COURT FILE NUMBER	1703-12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD. and 1371047 ALBERTA LTD.
DOCUMENT	**Bench Brief of Business Development Bank of Canada In Response to the Application of First Island Financial Services**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Cassels Brock & Blackwell LLP Suite 1250 Millennium Tower, 440 – 2nd Avenue SW, Calgary, Alberta, T2P 5E9 Telephone: 403-351-2921 Facsimile: 403-648-1151 **Attention: Jeffrey Oliver/Danielle Maréchal**

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
APR 16 2018
FAX.
Clerk of the Court

I. INTRODUCTION

1. First Island Financial Services Ltd. ("**First Island**") is seeking an Order of this Honourable Court removing or exempting a parcel of land located in Sturgeon County, Alberta (the "**Farm**") from the allocation of any costs arising after April 6, 2018 in the within proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**").

2. The relief sought by First Island should be denied on the basis that the allocation of CCAA costs as against various assets should occur at or near the end of the CCAA proceedings. To order otherwise would amount to a pre-determination of the costs allocation, and could result in prejudice to other stakeholders.

II. FACTS

BDC Mortgage

3. Business Development Bank of Canada ("**BDC**") held a mortgage (the "**BDC Mortgage**") against the Edmonton Land in the principal amount of $3,440,000.

> Affidavit of Russell French sworn June 29, 2017 at paras 4 and 5.

4. On September 26, 2017, the Court granted an order (the "**Approval and Vesting Order**") approving the sale of the Edmonton Land and the distribution of the proceeds received pursuant to the sale of the Edmonton Land to BDC.

> Order of the Honourable Justice S.D. Hillier granted September 26, 2017.

5. As a result of the sale of the Edmonton Land and the subsequent distribution of sale proceeds, the BDC Mortgage was repaid in full.

6. However, pursuant to paragraph 4 of the Approval and Vesting Order, the Court ordered that any payment made to BDC pursuant to the Approval and Vesting Order was without prejudice to subsequent orders allocating costs, the Administration Charge, the Interim Lender's Charge and/or the Directors' Charge (all as defined in the Initial Order and collectively, the "**CCAA Costs**") in the CCAA Proceedings among the various assets comprising the property of the CCAA Applicants, including the proceeds of the Edmonton Land.

> Order of the Honourable Justice S.D. Hillier granted September 26, 2017 at para 4.

First Island Mortgage

7. First Island holds a mortgage registered against the Farm.

8. At an April 6, 2018 hearing in the within proceedings, First Island brought forward a consent order (the "**Consent Order**") agreed to between the Monitor, CCAA Debtors and First Island that purported to, *inter alia*, (i) lift the stay to permit a foreclosure on the Farm; and (ii) cap the CCAA Costs against the Farm Land as at April 6, 2018.

9. BDC was not provided with any advance notice of the Consent Order and objected to the inclusion of the provision capping the CCAA Costs as against the Farm on the basis that, *inter alia*:

   (a) matters relating to the allocation of the CCAA Costs should be determined at or near the conclusion of the CCAA proceedings, consistent with the position of the Monitor in this proceeding (with which this Court has previously agreed);

   (b) permitting a cap of certain CCAA Costs at this stage of the CCAA proceedings would amount to a partial pre-determination of their allocation; and

   (c) the Approval and Vesting Order specifically reserved the issue of CCAA Cost allocations. As such, it would be inequitable to cap the CCAA Costs as against First Island without also providing a similar benefit/opportunity to BDC.

10. Upon the Honourable Justice Nielsen expressing concerns with this aspect of the relief sought by First Island, counsel to First Island sought a brief adjournment of the application to seek instructions from First Island. However, First Island was not available to provide instructions in this regard. In the circumstances, this issue was adjourned until April 20, 2018, in the event that First Island wished to continue to pursue that form of relief.

III. ISSUES

11. Is it appropriate for this Honourable Court to remove or exempt the Farm from the allocation of any costs arising after April 6, 2018 despite the fact that CCAA proceedings remain ongoing and a determination as to the allocation of CCAA costs as against various assets has not yet been made?

IV. SUBMISSIONS

If the Relief Sought by First Island is Granted, Other Creditors Should Receive Analogous Treatment

12. BDC is in a similar and arguably even better position than First Island in relation to arguments limiting cost allocations or capping them on a certain date. The Edmonton Land was listed for sale in February 2017, approximately four months prior to the commencement of the CCAA Proceedings. The purchaser of the Edmonton Land was identified and conducted multiple tours of the Edmonton Land approximately two months

prior to the commencement of the CCAA Proceedings. The Approval and Vesting Order was granted on September 26, 2017, more than six months ago. However, notwithstanding the foregoing, pursuant to the Approval and Vesting Order, BDC was not the beneficiary of any cap or date limit on cost allocations.

Second Report of the Monitor,
paras. 46 to 57

13. If the relief sought by First Island is granted, it is likely that other creditors will feel compelled to seek similar relief, rather than waiting to advance allocation arguments at the conclusion of the proceedings. In this circumstance, BDC will have no choice but to apply forthwith for a declaration that either the Edmonton Land is entirely exempt from any CCAA Cost allocation, or alternatively that no CCAA Costs can be allocated to the Edmonton Land after September 26, 2017 (being the date of the Approval and Vesting Order), or alternatively the closing date for the sale of the Edmonton Land.

14. As discussed further below, proceeding in such a fashion is an inefficient use of resources and may result in outcomes that are prejudicial to those parties who do not take pre-emptive action similar to that sought by First Island. This is contrary to the spirit and intent of the CCAA.

Cost Allocations under the CCAA should be made at the end of the proceedings

15. First Island's Application to remove or exempt the Farm from the allocation of CCAA Costs arising after April 6, 2018 is premature. While First Island may have good arguments in support of that relief at an appropriate time, the requested relief is a partial pre-determination of a cost allocation, which should be made at or near the conclusion of the CCAA proceeding.

16. The allocation of CCAA costs can have a material impact on the ultimate net recovery received by creditors. The determination of whether the CCAA Costs cease to apply to the Farm after April 6, 2018 will necessarily impact the quantum of CCAA Costs that are allocated to the Farm and therefore the quantum of costs that remain to be allocated to the remaining assets of the debtor.

17. In the absence of exceptional circumstances, decisions regarding the allocation of CCAA Costs (including a determination of whether or not those costs cease to apply to the Farm after April 6, 2018) should be reserved until the proceedings are at or near a conclusion. No such exceptional circumstances are present in this case and deferring the determination of CCAA Cost allocations as against the Farm to the end of the proceedings will not pose any prejudice to First Island.

18. The process of allocating CCAA Costs as between creditors has historically been addressed at the end of the proceedings, at a time when realizations are complete and there is considerable certainty as to the sums that need to be allocated:

> Ultimately, the apportionment of the Receiver's fees and disbursements is for the Court to determine at the end of the receivership, including repayment of any borrowings authorized by the Court: see e.g. *Maple Leaf Loading, Integris Credit Union, Re Medican Holdings Ltd, 2013 ABQB 224, Re Respec Oilfield Services Ltd, 2010 ABQB 277."* (*emphasis added*)
>
> *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 ABQB 124 para 169

19. The case of *Atlantica Diversified Transportations Systems Inc. (Re)*, 2018 NSSC 77 further confirms that these allocation decisions are rarely made prior to the conclusion of the proceedings. At para 48, Justice Freedman is quoted in *Winnipeg Motor Express Inc. et al.*, 2009 MBCA 110, para 40:

> ... The question whether the restructuring judge can allocate priority before the outcome of the restructuring is known was a matter of first instance. The restructuring judge had acknowledged as much, noting in her decision that "[t]he issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152 at para. 21). (*emphasis added*)

20. There are practical reasons which support this argument. Cost allocations are complex, with the necessary consideration of a number of factors.

21. Justice Brown in the case of *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43, as quoted in *HSBC Bank of Canada v. Maple Leaf Loading Ltd.*, 2016 BCSC 361 best summarizes these factors:

> (a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (b) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

> (c) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>
> (d) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>
> (e) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a pro rata basis;
>
> (f) Where an allocation appears prima facie as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

22. By their nature, these factors allocate obligations away from one creditor (to their benefit) and onto another creditor (to their detriment). As a result, these determinations should not be made in isolation. Rather, all allocations should be decided at the same time in the context of the entire proceedings so that all parties have the benefit of all information before them to permit fulsome arguments and negotiations to occur.

23. These proceedings are not near their conclusion. Much work remains to be done. To date, certain assets have been sold; others are subject to pending sales (which may or may not close); other assets may be sold in the future; and others assets may never be sold. The unfortunate reality is that decisions made and steps taken prior to April 6, 2018 may continue to have an impact on stakeholders after that date, particularly in light of the above-referenced unknowns.

