

COURT FILE NUMBER 1703 12327

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON



IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT CT, R.S.C. 1985, c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF
667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956
ALBERTA LTD., 1371047 ALBERTA LTD. AND 1919209
ALBERTA LTD.

DOCUMENT BRIEF OF NORTHLAND MORTGAGE & INVESTMENT CORP.

**ADDRESS FOR
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I. INTRODUCTION

1. This brief is written in response to the Monitor's application returnable September 21, 2017 for a \$700,000 holdback to be applied against the proceeds of the sale of the Winterburn Property.
2. Northland Mortgage & Investment Corporation ("**Northland**") holds a second registered mortgage against the Winterburn Property securing the sum of \$750,000.00 plus interest and plus legal costs, as between solicitor and his own client on a full indemnity basis (the "**Indebtedness**"). As at the date of this application, 1371047 Alberta Ltd. ("**137**") is indebted to Northland in the amount of \$896,941.25 plus interest at the per diem rate of \$362.46 mortgage.

Affidavit of Mark Eikeland sworn September 18, 2018 (the "**Northland Affidavit**")
at para 10

3. Staheli Construction Co. Ltd ("**Staheli**"), as first mortgagee, has applied to have the Winterburn Property sale proceeds paid out of court. After payout of Staheli, the balance of the sale proceeds should flow to Northland as the next secured creditor on title.
4. The \$700,000 holdback proposed by the Monitor leaves no proceeds for Northland. This will cause Northland, a passive and well secured creditor, to suffer a very significant shortfall. And, rather than spreading this interim allocation among creditors who benefit from these CCAA proceedings, makes Northland solely liable for this portion of the Monitor's cost to its extreme detriment.

II. BACKGROUND

5. The Winterburn Property was sold in April 2017 after being marketed for over a year. In support of the offer to purchase the Winterburn Property, the Monitor advised that the proceeds would provide for the payment of related mortgage, including Staheli and Northland's mortgages. Northland's support for this sale was sought by the Monitor and granted on their advice that this sale would pay out all or substantially all of first and second mortgages.

Confidential Supplement to the Monitor's Eleventh Report at para 13

Confidential Supplement to the Monitor's Twelfth Report at paras 10 and 11

6. In none of the discussions or documents filed in support of the sale was there any indication that a \$700,000 allocation and holdback would be sought against the proceeds.

III. LAW AND ARGUMENT

7. The *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, is remedial legislation. Its purpose is to allow a debtor company to emerge from financial difficulties and to maximize returns to creditors and other stakeholders. The proceedings are not meant to disadvantage creditors but to try and provide a constructive solution for all stakeholders.

Sun Indalex Finance, LLC v United Steelworkers, 2013 SCC 6 at para 205 [TAB 1]; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 77 [TAB 2]

8. The Respondent agrees with the Monitor that the allocation of the priority charges must be done on a case-by-case basis. This task engages this Honourable Court's discretion.

Royal Bank of Canada v Atlas Block Co Limited, 2014 ONSC 1531 at para 43 (*Atlas Block*) [TAB 3]; *Atlantica Diversified Transportation Systems Inc. (Re)*, 2018 NSSC 77 [TAB 4]; *National Bank of Canada v Stomp Pork Farm Ltd.*, 2008 SKCA 73 at paras 25, 30 [TAB 5]; *Hunjan International Inc. (Re)*, 2006 CarswellOnt 2718 at paras 55, 57 (*Hunjan*) [TAB 6]; *Re Hunters Trailer & Marine Ltd.*, 2001 ABQB 1094 at para 15 (*Hunters Marine*) [TAB 7]

9. This Honourable Court must be satisfied that the Monitor's proposed allocation is *prima facie* fair. Courts are entitled to depart from a monitor's proposed allocation where the reasons for departure are reasonably articulable.

Re: Medican Holdings Ltd., 2013 ABQB 224 at paras 39, 44 (*Medican*) [TAB 8]
In Re Hickman Equipment (1985) Ltd. (Receivership), 2004 NLSCTD 164 (*Hickman*) [TAB 9]

10. Any creditor objecting to a proposed allocation must show that there is an inequity in the circumstances or that the creditor will be prejudiced by the allocation.

Medican at para 39 [TAB 8]; *Atlas Block* at para 43 [TAB 3]

11. The overarching principles emerging from the case law indicate that costs must be allocated in a fair and equitable manner. An allocation is not required to be equal in order to be equitable, but a fair and equitable allocation cannot ignore the benefit or detriment suffered by any creditor in CCAA proceedings.

Atlas Block at para 43 [TAB 3]; *Hickman* at para 17 [TAB 9]

12. In Northland's case, the detrimental effect of the allocation and holdback proposed by the Monitor is acute. Of the Monitor's costs allocated to 137 to date, the Monitor proposes to holdback approximately half. And, rather than those costs being borne equally among creditors who stand to benefit from the CCAA proceedings, those cost are born solely by Northland.

13. Northland is not a publically traded bank or a lender who invests pooled investments, in which case a loss may be less difficult to absorb. Northland's \$750,000 mortgage is funded by a single individual, a widowed pensioner on Vancouver Island who relies on the interest payment to fund her retirement. The Monitor's proposed holdback and allocation methodology is to make her solely responsible for \$700,000 in costs which supposedly benefit all creditors.

Northland Affidavit at para 3

14. Staheli, as first mortgagee, is as much a beneficiary of the sale of the Winterburn Property as Northland and as a passive secured creditor, is in the same creditor class as Northland. However, the \$700,000 allocation and holdback impacts Staheli's security only slightly whereas Northland's security is effectively wiped off title.
15. The Respondent submits that the allocation proposed by the Monitor is both inequitable in the circumstances and prejudices the Respondent as a second mortgage holder on the Winterburn Property.
16. Though the purpose of an allocation is not to do a cost-benefit analysis to determine which creditors benefited more from the CCAA proceedings, in this instance it is useful to do a rough analysis. With respect to the Winterburn Property the Monitors effectively oversaw a commercial foreclosure, which is what would have happened had this been a receivership. The Winterburn Property was listed and sold. There were a few applications and some transaction costs. An average commercial foreclosure may cost \$15,000 to \$50,000 in legal fees and disbursements. The position of the Monitor is that potentially \$700,000 in fees are attributable to the sale of the Winterburn Lands.
17. This is overpaying for a commercial foreclosure by over \$650,000.
18. While the courts have held that there is a potential benefit to all creditors, including secured creditors, in a CCAA proceeding, the benefit to the secured creditors in this instance appears to be overstated.
19. Further, the Monitor has provided no documentation indicating the breakdown of the fees between legal fees and the Monitor's fees. Nor has the Monitor provided any accounts or time records which would allow the parties paying the allocation to review the fees.
20. Courts have acknowledged that "passive creditors", being those secured in land, stand to benefit substantially less from CCAA proceedings than operating creditors. In **Hunters Marine**, the Court ordered the passively secured creditor to be charged 15% of the Monitor's fees, to reflect the "difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery."

Hunters Marine at paras 20, 14 [TAB 7]

21. In *Hunjan*, when the Court approved the receiver's allocation, the Court was satisfied that the receiver had taken into account, to the extent possible, a distinction between those costs that could be said to benefit all creditors and those, where possible, specific costs could be fairly allocated to one or more particular creditors.

Hunjan at para 72 [TAB 6]

22. Northland submits that the Monitor's proposed allocation does not take into account the passive nature of Northland and Staheli's security in land and suggests that this Court follows *Hunters Marine* and attribute 15% of 137's portion of the Monitor's costs to its secured creditors with that portion to be shared pro-rate among the secured creditors based on the amount of their recovery.
23. If the Monitor's application is granted as sought, it has the potential to cast a chill on commercial lending practices in Alberta. Effectively, a creditor secured against land with sufficient equity to cover their loan and who was advised their security was good and that they could expect to be paid out of the sale proceeds will have had their entire security subsumed by Monitor's fees. Rather than secured lenders as a class paying 15% of the Monitor's total charges, one individual lender will have paid approximately 15% of the total fees by herself and will be barred from anywhere near full recovery on her loan.

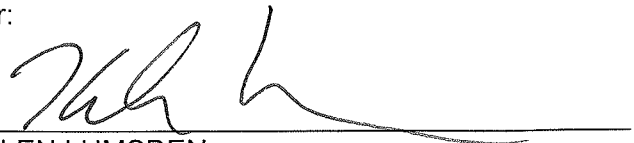
IV. RELIEF SOUGHT

24. Northland seeks:
- a. An order that the balance of the Winterburn sale proceeds after payment to Staheli be paid to Northland in respect of its indebtedness; and
 - b. An order reducing the holdback on the Winterburn sale proceeds to \$50,000 to be prorated between Staheli and Northland based on the amount of their recovery from the proceeds.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2018

WITTEN LLP

Per:



KALEN LUMSDEN

Solicitors for Northland Mortgage & Investment Corporation

Table of Authorities

Tab

1. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6
2. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
3. *Royal Bank of Canada v Atlas Block Co Limited*, 2014 ONSC 1531
4. *Atlantica Diversified Transportation Systems Inc. (Re)*, 2018 NSSC 77
5. *National Bank of Canada v Stomp Pork Farm Ltd.*, 2008 SKCA 73
6. *Hunjan International Inc. (Re)*, 2006 CarswellOnt 2718
7. *Re Hunters Trailer & Marine Ltd.*, 2001 ABQB 1094
8. *Re: Medican Holdings Ltd.*, 2013 ABQB 224
9. *In Re Hickman Equipment (1985) Ltd. (Receivership)*, 2004 NLSCTD 164

TAB 1

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

Sun Indalex Finance, LLC *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 *Appelant*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

Syndicat des Métallos *Appelant*

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

INDEXED AS: SUN INDALEX FINANCE, LLC v. UNITED STEELWORKERS

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

c.

Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers *Intimés*

et

Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

RÉPERTORIÉ : SUN INDALEX FINANCE, LLC c. SYNDICAT DES MÉTALLOS

2013 CSC 6

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1^{er} février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Moldaver.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1)a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited (“Indalex”), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”). The salaried plan was being wound up when the CCAA proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession (“DIP”) financing in order to allow it to continue to operate. The CCAA court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the CCAA court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The CCAA court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members’ arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the CCAA proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (“PBA”), and a constructive trust arising from Indalex’s alleged breaches

Pensions — Fiducies — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la LACC — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — La société a-t-elle manqué à ses obligations fiduciaires d’administrateur des régimes? — Les participants des régimes de retraite ont-ils droit à une fiducie par interprétation?

Procédure civile — Dépens — Appels — Norme de contrôle — La décision de la Cour d’appel sur les dépens d’une partie est-elle erronée?

Indalex Limited (« Indalex »), le promoteur et l’administrateur de deux régimes de retraite, l’un pour les salariés, l’autre pour les cadres, est devenue insolvable. Elle a demandé la protection contre ses créanciers sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). Le régime des salariés était en cours de liquidation lorsque la procédure fondée sur la LACC a été engagée. Le régime des cadres n’acceptait plus de participants, mais il n’était pas liquidé. Les deux régimes accusaient un déficit de liquidation.

Une série de mesures avalisées par le tribunal a permis à la société d’obtenir un financement de débiteur-exploitant (« DE ») et de poursuivre ses activités. Le tribunal chargé de l’application de la LACC a accordé aux prêteurs DE, un consortium composé de créanciers qui bénéficiaient d’une garantie de premier rang avant le début de la procédure, une priorité sur tous les autres créanciers. Le remboursement des sommes empruntées était garanti par Indalex É.-U.

Finalement, sur approbation du tribunal appliquant la LACC, Indalex a vendu son entreprise, mais l’acquéreur n’a pas repris à son compte les engagements de retraite. Le produit de la vente n’étant pas suffisant pour rembourser les prêteurs DE, Indalex É.-U., à titre de caution, a payé la différence et a acquis de ce fait la créance prioritaire des prêteurs DE. Le tribunal a autorisé le paiement conformément à l’ordre de priorité, mais il a également ordonné la retenue de fonds en réserve, remettant à plus tard l’examen de l’argumentation des participants relative à leur droit au produit de la vente.

Les participants des régimes ont contesté la priorité accordée dans le cadre de la procédure fondée sur la LACC. Ils ont fait valoir qu’ils avaient priorité pour le montant du déficit de liquidation en raison de la fiducie réputée créée par le par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« LRR »), et de la fiducie

of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of

par interprétation résultant de manquements allégués d'Indalex à son obligation fiduciaire d'administrateur des régimes. En première instance, le juge a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation. Il a conclu que, pour ce qui était du déficit de liquidation, les participants étaient des créanciers chirographaires. La Cour d'appel a infirmé la décision et statué que les déficits de liquidation des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant la créance des prêteurs DE bénéficiant d'une priorité et celles des autres créanciers garantis. En outre, elle a rejeté la prétention du Syndicat des Métallos, qui représentait quelques-uns des participants du régime des salariés, à savoir qu'il avait droit au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés.

Arrêt (les juges LeBel et Abella sont dissidents) : Les pourvois interjetés par Sun Indalex Finance, George L. Miller et FTI Consulting sont accueillis.

Arrêt : Le pourvoi interjeté par le Syndicat des Métallos est rejeté.

(1) *La fiducie réputée d'origine législative*

Les juges Deschamps et Moldaver : Il est bien établi que la fiducie réputée créée par le par. 57(4) de la *LRR* s'applique aux cotisations visées à l'al. 75(1)a) de la *LRR*. La seule question est de savoir si cette fiducie réputée d'origine législative s'applique aussi aux paiements au titre du déficit de liquidation exigés par l'al. 75(1)b). Dans le cas des salariés, la réponse est oui, compte tenu du texte, du contexte et de l'objet par. 57(4). Il n'en va pas de même pour le régime des cadres étant donné que cette disposition prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

Le paragraphe 57(4) de la *LRR*, qui crée la fiducie réputée en cas de liquidation, ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots

s. 57(4) of the *PBA*: “amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations”.

