pergamon Press Ltd., Re (1970), [1970] 3 All E.R. 535, [1970] 3 W.L.R. 792, [1971] 1 Ch. 388 (Eng. C.A.) — referred to

Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co. (1994), 26 Alta. L.R. (3d) 180, 31 C.P.C. (3d) 229, 30 C.B.R. (3d) 14, [1996] 1 W.W.R. 727, (sub nom. *Robertson (B.I.) & Associates Ltd. v. Ernst & Young Inc.)* 165 A.R. 41, (sub nom. *Robertson (B.I.) & Associates Ltd. v. Ernst & Young Inc.)* 89 W.A.C. 41, 1994 CarswellAlta 357 (Alta. C.A.) — considered

Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co. (1995), 36 C.B.R. (3d) 107 (note), 40 C.P.C. (3d) 208 (note), 33 Alta. L.R. (3d) xli (note), [1996] 1 W.W.R. 727n, (sub nom. *Robertson (B.I.) & Associates*

Ltd. v. Ernst & Young Inc.) 198 N.R. 80 (note), (sub nom. *Robertson (B.I.) & Associates Ltd. v. Ernst & Young Inc.)* 122 W.A.C. 160 (note), (sub nom. *Robertson (B.I.) & Associates Ltd. v. Ernst & Young Inc.)* 184 A.R. 160 (note) (S.C.C.) — referred to

Purdy v. Canada (Attorney General) (2003), 106 C.R.R. (2d) 106, 2003 BCSC 725, 2003 CarswellBC 1114, 226 D.L.R. (4th) 761, 11 C.R. (6th) 171, 175 C.C.C. (3d) 306 (B.C. S.C.) — referred to

R. v. Anderson (2001), 2001 SKQB 334, 2001 CarswellSask 454, 209 Sask. R. 117, [2002] 3 C.T.C. 197, [2002] G.S.T.C. 43 (Sask. Q.B.) — referred to

R. v. Budd (2000), 2000 CarswellOnt 4670, 150 C.C.C. (3d) 108, 138 O.A.C. 116 (Ont. C.A.) — referred to

R. v. Budd (2001), 271 N.R. 395 (note), 149 O.A.C. 399 (note), 2001 CarswellOnt 5610, 2001 CarswellOnt 5611 (S.C.C.) — referred to

R. v. Cadagan (1998), 1998 CarswellOnt 3432, 165 D.L.R. (4th) 747, 55 C.R.R. (2d) 364 (Ont. Gen. Div.) — considered

R. v. Gordon (1998), 1998 CarswellOnt 3946, 56 C.R.R. (2d) 285, 130 C.C.C. (3d) 129 (Ont. Gen. Div.) — referred to

R. v. Ladouceur (2002), 2001 SKCA 73, 2002 CarswellSask 373, 2 C.R. (6th) 68, [2002] 9 W.W.R. 209, 165 C.C.C. (3d) 321, 25 M.V.R. (4th) 165, 94 C.R.R. (2d) 189, 223 Sask. R. 161, 277 W.A.C. 161 (Sask. C.A.) — referred to

R. v. S. (R.J.) (1995), 36 C.R. (4th) 1, 26 C.R.R. (2d) 1, 177 N.R. 81, 21 O.R. (3d) 797 (note), 96 C.C.C. (3d) 1, [1995] 1 S.C.R. 451, 78 O.A.C. 161, 121 D.L.R. (4th) 589, 1995 CarswellOnt 2, 1995 CarswellOnt 516 (S.C.C.) — distinguished

R. v. Terry (1996), 197 N.R. 105, 106 C.C.C. (3d) 508, 48 C.R. (4th) 137, 135 D.L.R. (4th) 214, 76 B.C.A.C. 25, 125 W.A.C. 25, 36 C.R.R. (2d) 21, [1996] 2 S.C.R. 207, 1996 CarswellBC 2299, 1996 CarswellBC 2300 (S.C.C.) — considered

Samson v. R. (1995), (sub nom. *Samson v. Canada)* [1995] 3 F.C. 306, (sub nom. *Samson v. Canada)* 189 N.R. 89, (sub nom. *Samson v. Canada)* 102 F.T.R. 239 (note), (sub nom. *Samson v. Canada)* 64 C.P.R. (3d) 417, (sub nom. *Samson v. Canada)* 131 D.L.R. (4th) 360, 1995 CarswellNat 971, 1995 CarswellNat 971F (Fed. C.A.) — referred to

Spagucci's Ltd. v. Alberta (Gaming & Liquor Commission) (1997), 1997 CarswellAlta 935, 55 Alta. L.R. (3d) 173, [1998] 4 W.W.R. 33, 210 A.R. 90, 51 C.R.R. (2d) 126, 19 C.P.C. (4th) 391, 5 Admin. L.R. (3d) 227 (Alta. Q.B.) — referred to

United Kingdom v. James & Boyden (1996), (sub nom. *United Kingdom v. Ramsden)* 108 C.C.C. (3d) 289, 41 C.B.R. (3d) 124, (sub nom. *United Kingdom v. Ramsden)* 92 O.A.C. 270, 1996 CarswellOnt 2940 (Ont. C.A.) — referred to

United States v. Burns (2001), 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 39 C.R. (5th) 205, [2001] 3 W.W.R. 193, 265 N.R. 212, 148 B.C.A.C. 1, 243 W.A.C. 1, 81 C.R.R. (2d) 1, [2001] 1 S.C.R. 283 (S.C.C.) — referred to

United States v. Dynar (1997), 1997 CarswellOnt 1981, 1997 CarswellOnt 1982, (sub nom. *United States of America v. Dynar*) 213 N.R. 321, (sub nom. *United States of America v. Dynar*) 115 C.C.C. (3d) 481, (sub nom. *United States of America v. Dynar*) 147 D.L.R. (4th) 399, (sub nom. *United States of America v. Dynar*) 101 O.A.C. 321, 8 C.R. (5th) 79, (sub nom. *United States of America v. Dynar*) 33 O.R. (3d) 478 (headnote only), (sub nom. *United States of America v. Dynar*) 44 C.R.R. (2d) 189, (sub nom. *United States of America v. Dynar*) [1997] 2 S.C.R. 462 (S.C.C.) — referred to

Statutes considered:

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

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — considered

s. 230 — referred to

s. 232 — considered

s. 232(1) — considered

s. 233 — considered

Canada Evidence Act, R.S.C. 1985, c. C-5
s. 5 — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — considered

s. 7 — considered

s. 11(c) — referred to

s. 13 — considered

s. 32 — considered

Criminal Code, R.S.C. 1985, c. C-46
s. 83.28 [en. 2001, c. 41, s. 4] — considered

Evidence Act, R.S.O. 1990, c. E.23
s. 9 — considered

Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.)
Generally — referred to

s. 11(1) — referred to

s. 11(2) — referred to

s. 12 — referred to

s. 12(4)(c) — considered

s. 15 — considered

s. 16 — considered

s. 17(1) — referred to

s. 17(2) — referred to

s. 18 — referred to

s. 18(5) — considered

s. 20 — referred to

s. 20(2) — considered

s. 21 — considered

Securities Act, S.B.C. 1985, c. 83
Generally — referred to

United States Constitution, Fifth Amendment
Generally — considered

Treaties considered:

Treaty Between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters, C.T.S. 1990/19
Generally — referred to

MOTION by inspector for order to examine officers of defendant corporation under oath.

C. Campbell J.:

1 On this motion the court-appointed Inspector of Hollinger Inc. ("Inc.") seeks an order to examine under oath Lord Black and Messrs. Radler and Boultbee, the principal officers and directors of Inc. and other related companies at the time of the events that are the subject of this Inspection.

2 The request to examine is resisted on the basis that each of the named respondents is facing regulatory investigation by the Securities & Exchange Commission in the United States and potentially criminal investigation before a grand jury in the state of Illinois, as well as regulatory investigation before the Ontario Securities Commission.

3 More particularly, the named respondents assert the testimony under oath in Canada would inevitably result in their inability to rely on the protection against self-incrimination contained in the Fifth Amendment to the Constitution of the United States.

4 The potential risk to the named respondents arises from the different approaches to the privilege against self-incrimination that operates under the laws of Canada and the United States. In Canada, in general terms, a witness claiming protection must respond to questions properly asked, but the answers given cannot be used in a subsequent civil or criminal proceeding.[1] [2]

5 In the United States, a witness may decline to answer a question properly put, on the basis that the answer if given, would tend to incriminate. There may be consequences from the invocation of the Fifth Amendment immunity, particularly in civil proceedings.

6 The position taken by each of the named respondents is somewhat different but may be summarized as follows:

1. On behalf of Lord Black, it is submitted that given the real and likely risk that the transcript from any response in Canada would find its way into proceedings in the United States, at the very least consideration of responses from him should be postponed until the Inspector has exhausted other sources of information to the questions raised.

2. On behalf of Mr. Boultbee, it is suggested that a form of dialogue be commenced, which would permit in due course (after other avenues are exhausted as above) a narrowing of areas of inquiry from him, which after consultation with lawyers in the United States, Mr. Boultbee could rely on as not affecting his Fifth Amendment rights.

3. On behalf of Mr. Radler, it is urged that the circumstances surrounding the risk to him of responding to questions gives him and his fellow officers and directors a constitutional exemption from testifying.

7 The background leading to the Inspector's request may be found in previous decisions on this matter, particularly the decision dated September 15, 2004, which appointed the Inspector.

8 The findings that resulted in the appointment of the Inspector (which was opposed by Inc. when Messrs. Black, Radler and Boultbee were its principal officers) was based on the recommendation of the Audit Committee of Inc., for an investigation of payments received by those individuals and companies they controlled from Inc. and International.

9 As the recommendations of the Audit Committee were refused by the majority of directors (including the above-named individuals), the Audit Committee resigned.

10 The promise of investigation and reporting to public shareholders contained in the Inc. Board resolution of November 23, 2003 was never formally undertaken by the then Inc. directors and reported to the Inc. public shareholders prior to the appointment of the Inspector.

11 Given all that has transpired since November of 2003, up to and including the appointment of the Inspector and its work to date, I am satisfied that there is relevant information that it is very likely that only Lord Black, David Radler or Jack Boultbee can give, which is part of their fiduciary duty to report to the public shareholders of Inc.

12 It was suggested in argument that given the risk to the Charter values of those opposing the giving of information under oath, that the Inspector satisfy the Court that all other avenues of obtaining relevant information have been first canvassed and reported on.

13 In my view, this is neither necessary nor appropriate. The Inspector is an officer of the Court for this purpose. The Inspector has satisfied me that the individuals sought to be examined have relevant information, necessary to the purposes of the Inspectorship, which only they are able to give.

14 Given the relevance, necessity and the proper purpose for the questioning, there is no further onus on the part of the Inspector, and any objection can be dealt with when the Inspector actually serves a notice of examination and if need be, on a question-by-question basis.

15 Since its Second Report to the Court on November 25, 2004, the Inspector recommended a combined approach to review of documents and interviews with relevant parties who have knowledge of the transactions that occurred during the period being investigated, but not limited to members of senior management.

16 By order dated December 2, 2004, this Court approved the work plan of the Inspector as set out in paragraphs 57-66 of the Second Report, except where it provided for interviews of senior management. This exception was provided for in order to allow the respondents to this motion to raise their constitutional issues.

17 The Inspection order does not require that the Inspector first review all of the documents, interview all of the other possible witnesses and then seek an examination of Lord Black or other members of senior management. The approach of the Inspector was to recommend contemporaneous review of documents and interviewing or examining witnesses concurrently.

18 A more detailed account of the activities of the Inspector is set out in Appendix A to the Consolidated Outline of Argument dated April 22, 2005. Particular difficulty has been encountered with respect to documentation that, to say the least, was not kept by Inc. in an organized way prior to the Inspector being appointed (see Inspector's Third Report.)

19 It is to be hoped that as a result of the Order of March 2, 2005, and the retention of experts, the electronic discovery process will move more quickly.

20 It would appear from the reports of the Inspector that interviews to date with former employees, former audit committee members and others still leave many questions that can only be answered by the respondents herein. The reason for this is that the respondents were the individuals directly involved in the transactions and there are no current employees who are knowledgeable concerning the transactions.

Role of the Inspector

21 In order to put the submissions of the respondents, particularly the legal authorities relied on, in context, it is useful to consider the role of the Inspector.

22 The Inspector is appointed pursuant to s. 230 of the *Canada Business Corporations Act* R.S. 1985, c. C-44 ("CBCA") with the powers and for the purposes as set out in the section, and for those purposes is a Court Officer.

23 There are a number of cases that elaborate on the nature and role of the investigation. The function of an inspector is inquisitional, not prosecutorial. (see *Pergamon Press Ltd.*, [1970] 3 All E.R. 535 (Eng. C.A.)

24 The Inspector is under a duty to act fairly and impartially and does *not* adjudicate or determine civil or criminal responsibility [see *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.) and *First Investors Corp., Re* (1988), 59 Alta. L.R. (2d) 334 (Alta. C.A.)].

25 Related provisions of the CBCA deal specifically with protection of those who are required to respond to the Inspector's investigation.

26 Section 232 provides as follows:

> **232.** (1) Any interested person may apply to the court for an order that a hearing conducted by an inspector under this Part be heard *in camera* and for directions on any matter arising in the investigation.
>
> (2) A person whose conduct is being investigated or who is being examined at a hearing conducted by an inspector under this Part has a right to be represented by counsel.

27 Section 233 reads:

> **233.** No person is excused from attending and giving evidence and producing documents and records to an inspector under this Part by reason only that the evidence tends to criminate that person or subject that person to any proceeding or penalty, but no such evidence shall be used or is receivable against that person in any proceeding thereafter instituted against that person under an Act of Parliament, other than a prosecution under section 132 of the *Criminal Code* for perjury in giving the evidence or a prosecution under section 136 of the *Criminal Code* in respect of the evidence.

28 Most importantly, to address the concerns of the respondents, the report of the Inspector, the working papers of the Inspector and officials of the Inspection are cloaked with a privilege subject to Court Order.

29 In *Consolidated Enfield Corp. v. Blair* (Ont. Div. Ct.), Mr. Justice White sitting as a single judge of the Divisional Court, dealt with a request by the defendant Blair to obtain excerpts from the documents collected by a Court-appointed Inspector, produce them for inspection and to have the Inspector submit to oral examination.

30 White J. concluded following review of the relevant sections of the OBCA (for practical purposes identical to those of the CBCA above) that the Inspector was not subject to cross-examination on his report and that in the circumstances was not compellable to produce the documentation demanded.

31 This conclusion makes good common sense. The Inspector has a delicate duty. While the conclusions must not deal with civil or criminal responsibility, nevertheless there may well be factual findings that subsequently lead to remedies that may be based on factual conclusions.

32 To the extent that an individual is examined under oath, that individual may apply for directions under s. 232(1) with respect to the use answers given may be put. Indeed, directions may be sought regarding the circumstances under which evidence under oath is taken and what protection may be sought or given with respect to transcripts. The transcripts of oral examination do not become part of the public record without specific Court order.

33 Unlike the ordinary civil or criminal proceeding, the role of the Inspector is to avoid findings of incriminating responsibility and the material gathered has a privilege attached. The circumstances of oral examination can be directed in ways to restrict access, both when answers are given and to the transcript of answers after they are given.