24. Yet, the relief sought by First Island would insulate it from post April 6, 2018 consequences of decisions made prior to April 6, 2018, when no other creditor enjoys that benefit. At a later date, this may appear to be reasonable. However, that decision would be made with the benefit of additional information about the outcome of the within proceedings.

25. To grant this request now is to limit the rights of other parties to make future CCAA Cost allocation arguments in relation to First Island with the benefit of the actual sale results and costs at the conclusion of the proceedings. By way of example, what if a transaction that was court approved prior to April 6, 2018 does not close, and further costs are required to pursue alternate transactions? In that circumstance, no party would be able to assert that the consequences of that outcome (which are inextricably linked to pre April 6, 2018 circumstances) could be visited in part upon First Island. It is not fair to

grant this potential benefit to First Island at this stage in a vacuum, when in contrast, First Island is not prejudiced by waiting until the conclusion of these proceedings to argue issues of allocation, similar to what was required of BDC.

26. As noted above, the law dictates that the allocation should be made with regard to <u>all</u> of the circumstances. It is difficult to conceive how this can be done at this stage of the proceedings.

The Relief Sought by the Applicant is not Supported by the Cost Allocation Principles

27. The factors quoted in paragraph 21 above should also be viewed through the lens of Justice Hall's iteration of these principles in *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164. Specifically, at paragraph 17, he states that cost allocations should be made upon an objective basis, the fairest of which should be a uniform percentage of the sale price received for the asset secured. He also concluded that exceptions to a uniform application of allocations should not be lightly granted.

28. If First Island is granted the relief sought, the result would be in direct opposition to this principle, as it would result in multiple apportionments of costs that are not uniformly applied between the secured creditors. Further, First Island has not articulated any reason articulated as to why this is necessary or how they as a creditor will be prejudiced. Waiting until a later date for their allocation to be determined is also consistent with the position that has been expressed by the Monitor in this very proceeding that cost allocation issues should be determined concurrently and at a time when all of the relevant information and submissions (from both secured creditors and the Monitor) are before the Court.

29. Many of the arguments made by First Island in their Brief with respect to the cut-off date and allocation of CCAA Costs are equally applicable to BDC. BDC expects that it will strongly oppose the CCAA Cost allocation that is currently contemplated, recognizing however that the current allocation is preliminary and subject to change. However, due to the uncertainty associated with an allocation occurring that this stage, it is appropriate and fair as between stakeholders that a complete cost allocation occur at a later date, and that the ability of the Monitor and stakeholders to argue for various forms of CCAA cost allocation not be fettered at this time.

V. CONCLUSION

30. Accordingly, for all of the forgoing reasons, First Island's application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th day of April, 2018.

CASSELS BROCK & BLACKWELL LLP

Per: ______________________

Jeffrey Oliver/Danielle Maréchal
Counsel for Business Development
Bank of Canada

TABLE OF AUTHORITIES

1. *Atlantica Diversified Transportation Systems Inc. (Re)*, 2018 NSSC 77
2. *HSBC Bank of Canada v. Maple Leaf Loading Ltd.*, 2016 BCSC 361
3. *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531
4. *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 ABQB 124

SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantica Diversified Transportation Systems Inc. (Re),* 2018 NSSC 77

Date: 2018-04-04
Docket: *Hfx* No. 470769
Registry: Halifax

In the matter of: A Plan of Compromise or Arrangement of Atlantica Diversified Transportation Systems, Inc.

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 23, 2018, in Halifax, Nova Scotia
Subject:	*Companies Creditors Arrangement Act*; allocation of the Administrative Charge expenses on premature termination of proceedings as between secured creditors
Summary:	ADTS was a large trucking company. It leased its trucks and trailers from CW. By August 2017, ADTS was not paying its lease payments. On November 24, 2017, ADTS made an application in chambers for a CCA A plan of compromise or arrangement. An initial order was granted December 7, and a second order issued December 22, 2017. By February 20, 2018 the restructuring was abandoned, and the stay of proceedings lifted. BDO, as court appointed Monitor, recommended that the maximum permitted $75,000, Administrative Charge (ADTS legal counsel and advisor; BDO and legal counsel), be allocated between the secured creditors on the basis of debt payable to them as a percentage of the total debt payable to the secured creditors. The monitor recommended that CW pay 73% of the Administrative Charge. CW objected, claiming it most it should be responsible for 18% based on the 9% non-lease obligations amounts owed to it. CW argued that the 91% of ADTS's obligation to pay it arose from their lessor – lessee relationship, and therefore they were not secured creditors, consequently no amount should be allocated to them beyond

the 9% of non-lease obligations.

Issues: (1) Is the relationship between ADTS and CW one of true lessor and lessee?

(2) If it is a circumstance of "true leases", what allocation (if any) should be made against CW for payment of the Administrative Charge?

Result: (1) The relationship is one of true lessor and lessee. CW is not a secured creditor of ADTS in relation to any of the lease payments and charges arising there from that are outstanding.

(2) A just and equitable allocation of the Administrative Charge amount to CW is 20% or $15,000, based on ADTS's non-lease obligations to CW and the potential general benefits arising from the CCAA proceeding.

SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantica Diversified Transportation Systems Inc. (Re),* 2018 NSSC 77

Date: 2018-04-04
Docket: Hfx No. 470769
Registry: Halifax

In the matter of: A Plan of Compromise or Arrangement of Atlantica Diversified Transportation Systems Inc.

Judge: The Honourable Justice Peter P. Rosinski

Heard: March 23, 2018, in Halifax, Nova Scotia

Counsel: D. Bruce Clarke, Q.C., and Leon Tovey for the Applicant
Gavin MacDonald for Canadian Western Bank
Adam Crane and Heather Wyse for BDO Canada Ltd.
Matthew Moir for Trailer Wizards Ltd.

Gregory MacIntosh for the Federal Dept. of Justice (watching brief)

By the Court:

Introduction

[1] Corporations are deemed at law to be “persons”. Incorporation may be seen to be the birth, and ceasing to operate, and eventual dissolution, as the death of the Corporation.

[2] During their lives, corporations generate benefits for their shareholders, their employees and agents, and ultimately, the community. When they fail to remain viable, the impact is widespread.

[3] When corporations appear to be failing to remain viable, because their lifeblood (cash flow) is being drained to the extent that the coffers of the corporation are overwhelmed by their present payment obligations to others, the *Companies Creditors Arrangement Act,* RSC 1985, c. C – 36, (CCAA) provides a means to resuscitate, by financial restructuring, the company’s operations to a viable condition.

[4] Atlantica Diversified Transportation Systems Inc. (ADTS) is such a company.

Background

[5] In his affidavit, sworn November 23, 2017, David Montgomery confirmed that he is its President. The company operates a trucking business from its head office in Burnside, HRM (Halifax Regional Municipality – “Halifax”), Nova Scotia, with a yard(s) in Moncton, New Brunswick. The chief place of business is at Burnside, Halifax. It then had 102 employees and revenues for 2017 were expected to be in the range of $15-$17 million.

[6] It was not disputed that, at the time of the CCAA Initial Order, ADTS had approximately 137 trucks and 147 trailers in its operation, and that they ranged over Ontario, Québec, and the Atlantic provinces. As I discuss below, not all those were leased from Canadian Western Bank/Canadian Western Bank Leasing Inc. (for convenience, collectively or individually, CW).

[7] On August 24, 2017, CW sent a demand letter for the full balance owing under the Contract, being $628,836.97 (as of August 22, 2017, plus accruing interest, fees and costs of enforcement).

[8] On November 24, 2017, ADTS filed a Notice of Application in Chambers seeking *inter alia*, "an initial order under the CCAA, granting a stay of proceedings… the appointment of a person to monitor the business and financial affairs of the Applicant, and such other relief…".

[9] An Initial Order was granted by Justice Chipman on December 7, 2017.[1]

[10] The terms of the order included that ADTS "shall remain in possession and control of its current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, but expressly not including any accounts receivable factored or sold to Accutrac Capital Solutions Inc., prior or subsequent to the date of this order (together, the "Property"). Subject to further order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property.

[11] Furthermore, the Order reads at clause 10 and 11, respectively:

> 10 -The Applicant shall, subject to such requirements as are imposed by the Monitor and under any agreements for debtor-in -possession financing which may hereafter be approved by this court, have the right to:
>
> …
>
> > (b) return to any equipment lessor any asset under lease not required for the ongoing operations of the Business;
>
> ...
>
> 11 -Until and including the 22nd day of December 2017 or such later date as this court may order (the "Stay Period"), no claim, grievance, application, action suit, right or remedy, or proceeding or enforcement process in any court, tribunal or arbitration association (each a "Proceeding") shall be commenced continued or enforced against or in respect of any of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor or with leave of this Court, and any and all proceedings currently underway against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court. Not to limit the generality of the foregoing [included in the draft order were the following provisions – they were excised by Justice Chipman on that day]:

[1] In the Atlantic Provinces, Superior Courts have adopted model CCAA and Receivership Orders – specifically contained in Practice Memorandum No. 8 to the *Nova Scotia Civil Procedure Rules*.