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words “contributions accrued” can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer’s payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature’s trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is “accrued to the date of the wind up” as required by s. 57(4) of the *PBA*.

When the term “accrued” is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable

employés au par. 57(4) de la *LRR* : « montant égal aux cotisations de l’employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

La date où s’effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Le fait que le montant précis des cotisations n’est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu’elles ne seraient pas accumulées d’un point de vue comptable. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l’al. 75(1)(b) de la *LRR*.

L’historique législatif montre que la protection, qui couvrirait d’abord (1) uniquement les cotisations dues, s’est étendue (2) aux montants payables calculés comme s’il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l’exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation. L’historique législatif mène donc à la conclusion qu’une interprétation étroite qui dissocierait le paiement requis de l’employeur par l’al. 75(1)(b) de la *LRR* de celui exigé à l’al. 75(1)(a) irait à l’encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue.

La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée. En l’espèce, c’est à bon droit que la Cour d’appel a jugé qu’Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la question de la fiducie réputée d’origine législative.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Étant donné qu’il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, celui-ci n’ayant pas été liquidé à la date considérée, il s’agit donc essentiellement — pour ce qui concerne le régime des salariés — d’interpréter une disposition de la loi et de déterminer si le déficit de liquidation décrit à l’al. 75(1)(b) est « accumul[é] à la date de la liquidation » comme l’exige le par. 57(4) de la *LRR*.

Lorsque le terme « accumulé » [et plus encore son équivalent anglais « *accrued* »] est employé de pair avec une somme, il renvoie généralement à un élément

but which may or may not be due. In the present case, s. 57(4) uses the word “accrued” in contrast to the word “due”. Given the ordinary meaning of the word “accrued”, the wind-up deficiency cannot be said to have “accrued” to the date of wind up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words “accrued to the date of wind up” is that the amounts referred to are precisely ascertained immediately before the effective date of the plan’s wind up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only on the date of wind up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer’s potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer’s other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed

dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû. Dans la présente affaire, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ». Suivant le sens ordinaire du mot « accumulé », on ne peut considérer que le déficit l’était à la date de la liquidation. Le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu’à la liquidation et à l’égard desquels les employés ne font des choix qu’après la liquidation. Le déficit de liquidation n’est donc ni déterminé ni déterminable à la date de liquidation prévue.

Le contexte législatif général appuie la thèse que, suivant leur sens ordinaire et grammatical le plus plausible, les mots « accumulées à la date de la liquidation » renvoient aux sommes déterminées de façon précise immédiatement avant la date de prise d’effet de la liquidation du régime. Qui plus est, il appert de l’évolution et de l’historique des dispositions en cause que le législateur n’a jamais voulu que le déficit de liquidation fasse l’objet d’une fiducie réputée d’origine législative. Ils confirment en fait l’intention du législateur d’*exclure* du champ d’application de la fiducie réputée les obligations qui naissent seulement à la date même de la liquidation.

La loi établit une distinction entre deux types d’obligation de l’employeur qui sont pertinents en l’espèce. Il y a d’une part les cotisations requises pour acquitter le coût du service courant et d’autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu’à la date considérée. Il s’agit des paiements prévus à l’actuel al. 75(1)a), à savoir ceux qui sont dus ou accumulés, mais qui n’ont pas été versés. D’autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (le déficit de liquidation). Ces paiements font l’objet de l’al. 75(1)b). Il appert de l’évolution et de l’historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n’a jamais voulu que les obligations ultérieures éventuelles de l’employeur qui naissent une fois le régime liquidé fassent l’objet d’une fiducie réputée ou d’un privilège.

En l’espèce, la fiducie réputée du par. 57(4) ne vise pas le déficit de liquidation. Pareille exclusion est conforme aux objectifs généraux de la loi. Le législateur a créé des fiducies à l’égard des cotisations qui étaient dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d’un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l’employeur. Or, il y a de bonnes raisons de penser que c’est en raison d’autres objectifs concurrents que le législateur s’est abstenu d’accroître la portée de la fiducie réputée et d’y

trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust as a Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs

inclure le déficit de liquidation. La protection des régimes de retraite constitue certes un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite sous le régime de la *LRR*.

(2) *Priorité de rang*

Les juges Deschamps et Moldaver : Une fiducie réputée établie par une loi provinciale comme la *LRR* continue de s'appliquer dans les instances régies par la *LACC*, relevant de la compétence fédérale, sous réserve de la doctrine de la prépondérance fédérale. En l'espèce, accorder priorité aux prêteurs DE relève à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Malgré le désaccord avec la juge Deschamps sur la portée de la fiducie réputée du par. 57(4), si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la priorité de rang déterminée par application du principe de la prépondérance fédérale.

(3) *La fiducie par interprétation comme réparation du manquement à l'obligation fiduciaire*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il ne saurait y avoir conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires du régime de retraite qu'il administre. Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction d'employeur et d'administrateur de régime exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne

when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial CCAA proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the CCAA proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the CCAA judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the CCAA proceedings resulted in any such asset. Furthermore, to impose a constructive trust in

d'exercer les deux fonctions. Il y a en fait conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime.

À elle seule, la demande initiale de protection de la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations. De même, l'omission de donner avis de la demande initiale présentée sur le fondement de la LACC ne constituait pas un manquement à l'obligation fiduciaire d'éviter tout conflit d'intérêts. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux participants plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant.

C'est lors de la demande et de l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que de la demande et de l'obtention de l'approbation de la vente que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite. Cependant, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la LACC comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

L'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la LACC. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être. En conséquence, Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

Indépendamment de ce manquement, l'imposition d'une fiducie par interprétation ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Aucun élément de preuve n'appuie la prétention qu'un tel actif a résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels a donné lieu

response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per Deschamps and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a “corporate hat”. What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex’s fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the CCAA court to override the plan members’ priority. The corporation’s interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator’s duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator’s duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with *Cromwell J.* that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

la procédure fondée sur la *LACC*. Qui plus est, imposer une fiducie par interprétation par suite du manquement à l’obligation fiduciaire de veiller à ce que les bénéficiaires des régimes jouissent de garanties procédurales, alors qu’ils en ont joui dans les faits, se révèle inéquitable au vu de l’ensemble des circonstances.

Les juges Deschamps et Moldaver : L’employeur constitué en société qui décide d’agir en qualité d’administrateur d’un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d’une société ont aussi une obligation fiduciaire envers la société, l’employeur doit être prêt à résoudre les conflits lorsqu’ils surgissent. L’employeur qui administre un régime de retraite n’est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu’il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d’une décision, et non sa nature qui doivent être prises en compte.

En l’espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d’administratrice des régimes et les décisions de gestion qu’elle devait prendre dans le meilleur intérêt de la société. Plus précisément, en demandant au tribunal d’autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d’appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. L’intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d’insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l’administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l’occurrence, ce devoir de l’administrateur des régimes impliquait, plus particulièrement, qu’il donne à tout le moins aux participants la possibilité d’exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l’encontre des intérêts des participants.

En ce qui concerne la fiducie par interprétation, il est bien établi en droit qu’une réparation de la nature d’un droit de propriété n’est généralement accordée qu’à l’égard d’un bien ayant un lien direct avec un acte fautif ou d’un bien qui peut être rattaché à un tel bien. Il y a accord avec le juge *Cromwell* sur le fait que cette condition n’était pas remplie en l’espèce et il a été souscrit à ses motifs sur cette question. En outre, il était déraisonnable pour la Cour d’appel de modifier l’ordre de priorité.

Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be

Les juges LeBel et Abella (dissidents) : Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. Par conséquent, avant d'analyser les obligations fiduciaires de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation et les caractéristiques des bénéficiaires du régime. En l'espèce, les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex.

Rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujéti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir.

Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

En l'occurrence, l'employeur a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation.

(4) *Dépens dans le pourvoi du Syndicat des Métallos*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il n'y a en l'espèce aucune raison de revenir sur la décision de la Cour d'appel relative aux dépens en ce qui concerne le Syndicat des Métallos. L'instance engagée portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel a opiné essentiellement que, représentant seulement 7 des 169 participants du régime des salariés, le syndicat ne devait pas être en

able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

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By Cromwell J.

Referred to: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, aff'g 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Galambos*

mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'en étaient pas membres, les risques inhérents au litige sans les consulter. Il n'y a aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour.

Les juges Deschamps et Moldaver : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Les juges LeBel et Abella : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Jurisprudence

Citée par la juge Deschamps

Arrêts mentionnés : *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306; *Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *Crystalline Investments Ltd. c. Domgroup Ltd.*, 2004 CSC 3, [2004] 1 R.C.S. 60; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307; *Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273; *Société d'assurance-dépôts du Canada c. Banque Commerciale du Canada*, [1992] 3 R.C.S. 558.

Citée par le juge Cromwell

Arrêts mentionnés : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53; *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306; *Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, conf. 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261; *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574; *Sharbern Holding Inc. c. Vancouver Airport Centre Ltd.*, 2011 CSC 23, [2011] 2 R.C.S. 175;

[205] First, it is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

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

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

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

For this reason, I would be very reluctant to find that, simply by virtue of embarking on CCAA proceedings, an employer-administrator breaches its duties to plan members.

[206] Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek CCAA protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking CCAA protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the CCAA or under the BIA), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be

[205] Premièrement, il importe de rappeler que la procédure de la LACC n'a pas pour objet de défavoriser les créanciers, mais bien de trouver une solution à l'insolvabilité d'une société qui soit constructive pour tous les intéressés. Comme le fait remarquer ma collègue la juge Deschamps dans *Century Services*, au par. 15 :

... la LACC [...] a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif.

Dans le même arrêt (par. 59), elle cite également en l'approuvant l'extrait suivant des motifs du juge Doherty, dissident, dans *Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57 :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiati[ve] des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

C'est pourquoi j'incline très peu à conclure que l'employeur-administrateur manque à ses obligations envers les participants des régimes de retraite du seul fait qu'il engage une procédure sur le fondement de la LACC.

[206] Deuxièmement, les faits de la présente affaire n'appuient pas la prétention selon laquelle les intérêts de l'employeur s'opposaient à ceux des bénéficiaires des régimes quant à la décision de se prévaloir ou non de la protection de la LACC. On ne saurait sérieusement soutenir qu'une autre mesure aurait protégé davantage les droits des bénéficiaires des régimes. Ni la Cour d'appel ni les parties n'avancent quelque autre solution qui eût été préférable à la protection contre les créanciers demandée sous le régime de la LACC. Indalex éprouvait de graves difficultés financières et ses options étaient limitées : elle pouvait présenter une proposition à ses créanciers (suivant la LACC ou la LFI) ou faire faillite. Qui plus est, les attributions de l'administrateur des régimes

TAB 2

Century Services Inc. *Appellant*

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada** *Respondent***INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)****2010 SCC 60**

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada** *Intimé***RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)****2010 CSC 60**

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

TAB 3

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 Harbour 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
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[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.

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

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 process⁴ – a sale

⁴ *B & M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 56 C.B.R. (5th) 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 much 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

TAB 4

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.

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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.

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]

TAB 5



THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2008 SKCA 73

Date: 20080522

Between:

Docket: 1627

National Bank of Canada

Appellant

- and -

Stomp Pork Farm Ltd.

Respondent

- and -

Farm Credit Canada, Cargill Limited
and Meyers Norris Penny Limited, Monitor

Respondents

Coram:

Sherstobitoff, Lane & Jackson JJ.A.

Counsel:

Jeffrey Lee and Linda Widdup for National Bank of Canada
Kim Anderson for Stomp Pork Farm Ltd.
Joel Hesje, Q.C. for Farm Credit Canada
Ian Sutherland for Cargill Limited
Gary Meschishnick for Meyers Norris Penny Limited

Appeal:

From: 2008 SKQB 152, 2008 SKQB 179
Heard: May 13, 2008
Disposition: Appeal Decided May 13 and May 22, 2008 (orally)
Written Reasons: June 5, 2008
By: The Honourable Madam Justice Jackson
In Concurrence: The Honourable Mr. Justice Sherstobitoff
The Honourable Mr. Justice Lane

Jackson J.A.

I. Introduction

[1] The broad issue in this appeal is the extent to which a Chambers judge has the authority to allocate priority among the assets of pre-filing creditors for debtor in possession (“DIP”) financing early in the process of proceedings under the *Companies' Creditors Arrangement Act*¹ (“the CCAA”). In the result, the Court left in place the Chambers judge’s decision with respect to an allocation of priority for DIP financing that had already been advanced, but set aside the allocation of priority with respect to future and, as yet not required, DIP financing, with reasons to follow. These are those reasons.

II. Facts and Decisions under Appeal

[2] The facts are well set out in the two decisions of the Honourable Madam Justice A.R. Rothery under appeal such that I will provide a brief sketch only.

[3] Stomp Pork Farm Ltd. (“Stomp”) is the second largest commercial hog producer in Saskatchewan owning 27,000 breeding sows.² Its two principal lenders are National Bank of Canada (“NBC”) and Farm Credit Canada (“FCC”).

[4] As of March 24, 2008, Stomp owed NBC approximately \$20.5 million secured on Stomp’s current assets, which comprise livestock inventory and

¹ R.S.C. 1985, c. C-36.

² Appeal Book, Vol. 2, pp. 180a and 182a, Affidavit of Ivan Stomp sworn March 26, 2008, paras. 4, 5 and 19.

accounts receivable (the “Current Assets”). NBC has priority over the Current Assets to the extent of \$18 million and thereafter shares priority with FCC, with NBC's share, over and above the \$18 million, being 15%.

[5] As of March 27, 2008, Stomp owed FCC approximately \$28.5 million secured on Stomp’s land, buildings and improvements (the “Fixed Assets”). NBC also holds a security interest in 15% of the Fixed Assets.