34 If this were not enough, case law provides protection to named individuals arising from an Inspector's report. In *Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co.* (1994), [1996] 1 W.W.R. 727 (Alta. C.A.) (leave to appeal to Supreme Court of Canada refused [(1995), 36 C.B.R. (3d) 107 (note) (S.C.C.)]), the Court of Appeal for Alberta held that the report of an inspector is not admissible in evidence in proceedings beyond the reach of the Act.

35 In short, the rationale for this conclusion is that if admissible, the report would be relying on facts found in another context in which the adversely affected party had not had an opportunity to challenge or cross-examine.

36 I am satisfied that given the protection authorized by the statute under which the Inspector is appointed, together with the discretion that the Court may offer by way of assistance that adequate safeguards against self-incrimination of the respondents can be made and dealt with if necessary on further motion to the Court.

The Mutual Legal Assistance in Criminal Matter Act [3]

37 The protections provided to individuals who are subject to an Inspectorship investigation are not confined to those under the CBCA when they may face civil or criminal proceedings outside of Canada. Should a United States authority seek information or evidence from a Canadian proceeding, that request is dealt with by the regime set up under the Mutual Legal Assistance Treaty ("MLAT") authorized by the statute. There is a treaty in force between Canada and the United States, and its provisions require the Minister of Justice in Canada to respond to a request and if approved, to request a judge of this Court to deal with the issue of whether or not an order should be made.

38 As the operation of the statute and treaty in this case is entirely prospective at this point, I do not propose to review it in detail.

39 The request and the minister's initial action: Under ss. 11(1) and (2), when the U.S. makes a request to have a search or seizure, and similarly, under s. 17(1) and (2), when the U.S. makes a request of Canada to obtain evidence (by examination or production), once the Minister approves the request, the Minister charges a "competent authority" with the responsibility of applying to a court in the province where the evidence is located for a warrant or an evidence-gathering order, as the case may be.

40 The warrant for search and seizure, and the evidence-gathering order: Section 12 governs the issuance of warrants under the Act, and s.12(4)(c) states that "every person from whom a record or thing is seized in execution of the warrant and any person who claims to have an interest in a record or thing so seized has the right to make representations at the hearing before any order is made concerning the record or thing."Similarly, s.18 governs the issuance of evidence-gathering orders, and s. 18(5) states that an order "may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of the person named therein and of third parties."

41 The sending-abroad order: Section 15 describes the process for sending abroad seized material, and allows representations by "the person from whom a record or thing was seized in execution of the warrant and any person who claims to have an interest in the record or thing so seized." Moreover, the judge may include in the sending order any terms and conditions he or she deems desirable, including conditions "with respect to the protection of the interests of third parties." Section 20 is the mirror provision for the sending abroad of material collected under an evidence-gathering order. Subsection 20(2) allows representations from "the person who produced any record or thing" and "any person who claims to have an interest in any record or thing so produced", and states that the judge may make any terms and conditions considered desirable, including those relating "to the protection of the interests of third parties."

42 Professor Robert Currie notes that the judge has a fairly wide discretion as to whether or not the evidence should be sent. He or she is called upon to assess whether the warrant was executed according to its terms and conditions, and whether there are any other reasons that the evidence should not be sent. The judge should consider all the circumstances around the warrant's execution, and in addition, he or she must consider allegations of *Charter* violations by Canadian authorities[4] as well as "the need to ensure that Canada's international obligations are honoured and to foster co-operation between investigate [sic] authorities in different jurisdictions."[5]

43 The minister must seek and receive assurances that the sending order's terms and conditions will be complied with by the requesting state: Sections 16 and 21 are identical, stating that nothing ordered to be sent under sections 15 or 20 "shall be so sent until the Minister is satisfied that the state or entity has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing."

44 I am prepared to accept for the purpose of disposing of these motions at this time, the submissions on behalf of the respondents, that the MLAT process will not automatically ensure that the Fifth Amendment Rights of the respondents under the United States Constitution will be upheld.

45 In the first place, the respondents may well not be considered "interested" persons to be involved in the sending proceedings or to request access to the materials. (See *United Kingdom v. James & Boyden*, [1996] O.J. No. 2716 (Ont. C.A.))

46 *R. v. Terry*, [1996] 2 S.C.R. 207 (S.C.C.) was a decision of the Supreme Court of Canada in which McLachlin J., as she then was, recognized that foreign authorities acting under a treaty negotiated under the MLAT, are not governed by Canadian Charter values. As recognized in *R. v. Terry*, the practice of cooperation among states, particularly Canada and the United States, in law enforcement matters, does not make laws of one country applicable in another.

47 The point in mentioning the limitation on protection of Canadian Charter values when a request is made under the MLAT is to emphasize the distinct role that in this case would be played by the Inspector as an officer of this Court.

48 The information and material gathered by the Inspector are subject to the order of this Court, and have a privilege against disclosure associated therewith. This fact would undoubtedly be a significant issue to be taken into consideration on any application under the MLAT. These circumstances are to be distinguished from any of the decided cases in many of which the testimony has been given in open Court in Canada.

The *Charter* Argument

49 There are two *Charter* sections that are invoked by the respondents. Section 13 of the *Charter* provides "use immunity" for compelled testimony:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Section 7 of the *Charter* provides that:

> [E]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, affords further protection against derivative use in subsequent proceedings of evidence obtained from compelled testimony ("derivative use immunity.")

50 I accept for the purpose of analysis and to deal with the motion of the Inspector, that the impact of the *Charter* has added importance to the protection to be given to compelled testimony that has the potential to be used to incriminate.

51 Most of the decided cases arise in the context of testimony in criminal proceedings, civil actions or public inquiries where the testimony is compelled and heard in public.

52 For the purpose of disposition of this motion, it is not necessary to make a detailed analysis of the extent to which an inspector under the CBCA may be considered a "government authority" for the purposes of s. 32 of the *Charter*. [6]

53 I am prepared to assume that *Charter* values should be considered in the context of an investigation undertaken by an Inspector. The investigation, unlike a civil or criminal trial or a public inquiry, does not take place in public. The transcripts of interviews are not public documents and do not become such without specific Court order. This is consistent with both the provisions of the CBCA and of *Charter* values.

54 Counsel for the respondents urge the importance of reconciling compelled testimony in a statute-authorized process with the principle of self-incrimination.

55 Mr. Code on behalf of Mr. Radler submits that the Supreme Court of Canada's judgments establish three key governing propositions in reconciling the above principles:

> (i) The principle against self-incrimination is one of the principles of fundamental justice found in s. 7 of the *Charter*, providing residual protection beyond the specific protections found in ss. 11(c) and 13;
>
> (ii) Testimonial compulsion will ordinarily not offend the principle against self-incrimination, as long as the compelled witnesses receive both "use immunity" and "derivative use immunity", thereby preventing their compelled evidence from subsequently being used to incriminate them, either directly or indirectly;
>
> (iii) In addition to these evidentiary protections, s. 7 provides a further prophylactic protection against self-incrimination by preventing testimonial compulsion altogether, when the predominant purpose is to compel a witness to incriminate himself or herself.

56 The decision of *Application Under s. 83.28 of the Criminal Code, Re* (2004), 184 C.C.C. (3d) 449 (S.C.C.), at 477-8 [hereinafter *Bagri*] is relied on for the proposition that in an investigation conducted under s. 83.28 of the Criminal Code (which provides for investigative pre-charge compulsion in relation to terrorism offences), the Court must be concerned with "use immunity" (already provided for in s. 232 of the CBA) and also with "derivative use immunity" in other types of proceedings.

57 I accept that the directions that may be given to an Inspector at the request of the respondents can "provide that terms and conditions may be set for the protection of the named person's interests, the interests of third parties, and the interests of the investigation ... and ensure that constitutional and common law rights and values are respected." (see *Bagri*, p. 471.)

58 Consistent with a process that is at all times subject to Court supervision, I would envisage that any objection made by the respondents to answering any specific question of the Inspector on the basis of its potential for self-incrimination would be subject to review by this Court before the answer was required.

59 Such process would in my view more than balance the competing principles of compulsion and disclosure in favour of the respondents with respect to both "use" and "derivative use immunity."

Constitutional Exemption

60 Counsel for at least Mr. Radler urges that the purpose of this investigation in its circumstances applied to his client allows a "constitutional exemption [to] provide a form of complete immunity from testifying where proceedings are undertaken or predominately used to obtain evidence for the prosecution of the witness." (*Bagri supra* p. 478.)

61 In three 1995 cases, the Supreme Court of Canada dealt extensively with the competing interests of compelled testimony and *Charter* values. *R. v. S. (R.J.)* (1995), 96 C.C.C. (3d) 1 (S.C.C.) dealt with a subpoena issued to an accused young offender for testimony at the separate trial of his co-accused.

62 In the result, the Court dismissed the appeal from the Court of Appeal for Ontario, which ordered a new trial as a result of their finding that the trial judge had erred in quashing the subpoena to the co-accused based on the risk of his testimony being used against him in his own trial.

63 The Court was unanimous in the result but delivered three concurring judgments. In their judgment, Sopinka J and McLachlin J. (as she then was) concurring, started with the distinction between the common law protection of a witness in the stand under s. 5 of the *Canada Evidence Act* from the issue of compellability, which may arise under the *Charter*.

64 In his judgment, Sopinka J. dealt with the difficult issue of derivative use immunity by emphasizing the need to deal with compulsion of testimony at the outset before it is taken. At paragraph 316, he said:

> [316] In my opinion it would be consistent with the development of the common law and the principles of fundamental justice to allow the court to make an exception to the general right of the state to every person's

> evidence when the right of the accused to remain silent is seen to outweigh the necessity of having that evidence. This exception would recognize the anomaly of the systematic compulsion of persons accused of a crime to testify in other proceedings while, at the same time, they are entitled to remain silent if interrogated by the police before their trial and are granted absolute immunity from testifying during their trial. The absence of such an exception would undermine these rights if not render them illusory.

At paragraph 326 he concluded:

> [326] I conclude that a person charged may be entitled to an exception from the principle that the state is entitled to every person's evidence as a principle of fundamental justice under s. 7. The person claiming the exception should, as a general rule, assert the right before his or her testimony is taken and has the burden of satisfying the judge that in all the circumstances the prejudice to his or her interests overbears the necessity of obtaining the evidence. A person who is not actually charged may in some circumstances also claim the exception but since we are not called upon in this case to determine in precisely what circumstances this may be done, I prefer to leave this to another day. In balancing these interests, the following factors, which are not intended to be exhaustive, should be considered:
>
> 1. the relative importance of the evidence to the prosecution in respect of which the accused is compelled;
>
> 2. whether the evidence can be obtained in some other manner;
>
> 3. whether the trial or other disposition of the charge against the accused whose evidence is sought to be compelled could reasonably be held before he or she is called to testify;
>
> 4. the relationship between the proposed questions to the accused witness and the issues in his or her trial;
>
> 5. whether the evidence of the accused witness is likely to disclose defences or other matters which will assist the Crown notwithstanding the application of s. 5(2) of the *Canada Evidence Act*;
>
> 6. any other prejudice to the accused witness, including the effect of publication of his or her evidence.

65 The facts of *R. v. S. (R.J.)* are to be distinguished from the inquiry of the Inspector. In the first place, any questioning by the Inspector can be afforded "in camera" privilege if requested and ordered, the transcript kept from disclosure and potentially incriminating questions reviewed before answers are required.

66 These considerations in my view clearly distinguish the exemption in *R.S.J.* from the Inspector's inquiry.

67 *British Columbia (Securities Commission) v. Branch* (1995), 97 C.C.C. (3d) 505 (S.C.C.) dealt with compelled testimony under the *Securities Act* of British Columbia, which was alleged to violate s. 7 of the *Charter*. The Courts at all levels dismissed the application to quash the summons.

68 The following paragraphs of the judgment of Sopinka J. and Iacobucci.J. (for a unanimous court) focus the analysis on the purpose of the proposed compelled testimony:

> [7] In view of the conclusions reached in *S. (R.J.)*, any test to determine compellability must take into account that if the witness is compelled, he or she will be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection. The common feature of the respective compellability tests proposed in the reasons in *S. (R.J.)* is that the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. This test strikes the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other.
>
> [8] In applying this test, the Court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial

statute must be for the purpose of obtaining evidence in furtherance of that prosecution. In *S. (R.J.)*, Sopinka J. suggested some guidelines for determining whether this is the predominant purpose. In other proceedings, discerning the purpose is more complex. Where evidence is sought for the purpose of an inquiry, we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquiries under the statute may be for legitimate public purposes is not determinative. The terms of reference may reveal an inadmissible purpose notwithstanding that the statute did not so intend: see *Starr v. Houlden*, 1990 CanLII 112 (S.C.C.), [1990] 1 S.C.R. 1366. Indeed, even if the terms of reference authorize an inquiry for a legitimate purpose in some circumstances, the object of compelling a particular witness may still be for the purpose of obtaining incriminating evidence.

[9] It would be rare indeed that the evidence sought cannot be shown to have some relevance other than to incriminate the witness. In a prosecution, such evidence would simply be irrelevant. There may, however, be inquiries of this type and it would be difficult to justify compellability in such a case. In the vast majority of cases, including this case, the evidence has other relevance. In such cases, if it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use. Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable.

[10] We recognize that the purpose of calling a particular witness will not be readily apparent and that such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. If that relationship is reversed then no such inference may be drawn. As stated in *S. (R.J.)*, the issue of compellability may arise at the time when the witness is called to testify (the subpoena stage) and at a subsequent penal proceeding against the witness (the trial stage). By reason of the foregoing, the true purpose of the evidence will often not be apparent until the latter stage.

69 The above analysis from the decided cases was summarized by Fish J.A. in the Quebec Court of Appeal in *États-Unis c. Ross* (1995), 100 C.C.C. (3d) 320 (Que. C.A.) at pp 327-8, as follows:

[37] These cases deal with testimonial compulsion within and without the criminal justice system, both at trial and prior to trial. Read together, they establish that:

1. The right to silence has become constitutionally entrenched in Canada. This right, however, is not absolute.

2. The right to silence derives in large measure from the principle against self-incrimination, which is a principle of fundamental justice within the meaning of sec. 7 of the Charter.

3. Any statute that compels a person to testify diminishes that person's liberty and must therefore comply with the principles of fundamental justice.

4. The principles of fundamental justice are not hierarchical and none may be considered subordinate or impervious to the others.

5. The structure of the Charter reveals the intention of its framers to enact in constitutional form the same structural protection against self-incrimination for witnesses that existed historically.

6. This structure is founded upon the Crown's obligation to make a case, but it also assumes a general rule of compellability coupled with evidentiary immunity.

7. The principles of fundamental justice sometimes compete with one another. This is true of the privilege against self-incrimination and the principle that all relevant evidence should be accessible to triers of fact.

8. The principle against self-incrimination requires that persons compelled to testify be granted "derivative-use immunity" in addition to the "use immunity" guaranteed by sec. 13 of the Charter.

9. In addition, courts may exempt witnesses from testifying where they are satisfied that the predominant purpose for compelling those witnesses to testify is to obtain incriminating evidence against them rather than some legitimate public purpose.

10. To qualify as a valid public purpose, compelled testimony in a criminal or penal prosecution must be for the purpose of obtaining evidence in furtherance of that prosecution.