> a) Canadian Western Bank, Canadian Western Leasing and Alton Bubar Sales Ltd shall forthwith deliver to the Applicant any "fully paid for" units seized by them described in Exhibit "B" of the supplemental affidavit of David Montgomery; and
>
> b) Canadian Western Bank, Canadian Western Leasing and Alton Bubar Sales Ltd shall forthwith deliver to the Applicant transport records, equipment, personal effects and other documents required for the business of Atlantica seized by them as described in paragraph 7 of the supplemental affidavit of David Montgomery .

[12] A second Order from Justice Chipman on December 22, 2017, on motion of ADTS, included:

> The stay of proceedings in the Initial Order is hereby lifted to the extent necessary to permit Canadian Western Bank or Canadian Western Bank Leasing Inc. to continue to enforce its *lease or security interest* with respect to the units *seized prior to the date of the Initial Order*, and waiving any requirement for prior notice of sale or disposition to any party pursuant to section 60 of the Personal Property Security Act [Nova Scotia] and the equivalent sections of the legislation of any other province;…
>
> [My italicization]

[13] Regrettably, although efforts were made to sustain the company using the CCAA, by February 20, 2018, the hoped-for resuscitation was beyond reach. The court imposed stay expired that day.

[14] The parties agreed that the CCAA proceedings should be terminated, after the court addresses payment of the Administrative Charge, and Directors Charge (a $50,000 contingency fund referenced in the Initial Order, "to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of these proceedings, but subject however to the limitations contained in CCAA subsection 11.51 (4)."). Both these charges rank in priority to the secured creditors, other than the monies owing to the Canada Revenue Agency. I confirm that, concurrently, I have approved the accounts of the Monitor, its counsel and PwC, and counsel for ADTS.

[15] Next, I will address the payment of the Administrative Charge.

How should the maximum allowable $75,000 available for the Administrative Charge be allocated?

[16] The Initial Order provided for payment of, upon approval by the Court, the "Administrative Charge"; namely, professional fees and disbursements of the legal counsel and financial advisors of ADTS (Burchells LLP and PwC respectively) ; BDO Canada Limited (the Monitor) and its legal counsel (Patterson Law).

[17] That Order limited those fees to a maximum $75,000. Though their fees and disbursements were greater for each, proportionally that $75,000 presently breaks down among them as follows:

Patterson Law – $12,552.67

BDO Canada Limited – $41,973.88

Burchells LLP – $12,197.04

PWC – $8,276.42

[18] This decision deals with the disputed issue of how the court should allocate the above-noted professional fees and disbursements among the secured creditors. It is noteworthy that the CCAA process ended prematurely- namely, without a restructuring plan in place.

[19] No one takes issue with the Monitor's proposal that the allocation be based upon "a proportional basis… using the most current balance of debt as the denominator". It is premised on the notion that secured creditors ought to be somewhat responsible to pay to collect those debts owing to them because the prospect thereof flows from such plans of compromise or arrangement.

i) The position of the parties at the hearing

[20] BDO has recommended in its Third Report filed February 15, 2018 (a portion thereof excerpted as Exhibit "1" in the hearing), that CW bear approximately 73% of those fees based on their percentage of monies owed ($7,357,700) of the total $10,037,632.80.

[21] CW disagrees. It says as a true lessor of its trucks/trailers, it is entitled to either be exempted entirely from the allocation process, or if not, should only bear a modest allocation therefor, based on the remaining non-lease obligations owed to it by ADTS, i.e. the $595,401.97, as of December 13, 2017 or some similar figure as of the hearing date, March 23, 2018.

[22] According to David Miller's March 2, 2018, affidavit (Senior Assistant VP and Manager Equipment Leasing Group with CW), as of December 13, 2017, ADTS owed to CWB, pursuant to a 2014 Master Loan and Security Agreement

approximately $595,401.97, and to CWL, $6,480,416.64 pursuant to a 2010 Master Lease Agreement a total of $7,075,818.61.

[23] No other parties served took positions on this issue.

ii) What the jurisprudence says about CW's argument that it should be exempted from allocation of the Administrative Charge, because it is a "true lessor", and not a secured creditor regarding the truck/trailer leases

[24] At this juncture, it is useful to examine the state of the jurisprudence regarding whether, and when, true lessors should be exempted from the allocation.

[25] A helpful summary of the general principles applicable to such allocations is set out by Justice Masuhara in *HSBC Bank of Canada v. Maple Leaf Loading Ltd.*, 2016 BCSC 361:

> 34 Allocation is an exercise in judicial discretion. The overall result must be one that is fair and equitable. This does not necessarily equate to equality. Usually, there will be some who do better than the average and other who do not.
>
> 35 There are numerous approaches and methodologies to allocations. In some areas professional careers have been built in propounding allocation methodologies.
>
> 36 A summary of the general principles governing the allocation of receiver's costs was recently provided in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43 by Justice D.M. Brown as follows:
>
>> (a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>>
>> (b) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>>
>> (c) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>>
>> (d) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>>
>> (e) An allocation does not require a strict cost/ benefit analysis or that the costs be borne equally or on a *pro rata* basis;

> (f) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.
>
> 37 Other cases handed up on this point included: *Hickman Equipment (1985) Ltd. (Re)*, 2004 NLSCTD 164; and *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

[26] CW has argued that it provided leased trucks and trailers to ADTS, and the circumstances of that financial arrangement reflect a "true lease" rather than a "security interest" or "financing lease".

[27] The persuasive jurisprudence leads me to conclude that in circumstances of a "true lease", lessors are generally exempted from the allocation of such administrative expenses: *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204, leave to appeal refused 2009, MBCA 210, per Freedman JA, in Chambers (who notably favourably commented on the hearing judge's use and application of relevant legal principles); *Western Express Airlines Inc. (Re)*, 2005 BCSC 53; *Respec Oilfield Services Ltd. (Re)*, 2010 ABQB 277.

[28] Ultimately, what is just and equitable is largely determined by the facts of each case. Therefore, at Appendix "A", I will set out in detail what Justice Suche stated in *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

[29] Based on my examination of the relevant factors identified in the jurisprudence, and my findings of fact, all the trucks and trailers, which were leased by ADTS from CW represent "true" leases.

[30] The parties represented facts, and presented evidence, to the effect that:

> 1. CW leased 82 vehicles to ADTS. 27 were returned to possession of CW in November 2017 *before* CCAA proceedings were commenced. Of the 55 remaining after the expiration of the court-ordered stay on February 20, 2018 (two were those of the Warren Group/ Vaughan Sturgeon, and are to be returned March 26, 2018), 24 were delivered to the Rexton, and Moncton, New Brunswick premises for pickup by CW during the CCAA proceeding.
>
> 2. The remaining 29 were still outstanding as of March 10, but only 9 were still unreturned to CW on March 23, 2018.

[31] CW's counsel takes the position that it is not just and equitable that it should bear 73% responsibility for the $75,000 flowing from the approved Administrative Charge, since approximately 91% of the money owed by ADTS to CW arises from "true leases", and only the remaining 9% arises from non-lease obligations. CW

agrees that the 9% non-lease obligations amount *may* provide a basis for some modest allocation against it.

[32] Moreover, CW notes that it received no lease payments from ADTS for a period of over two months during the CCAA proceeding. It was suggested that ADTS did not have sufficient funds throughout to fully pay CW's lease payments. Notably, once CW began seizing its trucks and trailers (per Alton Bubar Sales, Ltd.) ADTS's core source of revenue flow was being cut off, consequently ADTS commenced the CCAA proceeding. However, it is noteworthy that *ADTS's obligation to make these payments to CW remained even during the CCAA process*, as they were not subject to a court-ordered stay, by operation of Section 11.01 of the CCAA, which section reads:

> No order made under section 11 or 11.02 has the effect of
>
> a. prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> b. requiring the further advance of money or credit.

[33] Notably, Section 11, which sets out the general power of the court, also circumscribes the power of the court ("subject to the restrictions set out in this Act"). It states in part:

> … If an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, *subject to the restrictions set out in this Act*, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[34] Based on that authority, CW had made a motion, filed January 25, 2018, to compel ADTS to pay the outstanding lease obligations, but in response to the expiration of the stay of proceedings of February 20, 2018, the motion was withdrawn.

[35] CW further argues that it received no actual "real and meaningful benefit", nor would it have received any potential benefit from the CCAA proceeding.

[36] Although BDO takes no position regarding whether CW has "true leases" or not, it argues even if that is the case, true lessors can be allocated some of the relevant costs, provided it is just and equitable in all the circumstances.