[6] Due to a variety of factors including high feed prices and currency rate challenges, Stomp became insolvent. On March 27, 2008, it applied *ex parte* and received an initial order under the *CCAA* for a stay of proceedings until April 25, 2008. The *ex parte* initial order was amended on March 28, 2008. This amended order will be called the “Initial Order.”³

[7] The Initial Order directs FCC to provide a DIP financing facility of \$3 million to Stomp repayable in 30 days to be secured in the following manner: (i) an administration charge to a maximum of \$100,000 to be allocated on a basis of a 50% charge on Current Assets and a 50% charge on Fixed Assets; and (ii) the balance to be secured 100% on the Current Assets including an expected payment of \$1.5 million from the Canadian Agricultural Income Stabilization Program – AgriStability Targeted Payment. Paragraph 34 of the Order reads:

34. This Court Orders that the DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the inventory (including all livestock and breeding livestock) and accounts receivable of the

³ Appeal Book, pp. 13a-35a, Amended *Ex Parte* Initial Order issued March 28, 2008.

Applicant, and the Canadian Agricultural Income Stabilization Program-AgriStability Targeted Payment (the "Security"), which charge shall not exceed the aggregate amount owed to the DIP Lender under the Commitment Letter, filed. The DIP Lender's Charge shall have the priority set out in paragraphs 45 and 48 hereof.⁴

[8] On April 2, 2008, NBC applied for an order substituting it as the DIP lender and allocating the DIP financing equally between the Current Assets and Fixed Assets as initially proposed by Stomp on March 27, 2008 and supported by NBC. In the alternative, NBC asked that the DIP lender's charge be allocated against Stomp's assets according to the recommendation of the Monitor in a formal written report to be prepared.

[9] Rothery J. agreed to adjourn the reconsideration application pending completion of a report by the Monitor analyzing Stomp's situation⁵ and providing its recommendations on the fair and equitable allocation of the DIP lender's charge and any future DIP financing.⁶ As part of this exercise, the Monitor was directed to consider the proportionate amounts of total aggregate indebtedness of Stomp to each of NBC and FCC and the relative liquidation values and fair market values of Stomp's Current Assets and Fixed Assets.⁷

[10] On April 23, 2008, Rothery J. confirmed her original decision to secure the super-priority for the DIP financing on the Current Assets and directed

⁴ *Ibid.*, p. 27a.

⁵ 2008 SKQB 152, para. 15.

⁶ *Ibid.* para. 16.

⁷ *Ibid.*

that any future DIP financing be secured 75% on the Current Assets and 25% on the Fixed Assets (the “April 23 Order”).⁸ The April 23 Order reads:

1. The application by National Bank for an Order varying the Initial Order so as to modify the allocation of the DIP Lender's Charge provided for in the Initial Order as it pertains to the FCC DIP Facility shall be and is hereby dismissed.
2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 75% to current assets of Stomp Pork Farm Ltd. and 25% to fixed assets of Stomp Pork Farm Ltd.⁹

[11] NBC applied immediately for leave to appeal both decisions relating to the Initial and April 23 Orders and for an order that the application for leave to appeal be expedited and heard by a panel of three judges of the Court, who would go on to hear the appeal proper if leave were granted. Chief Justice Klebuc granted such an order on April 28, 2008 directing that the leave application be expedited and added to the list of appeals to be heard during the regular sittings of the Court on May 13, 2008.

[12] On May 13, 2008, the Court refused the application for leave to appeal the Initial and April 23 Orders insofar as they pertain to the initial DIP financing. The Court granted leave to appeal the April 23 Order as it pertained to an allocation of priority for future DIP financing. Upon announcing these decisions, counsel for NBC indicated that he wished to consult with his client. On May 14, 2008, counsel advised that NBC's position was that the appeal be allowed and the April 23 Order be amended by substituting para. 2 of that order with the following:

⁸2008 SKQB 179, paras. 2 and 10.

⁹April 23 Order, Appeal Book, p. 169a.

2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 50% to current assets of Stomp Pork Farm Ltd. and 50% to fixed assets of Stomp Pork Farm Ltd.¹⁰

In the alternative, NBC submitted that if the Court were prepared to allow the appeal but were not prepared to grant this form of relief, the appropriate course of action would be that para. 2 of the April 23 Order be vacated in its entirety.

[13] On May 22, 2008, the Court advised the parties that it was allowing the appeal from the April 23 Order, as it pertained to future DIP financing, and vacating para. 2 of the April 23 Order in its entirety with reasons to follow.

III. Reasons

1. Reasons for Refusing Leave Pertaining to the Interim Order

[14] The Court's jurisdiction to hear this appeal is found in s. 13 of the *CCAA*:

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.¹¹

[15] In a series of cases emanating first from British Columbia¹² and then from Quebec,¹³ Alberta¹⁴ and Ontario,¹⁵ there has developed a consensus

¹⁰ Letter dated May 14, 2008 to the Registrar, Court of Appeal.

¹¹ *CCAA*, *supra* note 1.

¹² *Pacific National Leases Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

¹³ *Steinberg Inc. (Re)*, [1993] Q.J. No. 860 (QL) (Que. C.A.).

¹⁴ *Multitech Warehouse Direct Inc. (Re)*, (1995), 32 Alta L.R. (3d) 62 (C.A.); *Blue Range Resource*

among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general.¹⁶ The test is often expressed as a four-part one:

1. whether the issue on appeal is of significance to the practice;
2. whether the issue raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
4. whether the appeal will unduly hinder the progress of the action.¹⁷

[16] There can be no question that the issues raised in this appeal are of significance to the practice. The general question of the allocation of priority between the DIP financier, which is a pre-filing creditor, and the other existing creditors has been little explored by the existing jurisprudence. The particular questions of whether the restructuring judge can allocate priority before the outcome of the restructuring is known, and whether he or she may do so with respect to certain assets and not others, appear to be matters of first instance.

[17] Nor can it be questioned that the appeal is of significance to the action. By the decision pertaining to interim financing, NBC has had its priority position significantly affected. Beyond the impact on NBC, however, given

Corp. (Re), 1999 ABCA 255, (1999), 244 A.R. 103; *Canadian Airlines Corp. (Re)*, 2000 ABCA 149, (2000), 80 Alta. L.R. (3d) 213.

¹⁵ *Algoma Steel Inc.*, (2001), 25 C.B.R. (4th) 194 (Ont.C.A.).

¹⁶ See, for example, *Multitech*, *supra* note 14 at para. 3, summarizing *Steinberg*, *supra* note 13.

¹⁷ *Blue Range*, *supra* note 14 at para. 4; *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (C.A.) at para. 13; *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, (2008), 422 A.R. 4 at para. 12.

the large amount of funding involved, whichever decision the Court were to make on this appeal would be significant to the restructuring. Given the procedure that has been followed, it also cannot be seriously contested that the appeal would unduly hinder the action.

[18] It is the third factor, however, that is determinative in deciding whether leave to appeal should be granted in relation to the initial DIP financing.

[19] Notwithstanding the fact that the leave application and the appeal proper were heard together, the parties were advised at the commencement of the appeal that the Court would consider the question of leave independently from the merits of the appeal. Admittedly, in a case such as this one, where leave to appeal and the appeal proper are heard together, the line between when a judge grants leave and when a court decides the appeal blurs as the court turns more quickly to questioning counsel on the merits of the appeal and the impact on the restructuring than might otherwise occur in Chambers. There can be no question, however, but that the procedure followed in this case provided a rapid result for the parties.

[20] With respect to the initial financing, these factors became controlling for the Court. Rothery J. had before her an application made by the debtor requesting a \$3 million facility to be provided by NBC to be secured as a super-priority charge allocated 50% against Current Assets and 50% against Fixed Assets. NBC made its position clear that it was prepared to advance the funds if a priority allocation were made in this manner only. FCC opposed

this motion. All parties before the Court, however, agreed that it was imperative funds be advanced within hours if arrangements were to be made for Cargill Ltd. to supplement dwindling food stocks to permit the animals to be fed. It appeared to Rothery J. that the only other possible DIP financier before the Court was FCC. Rothery J. ordered FCC to make a \$3 million facility available by the next morning, which facility was to be secured primarily on the Current Assets, but in the event that FCC refused to provide that facility, NBC would be permitted to become the DIP financier, in accordance with its proposal, with a 50/50 allocation against Current and Fixed Assets. In sum, Rothery J. was required to make an order, on extremely short notice, with submissions from all parties including NBC, that immediate financing was required.

[21] That brings us to the proceedings adjourned to April 23, 2008 wherein Rothery J. agreed to reconsider the allocation following receipt of full argument and the Monitor's Report. Rothery J. reconsidered her decision and confirmed it. On this occasion, she wrote:

[1] In my fiat of April 7, 2008, cited at 2008 SKQB 152, I directed the Monitor to file a report with the court "to provide its recommendations on the fair and equitable allocation of any future DIP financing," as stated in paragraph 16 of that fiat. National Bank of Canada ("NBC") had brought a motion for me to vary the debtor-in-possession ("DIP") financing charge, and takes the position that the DIP financing provided by Farm Credit Canada ("FCC") may retroactively be allocated in accordance with the Monitor's recommendations.

[2] With respect to FCC's DIP facility, which expired April 22, 2008, my conclusion remains the same as it was when I initially granted the order for FCC's DIP facility. That is, as stated in para. 15 of the April 7, 2008, fiat, "the initial order placed the risk with the security that immediately benefitted from it, that is, the current assets." My conclusions on the risk allocation for that first DIP facility have not been changed by the Monitor's report. Oppositely, the Monitor's report supports my assessment that most of the FCC DIP facility was used to ensure that the pigs

continued to be fed and that they were prepared for market. This short term DIP facility was equitably allocated among the creditors to the CCAA application. Any application to vary my original order pertaining to the FCC DIP facility is hereby dismissed.

[3] The issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique. Indeed, it was the focus of much argument by counsel at the initial order proceeding. Any DIP financing proposed was on the basis of a specific allocation between current and fixed assets. The court was required to decide prior to the initial order being made. The factual background is outlined in my April 7, 2008, fiat.¹⁸

[22] We accept these reasons. At this stage of the proceedings, we might add or emphasize these factors: (i) the only DIP lenders available to the Court were pre-existing filing creditors; (ii) no pre-existing filing creditor was prepared to step forward to provide financing secured on all of the assets of the debtor without a priority allocation being made and incurring the risk that such a decision would entail; (iii) all parties appeared to agree that financing was crucial to ensure the aims of the *CCAA*; and (iv) some \$2.2 million of the \$3 million facility were ultimately required and had already been expended by the time the appeal was heard. On this last point, we accept the argument of FCC that to change the priorities with respect to funds already expended this early in the process plants an unwelcome seed of uncertainty in the process contemplated by the *CCAA*.

[23] In sum, the Court refused leave with respect to the initial DIP financing as the Court would be highly unlikely to intervene and intervention would upset a significant arrangement that was already in place.

¹⁸ 2008 SKQB 179, *supra* note 8.

2. Reasons for Granting Leave to Appeal the Order Pertaining to Future DIP Financing

[24] When we turned to consider whether leave should be granted with respect to the April 23 Order as it pertains to future financing, however, other considerations came to the fore. As with the orders pertaining to the initial financing, the issues raised are of significance to the practice and to the action and the appeal would not unduly hinder the progress of the action, but with respect to future financing the Court was satisfied that the appeal was *prima facie* meritorious. Thus, leave was granted with respect to this part of the April 23 Order.

3. Reasons for Allowing the Appeal Pertaining to Future DIP Financing

[25] The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. As Dr. Sarra has said:

There have been a number of judicial pronouncements on the role of the appellate courts during a *CCAA* proceeding. The British Columbia Court of Appeal in *Doman Industries Ltd.* held that where an order is made by the judge who is supervising the *CCAA* proceedings of the insolvent company from the beginning, the court will be very reluctant to grant leave to appeal the order. The appellate court will exercise its power sparingly when asked to intervene with respect to decisions made during the course of a *CCAA* proceeding, as the *CCAA* judge is

undertaking a careful and delicate balancing of numerous interests; and appellate proceedings may upset that balance and frustrate that process. The appellate courts have held that they will be cautious about intervening in *CCAA* proceedings at an early stage, particularly where the order contains a come-back clause that allows parties to bring their concerns regarding a decision to the judge supervising the *CCAA* proceeding.¹⁹ [Emphasis added.]

In this Court, leave has been refused in recent times based on these principles. See: *CIBC v. Community Pork Ventures*²⁰ and *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*²¹

[26] Notwithstanding this high level of deference, as Dr. Sarra indicates, appellate courts will intervene in certain cases:

Appellate courts will accord a high degree of deference when asked to interfere with the exercise of discretion of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion or there is a fundamental question of the lower court's jurisdiction. Leave will be refused by the appellate court [if] the appeal is of no general significance to the practice and where granting leave would disrupt the proposed plan that has been approved by the creditors.²² [Emphasis added]

[27] As Newbury J.A. stated in *New Skeena Forest Products Inc., Re*,²³ discretionary decisions in this area are not immune from review. Quoting from Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*,²⁴ she wrote:

[20] ... At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:

But if the appellate tribunal reaches the clear conclusion that there has been a

¹⁹ Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 89 [footnotes omitted].

²⁰ 2005 SKCA 78.

²¹ 2007 SKCA 72 at para. 49, [2007] 9 W.W.R. 79.

²² Sarra, *supra* note 19 at 89 [footnotes omitted].

²³ 2005 BCCA 192, [2005] 8 W.W.R. 224.

²⁴ [1941] 2 All E.R. 245.

wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]

(See also *Harelkin v. University of Regina* [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)²⁵ [Emphasis added]

[28] It is now well established that a superior court supervising the restructuring of an insolvent corporation under the *CCAA* may confer upon a lender, providing DIP financing to the insolvent corporation, the benefit of a court-ordered "super-priority" charge on the assets of the insolvent corporation and that, in certain circumstances, the DIP lender's charge may rank in priority to the existing security held by secured creditors of the insolvent corporation. It is sufficient to cite as an example in support of this proposition the most recent decision on point: *Re: Temple City Housing Inc.*²⁶

[29] While the above aspect of the law appears settled, few reported decisions consider the question of the appropriate allocation of DIP financing as between major secured creditors of the corporate debtor. Some principles

²⁵*New Skeena*, *supra* note 23.