70 The so-called "constitutional exemption" has been considered in a number of cases; no court has yet quashed a subpoena or excused a witness from compelled testimony for the reason that the predominant purpose of an inquiry was to incriminate the witness. [7]

71 Applying the above factors to the context of the Inspector's investigation, I conclude that the respondents have not discharged the burden with establishing a constitutional exemption to providing a response to the Inspector's inquiry.

72 As noted above, the purpose of the investigation is to provide information to the public shareholders of Inc. concerning the discharge of fiduciary duty by those officers and directors responsible for the affairs of the company at the relevant time.

73 The investigation does not have a predominant purpose of the self-incrimination by the respondents. To the extent that there is a risk of self-incrimination, the process can ensure specific responses remain privileged if appropriate. It is the factual conclusions of what happened when, with what authorization and record keeping, which is the essence of the Inspector's report, a far different purpose than the above cases of compelled testimony in a prosecutorial setting.

74 It should be noted that none of the respondents has to date been charged with a criminal offence in Canada or the United States as opposed to investigation.

The In Terrorem Argument

75 Mr. Greenspan on behalf of Lord Black submits that this Court cannot in the context of compelled testimony provide the assurance that it will not fall into the hands of authorities of the United States who if they have it, will use it, thereby destroying the Fifth Amendment privilege in the United States.

76 It was suggested in argument that the decision of Cumming J. of this Court in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2000] O.J. No. 2077 (Ont. S.C.J.) (appeal to Court of Appeal dismissed [2000 CarswellOnt 4072 (Ont. S.C.J.)] - leave to appeal to Supreme Court of Canada denied (S.C.C.)) might be questioned in light of more recent cases.

77 In *Fisherman*, the applicant (a U.S. citizen and resident) sought to stay a civil action in Ontario on the grounds that the answers that he might be compelled to give could become admissible against him in U.S. criminal proceedings in which he would not be able to invoke his Fifth Amendment right against self-incrimination.

78 Cumming J. held that the constitutional principles at stake arose from American constitutional requirements and not Canadian ones. He went on to conclude that the Canadian charter does not apply extra-territorially and it cannot be given extra-territorial effect to govern how criminal proceedings in a foreign country are to be conducted.

79 In my view, there is no reason to doubt the correctness of the conclusion of Cumming J. None of the cases to which I was referred, including *United States v. Burns* (2001), 151 C.C.C. (3d) 97 (S.C.C.) and *Purdy v. Canada (Attorney General)* (2003), 175 C.C.C. (3d) 306 (B.C. S.C.) among others, deviates from his statement.

80 I accept the proposition that the issue of Canadian *Charter* protection, including derivative use immunity, is to be determined under Canadian law by Canadian Courts. A decision by a Canadian Court *may*, depending on the "derivative use immunity" under Canadian law, affect the immunity of an individual subject to civil or criminal proceedings in the United States or elsewhere.

81 The respondents urge that this Court is not in a position to offer the protection of "derivative use immunity" necessary to provide Fifth Amendment protection in the United States.

82 At one level, I agree, that level being that it is not the function of this Court to look beyond protection of Canadian *Charter* values for those subject to Canadian proceedings.

83 The respondents rely on two affidavits, one of Barray A. Bohrer, a senior practitioner in a New York law firm, to the effect that "it is highly unlikely that any protective order entered by this Court will suffice to protect the testimony or documents provided and ... the practical consequence of such compelled testimony will be that... privilege under the Fifth Amendment to the United States Constitution will be effectively eviscerated."

84 As noted by counsel for the Inspector in his factum, what Mr. Bohrer has not opined on, and is not qualified to provide an opinion on, is what a Canadian Court would do in response to a request by a U.S. official through the MLAT or otherwise, where this Court has imposed protections and limitations on the use of any evidence arising from the Inspector's examinations.

85 I do not think it is appropriate or helpful to obtain an opinion from a U.S. attorney to the effect that this Court cannot control its own process. I therefore place little weight on his conclusion.

86 This seemed to be the thrust of Mr. Greenspan's oral submissions and I do not accept it. What I do accept is that U.S. officials will attempt to use every legal means to gather evidence to aid their regulatory and investigatory processes.

87 I also accept that this Court must bear this aim in mind in considering an approach to determining the extent of the Inspector's investigation and the use that can be made of it.

88 The respondents also rely on the affidavit of Gregory B. Craig, a lawyer with a Washington law firm. The operative paragraphs of his affidavit read as follows:

> (3) On Monday, December 22, 2003, Conrad M. Black responded to a subpoena from the U.S. Securities and Exchange Commission by invoking the Fifth Amendment of the United States Constitution, and by respectfully declining to testify on the ground that "no person shall be compelled to be a witness against himself."
>
> (4) On Monday, November 17, 2004, the Securities and Exchange Commission filed a Complaint in Federal District Court in Chicago, Illinois alleging securities fraud. One of the named defendants in that case is Conrad M. Black.
>
> (5) The United States government informed me on November 22, 2004 that Conrad Black is the subject of a federal grand jury investigation in Chicago, Illinois.
>
> (6) In my experience, in the criminal justice system, the United States government will make use of all its resources to investigate and to gather information and will not be deterred by the existence of national boundaries. I expect that with respect to Canada, the United States government would invoke Canada's treaty obligations to assist in the gathering of such evidence and information. In addition, use of such information in American court proceedings will be governed by the American rules of evidence regardless of any Canadian rulings regarding the information.

89 I accept this affidavit at its face value. Assuming an application were to be made under the MLAT in the future, it would be subject to consideration by a judge of this Court, who would not only be cognizant of the applicable *Charter* values at the time of the application, but as well of the application at that time of those values on this application.

90 I cannot conclude this matter without a comment on the response of the respondents to date to the Inspector's request for information.

91 On February 25, 2005, counsel to the Inspector wrote to counsel for the Independent Directors and counsel to Inc., enclosing questions for Hollinger Inc. and copies of the letters of counsel for Lord Black, Mr. Boultbee and Mr. Radler. The questions posed to Hollinger Inc. included all of the questions asked of the three individual respondents.

92 It is to be noted that to date, there has been no response to the Inspector's questions by the respondents. In argument on behalf of Mr. Boultbee, it was urged that the lack of response was made on the basis of advice from U.S. counsel that to do so might impair the privilege against self-incrimination in the United States.

93 With respect to that submission, this is a Canadian Court obliged to uphold Canadian *Charter* values and capable of doing so.

94 From the list of questions in the filed materials posed by the Inspector, it is obvious that a number of them can have no conceivable connection with incrimination of the respondents and yet no answer from the respondents has been forthcoming.

95 Lord Black, David Radler and Jack Boultbee were in charge of Inc. and other related companies during a period of time for which they are obligated in law and morality to account to public shareholders and others for their activities, what money they received for what reason and with what authorization.

96 To suggest that they should not be asked, much less answer any questions regarding their stewardship of Inc. under the protection of s. 232 of the CBCA and of Canadian *Charter* values is an affront not only to the public shareholders they were bound to serve but also to this Court.

Conclusion

97 I conclude that the respondents have not discharged the burden of establishing that questions from the Inspector either in writing or under oath are for the predominant purpose of incriminating Lord Black, David Radler and Jack Boultbee.

98 The legitimate purpose of the Inspector's investigation will require at a time to be determined by the Inspector and with the concurrence of this Court that the said individuals respond to appropriate questions in aid of the investigation.

99 Once the Inspector serves a notice of examination or summons, Lord Black, David Radler and Jack Boultbee are at liberty to seek directions from this Court under s. 232(1) of the CBCA for the conduct of such examination.

100 Such direction may include consideration of "use" and "derivative use immunity" as may be appropriate to the circumstances.

101 The motion for constitutional exemption from providing any evidence at this stage is dismissed.

102 I conclude that the relevant sections of the CBCA and of the *Mutual Legal Assistance in Criminal Matters Act* (insofar as it is relevant at this stage of the proceeding) are constitutionally valid insofar as they compel a person to submit to an examination by an Inspector to give evidence in respect of a Court-ordered investigation.

103 If it is appropriate to deal with the issue of costs, I may be spoken to.

Motion granted.

Footnotes

1 Section 9 of the *Ontario Evidence Act*, R.S.O. 1990 as amended
Witness not excused from answering questions tending to criminate
1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (1).

Answer not to be used in evidence against witness
(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (2).

2 Section E5 of the *Canada Evidence Act* R.S. 1985 c. C-5 as amended:
(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

3 R.S.C. 1985, c. 30 (4th supp.) as amended

4 Robert Currie, "Charter without borders? The Supreme Court of Canada, transnational crime and constitutional rights and freedoms" (2004) 27 Dal. L.J. 235 at 277

5 *Ibid.* citing *R. v. Budd* (2000), 150 C.C.C. (3d) 108 (Ont. C.A.); leave to appeal refused, (S.C.C.), which in turn cites *United States v. Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.)

6 Section 32 of the Charter reads: S. 32.(1) This Charter applies:
1. (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

7 See *Spagucci's Ltd. v. Alberta (Gaming & Liquor Commission)* (1997), 55 Alta. L.R. (3d) 173 (Alta. Q.B.), from para 18 on; *Johnson v. British Columbia (Securities Commission)* (2001), 206 D.L.R. (4th) 711 (B.C. C.A.); upheld B.C.S.C. [1999 CarswellBC 987 (B.C. S.C. [In Chambers])] decision that predominant purpose of inquiry was not to incriminate; *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, [2005] B.C.J. No. 589 (B.C. S.C.); At para 69: "the purpose for conducting the examination for discovery is clearly the legitimate carrying on [of] the civil action. There is no evidence to suggest otherwise;" *Samson v. R.* (1995), 131 D.L.R. (4th) 360 (Fed. C.A.)); *R. v. Gordon* (1998), 130 C.C.C. (3d) 129 (Ont. Gen. Div.)); *R. v. Ladouceur* (2002), 223 Sask. R. 161 (Sask. C.A.), in dissenting opinion — not discussed by majority; *R. v. Anderson* (2001), 209 Sask. R. 117 (Sask. Q.B.), predominant purpose was investigation of a tax case; and *R. v. Cadagan* (1998), 165 D.L.R. (4th) 747 (Ont. Gen. Div.)), Justice Then found that the predominant purpose of the inquiry was legitimate AND found that the burden on the witness to show prejudice at his or her own trial had not been satisfied.

End of Document

TAB 5

2011 ONSC 5741
Ontario Superior Court of Justice [Commercial List]

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.

2011 CarswellOnt 11083, 2011 ONSC 5741, 208 A.C.W.S. (3d) 20, 83 C.B.R. (5th) 139

General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company (Applicants) and Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo and Meyers Norris Penny Limited in its capacity as Receiver and Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc. (Respondents)

D.M. Brown J.

Heard: September 27, 2011
Judgment: September 28, 2011
Docket: CV-11-9169-00CL

Counsel: C. Prophet for Receiver
L. Brzezinski for Applicants
T. Pinos for Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo
S. Mitra, D. Reiter for Proposed Receiver, Albert Gelman Inc.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Debtors and creditors

VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Under appointment order, receiver was appointed with full powers of investigation and monitoring in relation to respondent 729 Ltd. — Receiver brought motion for, inter alia, specific relief relating to access to records — Motion granted, with few modifications — As regards electronically stored records, 729 Ltd. and its principals breached appointment order in denying receiver access to computers records were stored on and in not permitting receiver to make bitmap image of information in issue — 729 Ltd. and its principals also breached certain later order as they did not deliver bitmap image to their counsel by stipulated deadline — By its obstruction of receiver's efforts to gain access to computers records were stored on, 729 Ltd. emasculated receiver and its investigative utility by turning it into mere repository of such information as 729 Ltd. saw fit to release — Such conduct was breach of appointment order — If respondents had intermingled records of their companies so documents relating to business or affairs of 729 Ltd. were owned by or under control of other companies in group, that did not permit them to deny access to those documents or server they were stored on — Relevant paragraphs of appointment order were not limited to documents owned by 729 Ltd., but encompassed documents relating to business or affairs of 729 Ltd. — Relief sought granted with few modifications, and certain additional relief granted — As regards hard copy records, 729 Ltd. breached appointment order in denying receiver access to locations records were located and assuming control over process of selecting records it then fed to receiver — It was questioned, as in case of electronic records, why relief needed to be granted beyond that set forth in appointment order, but relief sought granted.

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

Receiver was appointed under appointment order as receiver with full powers of investigation and monitoring in relation to respondent 729 Ltd. — Receiver brought motion seeking, inter alia, expansion of its examination powers so that it could examine under oath all individuals that allegedly advanced monies to 729 Ltd., all individuals and corporations which had had loans due to or from 729 Ltd., and all individuals and/or corporations that received funds from sale of certain property — Motion granted, with few modifications relating to certain other relief sought — 729 Ltd.'s submission that it would be premature to make such order, and that issue should be parked until completion of production process and examination of certain principal of 729 Ltd., was not accepted — Based on chronology of events set out in receiver's reports, failure of 729 Ltd. to comply with production requirements of appointment order rendered it just, reasonable and necessary to grant receiver requested powers of examination — Evidence disclosed that 729 Ltd. was doing its best to stonewall receiver and delay production of relevant documents and information — Under those circumstances, expansion of receiver's powers of examination was necessary in order to enable receiver to complete its investigation within stipulated time.

Table of Authorities

Cases considered by *D.M. Brown J.*:

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]) — referred to

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265 (Ont. Div. Ct.) — referred to

MOTION by receiver for specific relief regarding access to records, and for expansion of its examination powers.

***D.M. Brown J.*:**

I. Motion to expand powers of an investigative receiver

1 In Reasons released June 30, 2011,[1] I appointed Albert Gelman Inc. ("AGI") as receiver with full powers of investigation and monitoring in relation to the respondent, 729285 Ontario Limited ("285"). On August 29 the Receiver appeared before Spence J. seeking certain orders, including the expansion of its powers. On consent Spence J. granted certain relief, and adjourned the balance of the motion, which I heard yesterday.

2 The Receiver seeks specific relief requiring 285 to provide access to certain Record storage sites and to deliver up Records of its business, including electronic Records. The Receiver also seeks an expansion of its examination powers so that it can examine under oath (i) all individuals that allegedly advanced monies to 285, (ii) all individuals and corporations which have had loans due to or from 285, and (iii) all individuals and/or corporations that received funds from the sale of the Royalton Residences, as defined in my order of June 30, 2011 (the "Appointment Order").

3 In support of its motion the Receiver filed its First Report dated July 11, 2011, its Second Report dated August 17, 2011, its Supplementary Second Report dated August 27, 2011 and its Second Supplementary Report to its Second Report dated September 22, 2011. Paragraph 7 of the order of Spence J. directed the Respondents to file any responding materials by September 6. They have not filed any such materials.

4 Let me start by dealing with the issues surrounding the electronic Records, since the conduct by 285 in respect of the electronic Records reflects, in large part, the approach which it has taken towards complying with those portions of my Appointment Order concerning the hard copies of Records.

II. Access to electronic records issue

A. The relief sought by the Receiver

5 In its proposed draft order the Receiver seeks two forms of relief: (i) an order that 285 prepare and deliver by October 12 an affidavit listing all electronic Records on servers which 285 does not object to producing on the basis of privilege, together with a list of those that it does, and the reasons for the objection; and, (ii) an order that the company deliver to the Receiver by October 12 electronic and paper copies of all electronic Records which it does not object to producing on the grounds of privilege.