[37] BDO suggests there were actual benefits because the CCAA process which appointed BDO as monitor, imposed statutory obligations upon it to keep all the parties informed etc. and to treat them similarly, while also practically providing a central contact entity which permitted a more organized processing of information and assets/monies which reduced the efforts that CW may have had to make in order to obtain such information (e.g. ADTS was given a list of vehicles and where they were, as well as access to information that a typical creditor would not receive, in contrast to the pre-CCAA – see paragraphs 15 – 19 of Kevin Woycheshin, Assistant VP and Manager of CW, sworn affidavit of November 29, 2017) and the Monitor's efforts to provide some measure of financial compensation to CW for use of its trucks and trailers – see clauses 14 (e), 36 and 44(b) of BDO's second report dated January 30, 2018 – see also the February 20, 2018 email from ADTS's counsel, Bruce Clarke, to CW's counsel attached to the March 23, 2018 letter to the court from BDO's counsel, which factual representations were presented to the court by agreement).

[38] Moreover, BDO notes that the benefit of the CCAA process generally must be considered from the perspective of the collective good of the secured and unsecured creditors of the corporation, and the benefit derived by any single creditor need not be directly demonstrated, as that is inherently difficult in such circumstances.

[39] CW argued that the CCAA process did not provide the *potential* benefits to it, that it might to other creditors, because its situation, involving specific assets which it still owned but were leased by ADTS, is a somewhat unusual and distinguishable circumstance.

[40] Regarding the suggestion that it had the *actual* benefit of the organized return of its vehicles/trailers as a result of the CCAA process, it noted that although 24 were returned to CW at Rexton/ Moncton, New Brunswick, during the process, those returns were not necessarily all attributable to the Monitor's actions. Thereafter, 29 units were still unreturned to CW as of March 10, 2018. I observe that 9 were still unreturned as of March 23, 2018.

[41] Moreover, CW says it suffered prejudice as a result of the process, because it could not seize the vehicles itself, though it was not being paid for its leased trucks and trailers while it remained entitled to be paid during the CCAA process; and which unreturned trucks and trailers continued to depreciate over that two-month period, and may have required repairs which were not effected in a timely manner.

[42] BDO's counsel notes that, if the allocation to CW is based only upon the 9% of the non-lease obligations or $595,401.97, or a generalized notional benefit that it received as a result of the Monitor's availability and actions, such as the mere stabilizing economic effect of the CCAA proceeding to February 20, 2018, its roughly revised calculation suggests that the allocations to the top three creditors would be as follows:

> Penske Truck Leasing Canada Inc.'s share would increase from 8.68% to 27.5%
>
> Accutrac Capital Solutions Inc.'s share would increase from 15.09% to 48%
>
> CW's share would decrease from 73.3% to 15%.

[43] BDO says that, as an independent entity assisting the court, it is considered to be an officer of the court (*Medican Holdings Ltd. (Re)*, 2013 ABQB 224, at paras. 39-42), and provided that its recommended allocation appears *prima facie* fair to the court, the onus is upon CW to establish that its situation is of such an exceptional nature as to be capable of rebutting that recommendation. I agree.

[44] Therefore, since the onus upon CW to demonstrate its circumstances are one of a "true lessor" has been satisfied, it should be exempted from the allocation, except to the extent that other parties have satisfied the court that either:

> CW received an *actual* direct or indirect ("real and meaningful") benefit;
>
> or
>
> they can otherwise elucidate a sufficiently articulable *potential* direct or indirect benefit that CW could have received (*Winnipeg Motor*, at para. 41, and *Hickman Equipment(1985) Ltd. (Re)*, 2004, NLSCTD 164 per Hall J, at para. 17) which would justify concluding, it would be fair and equitable to include some allocation of the Administrative Charge against CW.

[45] BDO urges the court to follow the Monitor's recommendation as being "just and equitable" in all the circumstances.

Conclusion

[46] I have found that CW is a true lessor in relation to the $6,480,416 .64 referenced in the March 2, 2018 affidavit of David Miller. In relation to that amount CW has at best only been shown to have gained a very modest actual ("real and meaningful") direct or indirect benefit from the CCAA proceeding.

[47] Insofar, as potential benefits that could have accrued to CW due to the CCAA proceeding, such a quantification is particularly difficult.

[48] As Justice Freedman reiterated in *Winnipeg Motor*, at para. 40:

> … The question whether the restructuring judge can allocate priority *before* the outcome of the restructuring is known was a matter of first instance. The restructuring "judge had acknowledged as much, noting in her decision that" the issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152, at paragraph 21).

[49] Nevertheless, the remaining $595,401.97 of non-lease obligations owed by ADTS to CW, as of March 2, 2018, provide a basis for the court to conclude that it is just and equitable to allocate some percentage of the Administrative Charge to CW.[2]

[50] It is fair, just and equitable that, CW compensate the effort to recover some of its owed income from the truck and trailer leases, and monies from its secured CSC/Master Loan obligations.

[51] ADTS's $595,401.97 non-lease obligations account for 18.18% of the remaining overall secured debt ($10,037,632.80 less [$7,357,700 – $595,401.97]) $3,275,334.77.

[52] In my view, a just and equitable allocation for CW is 20% of the Administration Charge - $15,000.

Rosinski, J.

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[2] In conjunction with the mere fact of the potential general benefit of the orderly attempt to restructure the business of ADTS under court supervision, arising in part from the court-ordered stay, which can prevent an accelerated domino effect that could negate the restructuring attempts otherwise, although the repercussion on the business which is seeking CCAA protection can be negative, as well as positive – see *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 215.

APPENDIX "A"

THE PARTIES AND THEIR POSITIONS

Heller

7 Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at $5,643,297, which was secured by accounts receivable of $5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately $8,750,000 (Cdn.) and $2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately $55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately $394,000 to financing lessors.

8 Heller supports the monitor's recommendation.

GE

9 GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately, GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

10 In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

11 GE supports the monitor's proposed allocation.

Paccar

12 As at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received $279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

13 Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors, particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

14 Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately $2.7 million, compared to Heller's loss of $55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

15 It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

16 These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

17 Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

18 These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

19 When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

20 Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered $4,738.12 out of the proceeds of sale of WME's redundant assets.

21 Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all other creditors. Thus, to include its recovery in the allocation, effectively amounts

to altering the security arrangements between WME and its creditors, which is something that should not be done.

22 Finally, Ramwinn has a claim against WME in the amount of $18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

23 *Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease*. It was paid its lease payments of $5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

24 BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. *Since the date of the hearing, I have made an order of bankruptcy against WME.*

25 I turn, then, to the legal issues raised on this motion.

TRUE VERSUS FINANCING LEASES

26 *Both Stoughton and Maxim claim to be "true" lessors*. The significance of this issue is twofold; s. 11.3(a) of the *CCAA* provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

27 Section 11.3(a) was added to the *CCAA* in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2497 (QL), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the *CCAA* into line with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), which has a similar provision concerning proposals.

28 The leading authority on the proper interpretation of s. 11.3(a) is *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (QL) (B.C.S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). *The distinction between a true lease -- that is, a contract of bailment also known as an operating lease -- and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.*

29 It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. *Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.*

30 At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so it is very difficult to generalize about how any particular type of relationship will be structured.

31 All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

32 In *Smith Brothers*, Bauman J. concluded that *s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay*, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the *CCAA*. He says:

56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

33 And further, at para. 61:

61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

34 *Smith Brothers has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it*

cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

35 I turn, then, to the two creditors in this case, Maxim and Stoughton. *I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.*

36 I say this because a review of *Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment* -- it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. *The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.*

37 It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

38 *The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on Western Express Air Lines Inc., Re, 2005 BCSC 53, (2005), 10 C.B.R. (5th) 154, over that in Paccar of Canada Ltd. v. Peterbilt of Ontario Inc., (2005), 18 C.B.R. (5th) 125 (Ont. Superior Court of Justice).*

39 *The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a).* In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

40 *The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.*

THE LAW

41 I turn, then, to the question of principles of allocation of Court Ordered Charges under the *CCAA*. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re,* 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. *It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.*

42 In *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164, at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

(1) The allocation of costs ought to be fair and even handed amongst all creditors upon an objective basis of allocation;

(2) *The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;*

(3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;

(4*) Exceptions to a uniform application of cost to creditors ought not to be lightly granted.* Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) *Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.*

[my italicization]

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HSBC Bank of Canada v. Maple Leaf Loading Ltd.,* 2016 BCSC 361

Date: 20160302
Docket: S144996
Registry: Vancouver

Between:

HSBC Bank of Canada

Petitioner

And:

Maple Leaf Loading Ltd., Pro-Trans Ventures Inc., Caterpillar Financial Services Limited, Element Fleet Management Inc., GE Canada Equipment Financing G.P., GE Canada Leasing Services Company, General Electric Canada Equipment Finance G.P., GE Canada Asset Financing Holding Company, GE Techology Finance, GE VFS Canada Limited Partnership, GE Capital Canada Equipment Financing & Leasing Company, Mercedes-Benz Financial Services Canada Corporation, Daimler Truck Financial, Finning International Inc., National Leasing Group Inc., Coast Capital Savings Credit Union, ATCO Structures & Logistics Ltd., Knight Manufacturing Ltd., Dynamic Capital II Corporation, Canadian Western Bank Leasing Inc., James Western Star Truck & Trailer Ltd., Zeemac Vehicle Lease Ltd., Inland Kenworth and Premium Truck & Trailer Inc.