²⁶ 2007 ABQB 786, affirmed *Temple*, *supra* note 17. The Court also notes that Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007, but it is not in force as the *Act* it amends, being *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 is not yet in force. When these amendments come into effect, they will confirm an authority that the courts have been exercising for some time.

are, however, more clear than others. The leading decision is *Hunters Trailer & Marine Ltd., Re.*²⁷

[30] The basic determination that a CCAA judge must make in deciding how to allocate the DIP financing charge amongst the assets of the debtor is what allocation would be most equitable, a task that is left initially to the discretion of the CCAA judge:

15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to say that equity call for an equal allocation of costs.²⁸

The equitable allocation of a DIP financing charge will need to balance, among other things, the creditors' various positions, the purpose of the DIP financing in particular and the CCAA regime in general:

... The court, in balancing prejudices, will weigh the possibility of a going-concern solution that potentially creates long-term upside value for numerous stakeholders, with the risk of further depletion of value that may be able to satisfy claims on a short-term basis. This balancing of interest and prejudice is at the heart of most financing judgments. Notwithstanding these potential benefits to all stakeholders, absent careful scrutiny of the terms of the DIP financing agreement, granting access to short-term capital can increase the risk of harm to stakeholders if the terms approved by the court lead to a CCAA plan that prejudices their interests more than a liquidation outcome.²⁹ [Emphasis added.]

[31] In *Hunters Trailer & Marine Ltd.*, the Court altered the allocation of the charge in relation to DIP financing near the end of the process, noting that the restructuring process was for the benefit, or potential benefit, of all creditors,

²⁷ 2001 ABQB 1094, (2001), 305 A.R. 175.

²⁸ *Ibid.*

²⁹ Sarra, *supra* note 19 at 96-97 [footnotes omitted].

including the creditor whose only security was in the real property. The Court appeared to allocate the charge on the basis of the extent of the benefit, or potential benefit, to the creditor of the DIP financing in relation to the assets over which it held a security:

[20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from *CCAA* proceedings. The *CCAA* recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

...

[22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

[23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

[24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

[25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered *CCAA* costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the *CCAA* proceedings there could have been no certainty as to the sale price of the land or UMC's share of the *CCAA* costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in

the event that its allocation of *CCAA* costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

[26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.³⁰

[Emphasis added]

Dr. Sarra makes the following observation about *Hunters Trailer*:

The court's recognition of the need for an equitable allocation is aimed at a mid-ground between one creditor bearing all the costs and all creditors sharing equally. The notion that financing is a potential benefit to all creditors is critical to the equitable allocation of costs.³¹

[32] Turning to the case at hand, only some statements may be made with certainty. There is in place a *pari passu* agreement between the principal lenders NBC and FCC. The nature of this arrangement is discussed fully in the decisions under appeal.

[33] The estimated liquidation value of the Current Assets of Stomp, identified by the Monitor, ranges from a low of \$12,949,616 and a high of \$12,974,232.³² The estimated liquidation value of the Fixed Assets of Stomp, identified by the Monitor, ranges between a low of \$11,056,000 and a high of \$13,004,000.³³

³⁰ *Hunters Trailer*, *supra* note 27.

³¹ Sarra, *supra*, note 19 at 112.

³² Appeal Book, Vol. 1, p. 94a, Monitor's Second Report, s. 8.1.2.3.

³³ *Ibid.*, p. 95a, s. 8.2.

[34] The Monitor's Second Report concluded with the following recommendation as to the equitable method of allocating the DIP Lender's Charge.³⁴

There is no prescribed formula and any means of calculating the allocation of a DIP Lenders Charge will be arbitrary. Section 9 outlines that 93.6% of DIP financing is projected to apply towards Current Assets. However, it is important to appreciate that the Fixed Assets stand to gain a significant increase in value through a successful CCAA.

All things considered, it is suggested that allocating the cost of the DIP Lenders Charge equally to Fixed Assets and Current Assets is a fair and equitable approach. Applying the 85/15 split under the *Pari Passu* agreement would result in NBC's share being 57.5% and FCC responsible for 42.5% of the DIP Lenders Charge.

[Emphasis added]

FCC, as might be expected, resists the Monitor's conclusion that it will derive any benefit from the restructuring, on the basis that it is prepared to ride out the current economic cycle, with or without hogs, until such time as the Fixed Assets can be sold. There is, of course, no evidence of this and the Monitor's Report appears at this time to be the best evidence of a contrary position.

[35] When Rothery J. made her initial decision, she was presented with no case law and little evidence beyond that which was necessary to demonstrate that if an order were to be made under s. 11 of the *CCAA*, it had to be accompanied by a DIP financing order. Then, by April 23, indeed by April 7, the DIP funds had been expended in accordance with a priority regime that accorded FCC priority. The same points cannot be made in relation to the future DIP financing.

³⁴ *Ibid.*, pp. 99a and 100a, s. 13.0.

[36] With respect to future financing, there is no immediate urgency and, with the benefit of case law, evidence and the Monitor's Reports, it can be said that it is premature to make an allocation of the priority between the secured creditors, and indeed such an allocation appears speculative at this time.

[37] None of the parties before this Court, including Stomp and FCC, argued in support of a split of 75% and 25%. With the benefit of full argument, it became apparent to all that the question of how to allocate the priority of the future DIP financing would best be left to further negotiation, and decision if necessary, as the restructuring process unfolds.

[38] NBC and FCC will each bear their own costs. If there is any issue with respect to the costs of the other parties, an application may be transmitted to the panel through the office of the Registrar.

TAB 6

Ontario Superior Court of Justice
Hunjan International Inc. (Re)
Date: 2006-05-03

Docket: 05-CL-5886

Frederick Myers, L. Joseph Latham for KPMG Inc.

Ashley John Taylor, Diana Juricevic for GE Capital Canada Leasing Services Inc., GE Capital Equipment Financing C.P., GE Capital Canada Leasing Trust and GE Capital Leasing Services Company

Paul R. Basso for Canadian Imperial Bank of Commerce

S. Harvey Starkman, Q.C., Kevin W. Fisher for En-Plas Inc.

E. Peter Auvinen, Arthi Sambasivam for CIT Financial Ltd.

Edmond Lamek for Expost Development Canada

Kenneth Dekker for Hunjan Holdings

C. Campbell J.:

[1] The issue before the Court concerns the allocation and apportionment of the costs arising from failed *Companies Creditors' Arrangements Act* ("CCAA") proceedings, which evolved into a receivership sale by auction of assets of the Hunjan Group, held November 30 and December 7, 2005.

[2] At issue is the allocation of actual disbursements incurred to keep the debtor companies operating during the CCAA proceedings, plus the fees, disbursements and expenses incurred during the receivership proceedings to preserve, protect and realize on the debtors' assets.

[3] The recommended allocation of costs by the Receiver as contained in its Tenth Report is challenged by different first-ranking secured creditors on different issues (the "Opposing Creditors.")

[4] Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium*

Construction Inc. (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.

[5] Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that “any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical.”

[6] The facts necessary for the determination of the issues that have arisen are largely not in dispute and are set out in the Tenth Report.

[7] Pursuant to the Order of this Honourable Court dated May 4, 2005 (the “Initial Order”), the Hunjan Group and Hunjan Holdings Ltd. (the “CCAA Applicants”) obtained protection from their creditors under the CCAA. Under the Initial Order, Deloitte & Touche Inc. was appointed to act as Monitor.

[8] The Initial Order allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce (“CIBC”) pursuant to a special loan facility known as “debtor-in-possession” or “DIP” financing. The Initial Order and the May 16 Order contain specific provisions that deal with certain aspects of the Court-approved DIP financing. In the Initial Order, the CCAA Applicants were limited in the amount that they could borrow by way of DIP financing to \$1 million in the aggregate. This amount would allow the CCAA Applicants to continue operations for a period of ten days, during which time it was anticipated that they would attempt to secure the necessary financing and other arrangements with their customers to allow them to continue to operate while they attempted to restructure over a longer period of time.

[9] After the Initial Order was granted, the CCAA Applicants began negotiations with CIBC, the CCAA Applicants’ principal first-ranking secured lender, and five of their largest customers (the “Participating Customers”). As a result of those negotiations, an accommodation agreement was entered into on or about dated May 13, 2005 (the “Accommodation Agreement.”)

[10] The Accommodation Agreement provided, among other things:

- (i) that the Participating Customers would continue to order product from the CCAA Applicants (sections 2-6);

- (ii) the basis upon which CIBC would provide additional DIP financing to allow the CCAA Applicants to operate during the CCAA Proceedings (the “Amended DIP Facility”), which financing was anticipated to peak at approximately \$8.8 million (paragraph 7);
- (iii) that the Amended DIP Facility was to be secured by a first ranking charge (subject only to the Administrative Charge contained in the Initial Order) and that all “Post-Filing Receipts” (monies received from operations or production after the Filing Date) would be first used to repay the Amended DIP Facility. This preserved to CIBC’s existing secured claims the proceeds of receipts that arose from the operations of the CCAA Applicants prior to May 3, 2005 (the “Pre-Filing Receipts”) (section 7); and
- (iv) that certain of the Participating Customers’ rights of setoff as against pre-CCAA receivables were limited (paragraph 2).

[11] The Receiver understands that, when the Accommodation Agreement and DIP Term Sheet (as herein defined) were negotiated and the May 16 Order was issued, it was anticipated that there would be a shortfall of approximately \$4.0 million between the DIP financing advances and the estimated Post-Filing Receipts to be generated by the CCAA Applicants to repay those advances. CIBC and the Participating Customers agreed, as set out in section 9 of the Accommodation Agreement, that the Participating Customers would be responsible for fifty percent (50%) of any Amended DIP Deficiency (the “Customer Contribution”), with such Customer Contribution not to exceed \$2.0 million. To secure that obligation, the Participating Customers paid \$2.0 million to CIBC to be held in trust pending the outcome of the CCAA proceedings and the quantification of the Amended DIP Deficiency.

[12] The Amended DIP Facility was set out in the Amended DIP Credit Agreement, dated May 13, 2005 (the “DIP Term Sheet”)[which provided, among other things, that CIBC was entitled to recover as part of its DIP loan the full amount of the costs it incurred in respect of the Amended DIP Facility.]

[13] The May 16 Order approved the Accommodation Agreement and the DIP Term Sheet, and also ordered that the Amended DIP Facility would be secured by the DIP Charge (as defined in paragraph 32 of the Initial Order). There has been no amendment, variation, or appeal of the May 16 Order.

[14] Furthermore, paragraph 6 of the May 16 Order sets out the means by which the Amended DIP Facility and the Amended DIP Deficiency, if any, was to be repaid. Paragraph 6 of the May 16 Order provides that the Amended DIP Facility is to be repaid:

- (i) first from Post-Filing Receipts; and
- (ii) to the extent there is a shortfall (that is, if there is an Amended DIP Deficiency), from the proceeds of any unencumbered assets (of which there are none); and
- (iii) “the remaining balance, if any, from the net realizations of the collateral which is the subject matter of the security created and issued by the Applicants or any of them to any of their secured lenders prior to the Filing Date and over which such lender or lenders hold a first ranking security interest, charge, mortgage or other encumbrances, pro rata in the proportions that the Applicants or any of them were indebted to each such secured lender as at the Filing Date.”

[15] What is not at issue is the rationale for the DIP financing. It has become accepted in restructuring in the automotive manufacturing industry that to determine whether the company can succeed and even if it does not, there needs to be a collaborative effort between the debtor’s major financiers and its principal customers.

[16] The reason for this need for co-operation is that those customers (being other automotive parts manufacturers or automotive assembly companies themselves) are part of a highly integrated “just-in-time” supply chain. A shut-down or failure of one manufacturer in the supply chain can cause a chain reaction shutting down the operations of manufacturers further up or down the supply chain. Such shut-downs affect thousands of jobs and cause millions of dollars in losses. Accordingly, customers have incentive to participate in facilitating a debtor’s effort to obtain financing to prevent a sudden shut-down of the debtor.

[17] The incentive for the Participating Customers to agree to be responsible for a portion of any Amended DIP Deficiency arose from the fact that they, for a specified maximum cost, were able to secure the timely delivery of necessary inventory during the CCAA Proceedings, and were permitted to have excess inventory banks built to give them an assurance that they would have sufficient time to arrange for alternative suppliers and a smooth transition to such new suppliers if a restructuring failed.

[18] There is an incentive for both Participating Customers and major creditors to cooperate even in a very likely bankruptcy, again to maximize the value of the inventory and return from its sale in the ordinary course.

[19] During the CCAA proceedings, the CCAA Applicants, with the assistance of the Monitor, carried out a marketing and sales process. However, no restructuring or going-concern sale was achieved.

[20] As a result of the failure of the CCAA proceedings, on July 18, 2005, CIBC applied for, and was granted, an Order by the Honourable Justice Stinson terminating the CCAA proceedings and appointing KPMG as the interim receiver and receiver of the Hunjan Group pursuant to Section 47 of the *Bankruptcy and Insolvency Act* (Canada) and Section 101 of the *Courts of Justice Act* (Ontario) (the "Receivership Order.") Pursuant to the terms of paragraph 37 of the Receivership Order, the Amended DIP Facility was terminated going forward but remained available to fund the finalization of certain matters that arose during the CCAA proceedings.

[21] The Hunjan Group had ceased all operating activities before the Receivership Order was granted. As a result, there were no on-going revenues generated with which to fund either the Receiver's fees or the disbursements required to fund the costs to be incurred during the Receiver's mandate, such as rent, maintenance, insurance, utilities, and other costs incurred for the preservation, protection and administration of the assets of the estate.