B. Chronology of events

6 I question the need to add to that which I thought was evident from my Appointment Order, paragraph 9 of which provided:

> THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or a bitmap image or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining **immediate access** to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.
>
> (emphasis added)

7 I made that order on June 30, nearly three months ago. According to the Reports of the Receiver, 285 still has not provided it with "unfettered access" to its computer system. Indeed, 285 has provided the Receiver with NO access to its computer system. Instead, according to the Reports of the Receiver, the following has transpired:

(i) Efforts by the Receiver to attend 285's premises on July 8 were unsuccessful because the premises were locked;

(ii) The Receiver attended 285's premises on July 11. Entry was denied by Mr. Kassam, stating that the Receiver should meet with Mr. Goutis. In a telephone conversation with Mr. Goutis later that day he told the Receiver any meeting should be delayed until after the hearing of a motion to stay the Appointment Order;

(iii) The Receiver was not given access to 285's computer Records during attendances on July 13 and 14;

(iv) In a memo to 285 dated July 13 the Receiver confirmed its request for physical access to 285's server date so that it could "extract and obtain copies of *any data pertaining to 285*";

(v) Receiver's counsel wrote to 285's counsel on July 13 advising, *inter alia*:

> Our client understands that [285] wishes to convert to a new accounting system. Our client is concerned that accounting or other electronic records may be destroyed or deleted in the process of a conversion. This would contravene paragraph 9 of the Appointment Order. Until our client has obtained a bit map image of the server, there should be no conversion of the accounting system. My client will be attending at the registered head office of [285] at 1:30 p.m. tomorrow to start the process of obtaining a bit map image of the server in accordance with paragraph 9 of the Appointment Order.

(vi) That elicited a response by 285's counsel on July 14 that his client was denying access to 285's server for the following reason:

> The server at 231 Avenue Road contains the records of a number of companies other that 729285, personal records and email and other records which include privileged correspondence with counsel. Given this fact, access will not be provided to the receiver to make a bit map image of the server. Rather, as you note, Mr. Goutis is arranging to generate hard and soft copies of the accounting data on the server relating to 279285 which will be provided to that Receiver. Given that there is no risk to the accounting data from the move to new accounting software, we trust this is satisfactory.

(vii) In an email sent July 14 Receiver's counsel offered very practical suggestions to the problems 285 was raising regarding the Receiver's access to its server pursuant to the Appointment Order:

> On a preliminary basis:
>
> > a/ I think my client's IT consultant will have to understand the process of the conversion to confirm the assertion that there is no danger to the integrity of the accounting data. Can you advise who he may speak to in this regard.
> >
> > b/ Is there any reason that the privileged documents cannot be removed from the server and deleted to provide a bit map image? Again this seems to be an issue for the IT consultants of our respective clients.
> >
> > c/ If there are records of other companies with respect to their dealings with 729285 Ontario Inc. my client is entitled to same. My client will not need to review records of (sic)
> >
> > d/ Is there an issue in taking a big map image for now and leaving it with you in escrow to preserve records for now and dealing with it only if the issue arises?

(viii) 285's counsel responded on July 15 proposing further discussions on the electronic documents issues;

(ix) The Receiver's counsel wrote back on July 15:

> We believe that a bit map image should be taken and remain in escrow in the event there is any dispute over electronic disclosure. The IT consultant of our client cannot opine on the assertions in your email of July 15, 2011 unless it has a chance to review the system. Accordingly, a conversation at this stage with the two of us would place us at a disadvantage.
>
> Notwithstanding the issue of a bit map copy, our client requires access to the company's server in order to identify electronic records that are subject to disclosure. My client has recommended that its IT consultant meet with your client's IT consultant or Mr. Goutis in order to understand the file structure and systems of the server. They can then jointly recommend an appropriate method to identify, copy and/or print those electronic records required to be produced. Such records may include, but not necessarily be limited

> to, accounting system files, correspondence files, electronic memos, email messages and electronic copies of legal documents not otherwise disclosed to date. In the event that Mr. Goutis is unfamiliar with the accounting systems to allow printing, exporting or copying [285] will have to provide a person experienced to assist the Receiver in this regard.
>
> Again the issue of the scope of the review is an issue, it remains the Receiver's position that all records of other companies and their dealings with [285] should be produced. Our client should not have to guess whether complete disclosure has been made by your client. In the event there is any disagreement on the entitlement to records, a motion for direction may be brought to resolve the same.

(x) 285's counsel responded, some 10 days later on July 25, stating:

> With respect to electronic records, my client's position is set out in my previous emails. The server which contains the accounting records of 729285 contains the records of other Liberty related businesses, including all e-mails, which include solicitor-client privilege documents. Mr. Goutis has indicated that he would provide an electronic back-up of all of the electronic files relating to 729285, and this should be sufficient for the purposes of the receiver. Again the receivership order does not entitle the receiver to have access to business records other than those of 729285.

(xi) On August 4 Lederman J. heard 285's motion for leave to appeal from the Appointment Order. On August 10 Lederman J. dismissed the motion; [2]

(xii) On August 4 the Receiver met with Messrs. Bhaloo and Goutis, representatives of 285. It sent 285 a memorandum dated August 5 memorializing the points discussed in that meeting. The Receiver advised 285 it would move before the Court on August 29 for further ancillary powers. The memorandum recorded the following discussion:

> Mr. Bhaloo requested the reason for which the Receiver would be continuing with its motion and whether or not it would reconsider the need for the motion. The Receiver indicated that it would be discussing same with its counsel. However, it would be taking into consideration the following: documentation received to date; inaccessibility to physically catalogue and review records at 285's premise and storage location; inability to obtain a bit map image of server contents; and inability to obtain a catalogue of and access to 285's electronic records.
>
> Mr. Bhallo advised that the Receiver should make request for documentation and that the representatives of 285 would determine which documents were relevant to the Receiver's mandate to determine if disclosure should be made. The Receiver indicated that it disagreed with this manner of disclosure.

(xiii) In its Second Report dated August 17, 2011 the Receiver stated:

> [16] The Receiver is unaware what changes have been made to the electronic Records since its appointment. Regardless, the Receiver believes that it would be prudent for it to obtain a bit map image of the server in order to preserve the integrity of all data on the server pending any further Order of the Court regarding access to the server.

(xiv) On August 23 counsel for 285 delivered to the Receiver hard copies of some of the documents it had requested. 285 still denied the Receiver access to its server;

(xv) The parties appeared before Spence J. on August 29. (I was on vacation.) On consent, Spence J. extended the term of the Receivership from 120 days to 210 days. I understand why that was necessary, given the obstruction by 285 of the Receiver's efforts to exercise its powers under the Appointment Order, but I am not sure that I would have agreed to the extension. In my view, the extension only rewarded 285 for its bad behavior. In respect of the bit map image, the parties agreed to what became paragraph 8 of the order of Spence J.:

> 8. THIS COURT ORDERS that 285, and its principals (Amir Kassam, Gregory Goutis, and Rahim Bhaloo) shall by no later than September 10, 2011, cause a bit map image of the computer server and computers located at the Premises and any computers owned or controlled by the principals of 285 (the "Computers") to be created and delivered to the offices of Cassels Brock & Blackwell LLP, 2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, where such bit map image shall be held pending further Order of this Court.

(xvi) On September 12, two days after the deadline set by Spence J., 285's counsel wrote the Receiver to advise:

> I can also confirm that a forensic computer company has been retained to image the requisite computers, and except to receive confirmation that has been completed, and the actual disc, today or tomorrow.

(xvii) Today and tomorrow came and went - no disc was delivered by 285 to the Receiver;

(xviii) On September 16 Receiver's counsel wrote to 285's counsel, in part:

> We note that the order of the Honourable Mr. Justice Spence required the creation of bit map images of various computers by September 10, 2011. Would you confirm that this has been completed and confirm a list of the drives which have been imaged.

(xix) The Receiver filed a Second Supplementary Report to the Receiver's Second Report dated September 22, 2011, in which it reported that it still had not received confirmation of delivery of a bit map image to 285's counsel.

(xx) At the hearing before me on September 27 counsel advised that the previous day 285 delivered some bit map image to its counsel.

C. Analysis

8 From my review of the Receiver's Reports I have no hesitation in concluding that 285 has failed to comply with the terms of the Appointment Order, including paragraph 9. 285 has obstructed the Receiver's access to its electronic Records and computer server, and it has played a game of cat and mouse, imposing extra time and costs on the Receiver's efforts to perform its powers under the Appointment Order.

9 It is crystal clear from the face of my order that in the case of Records "stored or otherwise contained on a computer or other electronic system of information storage", the Receiver was to have "unfettered access" in order to allow it:

> to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or a bitmap image or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver.

10 To date 285, and its principals, Messrs. Bhaloo, Kassam and Goutis, have denied the Receiver access to computers on which Records are stored. Consequently, 285, Mr. Bhaloo, Mr. Kassam and Mr. Goutis have breached my Appointment Order.

11 To date 285 and its principals, Messrs. Bhaloo, Kassam and Goutis, have not permitted the Receiver to make a bitmap image of "all of the information contained therein". Consequently, they have breached my Appointment Order.

12 They have now been in breach of the Appointment Order for some three months.

13 285 and its principals, Messrs. Bhaloo, Kassam and Goutis, also breached paragraph 8 of the order of Spence J. because they did not deliver a bit map image to their counsel by September 10, 2011, the stipulated deadline. An image was not delivered until September 26.

14 285 and its principals have, in effect, turned paragraph 9 of the Appointment Order on its head by denying the Receiver access to the computers where Records are stored and by assuming control over the process of selecting the electronic Records which it determines should be fed to its counsel or the Receiver. The whole point of my Appointment Order was to enable an independent Receiver to investigate and collect information in respect of the affairs of 285. By its obstruction of the Receiver's efforts to gain access to computers upon which Records are stored, 285 has emasculated the Receiver, and its investigative utility, by turning it into a mere repository of such information as 285 sees fit to release to it.

15 That is unacceptable. Such conduct constitutes a direct breach of the Appointment Order.

16 I recognize that the computer server on which 285 stores its Records is used by other companies in the Liberty Assisted Group. The interconnectedness of the companies in that group was known when the appointment motion was brought and, more importantly, was known when counsel were working out the terms of the Appointment Order. I spent several paragraphs in my June Reasons commenting on the parties' respective positions on the terms of the Appointment Order. Why, in heavens name, did 285 not advert back in June to the issue of how, as a practical matter, access to its Records should occur given its joint use of the server with related companies? Instead, the last three months have been spent by 285 interpreting the Appointment Order in a way which has obstructed and frustrated the Receiver in performing its duties.

17 In its counsel's letter of July 15 the Receiver took the following position:

> Again the issue of the scope of the review is an issue, it remains the Receiver's position that all records of other companies and their dealings with [285] should be produced. Our client should not have to guess whether complete disclosure has been made by your client. In the event there is any disagreement on the entitlement to records, a motion for direction may be brought to resolve the same.

18 That was a correct interpretation of paragraphs 8, 9 and 10 of the Appointment Order. Paragraph 8 provided:

> THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of 729285, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 8 or in paragraph 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communications or due to statutory provisions prohibiting such disclosure.

19 As can be seen, the defined term "Records" is not limited to documents owned by 285. Instead, it encompasses documents "related to the business or affairs of 729285". As the Reports of the Receiver disclose, 285 and its principals have stated that some information relating to the business or affairs of 285 will be found on records owned by related companies. That state of affairs has resulted from a decision of the Liberty Group of companies to operate its affairs and maintain its records in an inter-connected and co-mingled fashion. Consequently, for the Receiver to exercise the powers granted to it under the Appointment Order, it is inevitable that the Receiver will have to inspect and consider documents owned by companies related to 285. If the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents or to a computer server on

which they are stored. Paragraphs 8 and 9 of my Appointment Order are not limited to documents *owned* by 285; they encompass documents "*relating to the business or affairs of* 729285". With all due respect, nothing could be clearer.

20 In its counsel's letter of July 15 the Receiver proposed the following solution to 285's expressed concern about the disclosure of certain documents stored on the computer server:

> Notwithstanding the issue of a bit map copy, our client requires access to the company's server in order to identify electronic records that are subject to disclosure. My client has recommended that its IT consultant meet with your client's IT consultant or Mr. Goutis in order to understand the file structure and systems of the server. They can then jointly recommend an appropriate method to identify, copy and/or print those electronic records required to be produced. Such records may include, but not necessarily be limited to, accounting system files, correspondence files, electronic memos, email messages and electronic copies of legal documents not otherwise disclosed to date. In the event that Mr. Goutis is unfamiliar with the accounting systems to allow printing, exporting or copying [285] will have to provide a person experienced to assist the Receiver in this regard.

Those were reasonable and practical suggestions by the Receiver which 285 was not justified in rejecting. 285's refusal to adopt and follow those suggestions appears to reflect a corporate decision to obstruct the work of the Receiver and ignore the clear terms of the Appointment Order.

21 Such obstruction must end, otherwise 285 will succeed in undermining the court-sanctioned mandate of the Receiver and, in effect, secure the reversal of the Appointment Order, a reversal which Lederman J. refused to grant.

22 Parties cannot obstruct or interfere with the work of a court-appointed officer, such as the Receiver, yet that is precisely what 285 and its principals have done.

23 I must confess I question why I need to grant further relief with respect to electronically stored Records beyond that which is set forth in paragraph 9 of the Appointment Order. 285 must comply with that order. That means that 285 must grant the Receiver immediate, unfettered access to the computers and servers on which Records are located. 285's failure to do so risks attracting significant judicial sanctions.

24 Nevertheless, I grant, with a few modifications, the additional relief set out in paragraphs 4 and 5 of the Receiver's draft order found at Tab F of the Second Supplementary Report to the Receiver's Second Report to the Court. But, I wish to emphasize that by so doing I am not detracting from, or limiting in any way whatsoever, the breadth of paragraphs 8 and 9 of the Appointment Order.

25 The first modification which I will make to the proposed draft order concerns the deadline for compliance. Although counsel agreed to a deadline of October 12, 2011, I do not accept that as a reasonable deadline. Three months have passed since I made the Appointment Order, and 285 simply has stonewalled. The time for games is over. 285 has until October 4 to comply. Second, I will change the references to "electronic documents" to "electronic Records" so that the language in all orders is consistent.

26 Further, I am not content with the way in which the bit map image has been produced. For three months 285 has denied the Receiver access to the server on which Records are stored and assumed control over the production of a bit map image. I will say candidly that I have little confidence in the reliability of the bit map image so produced. *Consequently, 285 must give the Receiver, or its IT consultant, access to the server no later than 10:00 a.m. on Friday, September 30, 2011, so that it can make a bit map image. The Receiver also is entitled to copy any information stored on the computer server required to investigate, if necessary, whether any information stored on the computer related to the business or affairs of 285 has been altered in any way since the date of the Appointment Order.* Receiver's counsel is to hold the bit map image in escrow pending the agreement of the parties or further order of this Court.