Respondents

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment
(In Chambers)

Counsel for HSBC:	V. Tickle
Counsel for the Receiver:	H. Lance Williams
Counsel for Caterpillar Financial Services:	P. Rubin
Counsel for James Western Star Truck and Trailer Ltd and Inland Kenworth:	C. Cash
Counsel for Element Fleet Management Inc.:	A. Winters
Counsel for Knight Manufacturing:	M. Sennott
Place and Date of Hearing:	Vancouver, B.C. February 10, 2016
Place and Date of Judgment:	Vancouver, B.C. March 2, 2016

Introduction

[1] This decision deals with a dispute as to the allocation of the costs of the court appointed Receiver of Maple Leaf Loading Ltd. ("MLL"). The Receiver, Ernst & Young Inc., was appointed June 27, 2014. The amount for allocation is $1,172,856 and was approved by this court, November 28, 2014.

[2] The Receiver has proposed an allocation identifying location specific costs and general costs, and allocating those to all secured creditors, including equipment lessors, on a pro rata basis taking into account the secured creditors' recoveries. The basis for the approach taken by the Receiver is set out in its 6th Report of September 10, 2015 and Supplement to the 6th Report of January 18, 2016. The latter report contained the updated allocations proposed.

[3] The Receiver's allocation is supported by HSBC Bank Canada ("HSBC") and Element Fleet Management Inc. The GE group of creditors do not oppose the Receiver's allocation.

[4] Opposing the allocation are several creditors, including: Caterpillar Financial Services ("Caterpillar"), James Western Star Truck and Trailer Ltd. ("James Western"), Inland Kenworth ("Inland"), and Knight Manufacturing Ltd. ("Knight").

[5] James Western and Inland Kenworth are in the transportation industry and regularly repair trucks and equipment; this included the repair of MLL's trucks and equipment over the period before the appointment of the Receiver. They take the position that as repairers lien holders with validly registered liens in the Personal Property Security Registry of British Columbia, they have priority for payment over the Receiver pursuant to s. 32 of the *PPSA* and the *Repairers Lien Act*. The validity of the claims has been vetted and accepted by the Receiver. They also rely on the fact that they were not served with the initial application for the appointment of the Receiver and thus are not subject to the resultant order.

[6] Caterpillar also was not served with the initial application but accepts that some allocation of costs to it is warranted, however, takes exception to the $149,768 proposed by the Receiver. Caterpillar submits that at most the amount should be

$69,280. This equates to the recovery by the Receiver of the one piece of equipment left by Caterpillar with the Receiver for disposition.

Background

[7] The following summary of the background to this insolvency:

[8] MLL was a transportation company based in Prince George providing a range of specialized logistic solutions related to the management, handling and transport of ore and other mined products for clients involved in the mining and resource sector in British Columbia, Alberta, and the Yukon Territory. As such MLL had a fleet of heavy hauling equipment, tractors, trailers and pickup trucks that it used to service its customers (the “Hauling Equipment”). At the time of the appointment of the Receiver, there were 239 such units. The units were spread out across a variety locations including in or about Chetwynd, Grande Cache, Stewart, Tumbler Ridge, Watson Lake, Williams Lake, and Willow Creek.

[9] The majority of the Hauling Equipment was leased from equipment lessors which included: HSBC, GE Canada Leasing Services Co.; Caterpillar, and Knight Manufacturing Ltd.

[10] In addition, MLL financed its operations through credit facilities with HSBC.

[11] MLL began to struggle financially in late 2012 and was in violation of its debt covenants with HSBC. Efforts to restructure and refinance MLL were initiated but ultimately failed.

[12] In June 2014, HSBC issued demand letters along with Notices of Intention to Enforce its Security.

[13] On June 26, 2014, HSBC filed a petition for the appointment of the Receiver.

[14] On Friday, June 27, 2014, an *ex parte* application was brought on by HSBC and the order (the “Receivership Order”) was granted.

[15] On Monday, June 30, 2014, counsel for HSBC served by registered mail all of the named parties to its application a copy of the petition, supporting affidavits, and

Receivership Order. This included: Caterpillar, Element, James Western, Inland, and Knight. Delivery of the materials to each of the materials was on July 10, 2014; July 7, 2014; July 4, 2014; July 4, 2010; and July 2, 2014, respectively.

[16] The Receiver in carrying out is duty to realize on MLL's assets, entered into an agreement to sell to Ritchie Bros. Auctioneers (Canada) Ltd. the bulk of MLL's equipment on August 7, 2014. The Receiver was granted short leave to bring on an application for the approval of the agreement for August 13, 2014. A number of creditors objected to the sale and contacted the Receiver from August 8 through August 15, 2014. The objectors were: Caterpillar, Coast Capital Equipment Savings, K-Line Trailer Ltd., Canadian Western Bank, Element, and Darby Kreitz. The Receiver agreed to adjourn the August 13, 2014 hearing to August 19, 2014 to provide additional time to certain creditors who were objecting to the proposed sale to assess the merits of the agreement and to negotiate with the Receiver and Ritchie Bros. The Receiver at that time was dealing with 239 separate pieces of equipment.

[17] As a result of the adjournment further negotiations involving the creditors, the Receiver and Ritchie Bros. occurred.

[18] Of the nine pieces of equipment that Caterpillar held an interest in, Caterpillar removed eight and left one behind. Element had 19 vehicles and left 16 to be included in the Ritchie Bros. sale.

[19] An amended asset purchase agreement was entered into with Ritchie Bros. There were approximately 150 pieces of equipment in the sale.

[20] On August 19, 2014, this court approved the amended purchase agreement. The sale closed on August 20, 2014.

[21] On November 28, 2014, this court approved the unopposed application of the Receiver for its fees and disbursements and its legal counsel.

[22] I now turn to the discussion of the issues.

Discussion

1. Priority of Repairers Liens Holders

[23] The Receiver relies upon the terms of the Receivership Order as establishing its priority; more particularly, paras. 16 and 19, which state:

> **RECEIVER'S ACCOUNTS**
>
> 16. The reasonable fees and disbursements of the Receiver and its legal counsel, in each case at their standard rates and charges, shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to Sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> ***
>
> **FUNDING OF THE RECEIVERSHIP**
>
> 19. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000. (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as the Receiver deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

[24] HSBC in support of the Receiver stated that there were urgent circumstances given the mobile nature of the assets. It is uncontroverted that there were a significant number of vehicles spread across many remote locations.

[25] The Receiver also submitted that the position taken by the respondents in this hearing was unfair as they were involved in the Receiver's process and received the benefit of the Receiver's efforts. The Receiver points out that only once the majority of the Receiver's work had been completed did they object.

[26] James Western and Inland argue that the order has no effect over them as they had not been provided notice, the application having been made *ex parte*. In this regard, they handed up: *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). These respondents also point to the footnote to para. 16 of the Model Order (the same as the above provision) which specifically sets out that court must not make such an 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."

[27] Further, James Western and Inland argue that based on the common law the receivership does not permit priority over their liens. In support they cite *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492 (Ont.C.A.) which is also referenced in *Lochson*. In *Kowal*, the court stated exceptions to the general rule included the following:

> (a) the receiver is appointed at the request of or with the consent or approval of the holders of the security;
>
> (b) the receiver has been appointed to preserve and realize assets for the benefit of all interested parties including secured claims and the secured creditors have been given notice of the application for such appointment; or
>
> (c) the receiver has expended money for the necessary preservation or improvement of the property (generally an emergency situation where there is no time to apply to court beforehand and to provide the secured creditors with notice).

[28] These respondents also argue that because of their priority and rights as repairer liens holders they could have simply taken the vehicles subject to their liens and sold them. This they say is a common practice for them as repairers. They assert that assistance from the Receiver was unnecessary.

[29] These respondents also meet the argument that they did not take steps to vary the Receivership Order with the comments in *Halcyon Health Spa Ltd.*

(Receiver-Manager of) v. Arthur Andersen Inc. 2006 BCCA 458 where Donald J.A. stated at para. 14:

> In the circumstances of this case, BDC did not have a positive duty to apply to vary the order of Metzger J. in order to preserve its priority. Thus, BDC was entitled to wait until realization to deal with the difficulty created by the order. Having taken the order without naming BDC as a party, giving notice of the application, or securing its consent, Andersen took the risk of a shortfall.

[30] As well, these respondent refer to *Royal Bank v. Vulcan Machinery & Equipment Ltd.*, [1992] A.J. No. 1216 [*Vulcan*] at para. 49:

> 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 (Section 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.