[22] Furthermore, pursuant to paragraphs 22 to 30 of the Receivership Order, the terms of the May 16 Order regarding the repayment of the Amended DIP Facility (and any Amended DIP Deficiency) were preserved, such that all Post-Filing Receipts are to be first applied to the Amended DIP Deficiency, and not used to fund the receivership proceedings. Pre-Filing Receipts remain pledged to CIBC's pre-existing secured claims.

[23] However, paragraph 22 of the Receivership Order provides that any expenditure or liability that is made or incurred by the Receiver, including the fees and disbursements of its legal counsel, are protected by a court-ordered charge referred to as the "Receiver's Charge".

[24] Furthermore, paragraph 25 of the Receivership Order authorized the Receiver to borrow up to \$2.0 million for the purpose of funding the exercise of its powers, which

borrowings were to be protected by a court-ordered charge referred to as the “Receiver’s Borrowing Charge”.

[25] Both the Receiver’s Charge and the Receiver’s Borrowing Charge are a charge on all of the assets of the Hunjan Group, except the Pre-Filing Receipts. Both the Receiver’s Charge and the Receiver’s Borrowing Charge enjoy first-ranking priority over the Amended DIP Deficiency, except in respect of Post-Filing Receipts which, as stated above, are to be applied first to the Amended DIP Facility.

[26] On October 7, 2005, with the permission of the Court, the Receiver assigned each member of the Hunjan Group into bankruptcy.

[27] On November 30, 2005 and December 7, 2005, the Remaining Assets of the Hunjan Group were auctioned by CIA CPCC Inc. pursuant to an auction services agreement approved by Justice Ground on November 7, 2005.

[28] As a result of negotiations on July 18, 2005, paragraph 3A of the Receivership Order granted GE the right to exclude assets over which it had a first-ranking security from the Receiver’s auction process. However, over time, the Receiver extended this same option to each secured creditor whose security the Receiver acknowledged was first ranking or was confirmed as first ranking by court order. GE availed itself of this option, as did CIT to a lesser extent.

Allocation of the DIP Financing Costs

[29] As anticipated at the time it was put in place, there is a deficiency associated with the DIP financing estimated by the Receiver to be between \$3.4 and \$3.9 million, *after* applying a \$2.0 million customer contribution described below.

[30] The Opposing Creditors (other than CIBC) take issue with the Receiver’s calculation of the Amended DIP Deficiency and the basis of allocating the Receiver’s Charge and the Receiver’s Borrowing Charge among Opposing Creditors.

[31] The Order of Ground J. dated May 4, 2004 (the “Initial Order”) allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce (“CIBC”) The calculation of the Amended DIP Deficiency is a product of the Accommodation Agreement (defined herein), which was approved by the May 16 Order, and paragraph 6 of the May 16 Order, which sets out an incomplete waterfall for the repayment of the Amended DIP Deficiency.

[32] Paragraph 6 of the May 16 Order reads as follows:

THIS COURT ORDERS AND DECLARES that the Amended DIP Facility shall be secured by the DIP Charge (as defined in paragraph 32 of the May 4, 2005 Order herein) and the DIP Charge shall have the relative priority set out in paragraph 65 of such Order, provided however and without in any way limiting the force and effect of the DIP Charge, the DIP Lender shall apply the Post-Filing Receipts first in payment of the Applicants' obligations pursuant to the Amended DIP Facility and in the event any balance remains outstanding thereon following such application (the "Amended DIP Deficiency"), the Amended DIP Deficiency shall be repaid to the DIP Lender, firstly, from any Property (as defined by paragraph 3(a) of the May 4, 2005 Order) which was not subject to any security created and issued by the Applicants on or prior to the Filing Date, and the remaining balance, if any from the net realizations of the collateral which is the subject matter of the security created and issued by the Applicants or any of them to any of their secured lenders prior to the Filing Date and over which such lender or lenders hold a first ranking security interest, charge, mortgage or other encumbrances, pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date.

[33] The Accommodation Agreement is a complicated agreement to which in addition to the Participating Customers, CIBC and Export Development Canada ("EDC") are both party. (For the purpose of this decision it is not necessary to distinguish between the different interests of CIBC and EDC. They will jointly be referred to as "CIBC")

[34] Paragraph 7 of the Accommodation Agreement, entitled Forbearance and Funding by Lenders, sets out in detail the basis on which CIBC was prepared to forbear from exercising its rights and remedies. At the time of execution of the Accommodation Agreement and the DIP Credit Facility, the cash needs of Hunjan were projected to be somewhat in excess of \$3.5 million. In fact, they turned out to be the maximum provided for of \$8,800,000.

[35] The Opposing Creditors who object to the proposed allocation of the Receiver with respect to the shortfall rely on the wording of Paragraph 9 (b) of the Accommodation Agreement:

Each Participating Customer will fund its proportionate share of the lesser of (x) 50% of Hunjan's total net funding losses incurred over the period from May 4, 2005 to and including the Termination Date (taking into account any accrued liabilities as at the Termination Date that will be funded by CIBC under the CIBC DIP Credit Facilities), and (y) \$2,000,000 (such share, the "Customer Loss Share.") Each Participating Customer's "proportionate share" of such losses shall be as set out on Schedule B. For certainty, the obligation of each Participating Customer under this Section 9 shall continue notwithstanding such Participating Customer may have re-sourced all of its parts production and tooling prior to the expiry or termination of the Funding Period.

CIBC and EDC will each be responsible for their respective shares of the lesser of (x) 50% of Hunjan's total net funding losses over the Funding Period, and (y) \$2,000,000. The shares of each of CIBC and EDC shall be as agreed between them.

[36] The complaint of the Opposing Creditors is that in the Receiver's calculation of the DIP Deficiency to be borne by the Opposing Creditors pursuant to paragraph 6 of the May 16 Order, the Receiver applied the full amount of the Participating Customers 50% share (\$2,000,000) but failed to omit the contribution that they assert was agreed to by CIBC by Section 9(b) of the Accommodation Agreement.

[37] Both the Accommodation Agreement and the May 16 Order were preceded by the Amended DIP Credit Agreement dated May 13, 2005 (the "DIP Term Sheet") between CIBC and Hunjan, which INSERT para 15 of Receivers

[38] The position of the Opposing Creditors is that Paragraph 9(b) of the Accommodation Agreement calls on CIBC to take into account in determining the obligation to contribute, \$2,000,000, which was not advanced but which as between it and the Participating Customers was to be taken into account.

[39] The position of CIBC and the Receiver is that the May 16 Order is compatible with the position that the May 16 Order approved the Accommodation Agreement and the DIP Term Sheet, and also ordered that the Amended DIP Facility would be secured by the DIP Charge (as defined in paragraph 32 of the Initial Order). There has been no amendment, variation, or appeal of the May 16 Order.

[40] The Receiver calculated the Amended DIP Deficiency as set out in Schedule "K" of the Tenth Report on the basis that, as a result of the last paragraph of subsection 9(b) of the Accommodation Agreement, CIBC must bear the second half of the first \$4.0 million of the Amended DIP Deficiency, which would reduce the amount to be allocated among secured creditors by \$2.0 million. The Opposing Creditors allege that pursuant to that paragraph, CIBC agreed to fund or write-off up to an additional \$2.0 million towards any Amended DIP Deficiency that arose.

[41] The Opposing Creditors submit that the obligation of CIBC completely mirrors the obligation of the Participating Customers to fund \$2.0 million of any Amended DIP Deficiency. It should be noted that the Opposing Creditors were not parties to the Accommodation Agreement. Among other matters, they complain they were not made aware of it until sometime after July 1, 2005.

[42] The position of CIBC and the Receiver rejects the submission of the Opposing Creditors on the following basis:

[43] First, CIBC knew in advance that it would be providing the full amount of the Amended DIP Facility. Second, it agreed to provide the Amended DIP Facility knowing that there was projected to be a shortfall and negotiated the Customer Contribution to assist in reducing that loss. Third, the language referred to in paragraph 9(b) states, in respect of CIBC, that it will be responsible for its respective share of the Amended DIP Deficiency, and the numbers referred to in that paragraph reflect the Hunjan Group's projections of a \$4.0 million deficiency, and not a cap. Finally, CIBC negotiated language for paragraph 6 of the May 16 Order to ensure that the balance of the Amended DIP Deficiency would be shared by the secured creditors should it exceed \$4.0 million.

[44] The Receiver reads paragraph 9(b) of the Accommodation Agreement and paragraph 6 of the May 16 Order as working together to first reduce the Amended DIP Deficiency by the Customer Contribution and then allocating the remaining balance, whatever that may be, among the first ranking secured creditors on a percentage of debt basis.

[45] The Opposing Creditors question why Paragraph 9(b) above would refer to the Participating Customers funding 50% of the Funding Losses if CIBC were not agreeing to fund the other 50%.

[46] In support of the argument, the Opposing Creditors urge that at the very least, to the extent that the Court concludes that there is inconsistency between the Accommodation Agreement and the provisions of the May 16 Order, the former should prevail since it was incorporated into the May 16 Order and by implication had the approval of the Court.

[47] In support of its position that the Accommodation Agreement clearly provides for CIBC providing funding of \$2,000,000 of \$4,000,000, the Opposing Creditors point to two references to the issue in reports provided to the Court by the Receiver. The first reads as follows:

The total cash burn pursuant to the Accommodation Agreement is shared 50%/50% between the Participating Customers and the [Opposing] Creditors to a maximum of \$4 million. Any excess of over \$4 million is to be assumed by the [Opposing] Creditors.

[48] The second reference is in Schedule N3 to the Tenth Report as originally filed, and reads as follows:

Pursuant to the Accommodation Agreement, the DIP deficit is to be shared 50%/50% between the Participating Customers and CIBC to a maximum of \$4 million. Any excess of over \$4 million is to be allocated between all [Opposing] Creditors.

[49] Schedule N3 was amended at the oral hearing to provide as follows:

Pursuant to the Accommodation Agreement, the Participating Customers were responsible to contribute 50% of the Amended DIP Deficiency, with their maximum contribution being \$2 million.

[50] While I respect the reasons behind the position advanced on behalf of the Opposing Creditors, I am not prepared to accept the references in the Receiver's reports as determinative. The Opposing Creditors were not parties to the Accommodation Agreement. None of the Participating Customers, the Receiver or CIBC support the meaning now being advanced.

[51] I do not find the May 16 Order in any way ambiguous even though it does make reference to the Accommodation Agreement. The closing words of paragraph 6 read, "pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date."

[52] At the time of the Accommodation Agreement, the representation in effect of Hunjan was that the DIP Deficiency would be between \$3.5 and \$4.0 million. I accept the submission on behalf of the Receiver and CIBC that it is not likely that the latter would have provided the DIP financing if it were aware that in the event the deficiency that it financed exceeded the anticipated amount by 100%, that it would in effect have contributed an additional \$2 million.

[53] In this as well as many allocation cases, the effect of a decision can be said to operate disproportionately on one or more creditors to the benefit of others or even only one.

[54] The first principle of priority is to allocate in the manner prescribed by the Order. [See *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132 (Ont. C.A.) at 137.]

[55] Each case is to be considered on its own facts with the exercise of discretion and without the necessity to allocate on a direct "benefit" basis. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd., supra.*

[56] The conclusion at which I have arrived might well have been different had the other Opposing Creditors been parties to the Accommodation Agreement and the surrounding

facts and matrix clearly pointed to an understanding of all parties that CIBC would in effect be responsible for an additional \$2 million regardless of the DIP Deficiency. That is not the case on the material before me.

[57] The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) pp 209-212.]

[58] The position advanced by the Opposing Creditors has not met the onus of satisfying me that the allocation prepared by the Receiver is unfair or unreasonable in all the circumstances.

[59] I have considered carefully the submission made on behalf of the opposing creditors. Each has some merit. The assertion by CIT is that given its exposure (\$20 million), CIBC had more incentive to invest more money in the DIP financing.

[60] Counsel for En-Plas made much the same point, suggesting that the parties (CIBC) that take the risk should bear the cost on the basis that no one thought the DIP Financing Deficit would exceed \$4 million and the DIP Financing did not particularly benefit En-Plas given its particular position. The DIP Financing did permit the opportunity for improvement of their position by all creditors.

[61] The response from counsel for CIBC is simply that it is not equitable for his client to advance \$8 million and not have a charge on the DIP Financing simply doesn't make sense.

[62] In my view, the reason the cases referred to emphasize the discretion in the presiding judge is that between competing creditors, there is often competing equitable claims. I accept that if one result would work a manifest unfairness, that fact will likely be determinative where as I found here, that there is no manifest unfairness in permitting the creditor (CIBC) with the largest exposure some recovery from the DIP Financing Deficit.

[63] As I have concluded on the language of the Accommodation Agreement and the May 16 Order, there is no express restriction on recovery by CIBC. I am not persuaded that there is any manifest unfairness to the Opposing Creditors in accepting the position advanced by the Receiver, CIBC.

Allocation of Receiver's Expenses

[64] Not all the issues dealt with in the Receiver's Tenth Report were dealt with on this motion. The one that requires determination at this stage is that submitted on behalf of some creditors, which urge that the general administration expenses should be based on the percentage of pre-filing debt of each of the Opposing Creditors, rather than recovery.

[65] The Receiver reports that in allocating costs, it took into consideration the following factors:

- (a) these proceedings evolved from the CCAA Proceedings to the Receivership Proceedings and, as such, proceeds of realizations can be attributed to three different time periods, which may affect the entitlement to the proceeds from such assets and consequent costs allocations:
 - (i) *Pre-Filing Period* — The period prior to the Filing Date (being the commencement of the CCAA proceedings);
 - (ii) *Post-Filing Period* — The period between the Filing Date and the commencement of the Receivership Proceedings; and
 - (iii) *Receivership Period* — The period after the commencement of the Receivership Proceedings;
- (b) the May 16 Order already mandates how the Amended DIP Deficiency is to be allocated;
- (c) the Receiver's Charge and the Receiver's Borrowing Charge were generally incurred for the benefit of all creditors with assets in the Receivership; and
- (d) there were some circumstances in which specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between the cost and the benefit derived therefrom.