III. Access to hard copy records issue

27 During the course of its dealings with 285 the Receiver learned that the company kept its accounting records at four locations, including its offices at 231 Avenue Road and a storage room, or locker, located at Laird Drive and Eglinton Avenue. To date 285 has refused to permit the Receiver to inspect the documents located at those locations, taking the position that they are co-mingled with the records of related Liberty Group companies which are not subject to the order. Instead, 285 adopted an approach of providing records to the Receiver through its counsel.

28 Again, from my review of the Receiver's Reports I have no hesitation in concluding that 285 has failed to comply with the terms of the Appointment Order, including paragraphs 8 and 10. Paragraph 8 I reproduced above. Paragraph 10 of the Appointment Order specified that the Receiver shall have access "to those premises wherever the books and records of 729285 are kept, retained, stored or used...at any time or times including evenings, weekends and holidays". It went on to state that:

> 729285 shall take all reasonable steps to ensure the Receiver will have such access, provided however that the Receiver shall exercise its unfettered access to and control over the books and records of 729285 in such a manner as to minimally interfere with the business of 729285.

29 As in the case of paragraph 9 of the Appointment Order, 285 has turned paragraphs 8 and 10 on their heads by denying the Receiver access to the locations where Records are located and by assuming control over the process of selecting Records which it then feeds to the Receiver.

30 That, too, is unacceptable and a breach of the Appointment Order.

31 As in the case of the electronic Records, I question why I need to grant further relief beyond that which is set forth in paragraphs 8 and 10 of the Appointment Order. I repeat: 285 must comply with that order. That means the Receiver can enter into and have unfettered access to the Records relating to 285. That means the Receiver can inspect the filing cabinets or other Record depositories at those locations. [3] If those Record depositories contain documents owned by a non-285 company, then the Receiver cannot exercise its powers under paragraph 8 of the Appointment Order unless (and that is a big unless), the document "relates to the business or affairs of 729285". Again: if the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents to the Receiver. Paragraph 8 of my Appointment Order is not limited to documents *owned* by 285; it encompasses documents "*relating to the business or affairs of* 729285".

32 I will grant the relief sought in paragraph 3 of the Receiver's draft order, but I wish to emphasize that by so doing I am not detracting from, or limiting in any way whatsoever, the breadth of paragraphs 8 and 10 of the Appointment Order.

IV. Receiver's request to expand its powers to conduct examinations

33 The Receiver also seeks an order permitting it to examine, under oath, (i) all individuals that allegedly advanced monies to 285, (ii) all individuals and corporations which have had loans due to or from 285, and (iii) all individuals and/or corporations that received funds from the sale of the Royalton Residences.

34 Counsel for 285 submitted that it would be premature to make such an order and, instead, argued that the issue should be parked until the completion of the production process and the examination of Mr. Goutis. I disagree. Based on the chronology of events set out in the Receiver's Reports, I conclude that the failure of 285 to comply with the production requirements of the Appointment Order renders it just, reasonable and necessary to grant the Receiver the requested powers of examination. The evidence discloses that 285 is doing its best to stonewall the Receiver and delay the production of relevant documents and information. Under those circumstances, an expansion of the Receiver's powers of examination is necessary in order to enable the Receiver to complete its investigation within the stipulated time. I therefore grant the orders sought in paragraph 2 of the draft order found at Tab F of the most recent Receiver's Report.

V. Costs

35 The Receiver, AGI, may serve and file with my office written cost submissions, together with a Bill of Costs, by October 7, 2011. The Liberty Group Respondents may serve and file with my office responding written cost submissions by October 14, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

Motion granted, with few modifications relating to certain relief sought.

Footnotes

1 2011 ONSC 4136 (Ont. S.C.J. [Commercial List])

2 2011 ONSC 4704 (Ont. Div. Ct.)

3 In paragraph 45 of its Second Report the Receiver noted that Mr. Bhaloo had indicated that documentation in support of disbursements made by 285 on behalf of related companies were retained in the files of the related companies and not in the files of 285. At the hearing counsel for 285 stated that Mr. Bhaloo disputed the accuracy of the Receiver's statement. Mr. Bhaloo, however, did not file any evidence on the point, so I do not accept his challenge to the accuracy of the Receiver's report.

End of Document

TAB 6

2016 BCCA 231
British Columbia Court of Appeal

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

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

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

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

Neilson, Bennett, Savage JJ.A.

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

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

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

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.7 Actions involving receiver
VII.7.a Actions by receiver

Personal property security

IV Priority of security interest
IV.3 Purchase money security interest

Headnote

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

Insolvent company A Ltd. (debtor) financed trucks from financing company M Corp. and from leasing company B Ltd. (together, companies) — Debtor ceased operations and had total indebtedness exceeding $8,000,000 — Creditor I Union, who had general security agreement with debtor, obtained order appointing receiver pursuant to

s. 47(1) of Bankruptcy and Insolvency Act and s. 39 of Law and Equity Act — Chambers judge granted receiver's application for approval of sale of certain property by auction and dismissed companies' applications that their trucks were not subject to receivership order — Judge held that trucks constituted "property" and were subject to receivership order, but allowed companies to sell trucks on their own, with receiver's consent, on condition that proceeds be held in trust — Companies appealed judgment dismissing their applications — Appeals allowed — Trucks should have been excluded from receivership and should not be subject to receiver's charges — Issue did not turn on interpretation of "property" in receivership order — Companies' applications were expressly contemplated by receivership order — Companies had priority over creditor with respect to trucks pursuant to their purchase money security interests (PMSI) — To allow trucks to remain under receivership would grant receiver, and indirectly creditor who must indemnify receiver's losses, priority over companies — By virtue of lease or conditional sale agreements, debtor had only possessory interests in trucks, and receiver could not acquire greater interest — As companies' PMSIs took priority over creditor's general security agreement, and companies wanted no part of receivership, trucks should have been released.

Personal property security --- Priority of security interest — Purchase money security interest

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

Table of Authorities

Cases considered by *Savage J.A.*:

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

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

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

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

Giffen, Re (1998), 155 D.L.R. (4th) 332, 222 N.R. 29, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re)* 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re)* 164 W.A.C. 161, 45 B.C.L.R. (3d) 1, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — referred to

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

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

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

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

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

Sutherland v. Reeves (2014), 2014 BCCA 222, 2014 CarswellBC 1661, 61 B.C.L.R. (5th) 308, 357 B.C.A.C. 46, 611 W.A.C. 46 (B.C. C.A.) — 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

Terra Nova Management Ltd. v. Halcyon Health Spa Ltd. (2006), 2006 BCCA 458, 2006 CarswellBC 2565, 58 B.C.L.R. (4th) 64, 25 C.B.R. (5th) 199 (B.C. C.A.) — referred to

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

1231640 Ontario Inc., Re (2007), 2007 ONCA 810, 2007 CarswellOnt 7595, 37 C.B.R. (5th) 185, 289 D.L.R. (4th) 684, 13 P.P.S.A.C. (3d) 57 (Ont. C.A.) — referred to

Statutes considered:

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

s. 2 "property" — considered

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

s. 47(1) — considered

s. 71 — referred to

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

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

s. 243(1) — considered

s. 243(6) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

Law and Equity Act, R.S.B.C. 1996, c. 253
s. 39 — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 3 — considered

s. 55 — considered

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

***Savage J.A.*:**

I. Introduction

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

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

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

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

II. Background

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

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

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

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

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

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

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

• Paragraph 2(a) authorizes the Receiver to "take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Reasons Below

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

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

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

[30] The position of the Receiver ... is that the agreements relating to the subject trucks are "financing leases" as opposed to "true leases". As such, the trucks constitute Property and are subject to the Receivership Order. The

Receiver submits that if the agreements are "true leases" then the trucks do not form part of the assets of All-Wood and would not be subject to the Receivership Order.

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

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

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

IV. Statutory Provisions

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

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

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

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

V. Standard of Review

23 Generally on appeal, questions of law are reviewable on a standard of correctness. Findings of fact may be reversed on a palpable and overriding error. For true questions of mixed fact and law, where a legal principle is not readily extricable, the matter should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC

33 (S.C.C.) at paras. 8-12, 36. Failure to give sufficient weight to relevant considerations may justify appellate review: *Bell v. Bell*, 2001 BCCA 148 (B.C. C.A.) at para. 11.

VI. Interpretation of the Order

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

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

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

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

> [30] But I do not accept Mr. Sutherland's underlying premise. This appeal does not turn on an interpretation of the Model Order. It turns on the interpretation of the specific Order made by Mr. Justice Willcock. This is so for two reasons.
>
> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
>> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
>>
>> [Emphasis added in original.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.
>
> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.
>
> [Emphasis added.]

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

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

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

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

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

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

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

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

33 Integris describes the factual circumstances at the time the Receivership Order was made as chaotic. It says All-Wood's equipment was scattered among various locations, some remote; the landlord had distrained; the company's records had been removed; the employees were laid off; the company's management had walked away; the creditors were seizing assets; and CRA had a lien.

34 Integris submits the definition of "property" should include the Trucks because the Receiver could not have practically considered priorities before needing to step in and take control for the benefit of all creditors. I agree that

certain circumstances may justify finding a higher-ranking creditor liable to a receiver appointed by a general creditor. However, such scenarios are an exception to the general rule that a receiver cannot subject secured creditors to liability for disbursements or fees.

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

VII. Application Before the Court

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

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

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

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

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

40 *Kowal* was approved and applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (B.C. C.A.). In *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017 (B.C. S.C.),

aff'd 2006 BCCA 458 (B.C. C.A.), Stromberg-Stein J., as she then was, summarized the exceptions to the general rule provided in *Kowal*:

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

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

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

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

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

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

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

> 29. Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) clear business days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other

notice, if any, as this Court may order, *specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein.*

[Italics denote the handwritten addition to the order.]

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

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

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

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

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

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

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

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

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

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

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

VIII. Conclusion

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

***Neilson J.A.*:**

I AGREE.

***Bennett J.A.*:**

I AGREE.

Appeals allowed.

End of Document

TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canadian Imperial Bank of Commerce v. Wildflower Productions Inc. | 2001 BCCA 159, 2001 CarswellBC 409, 87 B.C.L.R. (3d) 1, 2 P.P.S.A.C. (3d) 147, 150 B.C.A.C. 25, 245 W.A.C. 25, 103 A.C.W.S. (3d) 468, [2001] B.C.W.L.D. 576, 197 D.L.R. (4th) 92 | (B.C. C.A., Mar 5, 2001)

1984 CarswellBC 572
British Columbia Court of Appeal

Lochson Holdings Ltd. v. Eaton Mechanical Inc.

1984 CarswellBC 572, [1984] B.C.W.L.D. 1932, [1984] B.C.W.L.D. 1937, [1984] B.C.W.L.D. 2720, 10 D.L.R. (4th) 630, 26 A.C.W.S. (2d) 239, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 53 C.B.R. (N.S.) 177, 55 B.C.L.R. 54

LOCHSON HOLDINGS LTD. v. EATON MECHANICAL INC. et al.; FEDERAL BUSINESS DEVELOPMENT BANK v. LOCHSON HOLDINGS LTD. et al.; FEDERAL BUSINESS DEVELOPMENT BANK v. MARRICK DEVELOPMENT CORPORATION et al.

Seaton, Hinkson and Macfarlane JJ.A.

Judgment: June 6, 1984
Docket: Victoria Nos. 125/82, 1170/78, 2513/79 & 504/79

Counsel: *D.I. Knowles*, for Federal Business Development Bank.
C.D. Skillings, for receiver, Jamieson.
R.J. Meyer, for Canadian Imperial Bank of Commerce.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers
VII.4 Order appointing receiver

Debtors and creditors

VII Receivers
VII.8 Remuneration of receiver
VII.8.a Accounts

Headnote

Receivers --- Order appointing receiver

Receivers --- Remuneration of receiver — Accounts

Receivers — Court-appointed receivers — Powers — Third mortgagee of land obtaining order nisi of foreclosure and appointment of receiver — Receiver borrowing to renovate foreclosed property — Bank holding first and second mortgage not notified of proceedings — No emergency existing to justify expenditure — Receiver not entitled to priority over bank.

Receivers — Court-appointed receivers — Order appointing receiver — Third mortgagee of land obtaining order nisi of foreclosure and appointment of receiver — Bank holding first and second mortgages not notified of proceedings — Bank not bound by court order.

The third mortgagee of a hotel property commenced foreclosure proceedings and obtained an order nisi and the appointment of a receiver. No notice of the proceedings was given to the petitioner, the holder of the first and second mortgages, and the petitioner had no knowledge of the proceedings. The receiver borrowed $36,000 from C. Bank to renovate the subject property. In its subsequent foreclosure proceedings the petitioner added C. Bank and the third mortgagee as parties and they consented to an order under which the property was sold. The court then ordered a distribution of the sale proceeds in which the receiver and C. Bank ranked after the petitioner's first mortgage but ahead of its second mortgage. The petitioner appealed.

Held:

Appeal allowed.

As the petitioner was not named in and had no notice of the third mortgagee's foreclosure proceedings, the receiver could not rely on the court order but had to rely on the common law to sustain its priority in the distribution under appeal.

At common law the court has no power to authorize a receiver's expenses for improving the property or carrying on the business at the expense of prior mortgagees without the sanction of such mortgagees. Accordingly, the mortgagees will not be bound by the acts of the receiver so as to entitle the receiver to priority. There are exceptions to this general rule, i.e., (1) where the receiver has been appointed at the request of or with the consent or approval of the security holders; (2) where the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, and properly incurs charges and expenses in so doing; and (3) where the receiver has expended money for the necessary preservation and improvement of the property. None of the exceptions applied in this case and the court had no power to assign the receiver priority ahead of the petitioner's second mortgage.

Table of Authorities

Cases considered:

Br. Power Traction & Lighting Co., Re.; Halifax Joint Stock Banking Co. v. Br. Power Traction & Lighting Co., [1906] 1 Ch. 497 — *distinguished*

Kowal (Robert F.) Invt. Ltd. v. Deeder Elec. Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.) — *followed*

Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd., 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487, 4 Man. R. (2d) 312 — *distinguished*

Regent's Canal Ironwks. Co., Re; Ex parte Grissell (1875), 3 Ch. D. 411 (C.A.) — *considered*

Authorities considered:

Clark on Receivers, 3rd ed. (1959).

Appeal from order of Tyrwhitt-Drake L.J.S.C., 43 C.B.R. (N.S.) 179, made in foreclosure proceedings fixing priorities.

Hinkson J.A. **(Excerpt from the transcript):**

1 This is an appeal in mortgage foreclosure proceedings from the decision of a judge fixing priorities. The circumstances giving rise to the foreclosure proceedings were that in September 1977 Lochson Holdings Ltd. sold a hotel and the land it was situated on to Eaton Mechanical Inc., taking a mortgage back. Eaton then sold the land and hotel to Marrick Development Corporation. The Federal Business Development Bank had first and second mortgages over the land. Lochson's mortgage was thus a third mortgage.

2 In 1978 Lochson began foreclosure proceedings pursuant to its mortgage. On 10th August 1978 Stewart L.J.S.C. granted an order nisi and appointed a Mr. Jamieson, who was an officer of Lochson, as receiver of the lands and premises. Contained in the order were a number of provisions with respect to the powers of the receiver and the priorities in the event a sale occurred.