[31] I am of the view that the lack of notice argument should not prevail in this case. In *Vulcan*, notice of the order was delayed; moreover, the creditors had maintained their opposition to the receiver's involvement with the equipment in which they held an interest. In *Terra Nova*, the delivery of the order did not take place for some two months after the order was granted and I note that in dismissing the appeal, Donald J.A., did not accept the argument that in light of having been served with the order that the respondent could avoid being fixed with actual knowledge of the order, though it did not affect the result. I note that he states that "in the circumstances" of that case a positive duty to apply to vary did not apply. The circumstances inform the consideration of the exceptions. Here, the Receiver acted promptly in serving all of the named parties with the order and supporting materials underlying immediately after obtaining it. There was some urgency in the circumstances. James Western and Inland were represented by counsel throughout the receivership.

[32] I find that the Receiver was acting to preserve or protect the vehicles and this benefited all of the interested parties, including the repairers lien holders. I am not

persuaded by the bare submission that the repairers lien holders were "at all times ready, willing and able to execute on their repairers/liens but were prevented from doing so by the receivership". There is little to no evidence supporting this. The evidence indicates that the respondents were engaged in discussions with the Receiver shortly after the order. The Receiver's reports identify and comments on the efforts to investigate the numerous liens and issues related to them. It is apparent that there was ongoing communications. James Western and Inland had the opportunity to take the actions it says it was entitled to take but they did not. The evidence of Caterpillar retrieving virtually all of their vehicles from the Receiver militates against this position. I also note that these were at least two court appearances in which Inland or James Western could have applied for a variation.

[33] In my view, some allocation is warranted.

2. Allocation

[34] Allocation is an exercise in judicial discretion. The overall result must be one that is fair and equitable. This does not necessarily equate to equality. Usually, there will be some who do better than the average and other who do not.

[35] There are numerous approaches and methodologies to allocations. In some areas professional careers have been built in propounding allocation methodologies.

[36] A summary of the general principles governing the allocation of receiver's costs was recently provided in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43 by Justice D.M. Brown as follows:

> (a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (b) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

(c) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

(d) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(e) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(f) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

[37] Other cases handed up on this point included: *Hickman Equipment (1985) Ltd. (Re)*, 2004 NLSCTD 164; and *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

[38] The Receiver has outlined the allocation approach in its reports. In the Receiver's view some of the costs incurred should be borne by all secured creditors as they benefitted from aspects of the Receivership proceedings. As mentioned, the proposed approach is a "pro rata recovery allocation". It is submitted that allocation methodologies based pro rata on realizations are *prima facie* reasonable. It is submitted that the allocation proposed is reasonable.

[39] Caterpillar in opposing the proposed allocation submits that it is unfair, inequitable and prejudicial. Caterpillar's argument included that the proposed allocation is a readjustment of priorities, there is no connection between the allocated costs and Caterpillar, that it does not take into account the degree of benefit, the direction of Caterpillar and other secured creditors, and that the allocation is disproportionate to the benefit received.

[40] Caterpillar points to the fact that in the course of the receivership, the Receiver sold one piece of Caterpillar's equipment for approximately $142,860 (net $69,280) and that the proposed allocation to it is $149,768.

[41] During the proceedings before me alternative allocations were discussed and during the several week break between hearing dates, the Receiver and Caterpillar discussed additional allocations. One scenario was an allocation by the total number of pieces of equipment in the receivership. A variation to this was to allocate on the total number of pieces greater than $10,000. This value was selected by the Receiver.

[42] Having reviewed the actions of the Receiver and the nature of the costs as set out in the Receiver's reports, I am concerned with the overall fairness of the cost allocation as can be seen in the result upon Caterpillar; it seems to me that the pro rata allocation based on number of pieces of equipment greater than $10,000 in value is better correlated to the costs than recoveries. Viewed generally, the activities of the Receiver and the expenses incurred relate directly and indirectly more to the Hauling Equipment as opposed to their realization value. This results in a relative leveling of the percentage cost burden which in this case appears fairer.

Conclusion

[43] As a result, I am of the view that the allocation as prepared by the Receiver in its Supplement to the 6th Report of the Receiver at Appendix G (pieces valued at over $10,000) is the allocation which is to be used.

[44] The outstanding matters in the Receiver's application notice should be set down for hearing through Trial Scheduling.

"The Honourable Mr. Justice Masuhara"

CITATION: Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 1531
COURT FILE NO.: CV-13-10201-00CL
DATE: 20140310

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Royal Bank of Canada, Applicant

AND:

Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

BEFORE: D. M. Brown J.

COUNSEL: S. Babe, for the Applicant, Royal Bank of Canada

R. Fisher, for the Business Development Bank of Canada

S. Friedman, for the Receiver, KPMG Inc.

HEARD: February 13, 2014

REASONS FOR DECISION

I. Receiver's motion to allocate sales proceeds and its costs between two secured creditors

[1] By order made October 4, 2013, KPMG Inc. was appointed receiver of all of the assets and undertakings of Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario Inc. o/a Atlas Block Trucking (the "Debtors"). Pursuant to orders of this Court the Receiver has sold most of the Debtors' assets. The Receiver moved for the approval of the distribution of the net sales proceeds from certain of the Debtors' assets between the two main secured creditors, the Royal Bank of Canada and the Business Development Bank of Canada, as well as the approval of its allocation of fees and costs as between RBC and BDC.

II. Background

[2] The Debtors manufactured a range of brick and concrete building and landscaping products for sale to industrial and commercial construction contractors. The head office of Atlas Block was located in Midland, Ontario, at what was called the Victoria Harbour Plant. Atlas operated manufacturing facilities at (i) the Victoria Harbour Plant, (ii) the Hillsdale Plant, and (iii) the Brockville Plant.

[3] The Hillsdale Plant was the major asset of Atlas Block. Its construction and equipping was financed with $17.5 million in loans from BDC, $4.8 million from the Ontario government, and $2.2 million in equipment financing from RBC.

[4] RBC and BDC provided other financing to Atlas Block.

[5] Production at the Brockville Plant ceased about two weeks prior to the appointment of the Receiver. The Receiver continued production at the Hillsdale and Victoria Habour Plants for a short period of time until the end of November, 2013.

[6] As a result of a sales and marketing process, the Receiver entered into two asset purchase agreements to sell the equipment, inventory and real estate of Atlas Block to Brampton Brick Limited ("BBL"). Those agreements received court approval on December 20, 2013. In my endorsement approving the BBL sale I wrote, in part:

> This motion is not opposed, however BDC reserves its rights with respect to distribution and my order is made subject to that reservation…

[7] The sales to BBL were completed on January 6, 2014, however they did not include the sale of the real property at the Victoria Harbour Plant. On January 14, 2014, BBL informed the Receiver it that it would not be acquiring the real property at Victoria Harbour.

III. The BBL Asset Purchase Agreement

[8] Under the November 29, 2013 Asset Purchase Agreement (the "Atlas Block APA") BBL purchased the following land and equipment:

(i) Hillsdale: (a) the Hillsdale Real Property, (b) certain molds and forklift equipment; (c) manufacturing equipment; and (d) inventory;

(ii) Victoria Harbour: (a) office furniture and equipment; (b) certain manufacturing equipment; and, (c) inventory; and,

(iii) The interest of Atlas Block in RBC Equipment Leases, which included some leased equipment at the Hillsdale Plant, as well as at the Brockville Plant.

[9] Section 2.7 of the Atlas Block stated that the purchase price would be allocated amongst the purchased assets as set forth on Schedule "K" to the APA, in part, as follows:

Asset	Allocated Amount
Hillsdale Real Property	$1,000,000
RBC Equipment Leases	$2,611,539

Hillsdale and Victoria Harbour Equipment	$7,638,458

[10] In the Atlas APA BBL agreed to assume the obligations under the RBC Equipment Leases and the allocated $2.61 million represented the remaining obligations due under those leases.

[11] Under the December 12, 2013 Asset Purchase Agreement (the "Brockville APA"), BBL agreed to purchase from the Receiver (i) the Brockville Real Property, (ii) the Brockville Equipment, (iii) the Brockville office furniture and equipment, and (iv) the Brockville Inventory. The purchase price of $600,000 was allocated pursuant to section 2.6 of the Brockville APA amongst the purchased assets, in part, as follows:

Asset	Allocated Amount
Brockville Real Property	$100,000
Brockville Equipment and office equipment	$100,000
Brockville Inventory	$400,00

IV. The Receiver's proposed distribution of the sales proceeds

A. The Receiver's proposal

[12] In its Third Report dated January 31, 2014 the Receiver stated that under the two APAs BBL had allocated about $8.2 million of the purchase price to assets subject to the security held by BDC. It continued:

> The Receiver has no basis on which to consider the allocation by BBL to be unreasonable and therefore has used the BBL allocation set out in the Purchase and Sale Agreements as the basis for determining the proceeds to be paid to BDC and RBC.