[66] Those creditors who urge that the allocation of costs should be on the basis of pre-filing debt do so on the basis that in their view CIBC derived a benefit from a significant amount of recovery pre-filing that should be taken into account and not just the amount that was recovered post-filing.

[67] The total amount of the Receiver's Borrowing and expenses is set out in Schedule W to the Report of the Receiver and totals some \$2,087.629.00. On the basis of realization

based on security and the allocation, relative cost to CIBC is at a level of 42.7%, that of GE at 38.3%, EnPlas at 14.3% and CIT at 4.5%.

[68] The response by the Receiver submits that while CIT's gross realizations were \$612,663, of that amount it has already received free of any deduction an account of costs the sum of \$300,000, leaving only \$312,663 against which CIT's total share of the costs must be charged.

[69] There is some evidence of what each of the creditors recognized might be its share of anticipated costs at the time of the May 16, 2005 order, which makes the Receiver's allocation reasonable in relation.

[70] I have considered the submissions of those objecting creditors, as well as those of the Receiver.

[71] I am mindful that each creditor from its own particular perspective will have a view of what is or is not fair in terms of allocation. There is unlikely to be one specific method that can objectively point to absolute fairness to all parties. The exercise is inevitably one of viewpoint for the creditor and exercise of discretion for the Court.

[72] I am satisfied that the Receiver has to the extent possible attempted to apply costs in a reasonable and fair manner and has taken into account to the extent possible a distinction between those costs that could be said to benefit all creditors with assets in the Receivership and those where it was possible, where specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between cost and benefit derived.

[73] I also accept that where the allocation is *prima facie* fair, the onus should be on an opposing creditor to satisfy the Court that they are unfair or prejudicial. (See *Canadian Imperial Bank of Commerce v. Acchione Construction Co.* (1989), 36 C.L.R. 144 (Ont. S.C.) [Master] 146.

[74] I recognize that there are other bases of allocation and have no issue with the general principles set out by Hall J. in *Hickman Equipment (1985) Ltd., Re*, [2004] N.J. No. 299 (N.L. T.D.)

[75] Having considered the submissions of all creditors, I am not persuaded that the onus has been met. The Receiver's cost allocation is therefore approved.

[76] Counsel may obtain a further appointment to deal with any issues remaining on the motion and the fixing of costs, if required.

Order accordingly.

TAB 7

Re Hunters Trailer & Marine Ltd., 2001 ABQB 1094

Date: 20011214
Action No. 0003 19315

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***,
R.S.C. 1985, c. C-36, AS AMENDED

- and -

IN THE MATTER OF HUNTERS TRAILER & MARINE LTD.

REASONS FOR DECISION
of the
HONOURABLE CHIEF JUSTICE ALLAN H. WACHOWICH

APPEARANCES:

Kentigern A. Rowan
Ogilvie LLP
for Canadian Western Bank

Terrence M. Warner
Miller Thomson LLP
for CIT Financial Ltd.

Douglas H. Shell
Lucas Bowker & White
for Deutsche Financial Services

R. Craig Steele
Bordner Ladner Gervais LLP
for Bank of America Canada Specialty Group Ltd.

Juliana E. Topolniski, Q.C.
Bishop & McKenzie
for Mr. Blair Bondar

Darcy G. Readman and Darren R. Bieganek
Duncan & Craig LLP
for UMC Financial Management Inc.

Jeremy H. Hockin & Deborah J. Polyn
Parlee McLaws
for Deloitte Touche Inc.

THE APPLICATION TO DETERMINE COST ALLOCATION

[1] The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in possession" (DIP) financing and administrative charge provided for in the *Companies' Creditors Arrangement Act* proceedings (*CCAA* costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

[2] Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the *CCAA* proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The primary issue of contention is the extent to which UMC Financial Management Inc.

(UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the **CCAA** costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of **CCAA** costs.

THE ARGUMENTS OF THE PARTIES

[3] DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all **CCAA** costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the **CCAA** costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the **CCAA** proceedings to one class of creditors.

[4] CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the **CCAA** costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

[5] UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the **CCAA** costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

[6] The Interim Receiver recommends something of a middle ground. While acknowledging that the *Bankruptcy and Insolvency Act* does not apply to **CCAA** proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

[7] The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the

remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent of the Monitor's fees and \$500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

[8] UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE CCAA COSTS

[9] The *CCAA* does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

[10] The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1993), 11 O.R. (3d) 353 at 359 (Gen. Div.):

The purpose of the Act is not to give a benefit or an advantage to one class of creditors at the expense of other creditors. Likewise, it is the duty and responsibility of the Court not to alter the security arrangements entered into by the company and its various creditors. It is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company.

[11] Chadwick J. in that case ordered that the fees of the monitor and its legal counsel should be paid out of the assets of the company prior to distribution to the creditors as the

CCAA proceedings were for the benefit of all creditors. In addition, the court gave priority to funds advanced by two of the creditors so that construction projects could be completed to avoid incurring late penalties and charge-backs. The court reasoned that advancement of those funds was for the benefit of all creditors and that granting priority for payment of the funds would not change the priority of the various other creditors or jeopardize their security.

[12] Like the argument raised by UMC in the present case, the secured creditors in *United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.) argued that the super-priority granted for monitor's fees was unfair given that they had no interest in preserving the active business of the debtor. Mackenzie J.A. responded at para. 28:

The object of the **CCAA** is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In *Chef Ready [Hongkong Bank v. Chef Ready Foods (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)]*..., Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants **CCAA** relief.

[13] The Monitor acts on behalf of the Court for the benefit of all parties (*Re Starcom International Optics Corp.* (1988), 3 C.B.R. (4th) 177 (B.C.S.C.); *Canadian Asbestos Services Ltd. v. Bank of Montreal, supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

[14] All creditors may be affected by a stay imposed in the **CCAA** proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the **CCAA**. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

[15] Equity informs the decisions made by courts in the exercise of their jurisdiction under the **CCAA**. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the **CCAA** costs. That is not to say that equity calls for an equal allocation of costs.

[16] The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The

Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in terms of *CCAA* costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

[17] Six classes of creditors voted on a reorganization plan in *Re Keddy Motor Inns Ltd.* (1992), 90 D.L.R. (4th) 175 (N.S.S.C.A.D.). The appellants were some of the only creditors who were fully secured. They complained that the class of secured creditors was too broad and that they should not have been placed in a class with creditors secured by non-core properties and mechanics' lienholders. Freeman J.A., who delivered the decision of the court, acknowledged that it might have been better if secured creditors of core properties had been placed in a separate class (see also *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.)). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment – as opposed to equitable treatment – is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

[18] Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in *CCAA* proceedings.

[19] In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in *Kowal* [*Robert F. Kowal Investments Limited v. Deeder Electric Limited* (1975), 9 O.R. (2d) 84 (C.A.)] that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

[20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from **CCAA** proceedings. The **CCAA** recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

[21] Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of **CCAA** costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitors fees and \$500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

[22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

[23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

[24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

[25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered **CCAA** costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the **CCAA** proceedings there could have been no certainty as to the sale price of the land or UMC's share of the **CCAA** costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of **CCAA** costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

[26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting

on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

[27] UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of *CCAA* costs and the principles that should be applied in such a determination. There is no need, as there was in *Canadian Imperial Bank of Commerce (CIBC) v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

CONCLUSION

[28] UMC is allocated 15 percent of the Monitor's fees, \$500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the *CCAA* costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

HEARD on the 26th day of November, 2001.

DATED at Edmonton, Alberta this 14th day of December, 2001.

J.C.Q.B.A.

TAB 8

Court of Queen's Bench of Alberta

Citation: Re: Medican Holdings Ltd., 2013 ABQB 224

Date: 20130423
Docket: 1001 07852
Registry: Calgary

In the Matter of The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended
and The *Judicature Act*, R.S.A. 2000, c. J-2, as Amended

Between:

**And the Matter of a Plan of Compromise or Arrangement of Medican Holdings Ltd.,
Medican Developments Inc., R7 Investments Ltd., Medican Construction Ltd., Medican
Concrete Inc., 1090772 Alberta Ltd., 1144233 Alberta Ltd., 1344241 Alberta Ltd., 9150-
3755 Quebec Inc., Axxess (Sylvan Lake) Developments Ltd., Canva (Calgary)
Developmentxs Ltd., Elements (Grande Prairie) Developments Ltd., Medican (Edmonton
Twrwillegar) Developments Ltd., Medican (Grande Prairie) Holdings Ltd., Medican
(Kelowna Move) Developments Ltd., Medican (Lethbridge - Fairmnt Park) Developments
Ltd., Medican (Red Deer - Michener Hill) Developments Ltd., Medican (Sylvan Lake)
Developments Ltd., Medican (Westbank) Development Ltd., Medican (Westbank) Land
Ltd., Medican Concrete Forming Ltd., Medican Les Entreprises Medican Inc., Medican
Equipment Ltd., Medican Framing Ltd., Medican General Contractors Ltd., Medican
General Contractors 2010 Ltd., Riverstone (Medicine Hat) Developments Ltd., Sanderson
of Fish Creeek (*calgary) Developments Ltd., Sierras of Eaux Claires (Edmonton)
Developments Ltd., Sonata Ridge (Kelowna) Developments Ltd. Sylvan Lake Marina
Developments Ltd., the Estates of Valleydale Developments Ltd., the Legend (Winnipeg)
Developments Ltd., and Watercrest (Sylvan Lake) Developments Ltd.**

Petitioners

**Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner**

Introduction

[1] The applicant, MCAP Financial Corporation ("MCAP") is seeking a declaration that no monetary amount be allocated to it on account of certain charges arising under an Order made pursuant to the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 ("CCAA"). It argues that it should not have to bear any portion of the proposed allocated costs because it received no benefit from the CCAA proceedings, eventually was released from the proceedings and incurred separate fees to enforce its security. The Medican Group and the Monitor submit that MCAP should pay \$397,500 in charges. For the reasons given below MCAP's application is denied.

Background

[2] Medican Holdings Ltd. is the parent entity of the Medican Projects division of the Medican Group of companies¹. The various Medican Project entities are all affiliated companies engaged in the business of residential real estate development. Both Medican (Westbank) Development Inc. ("Medican Development") and Medican (Westbank) Land Ltd. ("Medican Land") are wholly owned subsidiaries of Medican Holdings.

[3] MCAP is the senior secured lender of the initial phases of a multiunit condominium project in Westbank, British Columbia, known as the Kaleido Project. The Kaleido Project was developed on lands owned by Medican Land as bare trustee on behalf of Medican Development (together the "Kaleido Companies"). MCAP held a first mortgage over the Kaleido Project.

[4] In 2010 the Medican Group sought protection under the CCAA in an attempt to restructure its affairs. The Kaleido Companies were among the petitioners. The initial order which included a stay of proceedings was granted on May 26, 2010 and provided, inter alia, that secured creditors of Medican were liable to pay certain court-ordered charges in relation to the proceedings, including the suppliers' charge, a directors' and officers' indemnification charge, an administration charge, and the debtor-in-possession ("DIP") lender's charge (the "Charges"). In order to pay for the Charges proceeds from the sale of condominium units of projects over which creditors held security were deposited into a separate account (the "Charge Levy").

[5] The Medican Group obtained a DIP loan from Paragon Capital Corporation Ltd. which ultimately totalled \$3.5 million. It was secured as a first priority against all of the Medican Group's assets including those of the Kaleido Companies. As stated, the DIP lender's charge formed part of the Charges. On several occasions project-specific financing was arranged (known as "Mini DIPs"); however, the DIP loan was approved on the basis that it would be used to support the general funding requirements of the Medican Group.

¹There are 39 applicant entities comprising the Medican Group, 36 of which filed the consolidated plan of arrangement under the CCAA (excepting the Kaleido companies and Sanderson)

[6] As a part of the restructuring, and with the approval of MCAP, the Medican Group engaged a listing agent (Coldwell Banker) to market the unsold condo units in the Kaleido Project of which only Phase I had been completed. During the time the units were listed with Coldwell Banker none were sold. MCAP expressed dissatisfaction with the restructuring efforts.

[7] On December 5, 2011 MCAP obtained an Order permitting it to apply to court in British Columbia to appoint a receiver (and ultimately a trustee in bankruptcy) over its collateral in the Kaleido Companies. This occurred following the approval of a related agreement between MCAP and the Medican Group whereby the Kaleido Companies' property and assets were released into the possession of the receiver upon consent of the Medican Group. As a part of the court approved agreement the Medican Group consented to the receivership on the basis that, *inter alia*, the Charges were to remain in existence and that nothing in the agreement "shall determine the allocation to be made against the [Kaleido] Property in respect of the Charges and the parties hereto reserve all rights and remedies in connection with the allocation to be made". The stay of proceedings was lifted for the limited purpose of allowing such receivership to proceed.

[8] At the same time the Medican Group lodged a consolidated Plan of Compromise and Arrangement (the "Plan") dealing with all Medican Group entities subject to the CCAA proceedings excepting the Kaleido Companies and another Medican company. The CCAA proceedings provided that the DIP lender's charge was to be repaid by the Medican Group in part through the Charge Levy and in part through operating cash flow. The Monitor submits that the Kaleido Companies' outstanding contribution to the Charge Levy should be \$397,500. The Monitor further estimates that due to the Charge Levy surplus this amount will be reduced to approximately \$279,300 following the allocation of a portion of the anticipated surplus back to the Kaleido Companies.

[9] On January 11, 2012, MCAP was granted an order nisi by the British Columbia Supreme Court declaring that the outstanding balance owing to MCAP was \$18,216,064. Following the appointment of a receiver MCAP advanced \$2.5 million more than \$1.6 million of which was used to pay strata fee arrears, fix building deficiencies, pay security deposits, and pay fees associated with the National Home Warranty Program. MCAP submits this was done in order make the condo units in the Kaleido Project marketable by the receiver. The receiver is still in the process of completing the sale of units in the Kaleido Project. MCAP submits that when the final sales figures are available it will have sustained a shortfall of approximately \$10.6 million. I note that MCAP did file a proof of claim to participate in the Plan as an unsecured creditor.