3 At the time that order was made, the Federal Business Development Bank not only had no notice of the application, but had no knowledge of Lochson's foreclosure proceedings. Subsequent to the making of that order Mr. Jamieson, in his capacity as receiver, borrowed approximately $36,000 from the Canadian Imperial Bank of Commerce. He spent that amount on renovations of the hotel. On 23rd February 1979 the Federal Business Development Bank began foreclosure proceedings under its mortgages. Lochson was named as a party. On 14th March 1979 an order nisi of foreclosure was granted. Counsel for Lochson approved the form of that order. On 5th October 1979 the Canadian Imperial Bank of Commerce moved to be joined as a party in the foreclosure proceedings of both Lochson and the Federal Business Development Bank. Those motions were granted.

4 On 14th March 1980 the hotel premises and the lands were sold for $150,000. The court granted approval of the sale. Ultimately an application came before Tyrwhitt-Drake L.J.S.C. and on 23rd June 1982 he made an order on the application of Mr. Jamieson as receiver, fixing the priorities with respect to those entitled to share in the funds realized on the sale of the hotel [reported at 43 C.B.R. (N.S.) 179]. It is from that order that the present appeal is taken.

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

6 The position of Mr. Jamieson and the Canadian Imperial Bank of Commerce is that the priority fixed by Tyrwhitt-Drake L.J.S.C. should be upheld. By his order the first mortgage of Federal Business Development Bank ranks second in priority after the Crown Provincial for taxes, and ahead of Mr. Jamieson as receiver for his charges, costs and disbursements. Thus Mr. Jamieson, as receiver, would come in priority ahead of the second mortgage of the Federal Business Development Bank, but after its first mortgage. As the receiver and the Canadian Imperial Bank of Commerce are unable to rely upon the order made by Stewart L.J.S.C. on 10th August 1978, it has been necessary to fall back on the position at common law in order to sustain the priority granted by Tyrwhitt-Drake L.J.S.C.

7 Counsel referred to the decision in *Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd.*, 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487 at 493 -97, 4 Man. R. (2d) 312, and to the decision in *Re Br. Power Traction & Lighting Co.; Halifax Joint Stock Banking Co. v. Br. Power Traction & Lighting Co.*, [1906] 1 Ch. 497, but in my opinion those cases only touch peripherally upon the problem we

are here concerned with, and really do not resolve the issue with which we are faced, namely, whether the charges and expenses of the receiver take priority over the second mortgage held by the Federal Business Development Bank.

8 In my opinion, the issue is to be resolved on the basis of the decision of the Ontario Court of Appeal in *Robert F. Kowal Invt. Ltd. v. Deeder Elec. Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.). In that case a secured creditor received no notice of the application to appoint a receiver and the issue arose as to whether or not and upon what basis the secured creditor could become bound by the acts of the receiver so that the receiver would be entitled to priority over the secured creditor. Houlden J.A., in delivering the judgment of the court, made reference to Clark on Receivers, 3rd ed. (1959), and quoted from that text at p. 88 of the judgment, as follows:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortagees or lienholders.

I understand that statement to express the position at law.

9 Then, Houlden J.A. continued at p. 88:

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

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

10 Then Houlden J.A. continued to discuss a second exception and he said this at p. 89:

> The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him.

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

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

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

12 The third exception discussed by Houlden J.A. is the situation where the receiver has expended money for necessary preservation or improvement of the property. Houlden J.A. says at p. 91:

> If the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors.

And then he discusses two cases dealing with the meaning of "necessary costs of preservation". One of the cases he refers to is *Re Regent's Canal Ironwks. Co.; Ex parte Grissell* (1875), 3 Ch. D. 411 (C.A.), where James L.J. said at p. 427:

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

He also refers to a passage from Clark on Receivers, 3rd ed. (1959), and then he gives some illustrations of his appreciation of steps taken to preserve the property, and he says at p. 92:

> If, for example, the wind had blown off the roof of the car wash so that the premises were exposed to the elements, the repair of the roof by the receiver to prevent damage to the interior of the premises would have been for the benefit of all parties; and the receiver would have been entitled to priority over the appellant's charge for moneys expended for this purpose.

13 An analysis of the three exceptions indicates that with regard to the first and second, the secured creditor must either apply for, consent to, or approve of, the appointment of a receiver or have notice under the second exception. The third exception, it seems to me, deals with a different type of situation, really one where there are circumstances which require the receiver to do something to preserve the property in an emergency situation where there is no time to come to the court beforehand and give notice to the creditors beforehand of what he intends to do, and thus obtain the approval of the court, and so he comes to the court after the event and in appropriate circumstances the court will approve the action of the receiver in those circumstances.

14 In my opinion, on the facts of the present case the receiver does not come within the third exception.

15 So, I go back to what Houlden J.A. 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 lienholders without the sanction of such mortgagees or lienholders. It seems to me that that is the principle that applies in these circumstances.

16 In the result, I would allow the appeal and set aside the priorities as fixed by Tyrwhitt-Drake L.J.S.C. and conclude that the receiver is not entitled to priority ahead of the second mortgage held by the Federal Business Development Bank. For those reasons I would allow the appeal.

***Seaton J.A.*:**

17 I agree.

***Macfarlane J.A.*:**

18 I agree.

***Seaton J.A.*:**

19 The appeal is allowed. Costs should go against the receiver and the Canadian Imperial Bank of Commerce.

Appeal allowed.

End of Document

TAB 8

Most Negative Treatment: Not followed
Most Recent Not followed: Pyrogenesis inc., Re | 2004 CarswellQue 2292, J.E. 2004-1981, REJB 2004-70374, [2004] R.J.Q. 2769, 5 C.B.R. (5th) 286 | (C.S. Qué., Sep 1, 2004)

1975 CarswellOnt 123
Ontario Court of Appeal

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

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

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

Jessup, Lacourcière and Houlden JJ.A.

Judgment: April 23, 1975

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees

Headnote
Receivers — Remuneration of receiver — Remuneration — Priority of fees

Receivers — By court appointment — Winding-up of partnership — Fees and disbursements of receiver — Priorities.

The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. *Boehm v. Goodall*, [1911] 1 Ch. 155 applied. Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. In these circumstances the order permitting the receiver to borrow would ordinarily provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.

The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact, that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, supra, applied, and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding & Engineering Co. Ltd.*, [1912] W.N. 66; *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) (Man. C.A.) applied.

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

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

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

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

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

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

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

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

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

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not to exceed prime plus 3 per cent, for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

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

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

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

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

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

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

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

13 Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

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

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

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

16 However, the exception to the general rule enunciated in *Strapp v. Bull*, supra, has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given no notice of the proceedings which led to the appointment of Jerry Friedman as receiver. It was not until after the indebtedness was incurred that the receiver sought an order giving him priority over the appellant's charge. The first exception to the general rule has, therefore, no application to the facts of this case.

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

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

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

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

20 The second exception to the general rule likewise has no application to the facts of this case. Paragraph 13 of the order of Goodman J. of 9th May 1974, quoted supra, created a charge on the whole of the undertaking, property and assets of the partnership. This could have referred only to the equity that the partnership had in the undertaking, property and assets. Prior to the appointment of the receiver, the partners had, of course, no power to create a security

having priority to the registered charge of the appellant. Although the court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly notice would have to be given to the appellant of such an application and likely the appellant would have to be made a party to the proceedings: *Allan v. Man. and North Western Ry.* (1894), 10 Man. R. 143.

21 The third exception which should be noted is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision *Re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875), 3 Ch. D. 411, James L.J. in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):

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

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

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

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

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

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

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

End of Document

TAB 9

1992 CarswellAlta 287
Alberta Court of Queen's Bench

Royal Bank v. Vulcan Machinery & Equipment Ltd.

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

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

Cairns J.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees

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

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

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

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

Held:

The application to vary was allowed.

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

Table of Authorities

Cases considered:

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

Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co. (1991), 5 C.P.C. (3d) 299, (sub nom. *Re Wm. C. Rieger Co. (Receivership))* 126 A.R. 69 (Q.B.) — *considered*

Credit foncier franco-canadien v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. S.C.) [affirmed (1966), 56 W.W.R. 623n (Alta. C.A.)] — *referred to*

Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc. (1984), 55 B.C.L.R. 38, 52 C.B.R. (N.S.) 129 (C.A.) — *considered*

Federal Business Development Bank v. Persic (1981), 32 B.C.L.R. 75 (C.A.)*referred to Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (C.A.), reversing (1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.) — *considered*

Oberman v. Mannahugh Hotels Ltd., [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.)*considered Robert F. Kowal Investments Ltd. v Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.)*considered Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.)*considered Stenner Financial Services Ltd., Re* (1988), 68 C.B.R. (N.S.) 298 (B.C.S.C.) — *considered*

Statutes considered:

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

s. 95

Judicature Act, R.S.A. 1980, c. J-1 —

s. 13

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

Rules considered:

Alberta Rules of Court —

R. 387(2)

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

Cairns J. **(orally):**

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

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

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

2 The issues that I must address are therefore these:

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

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

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

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

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

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

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

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

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

12 The September 17, 1990 deadline was extended to September 24, again to October 1 and again to October 8, 1990 to facilitate a resolve of financial difficulties or a sale, all without success. The sale that was anticipated was to a related company "Vulmac," the shares of which were owned principally by Mr. Ken Knight, the principal of Vulcan Machinery and also the principal of another company of the Vulcan Group, known as Vulcan Machinery Sales Ltd., and after offers and counteroffers were exchanged, up to and through October 3 and 4, no sale was consummated by October 8, 1990 or at all.

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

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

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

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

of claim, order and application which were reviewed at a meeting of bank officials and solicitors September 20, 1990 and was aware of the priority provisions as to costs and that the pro rata distribution of costs was, according to him, an advantage of going the "court-appointed route."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 1) as to *Mitsubishi*

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

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

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

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

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

The law

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

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

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

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

> And certainly, where the receiver acts under an appointment by the court, he may not (in the absence of an agreement for indemnity) look to the party at whose instance that order was made, even where the appointment, as here, was made with the consent of all the interested parties: *Boehm*, supra and *Johnston v. Courtney*, [1920] 2 W.W.R. 459 (B.C.C.A.). The reason for this is that a receiver so appointed is not the agent of any party, including the one whose initial request led to his appointment, but rather he is an officer of the court, and in the discharge of the responsibilities entailed by such appointment he is prima facie to be looked upon as the arm of the court in that behalf: see also *Braid Bldrs. Supply & Fuel Ltd. v. Genevieve Mtge. Corpn.* (1972), 17 C.B.R. (N.S.) 305 at 305, 29 D.L.R. (3d) 373 (Man. C.A.), per Dickson J.A. (as he then was):
>
>> In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B.D. 67 (D.C.).
>
> And he continued at pp. 307-308:
>
>> The argument is that a receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 (C.A.); *Re Glasdir Copper Mines Ltd.; English Electro-Metallurgical Co. Ltd. v. Glasdir Copper Mines Ltd.*, [1906] 1 Ch. 365 (C.A.). It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. The court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of the creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property.

Further at p. 189 Wilson J. stated:

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

receivers and managers, and they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property.

And further at p. 189 Wilson J. stated:

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

And further at p. 190 Wilson J. stated:

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

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

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

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

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

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

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

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

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

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

> In my opinion, the issue is to be resolved on the basis of the decision of the Ontario Court of Appeal in *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84, 21 [C.B.R. (N.S.)] 201. In that case a secured creditor received no notice of the application to appoint a receiver and the issue arose as to whether or not and upon what basis the secured creditor could become bound by the acts of the receiver so that the receiver would be entitled to priority over the secured creditor. Mr. Justice Houlden, in delivering the judgment

of the court, made reference to *Clark on Receivers*, 3rd ed., vol. 1, s. 22, p. 25, and quoted from that text at p. 496 D.L.R., p. 88 O.R. of the judgment, as follows:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

I understand that statement to express the position at law.

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

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

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

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

> The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him.

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

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

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

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

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

An analysis of the three exceptions indicates that with regard to the first and second, the secured creditor must either apply for, consent to, or approve of, the appointment of a receiver or have notice under the second exception. The third exception, it seems to me, deals with a different type of situation, really one where there are circumstances which require the receiver to do something to preserve the property in an emergency situation where there is not time to come to the court beforehand and give notice to the creditors beforehand of what he intends to do, and thus obtain the approval of the court, and so he comes to the court after the event and in appropriate circumstances the court will approve the action of the receiver in those circumstances.

In my opinion on the facts of the present case, the receiver does not come within the third exception.

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

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

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

As the receiver-manager proceeded to incur the expenses of preservation and realization with the knowledge that Revenue Canada and W.C.B. intended to press their claims, it must be taken to have assumed the risk that the court might be powerless to ensure reimbursement even though it was acting on behalf of the court. Consequently, the receiver-manager could not have priority over W.C.B. or Revenue Canada.

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

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

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

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

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

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

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

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

51 5. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.).

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

> As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. [One would ordinarily expect that] in these circumstances the order permitting the receiver to borrow would [clearly] provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.
>
> The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact [as was attempted in the present case], that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.* ... and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order ...
>
> The third exception [which should be noted] is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors ... In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a mortgagee of sums to which he is legally entitled under his charge falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the receiver would be entitled only to priority over the [moneys] of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

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

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

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

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

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

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

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

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

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

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

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

> Reference is made to the decision of Houlden J.A. in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.), where Houlden J.A. stated that as a general rule the court should not subject the security of a prior secured creditor to liability for fees and disbursements incurred by a receiver; however, he listed the following three exceptions to the general rule:
>
> 1. If the receiver has been appointed at the request of or with the consent or approval of holders of security.

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

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

> In any event, the creditors did not realize that the method of allocating costs and expenses by the receiver was going to affect them financially on a proportionate basis that most of the creditors found unacceptable. The court is in full agreement with the statement made by the British Columbia Court of Appeal in *Lochson Holdings v. Eaton Mechanical Inc.* [supra]. At p. 632, specifically, the court states:
>
>> It is fundamental that a person is not to be bound by a court order of which he has no notice.
>
> In this case, I am satisfied there was sufficient time to get prior court approval of the proposed extraordinary source of remuneration being sought by the receiver. I am satisfied that the cost allocation schedule and the formula in para. 22 of the receivership order has the effect of depriving the secured creditors of a substantial portion of the benefit to which they are entitled.

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

> The exceptions that the court has to look at with respect to the appointment of the receiver include: (1) the receiver has been appointed at the request or with the consent or approval of the holders of security. I am satisfied from the material put before the court that the receiver was not appointed at the request or with the consent, approval, or acquiescence of any of the secured creditors with the exception of the fact that Alberta Opportunity Company was aware that the receivership order was going to be applied for but indicated it did not approve of the order.
>
> Secondly, that the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors. In my opinion, the secured creditors had no need to have their goods and equipment protected as they were perfectly prepared to remove them from the premises of Rieger to a place of safekeeping the majority of which had their own distribution network and dealers throughout the province and could have disposed of this farm implement equipment and parts without the intervention of a receiver.
>
> The third condition, the receiver has expended money for the necessary preservation or improvements of the property. In my view, the position of the secured creditors is that the preservation of their property by the receiver was not an activity which was initiated at the request of the secured creditors nor was it something that was done with the acquiescence of the secured creditors.