Observing that it had incurred certain costs and fees on behalf of BDC during the Receivership, the Receiver proposed to deduct those costs from the Gross BDC Proceeds to arrive at a net figure payable to BDC. Appendix "O" to the Third Report set out the Receiver's calculations. Based on those calculations, the Receiver proposed to distribute to BDC proceeds of $7.7 million.

[13] The Receiver reported that the majority of the remaining funds in its receivership accounts related to proceeds from RBC's security. The Receiver proposed to make a distribution to RBC of $3.46 million.

[14] RBC supported the distribution proposed by the Receiver.

B. BDC's position

[15] BDC objected to the Receiver's proposed distribution on the grounds set out in the February 5, 2014 affidavit of Lori Matson, Director, BDC Business Restructuring Unit. As of October, 2013, the Debtors owed BDC approximately $17.39 million.

[16] Matson confirmed that BDC had received from the Receiver a draft of the Atlas APA as early as November 7, 2013, some three weeks prior to its execution, and BDC had understood at that time that part of the purchase price involved BBL assuming about $2.6 million in RBC Equipment Leases. According to Matson, BDC did not take issue with the BBL purchase price, but did have concerns about the allocation of the purchase price:

(i) Matson alleged that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price;

(ii) BDC contended that by assuming the remaining obligations under the RBC Equipment Leases, BBL was "factoring in the transaction structure (i.e.: assumption of capital leases), into its allocation rather than the value of the assets being obtained thereunder. The result is a purchase price allocation that is not reflective of the value of the various assets being acquired based upon appraisals…the allocation becomes arbitrary as it does not distinguish the financing aspect from the underlying value of the assets being acquired". BBL allocated the purchase price based on the amount of the debt being assumed which bore no relationship to the value of the underlying assets. Matson described the situation as an "over-allocation relative to the capital leased assets"; and,

(iii) BBL's allocation of the purchase price did not reflect historic appraised values of the purchased assets.

It was Matson's evidence that the Receiver should distribute $10,644,360 to BDC based upon appraised values, not the $7.7 million it proposed based on the purchase price allocation in the APAs.

[17] At my request, the Receiver filed a supplementary document which compared the calculation of its proposed distributions to the distributions proposed by BDC.

V. Analysis: Allocation of sales proceeds

A. Allegation of pre-execution discussions between BBL and RBC

[18] Matson alleged that "negotiations took place between the Purchaser and RBC as part of the Purchaser's due diligence process in advance of the bidding that had the effect of creating an opportunity for the Purchaser to finance part of this purchase and as well creating expectations relative to the allocation of the sale proceeds on the part of RBC".

[19] Matson did not disclose in her affidavit any source or basis for her allegation.

[20] Mark Swanson, a Manager in RBC's Special Loans and Advisory Services Department, deposed, in his February 6, 2014 affidavit, that RBC had no communication with BBL prior to being told by the Receiver that BBL's offer included, amongst its terms, the assumption of the RBC Equipment Leases on an undiscounted basis. Swanson stated that the Receiver had asked RBC whether it would support a motion to approve a transaction under which BBL assumed the leases, rather than paying cash for them, but Swanson deposed that there had been no discussion between RBC and the Receiver of a discount or reduction of payments under the leases.

[21] In the Second Supplement to its Third Report the Receiver responded to Matson's allegations:

> …BDC suggests that negotiations took place between BBL and RBC prior to the submission of BBL's offer. The Receiver provided all potential purchasers who signed the Receiver's confidentiality agreement with information on Atlas' various leases and fixed assets through the Receiver's online data room so that they could perform their due diligence. BDC was also provided access to the Receiver's data room and was therefore aware of the information available to all purchasers. The Receiver is not aware of any other information supplied to BBL nor any negotiations between RBC and BBL prior to the submission of BBL's offer. The Receiver notes that BDC has not provided any evidence to support their allegations.

[22] Given the failure of BDC to disclose the evidence upon which it based its allegation of the pre-execution negotiations between BBL and RBC and in light of the strong direct evidence to the contrary from the Receiver and RBC, I give no effect whatsoever to BDC's allegation that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price. BDC's allegation was without any evidentiary foundation foundation.

B. The RBC Equipment Leases

[23] There was no dispute that part of the consideration offered by BBL under the Atlas APA was its agreement to assume the obligations of Atlas Block under the RBC Equipment Leases. The amount allocated for that consideration under the Atlas APA was the amount of the remaining obligations under those leases.

[24] I do not accept BDC's submission that such an allocation of consideration was somehow arbitrary or unfair. To the contrary, the consideration allocated for BBL's assumption of that liability corresponded exactly to the monetary amount of the remaining obligations under those leases. There was nothing arbitrary about such an allocation. The crux of BDC's complaint really related to the amount of the purchase price allocated to other assets, in particular the Hillsdale Real Property, so I turn now to that issue.

C. The relationship between allocations of the purchase price to the Hillsdale Real Property and the appraised values of that asset

C.1 The positions of the parties

[25] The crux of BDC's complaint about the proposed distribution of sales proceeds was that in the APAs BBL's allocation of the purchase price did not reflect historic appraised values of some of the purchased assets, in particular the Hillsdale Real Property.

[26] In section 1.1.7 of its Second Report dated December 12, 2013, the Receiver observed that "the construction of the Hillsdale Plant unfortunately coincided with the start of the 2008/2009 economic downturn…" Schedule "K" to the Atlas APA allocated $1 million of the purchase price to the Hillsdale Real Property. BDC submitted that $3 million should have been allocated to that property.

[27] Matson attached to her affidavit extracts from two appraisals of the Hillsdale Real Property performed in 2008 and 2011. The first extracts were from a June, 2008 appraisal that had been prepared by Katchen Appraisals Inc. for BDC. By its terms the Katchen Appraisal was intended to assist for financing purposes only and was "to serve as a benchmark for establishing the projected value of the property *as improved with a completed concrete block manufacturing facility*, in fee simple, assuming a market exposure of twelve months prior to sale under forced sale conditions on June 17, 2008…" Katchen valued the property at $4.5 million.

[28] Matson also attached extracts from a second appraisal, one prepared by Appraisers Canada Inc. with an effective date of December, 2011. The appraisal stated that it was intended only "for an accounting function and for no other use" and that its purpose was "to estimate a current hypothetical market value of the subject property, as if unimproved, as at the effective date". Appraisers estimated that value as in a range between $2.162 to $2.883 million, with a "value tendency" of $2.5 million.

[29] Pointing to the extracts from both appraisals, Matson deposed that BBL's price allocation "seriously undervalues the land and building" and "allocating $1,000,000 to the real property is not reasonable".

[30] In its Second Supplement to the Third Report the Receiver noted that the appraisals relied upon by BDC were prepared at different dates and used different appraisal assumptions:

> The Receiver does not believe that this amalgamation of estimated values is a superior method of allocating the purchase price as compared to the allocation of a third party purchaser of assets.

The Receiver also observed that the Hillsdale Plant was a special purpose asset, remotely located, which was difficult and perhaps cost prohibitive to relocate.

[31] Although RBC did not comment directly on the valuations, Swanson did depose that back in August, 2013, just after RBC had commenced this application, it had been asked by the Debtors' financial advisor to adjourn the application to enable the Debtors to work out a refinancing with BDC. A signed memorandum of understanding between the Debtors and BDC provided to RBC disclosed that BDC's existing loan in excess of $17 million would be replaced by a $5 million loan to a Newco which would acquire the Debtors' assets and business. Newco would issue preferred shares to BDC. In the result, that transaction did not proceed and a receiver was appointed. Swanson deposed:

> The history of this matter therefore shows that the Receiver, who RBC drove to appoint, successfully increased BDC's anticipated recovery by over $3 million and reduced BDC's risk by even more. The Receiver has therefore significantly reduced the shortfall that BDC was otherwise willing to incur.

C.2 Analysis

[32] In *Bank of America Canada v. Willann Investments Ltd.*[1] Farley J. commented that when examining a receiver's proposed sale of assets in light of the principles set out in *Royal Bank of Canada v. Soundair*,[2] a court might well refrain from approving a sale that proposed an allocation of the purchase price which was significantly different from the latest valuation of the assets because such an allocation would not fairly consider the interests of all creditors.[3] From that it follows that the time for objecting to an allocation of the purchase price in a proposed sale is when the sale is brought before the Court for approval. If the Court agrees with the objection, it can decline to approve the sale, which may or may not result in further negotiations with the proposed purchaser, depending upon the significance to it of the purchase price allocation.