[10] MCAP's position through the proceedings has been that even though the Kaleido Project was subject to the CCAA proceedings this did not amount to an agreement on behalf of MCAP that it would bear any obligation for the Charge Levy. The parties disagree as to whether MCAP is obliged to contribute to the Charge Levy.

Issue

[11] This court must determine whether the proposed portion of the CCAA Charge Levy allocated against the Kaleido Project should be reduced or illuminated.

Argument

[12] The parties' positions on the application can be summarized as follows:

a. MCAP

[13] Essentially, Counsel for MCAP submits that it would be inequitable to allocate the Charge Levy against it as though it were an affected secured creditor under the Plan. In particular, it submits that the following factors should be taken into account in determining its allocation: first, it submits that the entities under the Medican Group are distinct with each entity undertaking the development of stand-alone real estate projects such as the Kaleido Project. MCAP stresses that this is not a situation in which a group of debtors carries on a common consolidated purpose. In addition, counsel for MCAP drew attention to the fact that there was no cross-collateralization in that MCAP did not hold security over any other assets of the Medican Group for the obligations arising under the Kaleido Project.

[14] Second, MCAP submits that it received no benefit in connection with the CCAA proceedings. It states that none of the DIP financing was spent on the Kaleido Project. In particular post-filing obligations were not paid during the stay and the Kaleido Project deteriorated during the course of the CCAA proceedings. For example, nothing was paid to the strata corporation, the municipal taxing authority, or to utility providers in relation to the Kaleido Project. MCAP argues that this negatively affected its security over the Project. It submits that the situation became severe enough that the strata corporation (which was stayed from enforcing its rights) approached MCAP directly for funding which it refused to provide absent the ability to appoint a receiver. During this period the National Home Warranty Program ultimately cancelled its coverage, notwithstanding the stay.

[15] In addition, MCAP argues that its ability to realize on any condo unit sales was negatively impacted by the CCAA Proceedings. The initial order was granted on May 26, 2010. MCAP states that it waited approximately 18 months for the Medican Group to come up with a plan in relation to the Kaleido Project or propose some other alternative acceptable to MCAP; all the while MCAP was stayed from enforcing its remedies. During this period, the Medican Group retained Coldwell Banker to market unsold condo units in the Medican Group properties. The Monitor implemented a course of action known as the "MCAP Protocol" to market the unsold units in the Kaleido Properties with a range of proposed square footage listing prices for the units ranging from \$260 to \$280 depending on the unit. MCAP submits that given the deteriorating state of the Kaleido Project and deficiencies in the units the price per square foot was too high and in any event no units were sold during the CCAA Proceedings. Subsequent to the

appointment of the Receiver 46 of the 47 saleable units have been sold at an average square foot price of \$186.

[16] Third, MCAP argues that the case at bar can be distinguished from the authorities before this court in that the existing case law involved failed CCAA proceedings with the eventual appointment of a receiver. MCAP submits that in the present case the Medican Group's Plan sanctioned by the Court excludes the Kaleido Companies. As such, the affected creditors - other than MCAP - benefit from the Plan's pool of funds with the Monitor estimating an average payout of 10 cents on the dollar. MCAP takes the position that it should not have to pay any portion of the aggregate charges for a plan from which it was excluded. It submits that it did not want the Kaleido Project included in the CCAA proceedings from the outset and in getting the stay lifted there was an express reservation of rights.

b. The Monitor

[17] The Monitor takes the position that a portion that MCAP's obligation to contribute to the Charge Levy flows from the fact that the developers of the Kaleido Project were petitioners in the CCAA proceedings whether MCAP was in favour of their inclusion or not. Monitoring the Kaleido Project was a part of the Monitor's mandate in the proceedings and therefore MCAP should bear the associated costs. It argues that although the Kaleido Project was ultimately not included in the Plan this does not detract from the fact that the Project formed part of the monitor's responsibilities throughout the CCAA proceedings prior to the lifting of the stay and the adoption of the Plan.

[18] The Monitor acknowledges that during the CCAA proceedings no units in the Kaleido Project were sold. In its brief, the Monitor suggests that its marketing efforts in relation to the Kaleido Project condo units were "hand-cuffed" by the MCAP Protocol. I note that in the Monitor's "Kaleido Report" dated February 15, 2013 the Monitor states that it proposed the MCAP Protocol and it was accepted by MCAP. This is consistent with correspondence outlining the Protocol. The Monitor argues that in any event MCAP did receive a benefit from the CCAA proceedings in that the stay prevented priority claims being enforced by either the strata corporation for unpaid fees or the municipality for unpaid taxes.

[19] The formula used by the Monitor to allocate contributions to the Charge Levy was to assess the sum of \$8,500 from the sale of condominium units in Medican Group projects for the purposes of addressing the Charge Levy. During oral argument the Monitor submitted that although the global contribution figure was \$8,500 per unit MCAP was only assessed \$7,500 per unit as a result of negotiations surrounding the lifting of the stay and the appointment of the receiver. Although counsel for MCAP agrees that the assessment is \$7,500 it denies that it agreed to any sort of a concession in connection for lifting the stay but reserved its right to challenge its contribution.

[20] The Monitor takes the position that equity demands a contribution from MCAP. In its 15th Report it states, at paras 68-69:

Clearly, without the Kaleido Project contribution to the CCAA Charge Levy, the CCAA Charge Levy Surplus is significantly lower, negatively impacting those Medican Group entities (and ultimately the secured creditors remaining in those entities, if there are any or no subsequent settlements reached with such secured creditors) that are to receive a refund.

Unless the Kaleido Project makes a proportionate contribution to the CCAA Charge Levy, certain of the Company's secured creditors will have disproportionately funded the CCAA Charge Levy. This would appear inherently unfair given that all assets of the Medican Group were encumbered by the Priority Charges.

c. The Medican Group

[21] Counsel for the Medican Group adopts a position similar to that of the Monitor. Medican submits that the DIP loan approved under the Initial Order was sought and obtained on the basis that it would be used to support general funding requirements for the whole of the Medican Group and was not contemplated to fund any particular project. Rather, project-specific financing was arranged through the establishment of "Mini Dips", which have not been included in the proposed allocation.

[22] The Medican Group also raised an argument similar to that of the Monitor concerning equity; namely, that if MCAP does not contribute to the Charge Levy this will increase the cost of repayment for all of the other Medican entities. It submits that increasing the contribution of the remaining creditors to the exclusion of MCAP would be unfair.

[23] In discussing the proper approach to MCAP's contribution the Medican Group asserts that the Kaleido Project was not ignored during the CCAA proceedings. It submits that an extensive memorandum including a detailed market analysis and listing proposal for completed condo units in the Kaleido Project (being the MCAP Protocol) was prepared and delivered to MCAP. The Medican Group also argues that the listing terms of the MCAP Protocol were agreed to by MCAP as opposed to it being unilaterally imposed upon MCAP. In addition, the Medican Group asserts that the saleability issues concerning the Kaleido Project, including unpaid strata fees, utilities and property taxes, as well as deficiencies in the units themselves, constituted pre-filing claims as opposed to being issues which arose solely during the stay.

The Law

[24] There is a limited body of case law providing guidance on the principles of cost allocation. In arguing their positions before me, counsel referred to the following authorities: *Re*

Respect Oilfield Services, 2010 ABQB 277, 28 Alta LR (5th) 239; *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 1094, 305 AR 175; *Re Winnipeg Motor Express Inc*, 2009 MBQB 204, 243 Man R (2d) 31, aff'd 2009 MBCA 110, 245 Man R (2d) 274; *Re Hickman Equipment (1985) Ltd*, 2004 NLSCTD 164, 5 CBR (5th) 56; *Re Western Express Air Lines Inc*, 2005 BCSC 53, 10 CBR (5th) 154; *Re Hujan International Inc* (2006), 21 CBR (5th) 276 (ONSCJ); and, *Bank of Nova Scotia v Norpak Manufacturing Inc* (2003), 180 OAC 40 (ONCA).

[25] The parties all agree that the case law instructs that any allocation under the Charge Levy must be fair and equitable and that each case is to be decided on the facts. However, they disagree as to what amounts to an equitable allocation on the facts at bar. In particular, MCAP argues that the unique facts of this case dictate an approach that, while equitable, would not result in an equal allocation. In so doing it relies on this Court's statement in *Hunters Trailer & Marine*, at para 15 that:

Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to say that equity calls for an equal allocation of costs.

[26] In *Hunters* the Court examined whether super-priority DIP financing and administrative costs in relation to CCAA proceedings should be allocated equally between a number of major secured creditors. One of the creditors, UMC Financial Management, held a first and second mortgage on the debtor's real property as well as an assignment of certain life insurance proceeds. UMC argued that it would be inequitable to bear the costs on the basis proposed by the other creditors as it would be liable for a disproportionate share of the costs. UMC took the position that it was a 'passive' creditor that gave loans on the value of land as opposed to the value of the business as a going concern. It argued that as the risk of loss was greater for operating lenders these creditors should bear a larger portion of the CCAA costs.

[27] In directing that UMC bear a proportion of the DIP costs, the Court held that it would be unfair to ignore differences in the type of security held by creditors and the degree of potential benefit that they might obtain from CCAA proceedings. In allocating 15 percent of the Monitors fees and 5 percent of the DIP costs to UMC the Court noted that a strict accounting on a cost-benefit basis would be impractical. Of particular note to the case at bar the Court opined at para 23 that:

Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was of the benefit, at least the potential benefit, of all creditors.

[28] *Respec Oilfield Services* dealt with a number of applications to apportion CCAA costs incurred with respect to a failed attempt to reorganize. In *Respec*, the debtor was placed into

receivership and a number of pieces of heavy equipment were sold via auction. Pursuant to a court order those creditors who wished to remove equipment subject to their security from the auction were entitled to do so upon paying the monitor a deposit on the proportion of allocated costs it would ultimately have to pay. Certain parties (including GE and JPL) paid this deposit and removed their equipment. Two separate banks, Canadian Western and the Business Development Bank, held a first and second priority claim, respectively, over the debtor's assets excepting a considerable number of pieces of equipment which were subject to a priority Purchase Money Security Interest ("PMSI").

[29] The monitor recommended that all costs associated with the auction and all DIP related costs be allocated on a *pro rata* basis amongst all secured creditors based upon actual or estimated recovery. This would result in the two banks contributing to the indirect costs on the auction notwithstanding that they were unlikely to receive any of the auction proceeds given that their security status ranked behind the PMSI holders. The court confirmed at para 22 that it was under no obligation to allocate costs on the basis of a cost-benefit analysis as to which creditor benefitted to what degree as a result of the CCAA proceedings.

[30] GE opted to remove the equipment over which it held security from the auction but failed to sell it. It produced evidence that the unsold equipment was worth less than the guaranteed auction price. The court held that the *pro rata* share of the allocated costs would not be reduced based upon the reduced value of the equipment as this would reward GE for making what ended up being a poor business decision by placing the differential upon the other creditors.

[31] JPL also opted to remove its equipment from the auction. However, the Court held that in this instance JPL should not be allocated any costs, as it was a "true" lessor of equipment and therefore received no benefit from the CCAA proceedings. A similar result was reached in *Western Express Air Lines* where the court held that the lessors of certain aircraft were not obliged to pay any portion of the charges under the CCAA proceedings as the lessors were not creditors and did not receive any benefit from a successful restructuring.

[32] In *Hunjan International* the Court confirmed that the allocation of costs is to be analyzed on a case-by-case basis, that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not directly benefit from a proceeding before costs can be allocated against it.

[33] In *Hickman Equipment* the company initially sought protection by obtaining a CCAA order. The debtor went bankrupt and the court subsequently issued a receivership order covering all property of the debtor in the same manner and to the same extent as the CCAA order. The receiver developed a cost allocation plan which included a holdback of 15 percent of the proceeds of sale of assets as a contribution to the plan on the understanding that the final allocation of costs would occur upon the completion of the realization process. GMAC Leasco, a first secured creditor, brought an interlocutory application to seek payment of proceeds arising from security taken in assets which the receiver had sold. Specifically it argued that no

costs/holdback should be allocated in respect to 18 vehicles which were sold solely through the effort and expense of its agent and not through any effort or expense of the receiver.

[34] The receiver argued that generally speaking it did not make a distinction between the assets that the debtor had in its possession and that the costs incurred in the management of the receivership were generally incurred in relation to all property. It argued that the plan applied to numerous matters, in addition to the simple cost of realizing assets. It was unable to determine which costs and fees were directly attributable to the units eventually sold by GMAC. In finding that GMAC was entitled to a reduction in the holdback cost allocation due to the fact that the receiver did not have to expend its efforts on the sale of the equipment the court formulated the following principles, at para 17:

- (1) The allocation of costs ought to be fair and evenhanded 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.

[35] *Winnipeg Motor Express* also dealt with a dispute over the appropriate allocation of DIP financing and administrative costs incurred since the granting of a stay. The monitor recommended that the costs be allocated among secured creditors based on *pro rata* recovery. Paccar, which had entered into a financing lease with the debtor under which it leased certain equipment opposed the monitor's proposed allocation on the grounds that it was inequitable. It argued that it received no benefit from the restructuring and that its equipment actually

deteriorated during the stay. In discussing the applicable legal principles, the court held, at para 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.

[36] In noting that the purpose of a stay under the CCAA is to provide a struggling company with the opportunity to restructure in the hopes of achieving viability, the court stated that based upon the monitor's expertise and familiarity with the events surrounding the restructuring period, the onus is on an objecting creditor to demonstrate inequity in instances where the proposal is *prima facie* fair. A number of creditors argued that they would have been better off had they realized on their security and not participated in the CCAA proceedings. In addressing this argument the court found "that may or may not have been so, but of course the point of the CCAA is that the collective good and the benefit to all stakeholders governs": para 45.