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

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

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

> — that I make the passing comment that on the basis of such cases as *Robert F. Kowal Investments v. Deeder Electric Ltd.* (1975) 59 D.L.R. (3rd) 492, I would have been prepared in spite of the non-notification of the Canadian Imperial Bank of Commerce, to uphold the priority accorded the receiver on the basis that in my view,
>
> > 1. The receiver was appointed to preserve or realize assets for the benefit of all interested parties including the secured creditor; or
> >
> > 2. That the receiver has expended monies for the necessary preservation of the property to the benefit of all parties.

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

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

63 In this case, the registrar of travel agents was appointed a receiver with respect to a travel agent. On a subsequent application, the receiver applied for a first charge provision, which latter applica tion was opposed by a debenture holder on the basis of no acquiescence on the initial application by the debenture holder and, secondly, on the basis of an indemnity provided by the receiver.

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

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

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

therefore, they ought not to be obliged to satisfy any of the receiver-manager's fees, charges or expenses, either pursuant to para. 14 of the order, or at common law on the exceptions of *Kowal*.

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

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

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

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

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

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

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

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

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

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

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

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

79 As to exception 3, there were, in my judgment, no moneys expended to maintain or preserve the security of Mitsui; however, if there were, they were moneys either not properly expended, or if properly expended, on property over which they had no entitlement. In the result, Mitsui is liable for none of the receiver-manager's fees pursuant to para. 14 of the Medhurst order or at common law.

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

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

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

83 As to Mitsubishi and exception 3, and this is the most difficult of the six analyses I have had to conduct, I have again considered the arguments of counsel and the evidence submitted. Despite the fact that the receiver-manager performed services such as employee retention, changing locks, inventory lists, hiring Mr. McIvor (a former employee of Vulcan) dealing with landlords and ensuring that no restraints or seizures occurred, liquidating furniture, ensuring equipment,

attending warranty work and service work, attending to statutory claims, dealing with parts over which Mitsubishi had no security, and other miscellaneous matters, none of these activities, in my view, benefited, on balance, Mitsubishi and were conducted by Price Waterhouse knowing of Mitsubishi's position that it simply wanted its goods back and wanted nothing to do with Price Waterhouse in its capacity as receiver-manager of Vulcan and would have, subject to Price Waterhouse inquiring as to the validity and equity of their security, applied for and likely been exempted from the receivership order had it received notice. On a strict wording of the third *Kowal* exception being: "The receiver has expended money for the necessary preservation and improvement of the property."

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

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

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

Application allowed.

TAB 10

2015 ABQB 745
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Trimove Inc.

2015 CarswellAlta 2169, 2015 ABQB 745, [2015] A.J. No. 1275, [2016] A.W.L.D. 488, 260 A.C.W.S. (3d) 677

Servus Credit Union Ltd, Applicant and Trimove Inc. and Geeta Luthra, Respondents

J.B. Veit J.

Heard: November 18, 2015
Judgment: November 24, 2015
Docket: Edmonton 1503-06388

Counsel: Kentigern A. Rowan, Q.C., for Receiver, MNP Ltd.
Thomas Gusa, for Applicant, Servus Credit Union Ltd.
Darren R. Bieganek, Q.C., for AFSC (Agricultural Financial Service Corporation)
Vishal Luthra, Geeta Luthra, for themselves

Subject: Civil Practice and Procedure; Insolvency; Public; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

IV Receivers

IV.2 Fees and expenses

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses

Court-appointed receiver recovered total of approximately $1.1 million of which approximately $863,000 was available to distribute to creditors — Receiver brought application for approval of its fees and its lawyer's fees which together totalled approximately $82,000 — Application granted — No basis was established for any substantive challenge to fees — Receiver provided detailed information about its activities and about individuals who undertook them and their rates — Amount of work undertaken by receiver was to be assessed in light of all circumstances of case including uncooperative attitude expressed by debtors at outset, difficulties of accounting for rolling stock, and ongoing failure of debtors to provide timely, accurate information — Debtors had contracted to pay receiver's lawyer's fees on full indemnity basis — Contract with respect to fees should be conclusive in absence of any argument that contract itself is invalid — There was no suggestion that legal fees exceeded those which could be said to be essential to and arising within four corners of litigation.

Table of Authorities

Cases considered by *J.B. Veit J.*:

Alberta Treasury Branches v. Weatherlok Canada Ltd. (2011), 2011 ABCA 314, 2011 CarswellAlta 1883, 343 D.L.R. (4th) 304, (sub nom. *Trinier v. Shurnaik*) 515 A.R. 148, (sub nom. *Trinier v. Shurnaik*) 532 W.A.C. 148, 68 Alta. L.R. (5th) 400 (Alta. C.A.) — referred to

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed

Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Sidorsky v. CFCN Communications Ltd. (1995), 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, 1995 CarswellAlta 86 (Alta. Q.B.) — referred to

911502 Alberta Ltd. v. Elephant Enterprises Inc. (2014), 2014 ABCA 437, 2014 CarswellAlta 2293, 588 A.R. 296, 626 W.A.C. 296 (Alta. C.A.) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C — referred to

APPLICATION by receiver for approval of fees.

***J.B. Veit J.*:**

Summary

1 The court-appointed receiver asks for approval of its, and its lawyer's, fees.

2 The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.

3 The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately $1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The receiver recovered a total of approximately $1.1 million, of which approximately $863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately $298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately $82,000.00.

4 The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be $3,000.00.

5 The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

6 Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in *Belyea*, *Bakemates* and *Diemer*.

7 Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, 'We'll make sure you get nothing", the nature of the assets - rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

8 While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in *Bakemates*, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive.":*BT-PR Realty Holdings*. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

9 If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in *Bakemates*.

Cases and authority cited:

10 *By the debtors*: *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B. C.A.); *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (Ont. C.A.).

11 *By the court*: *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) [hereinafter Bakemates]; *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]); *911502 Alberta Ltd. v. Elephant Enterprises Inc.*, 2014 ABCA 437 (Alta. C.A.); *Sidorsky v. CFCN Communications Ltd.*, [1995] A.J. No. 174 (Alta. Q.B.); *Alberta Treasury Branches v. Weatherlok Canada Ltd.*, 2011 ABCA 314 (Alta. C.A.) [hereinafter Trinier].

1. Background

12 Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

13 Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately $1.1 million. As a representative example, in the $700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

> 1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

14 Geeta Luthra guaranteed the repayment of those facilities.

15 Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

> On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed .... In response to this statement Karan stated that "We'll make sure you get nothing".

16 When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

17 On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had $146,480.00 in outstanding accounts payable and no funds to pay them.

18 On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

19 On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

> [the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security....
>
> Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands.... I provided him the following items ... list of equipment, I recalled from my memory and locations ...

20 Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

21 Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

22 Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

23 Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

24 In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

25 The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

2. Testing receivers' and lawyers' fees

26 I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in *Belyea* and *Diemer*.

27 In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is *Bakemates*, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

28 The other case to which I must refer is *BT-PR Realty Holdings*. That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as *Diemer*, but also any contract in relation to legal fees. As Farley J. said:

> I do not particularly quarrel with the list of factors set out in the *Bank of Montreal v. Nicar Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):
>
> (a) the nature extent and value of the cases;
>
> (b) the complications and difficulties encountered;
>
> (c) the degree of assistance provided by the parties;
>
> (d) time spent by the receiver;
>
> (e) the receiver's knowledge, experience and skill;
>
> (f) diligence and thoroughness;
>
> (g) responsibilities assumed;
>
> (h) results achieved; and,
>
> (i) the cost of comparable services.
>
> <u>However I would add</u>
>
> (j) <u>other material considerations - for example in this case:</u>
>
> (i) <u>the April 12 agreement to the fees;</u>

> (ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).
>
> I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. <u>See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route.</u> In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors <u>and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.</u>

In other words, in *BT-PR Realty Holdings*, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

3. Applying the principles in this case

a) Receiver's fees

29 Information about the receiver's fees is attached to an affidavit in the manner recommended by *Bakemates*. The debtors do not provide any evidence on the issue of fees.

30 It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

31 More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

32 In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

33 The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

34 Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

35 Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

36 It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

37 Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for $3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

38 In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.

b) Lawyer's fees

39 The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in *Bakemates*: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

40 However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

41 More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in *Elephant Enterprises*.

42 As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in *Sidorsky*, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

> 5 There are three levels of costs that may be payable by one party to another:
>
> > 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
> >
> > 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
> >
> > 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

43 As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in *Trinier*:

> G. Any Discretion?
>
> 39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.
>
> 40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view.

> They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.
>
> 41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.
>
> 42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: *BT-Pr Realty Holdings Inc.*

44 In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

45 However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

4. Proposal to hire an expert to review the receiver's fees

46 If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in *Bakemates* rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the *Bakemates* procedure does not arise.

5. Costs

47 The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Application granted.

End of Document

TAB 11

2013 ABQB 670
Alberta Court of Queen's Bench

Thompson Bros. (Constr.) Ltd. v. Jay Vee Sandblasting Ltd.

2013 CarswellAlta 2408, 2013 ABQB 670, [2014] A.W.L.D. 305,
[2014] A.W.L.D. 306, 235 A.C.W.S. (3d) 600, 7 C.B.R. (6th) 258

Thompson Bros. (Constr.) Ltd. Plaintiff/Respondent and Jay Vee Sandblasting Ltd., Defendant and BDO Canada Limited, Receiver and MMD Leasing Ltd., Sandra Kirkup and 67017 Manitoba Ltd. Applicants

B.R. Burrows J.

Heard: October 25, 2013
Judgment: November 15, 2013
Docket: Edmonton 1303-03149

Counsel: Greg Heinrichs, Q.C., Deborah Szatylo for Applicants
Sigurd Delblanc for Plaintiff / Respondent
Russell A. Rimer for Receiver
No one for Jay Vee Sandblasting Ltd.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

III Bankruptcy petitions for receiving orders
III.4 Stay of petition
III.4.a Pending outcome of other proceedings

Bankruptcy and insolvency

V Bankruptcy and receiving orders
V.4 Rescission or stay of order

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Stay of petition — Pending outcome of other proceedings

Respondent T Ltd. was secured creditor of J Ltd. and was applicant for receivership order which had been imposed — Secured debt claimed by T Ltd. was $11.75 million; however, there were debts to other priority creditors exceeding $600,000 — Applicants had unsecured claims against J Ltd. exceeding $1.6 million; additionally, were other unsecured creditors whose claims totalled $1.9 million — Since receivership order, receiver had proceeded with sale of assets of J Ltd. — Applicants brought application for order lifting stay of proceedings imposed in receivership order in respect of J Ltd. — Application granted — Proceeds of sale of assets of J Ltd. exceed undisputed amount of secured debt by significant amount — After eight months neither receivership nor court applications have advanced very far toward resolution of disputes between creditors — Bankruptcy trustee would have rights and powers which would potentially bring disputes to determination more quickly and probably more efficiently than current proceedings — There would seem to be little basis for concern that bankruptcy trustee would be required to duplicate work already done by receiver — Lifting stay of proceedings should be granted to permit applicants to bring bankruptcy application.

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

Respondent T Ltd. was secured creditor of J Ltd. and was applicant for receivership order which had been imposed — Secured debt claimed by T Ltd. was $11.75 million; however, there were debts to other priority creditors exceeding $600,000 — Applicants had unsecured claims against J Ltd. exceeding $1.6 million; additionally, were other unsecured creditors whose claims totalled $1.9 million — Since receivership order, receiver had proceeded with sale of assets of J Ltd. — Applicants brought application for order lifting stay of proceedings imposed in receivership order in respect of J Ltd. — Application granted — Proceeds of sale of assets of J Ltd. exceed undisputed amount of secured debt by significant amount — After eight months neither receivership nor court applications have advanced very far toward resolution of disputes between creditors — Bankruptcy trustee would have rights and powers which would potentially bring disputes to determination more quickly and probably more efficiently than current proceedings — There would seem to be little basis for concern that bankruptcy trustee would be required to duplicate work already done by receiver — Lifting stay of proceedings should be granted to permit applicants to bring bankruptcy application.

Table of Authorities

Cases considered by *B.R. Burrows J.*:

Haunert-Faga v. Faga (2013), 2013 CarswellOnt 11104, 2013 ONSC 5161, 4 C.B.R. (6th) 118 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 38 — considered

s. 43 — pursuant to

APPLICATION by applicants for order lifting stay of proceedings imposed in receivership order in respect of J Ltd.

***B.R. Burrows J.*:**

1 MMD Leasing Ltd., Sandra Kirkup and 67017 Manitoba Ltd., who I will refer to collectively as the Kirkup Group, seek an order lifting the stay of proceedings imposed in a Receivership Order in respect of Jay Vee Sandblasting Ltd. granted by Thomas J. on March 7, 2013. They seek the lifting of the stay so they can bring a bankruptcy application under *BIA* s. 43 with respect to Jay Vee of which each of them is an unsecured creditor.

2 Thompson Bros. is a secured creditor of Jay Vee and was the applicant for the Receivership Order. The order appointed BDO Canada Ltd. as Receiver.

3 The secured debt claimed by Thompson Bros. is $11.75 million. Of this, $8.15 million was originally owed to the Canadian Western Bank whose security held first priority. Thompson Bros.' secured debt (the amount of which is in issue but which Thompson Bros. claims to be $3.6 million) held second priority. The Bank assigned its debt to Thompson Bros.

4 The First Report of the Receiver dated May 10, 2013 indicates debt to the Canada Revenue Agency and other priority creditors exceeding $600,000.

5 The Kirkup Group has unsecured claims against Jay Vee exceeding $1.6 million. Actions had been commenced in respect of these debts against Jay Vee prior to the receivership. There are other unsecured creditors whose claims total $1.9 million.

6 Since the receivership was ordered there have been two main streams of activity. First, the Receiver has proceeded with the sale of Jay Vee's assets. Second, the Kirkup Group has made a number of applications inspired by its principals' concerns that there was significant pre-receivership dissipation and unremunerated use of the assets of Jay Vee, and that the proper credit has not been made for payments made by Jay Vee in respect of the Thompson Bros.' debt. I will describe these concerns more specifically below.

7 The first stream of activity reached the point on October 25, 2013 of the Court approving the sale of the assets of Jay Vee to Thompson Bros. subject to terms which, among other things, attempted to preserve the rights of the Kirkup Group to pursue the concerns they have raised in the second stream of activity.

8 The second stream of activity consists of the following applications brought by the Kirkup Group:

a. June 21, 2013 - Application for an order determining:

1. the amount of the debt owed by Jay Vee to Thompson Bros.,

2. the validity of the security taken by Thompson Bros. against Jay Vee,

3. the validity of the security taken by Canadian Western Bank against Jay Vee which was subsequently assigned to Thompson Bros.

In this application the Kirkup Group alleged that Thompson Bros. might not have been a legitimate arms-length creditor of Jay Vee and may have been a mortgagee in possession.

b. July 25, 2013 - Application for an order setting aside the Receivership Order of March 7, 2013, or alternatively, replacing BDO Canada Limited as Receiver with a new Court appointed receiver and other relief.

c. July 29, 2013 - Application for an order directing Paul Sturt, deponent of an affidavit filed by Thompson Bros. in response to the previously filed applications, to provide answers to undertakings, and to questions refused to be answered at Questioning on the affidavit.

d. August 12, 2013 - Application for an order directing Earl Northcott to answer undertakings and questions he refused to answer at Questioning on an affidavit.

e. August 12, 2013 - Application that the first two applications be determined at a trial involving *viva voce* evidence.