[33] Once a court approves a sale agreement, however, as occurred here, it becomes more difficult for a creditor to advance an objection about the fairness of the term of the sales agreement allocating the purchase price because such an objection, in essence, constitutes an objection to a material term of the now-approved sale agreement. Put another way, not having opposed the approval of a sales transaction, thereby securing the benefit of that sale of the

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[1] 1992 CarswellOnt 1743 (Gen. Div.)
[2] (1991), 4 O.R. (3d) 1 (C.A.)
[3] *Bank of America Canada, supra.*, para. 5.

debtor's assets, a creditor faces difficulty in objecting subsequently to a material term of the agreement which it did not oppose.

[34] In the present case BDC did not oppose the approval of the BBL APAs – no doubt because the BBL offers were far, far superior to any other offer obtained by the Receiver – but BDC did put a "reservation of rights" on the record, without filing evidence at the time about the nature of its objections. A receiver's distribution motion should not turn into a debate about the fairness of the term in the approved sale agreement which allocates the purchase price to particular assets. The proper time for such a debate is at the hearing of the approval motion. I will consider the objections made by BDC, but their timing weakens the weight to be given to them.

[35] Turning to the submission of BDC that the allocated purchase price for the Hillsdale Real Property was far below its appraised value, I have five comments. First, any appraisal must be read in its entirety to understand the methodology used and the assumptions employed. On this motion BDC only filed portions of the reports from which it was not possible to ascertain the methodologies and information used by the appraisers to arrive at their estimates. Failing to file the entire reports significantly undermined their evidentiary value. Second, the reports gave opinion values as of June, 2008 and December, 2011. The reports therefore were quite dated, the last expressing a value some two years prior to the appointment of the Receiver. Since the actions of the Receiver must be assessed at the time taken, stale valuation reports are of little assistance in ascertaining how the market perceived the value of the Hillsdale Real Property as of November, 2013, the date of the Atlas APA.

[36] Which leads me to my third point. In the December 12, 2013 Supplement to its Second Report the Receiver stated:

> BDC also has a mortgage on the real property at Hillsdale…Both the Receiver and BDC agreed that an appraisal of the Hillsdale Real Property would not be cost beneficial as the value of the Hillsdale Real Property is intrinsic to the manufacturing plant and could not be separately assessed. It was agreed that an appraisal of the market value of the Hillsdale Real Property on a standalone basis would be theoretical at best, and not provide useful information in assessing offers.

It is difficult to understand how BDC now relies on stale valuation reports to support its submissions on the allocation of net sale proceeds in light of that agreement.

[37] Fourth, the material deficiencies in the evidentiary utility of the two appraisal reports referred to by Matson brings one back, then, to the general principle that where a receiver markets a property, appraisals cease to have much significance in the valuation process[4] – a sale

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[4] *B & M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 56 C.B.R. (5^{th}) 313 (Ont. S.C.J.), para. 13; *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Gen. Div.), para. 5.

is always a better indication of value of a particular property than a valuation. In the present case, the Receiver contacted 83 different interested parties, 36 of which signed confidentiality agreements, and 8 of which submitted offers. The BBL offer accepted by the Receiver was far, far superior to any other offer.

[38] Fifth, and finally, in the Second Supplement to its Third Report the Receiver provided the following evidence:

> [T]he Hillsdale building was a sole purpose building, built for the purpose of block production only. Accordingly, it is likely that the building would only have value in a going concern sale. If the assets were liquidated and removed, the building would at best have scrap value and may have been a liability for a purchaser of the real property as it would likely have to be demolished. Therefore, the allocation of the $1.0 million to the real property is likely superior to liquidation value.

I accept that evidence.

[39] Accordingly, I see no reason to interfere with the Receiver's recommendation to distribute the net sales proceeds using a methodology based on the allocation of the purchase price found in the approved Atlas APA and Brockville APA. I therefore grant the relief sought in paragraph (g) of the Receiver's February 3, 2014 notice of motion.

VI. Allocation of the Receiver's costs

[40] The Receiver sought approval of its fees and disbursements of $196,882.73 for the period December 1, 2013 to January 15, 2014, as well as for those of its counsel for the same period in the amount of $147,503.13. Recognizing the competing security interests in the receivership, the Receiver and its counsel had tracked their time and expenses in three separate categories: (i) those directly related to BDC asset realization activities; (ii) those directly related to RBC asset realization activities; and, (iii) those shared between BDC and RBC realization activities.

[41] BDC took no issue with the direct expenses attributed by the Receiver to BDC assets ($67,598). The Receiver tracked shared expenses totaling $510,782. It proposed allocating $357,159 of those expenses to BDC on the basis that BDC recovered 69.92% of the total sales proceeds. RBC supported the Receiver's proposed allocation. BDC objected to the amount of the fees and to their allocation, contending that only 50% of the shared costs should be allocated to it, or the sum of $255,391. BDC complained that "a significant portion of these costs were expended in the collection of accounts receivable and the production and sale of inventory which clearly solely benefitted RBC. In addition, there are significant Receiver and legal fees relative to the trust claims of Holcim and Tackaberry".

[42] This Court approved the Receiver's fees and legal fees for the period up to November 30, 2013 in its December 20, 2013 order. As to the fees incurred after that date, in paragraph 21 of her affidavit Matson "sought clarification" of certain work performed by the Receiver and its counsel. In section 3.1 of the Second Supplement to its Third Report the Receiver provided

detailed clarification. In light of that clarification, I conclude that the fees for which the Receiver sought approval were reasonable in the circumstances.

[43] As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:

(i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;

(ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

(iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

(iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.[5]

[44] The Receiver responded to BDC's complaint about the allocation of certain time by reporting that it had only charged time for accounts receivable collections and the Holcim/Tackaberry claims to RBC. That addressed that complaint.

[45] As to the allocation methodology for shared fees, the Receiver reported that as early as October 18, 2013, it had provided BDC with its allocation method for professional fees and expenses incurred in the estate. Its email to RBC of that date stated:

> The shared time will be allocated on realizations of the secured creditor assets so the exact breakdown of those fees will not be known until the assets are realized.

The Receiver provided BDC with requested weekly reports allocating those fees amongst the three time categories. The Receiver responded to periodic inquiries about the fees and their

[5] See the cases cited by C. Campbell J. in *Re Hunjan International Inc.* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.) and Cameron J. in *JP Morgan Chase Bank N.A. v. UTCC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.).

allocation from BDC, and it was not aware that BDC took issue with the allocation until February 4, 2014.

[46] I find it difficult to place must credence in an "11th hour" objection by a creditor to the receiver's proposed allocation of fees when the Receiver disclosed the proposed methodology at the start of the administration of the receivership estate, the creditor did not object, and the Receiver provided on-going, transparent reporting to the creditor of the fees incurred.

[47] The Receiver also stated:

> The Receiver believes that BDC derived a significant benefit from the Receiver's operations and eventual sale to BBL. As discussed previously the DSL Appraisal makes it clear that the realizable values of Atlas' assets would have been significantly impaired absent a going concern sale when one compares the appraised value of $6.5 million in a going concern type sale versus a value of $1.5 million in a liquidation sale…The Receiver agrees with BDC that BBL paid more for all of the Atlas assets, and most notably the Hillsdale Equipment (as the Hillsdale plant is the only plant of the two sold in the First BBL Sale that BBL is operating), because of the Receiver's preservation of the Atlas customer base through continued operations during the receivership. This was of great benefit to BDC, perhaps more so than to RBC.

[48] The allocation methodology proposed by the Receiver for shared costs based *pro rata* on realizations was *prima facie* reasonable in the circumstances of this case. The Receiver disclosed that methodology to BDC at the start of its administration, and BDC did not object until the 11th hour. BDC has not demonstrated any unfairness in the methodology proposed by the Receiver.

[49] Consequently, I grant the orders sought by the Receiver in paragraphs (h) and (i) of its notice of motion dated February 3, 2014.

VII. Costs

[50] I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office written cost submissions, together with a Bill of Costs, by March 21, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by March 28, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D. M. Brown J.

Date: March 10, 2014

Court of Queen's Bench of Alberta

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

Date: 20180221
Docket: 1703 21274
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

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

Defendants

- and -

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

Applicants

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

Introduction and Background

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

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

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

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

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

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

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

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

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

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

Position of the Applicants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

...

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

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

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

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

Preliminary objection to Edmonton's application

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

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

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

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

(a) vary the judgment or order, or

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

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

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

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

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

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

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

> [46] The principles governing an application under s. 187(5) are that:
>
> (i) The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.
>
> (ii) Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.
>
> (iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order.
>
> (iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.

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

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

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

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

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

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

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

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

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

Onus on come-back application

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

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

Policy considerations

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

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

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

CCAA* v *BIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.
>
> [175] The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other “chicken little” argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

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

ICI Opt out/lifting the stay application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[81] The Court held:

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

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

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

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

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

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

[85] He observed:

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

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

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

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

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

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

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

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

[90] The Court held:

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

[91] It also noted:

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

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

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

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

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

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

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

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

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

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

Priority issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Standard General

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Edmonton

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

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

[145] Blair J stated at 794:

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

[146] However, Blair J stated at 795:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ICI

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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