9 On September 4, 2013 I granted an order declaring that all security granted by Jay Vee to the Canadian Western Bank was valid and that the amount of the debt it secured was $8,105,776.64. The order was expressed to be without prejudice to the Kirkup Group's right to seek a setoff against the total debt owed to Thompson Bros. by Jay Vee of any amount the Kirkup Group might prove Thompson Bros. is responsible to pay Jay Vee.

10 In the same order I dismissed Kirkup Group's applications to set aside the Receivership Order or alternatively to replace BDO as Receiver. The other Kirkup Group motions listed above were adjourned.

11 Also in the September 4, 2013 order I ordered that if Thompson Bros. was the successful purchaser of Jay Vee's assets (which, as noted, it was) the question of whether and to what extent Thompson Bros. should be required to leave the assets purchased unencumbered, or alternatively the amount of security which Thompson Bros. should be required to post so that the claims advanced by Kirkup Group would not be prejudiced, would be determined at the application for

approval of the sale. In fact, at that application, on October 25, 2013, that issue was further adjourned. In the meantime the Receiver was directed to make no distribution of the net proceeds of the sale until further order.

12 The concerns that the Kirkup Group raises in the second stream of activity are more specifically described by Kirkup's counsel in the materials filed on this application as follows:

a. Payments (or at least an August 2012 payment of $300,000) made by Jay Vee to Thompson Bros. has not been credited in the accounting for Jay Vee's debt to Thompson Bros.

b. Payments were made in June, July and August 2012 by Jay Vee to "Thompson individuals" for no apparent reason. Undertakings to advise why these payments were made have not been satisfied.

c. Jay Vee records indicate that two payments totalling $88,000 were made by certified cheque to unknown payees on October 9, 2012. Information explaining these payments has not been provided.

d. The mortgage granted by Jay Vee to Thompson Bros. does not provide for compound interest. Thompson Bros. has improperly calculated the debt using interest compounded monthly.

e. The mortgage granted by Jay Vee to Thompson Bros. secured a debt of $1.5 million that was outstanding on April 24, 2009. It did not secure advances which were made by Thompson Bros. to Jay Vee after that date. Payments by Jay Vee should be credited against the oldest debt - the mortgage debt. If payments were properly credited, no payment should have been credited against advances made by Thompson Bros. to Jay Vee after the mortgage, on August 27, 2009 and August 26, 2010, totalling $650,000, until the mortgage debt was entirely repaid. The accounting records disclosed to date do not confirm that this accounting procedure was followed. If it was, the post April 24, 2009 advances would be wholly outstanding and would now be statute barred. [I note that the Kirkup Group materials do not discuss how the General Security Agreement granted by Jay Vee in favour of Thompson Bros. on April 24, 2009 which appears to grant security in respect of existing and "future obligations, liabilities and indebtedness" fits into this allegation.]

f. There was no documentation providing that interest was payable on advances made by Thompson Bros. to Jay Vee after April 24, 2009. None should be included in the debt claimed in respect of advances made after that date.

g. The debt claimed by Thompson Bros. includes legal fees incurred by Thompson Bros. in relation to the collection of the debts owed to it. The only legal fees that Thompson Bros. can properly claim against Jay Vee are those relating to the mortgage and the enforcement of the mortgage. The legal fees paid, which exceed $140,000, were for services both inside and outside that scope. The portion for services outside that scope are not properly included in the secured debt.

h. Some of the information obtained by the Kirkup Group suggests that for several months prior to the Receivership Order, Thompson Bros. may have been a mortgagee in possession as it was playing a significant role in the day to day operation of Jay Vee. This would open the question of whether Thompson Bros. mismanaged the affairs of Jay Vee during that period in such a way that the amount of the debt owed by Jay Vee to Thompson Bros. should be reduced. An example of such mismanagement could be permitting Norpoint Sandblasting & Painting Ltd. to use Jay Vee's facility without payment of rent. Other indications of mismanagement in the same period include that there were very substantial reductions in a) the reported value of Jay Vee's inventory (from $1,968,980 to $20,000), and b) the reported value of Jay Vee's accounts receivable (from $9,673,782.85 to $323,281.68).

i. Principals of Jay Vee used money of Jay Vee to pay for personal items including expensive vehicles, rent and Court ordered maintenance.

j. Jay Vee funds were paid to both related and unrelated persons and entities for unknown or no reason.

13 The stay of proceedings provision in the Receivership Order states:

No Proceedings Against the Debtor or the Property

8. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8.

14 The Kirkup Group seek a lifting of the stay to permit them to apply for a bankruptcy order against Jay Vee. They submit that a bankruptcy proceeding would provide a better procedure for the determination of the issues they have raised in the second stream of activity described above than the receivership proceeding provides.

15 In particular they submit that the powers of a trustee in bankruptcy are wider in relevant ways than those of a Court appointed receiver. In that regard they cite the following passages from Bennett on Receiverships, Carswell, 3 rd ed., found under the title, "Reasons for Bankruptcy from Unsecured Creditor's Point of View":

• Information: ... bankruptcy affords unsecured creditors through the trustee a right to demand an accounting from the security holder as well as an opportunity of determining whether the security instrument can be attacked. (page 624)

• Investigation: ... the bankruptcy gives all creditors a measure of protection through the mechanics of the Act. Even if the trustee in bankruptcy does not have sufficient proceeds, creditors have the right to fund the trustee or to proceed under section 38 of the *Bankruptcy and Insolvency Act* for a thorough investigation of the affairs of the debtor.

Moreover, once the debtor is placed into bankruptcy, the trustee in bankruptcy acquires causes of action that may not be apparent without an investigation. If the trustee is successful in pursuing the causes of action, the proceeds benefit preferred and unsecured creditors including the security holder who is partially secured.

... in a bankruptcy situation, the trustee may proceed and recover moneys paid as a preference with the result that such moneys devolve upon all preferred and unsecured creditors. (page 626)

And these passages found under the title, "Causes of Action available only to Trustee in Bankruptcy":

• Fraudulent Preferences and Transfers at Undervalue: ... the trustee in bankruptcy may be entitled to attack the security instrument pursuant to the *Bankruptcy and Insolvency Act* as being a fraudulent preference or a transfer at undervalue. (page 630)

... Aside from any trustee attack that might be made against the security holder, the trustee may also assert any of the causes of action against third parties who have received fraudulent preferences or who have received transfers at undervalue. (page 633)

• Examinations: ... [Pursuant to *BIA* s. 163(1)] [t]he trustee may without an order examine under oath any person reasonably thought to have knowledge of the affairs of the bankrupt. The trustee may require a person to produce any books, documents, correspondence or other papers in that person's possession or under his or her power relating all or in part to the bankrupt, his or her dealings, or property. In addition, the trustee may require anyone who has or is believed or suspected to have [it] in his or her possession to produce or deliver any property of the bankrupt, including books, documents, or papers. (page 636)

• Creditors' Remedies - Section 38 Proceedings: ... If the trustee does not have sufficient funds to proceed or receives a legal opinion that the trustee's cause of action is not meritorious, then it is open for an unsecured creditor including a security holder who has a claim for a deficiency balance, to proceed with such cause of action pursuant to s. 38 of the *Bankruptcy and Insolvency Act*. Creditors may have claims against another creditor who, for example, received a fraudulent preference and may have claims against the security holder and receiver. With respect to both types of claims, creditors do not have any cause of action against them directly as such claims are vested in the trustee in bankruptcy. The creditors must either obtain an assignment from the trustee or an order under section 38 of the Act.

16 The Kirkup Group also observe that their efforts to this point to have their concerns explored in the receivership have been largely unsuccessful. On April 18, 2013, the Kirkup Group's solicitors wrote to counsel for the Receiver requesting that the Receiver investigate what happened to Jay Vee's inventory and accounts receivable between August 2012 and March 2013. As previously noted the recorded value of the former declined from $1,968,980 to $20,000 and the recorded value of the latter declined from $9,673,782.85 to $323,281.68 in that period. A follow-up letter was sent to the Receiver's counsel on May 6, 2013. There is no indication that the Receiver has responded to these requests.

17 I note that in the Bench Brief filed on August 28, 2013 for the September 4, 2013 application the Receiver's counsel has acknowledged that the Kirkup Group has raised the issues it has and that, at some point, at least some of them must be addressed. That brief also stated that the Receiver has been unable to determine with any degree of certainty the exact amounts owed by Jay Vee to Thompson Bros. though, "it seems apparent on the evidence presented thus far, that the amount owing to Thompson Bros. is definitely in excess of $1.5 Million dollars (*sic*)". I am not aware of any objective determination having been made as to what caused the very significant decline in the stated value of Jay Vee's inventory and accounts receivable in the six months preceding the appointment of the Receiver. So far as I am aware it has not been determined whether any causes of action exist in favour of Jay Vee in connection with whatever those causes were.

18 Thompson Bros. did not file any affidavit or other materials in response to this application. In oral submissions, Mr. Delblanc, counsel for Thompson Bros., submitted that bankruptcy proceedings would be "incredibly expensive". Whether or not this is so, I note that the cost of the bankruptcy proceedings would not reduce the recovery of Thompson Bros. to the extent that, as it claims, it is a fully secured creditor.

19 Mr. Delblanc further submitted that the Kirkup Group is, in this application, seeking equitable relief (the lifting of the stay). He submitted that the Kirkup Group's conduct prior to the Receivership Order should disentitle it to do so. He referred to portions of the questioning of Grant Kirkup and Earl Northcott (the principal of Jay Vee) which, he submitted, showed that Mr. Kirkup caused the mischief which put the company into receivership.

20 Excerpts from the questioning of Mr. Northcott give some indication as to how the recorded value of accounts receivable may have become inflated. He testified that Jay Vee both billed for anticipated work that never materialized and adjusted the date of billings (without cancelling the aged accounts) so as to show accounts receivable being more current than they actually were. This was done to satisfy the margin requirements of the Canadian Western Bank. Mr. Northcott testified that Mr. Kirkup, who was providing accounting services to Jay Vee, both knew of and participated in these manipulations of the records. In his questioning, Mr. Kirkup confirmed that he knew that misrepresentations were being made to the bank.

21 Mr. Delblanc indicated that his clients will be commencing action against Grant Kirkup in connection with his actions in this regard. It seems to me that it is more likely that Jay Vee would have a cause of action arising from them, than that Thompson Bros. would. This is a matter which might properly be investigated and pursued by a bankruptcy trustee. In my view this outweighs any concern that the Kirkup Group does not have clean hands.

22 Counsel for the Canada Revenue Agency, Mr. Segal, appeared and opposed the application. He noted that there is a GST deemed trust which though presently asserted at $10,000 may in fact be less than that or non-existent. While he acknowledged that the priority that would otherwise be accorded to the deemed trust would not be recognized in a bankruptcy, he suggested that the amount in issue is so small that this should not be a factor in determining whether or not to lift the stay. I agree.

23 He also objected that the cost of bankruptcy proceedings would not appear to be justified. He suggested that the disputes that exist between Thompson Bros. and the Kirkup Group should more properly be determined in the applications that have been brought. The costs of determining those issues should be borne by the disputants. In a bankruptcy, they would be a charge on the residue, if any, available for distribution to unsecured creditors.

24 Mr. Rimer, counsel for the Receiver, observed that the Kirkup Group itself would be responsible to pay the costs of the bankruptcy trustee unless and until it is determined that the Thompson Bros.' debt is not wholly secured. Unless that determination is made, the proceeds of the sale of Jay Vee's assets in the receivership will not extend to the satisfaction of the secured creditor. There will be nothing for unsecured creditors. It may be difficult for the Kirkup Group to find a bankruptcy trustee willing to accept the appointment.

25 It can reasonably be argued that applications in the receivership proceedings have not proved to be an efficient method of having the issues raised by the Kirkup Group determined. The Receiver, probably quite properly, appears to have been focused on the first stream of activity in the receivership - the sale of Jay Vee's assets. The main adversaries in the disputes arising in the second stream of activity, the Kirkup Group and Thompson Bros., appear to have taken entrenched litigation positions which produce more heat than light. It is reasonable to expect that the inquisitorial process employed by a bankruptcy trustee would more likely achieve resolution of the issues than the adversarial setting in which these disputes currently reside.

26 The authorities indicate that in determining whether or not to lift the stay, "... the court must consider the totality of the circumstances and the relative prejudice to both the creditor and the debtor. The Court should consider a balancing of the interests of all affected parties." *Haunert-Faga v. Faga*, 2013 ONSC 5161 (Ont. S.C.J. [Commercial List]) at para. 15.

27 I would summarize the significant features of the circumstances here as follows:

• The Kirkup Group has raised serious concerns regarding the amount owing under the security claimed by Thompson Bros., the dissipation of Jay Vee assets prior to the receivership, and the involvement of Thompson Bros. in the management of Jay Vee prior to the receivership.

• Thompson Bros. has raised serious concerns regarding the involvement of the Kirkup Group in the management of Jay Vee prior to the receivership.

• The proceeds of the sale of the assets of Jay Vee exceed the undisputed amount of the secured debt by a significant amount.

• After eight months neither the receivership nor Court applications have advanced very far toward resolution of the disputes. A bankruptcy trustee would have rights and powers which would potentially bring the disputes to determination more quickly and probably more efficiently than the current proceedings appear likely to do.

• The cost to Thompson Bros. if the disputes were resolved through the bankruptcy process would not be greater than the current proceedings, if, as it asserts, its security extends to the total amount of the sale of the assets of Jay Vee.

• There will be no cost to unsecured creditors unless the bankruptcy trustee determines that there are claims to pursue and they are successfully pursued. Otherwise the applicant for the bankruptcy order, the Kirkup Group, will be responsible for the cost of the bankruptcy proceedings.

• No unsecured creditor other than the CRA has opposed the application. The CRA has not participated in the second stream applications. Mr. Segal's submissions suggest that the CRA is resigned to the conclusion that there will be nothing for unsecured creditors. If in bankruptcy proceedings any funds become available for distribution to preferred and unsecured creditors, the CRA will have been prejudiced by receiving less of a windfall than it might otherwise have received. That is not a real prejudice.

• Beyond the possibly more effective "inquisitional" approach available to a bankruptcy trustee, both the Kirkup Group and Thompson Bros. (to the extent there is a deficiency in its recovery) would, if a bankruptcy order is obtained, acquire the right to apply under *BIA* s. 38 for leave to pursue any Jay Vee cause of action the bankruptcy trustee is not willing to pursue.

• The continuation of the existing receivership to the point that the "first stream" activities are concluded need not be affected by a bankruptcy order. There would seem to be little basis for concern that the bankruptcy trustee would be required to duplicate work already done by the Receiver.

28 Having given due consideration to these circumstances and the positions of affected parties I conclude that the lifting of the stay applied for should be granted. I therefore grant leave to MMD Leasing Ltd., Sandra Kirkup and 67017 Manitoba Ltd. to bring a bankruptcy application under *BIA* s. 43 with respect to Jay Vee Sandblasting Ltd., notwithstanding the stay of proceedings contained in paragraph 8 of the Receivership Order granted herein on March 6, 2013.

Application granted.

End of Document