[37] After reviewing the factors espoused in *Hickman*, the court made the following observations in adopting the monitor's recommendations for a uniform costs application:

49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

[...]

52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding

such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the CCAA.

[38] On appeal, Paccar reiterated its position that it never stood to gain from the CCAA proceedings and that it suffered under the stay. It further argued that the lower court erred in treating all secured lenders equally despite differences in their security and the benefit received. In denying application for leave to appeal the court of appeal noted that the trial judge had been alive to the fact that she could take into account the different nature of the securities held by, as well as the potential benefit to, creditors in determining whether a proposed allocation was equitable. She noted that that Paccar, as well as other contesting creditors, did in fact receive a benefit under the proceedings. In particular, the cost, effort, delay and risk involved in recovering their equipment had been reduced pursuant to the restructuring efforts.

Analysis

[39] The law is clear that where a monitor's proposed allocation is *prima facie* fair the onus falls on the objecting creditor to demonstrate an inequity in the circumstances: *Hunjan*, paras 58 and 73; *Winnipeg Motor Express* (QB), para 48.

[40] MCAP argues that the facts in this case do not demonstrate an allocation which, on the face of it, is fair and reasonable. It states that an inherent unfairness exists in that MCAP has been allocated costs on the same basis as those creditors who were included in and benefited under the Plan. In addition, it argues that the Monitor should not be able to rely on arguments in equity when its proposed allocations do not treat all creditors equally. In support of this position, MCAP submits that although the Monitor is purporting to treat senior secured lenders equally those secured lenders who did not suffer a shortfall in the realization of their security are not included in the allocation of the Charge Levy. In addition, MCAP submits that the actual calculation of the \$397,500 it is being called upon to contribute does not relate to the same "per unit charge" basis that the Monitor used in calculating the amount owing by other creditors. MCAP's per unit allocation equated to \$7,500 per unit while the Monitor indicated that the global per unit allocation would be \$8,500 per unit. While MCAP agrees this discrepancy is favourable to it it suggests that it is nonetheless inequitable.

[41] Given the above MCAP thus submits that the burden remains with the Monitor to demonstrate the fairness of the proposed allocation.

[42] The Monitor takes the position that its proposal is both reasonable and fair. As an officer of the court, the Monitor's allocation is a discretionary decision and is therefore entitled to deference: *Winnipeg Motor Express* (QB), para 48. While the Monitor acknowledges that there may have been a number of different approaches in this instance it asserts that its choice of method was reasonable and reflects the potential benefit to creditors under the CCAA proceedings.

[43] I find that notwithstanding the distinction in the per unit charge allocated by the Monitor the Monitor's proposed Charge Levy treats MCAP like the other senior secured lenders. While the proposal may not be equal (given the \$1,000 per unit charge distinction), it is *prima facie* equitable. Therefore the onus lies with MCAP to demonstrate that the allocation is unfair.

[44] I do not find that MCAP has satisfied this onus. With respect, its arguments are based upon a cost-benefit analysis utilizing any actual benefits received under the CCAA proceedings. The courts have consistently rejected this approach in favour of one based upon a potential benefit analysis. Exceptions to a monitor's proposed allocations are not to be lightly granted and should only be made where the necessity for departure is reasonable articulable; *Hickman*, para 17.

[45] This court cannot accept MCAP's position that its suggested contribution of nothing is grounded in equity. In essence, MCAP participated in the CCAA process for 18 months in cooperation with the monitor in the hopes that the process might yield some benefit. It accepted the Medican Protocol and the sales process established under Coldwell Banker. At any point it could have applied, on appropriate notice and evidence, to have its own receiver put into place but it did not. If it had a serious concern about the sales process or pricing, it could have brought a court application to amend the Protocol; again it did not. It cannot say that it participated, but with no result, so it does not now wish to contribute. The allocation of the Charge Levy is not to be determined with the benefit of hindsight.

[46] There are other factors which bear on whether MCAP's proposed allocation is equitable or not. MCAP would have been aware of the outstanding strata fees and the possible termination of utility services. In a letter from the Strata Corporation's legal counsel to MCAP dated July 26, 2010 the 'dire financial straits' of the Strata Corporation is outlined, along with a forecast that "...the resulting disarray will not enhance the value of the individual strata lots." MCAP acknowledged that it was aware that pre-funding strata fees were not being paid. It acknowledged that it had no reason to believe that the DIP funds were being used to correct these arrears. Yet it waited out the 18 month stay period. That MCAP believed it stood to possibly benefit from the CCAA proceedings and the MCAP Protocol is implicit in its choice to remain under and cooperate within the process. MCAP was aware throughout the process that the ultimate allocation was reserved for future determination.

[47] It is agreed that the CCAA proceedings did not yield any direct benefits to MCAP. No DIP funding was directly allocated to the Kaleido Project and no Mini DIP was established in relation to Kaleido. However, the Charges relate to general expenses associated with the entirety of the CCAA proceeding. The MCAP Protocol was established and condo units were marketed. There was an unsuccessful attempt to sell the Kaleido Project *en bloc*. The National Home Warranty Program (for the majority of the stay period) did not cancel its coverage. The Strata Corporation was prevented from claiming unpaid fees and the municipality for unpaid taxes. The Kaleido Project fell within the scope of the CCAA proceedings and formed a part of the Monitor's responsibilities. Effort was expended in dealing with the Kaleido sales process. DIP

funding allowed Medican to meet urgent financial needs during the stay. As such, while no direct benefit was obtained, MCAP acquired the above-mentioned indirect benefits (maintenance of the status quo) as well as "potential" benefits in the form of possible unit sales under the MCAP Protocol. Indeed, the degree of potential benefit to MCAP under the sales Protocol was far from negligible. The Monitor is not obliged to perform an analysis as to which creditors benefited and to what degree. Here, costs incurred as a part of the Charges were borne in the management of the CCAA proceedings and generally incurred in relation to all Medican property including that of the Kaleido Companies.

[48] Moreover, it is not entirely accurate to argue that MCAP received zero benefits under the proceedings. In addition to its position as a secured creditor of the Kaleido Project, MCAP also stood as a potential unsecured creditor to Medican. In this latter position, MCAP did in fact participate in the Plan and, although there was little evidence before the court in this regard, seemingly benefitted by filing its proof of claim.

[49] I note also that the stay period allowed MCAP to attempt to "wait out" what was clearly a downturn in the residential real estate market although the condominium units were eventually marketed at a reduced price per square foot. Again, MCAP cannot now advance an argument grounded in hindsight. Nor, as per *Respec Oilfield Services*, should it be rewarded for what may have ultimately amounted to a poor business decision.

[50] MCAP argues that its position is analogous to situations in which the courts have refused to allocate priority charges against true lessors. It relies on *Respec Oilfield Services* and *Western Express Airlines* in this regard. I do not find MCAP's position in the current case to be analogous to that of a true lessor. While the courts in *Respec* and *Western Express* clearly held that a true lessor was exempt from contribution towards a cost levy, such cases can be clearly distinguished on the basis that, as property owners, a true lessor does not stand to gain a potential benefit from CCAA proceedings. As an owner of the collateral, a lessor is entitled to a return of the collateral regardless of the outcome of the restructuring attempt. There is no reason on the facts before me to liken MCAP's situation to that of a lessor.

[51] MCAP held the same type of security as other secured creditors. It suffered the same fate as other secured creditors who experienced a shortfall. While it did not receive direct benefits as a result of the Charges the potential for direct benefit clearly existed. It would be inequitable to redistribute MCAP's proposed contribution upon the remainder of the secured creditors given that all assets of the Medican Group were encumbered by the Charges. There is simply no basis upon which to deviate from the Monitor's proposed Charge Levy allocation. For these reasons the Application is denied.

Heard on the 21st day of February, 2013.

Dated at the City of Calgary, Alberta this 23rd day of April, 2013.

K.M. Horner
J.C.Q.B.A.

Appearances:

David W. Mann/Scott D. Kurie of Denton's
for Medican Holdings Ltd. et al

Sean Collins of McCarthy Tetrault
for MCAP

A. Aaron Stephenson of Norton Rose
for the Monitor

TAB 9

Editor's Note: Corrigendum released September 2, 2004. Original judgment has been corrected, with text of corrigendum appended.

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Mr. Justice Robert M. Hall
Date of Document:	2004 09 01
Statement of purpose in filing:	Reasons for Judgment on Application issued January 22, 2004 by GMAC Leaseco Ltd. for recovery from Receiver of cost allocations for units sold by Leaseco (as opposed to being sold by the Receiver) in the amount of \$53,909.08.
Court Sub-File Number:	9:10 (Ref. Sub-File 7:60)

CITATION: *In Re Hickman Equipment (1985) Ltd.*
 (In Receivership), 2004 NLSCTD 164

DATE: 2004 09 01

DOCKET: 2002 01T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

IN THE MATTER OF a Court ordered Receivership of Hickman Equipment (1985) Limited (“Hickman Equipment”) pursuant to Rule 25 of the **Rules of the Supreme Court, 1986**, under the **Judicature Act**, RSNL 1990, c. J-4, as amended

AND IN THE MATTER OF the **Bankruptcy and Insolvency Act**, c. B-3 of the Revised Statutes of Canada, 1985, as amended (the “BIA”)

Before: The Honourable Mr. Justice Robert M. Hall

Place of Hearing: St. John’s, Newfoundland and Labrador

Date of Hearing: June 8, 2004

Appearances: Thomas R. Kendell, Q.C. for the Applicant, GMAC Leaseco Ltd.
 Frederick J. Constantine for the Receiver, PricewaterhouseCoopers Inc.
 Geoffrey Spencer for CIBC.
 Bruce Grant for John Deere Ltd. and John Deere Credit Inc.
 Griffith Roberts for Hickman Motors Ltd. and Group Holdings Ltd.

Authorities Cited:

STATUTES CONSIDERED: Personal Property Security Act, SNL
 1998, c. P-71

REASONS FOR JUDGMENT

Hall, J.

Background

1. On February 7, 2002, this Court issued an Order (filed on February 8, 2002) whereby Hickman Equipment (1985) Limited (“HEL”) was afforded protection under the provisions of the **Companies Creditors Arrangement Act** (the “**CCAA Order**”). The **CCAA Order** essentially dealt with all assets of HEL regardless of whether those assets were in the possession of HEL as owner, or as agent for others, and whether secured or otherwise.

2. On March 14, 2002 this Court issued a Receivership Order (“the Receivership Order”) which Receivership Order ordered that PricewaterhouseCoopers Inc. (“PWC”) be appointed Receiver of HEL. The Receivership Order covered all of the property in the possession of HEL in the same manner and to the same extent as the **CCAA Order**. An earlier Receiving Order adjudged HEL bankrupt and also appointed PWC Trustee of the bankrupt estate. By virtue of paragraphs 10(c) and 10(e) of the Receivership Order, PWC was directed to develop a plan and procedure to govern the orderly liquidation of the assets of HEL. PWC was also directed to formulate a plan for a determination of the legal and equitable rights of creditors of and claimants against the bankrupt estate, there being many competing creditors claiming the same security. In particular, paragraphs 10(c) and (e) required the development by PWC of a Realization Plan and a Cost Allocation Plan. These

paragraphs in the Receivership Order stated:

1. "THIS COURT ORDERS that, in respect of the Assets, the Receiver is hereby empowered from time to time until further order of this Court generally to do all things which may be reasonably necessary in order to facilitate the development of a plan and procedural structure for the liquidating of the Assets or any part thereof and for the determination of the legal and equitable rights of all creditors and claimants including, without limitation:
 2. ...
 3. (c) to develop and recommend the optimal method for disposition of the Assets and the distribution of property or proceeds to those claimants or creditors entitled thereto and to report to the Court as soon as possible, but in any event within 45 days after this Order, with a recommended procedure to dispose of all realizable Assets, including the allocation of the costs of the entire process (the "Realization Plan"), provided that the Receiver shall only sell Assets upon further order of the Court.
 4. (e) to conduct such investigations and analyses of the Assets as may in its judgement be necessary or advisable to enable it to develop a plan for the determination of the rights and entitlement of creditors to the Assets or parts thereof, and present such plan and to apply to this Court for any direction or directions with respect to the preparation, development or implementation of such plan, including the allocation of costs of the entire process (the "Claims Plan")."
3. On May 14, 2002 this Court approved the Realization Plan and Cost Allocation Plan developed by PWC and the formal Order to that effect was filed on May 17, 2002.
4. After the approval of the Realization Plan and Cost Allocation Plan PWC proceeded with and completed the liquidation of substantially all of the assets of HEL. The majority of assets were sold by public auction, although some were sold by tender and others by way of negotiated sale agreement or pursuant to Court Order. As sales were completed and assets disposed of, many of the secured creditors of HEL, including the Applicant GMAC Leasco Ltd. in this current matter, brought Interlocutory Applications seeking payment to them of proceeds arising from the sale of assets over which these creditors claimed security. As these applications were arising prior to the completion of all elements of the receivership, it was necessary for the Receiver to develop a procedure whereby it could retain a holdback from the sale of the assets as a contribution towards costs incurred in the

receivership and to be attributed to the various creditors pursuant to the Cost Allocation Plan. As a result PWC sought, and this Court granted approval to PWC to retain a holdback of 15% of the proceeds of each sale as a contribution to the Cost Allocation Plan on the understanding that the matter of the allocation of cost would be revisited upon the completion of the realization process. Paragraph 5 of the Cost Allocation Plan dealt specifically with this intended revisit by providing:

1. "Costs of the Receiver or the Trustee in implementing the Realization Plan shall be apportioned as approved by the Court on the recommendation of the Receiver, with notice to all Interested Parties after completion of the realization process. In making its recommendation, the Receiver will adjust the allocation of costs to more equitably match assigned costs to actual realization proceeds. There may be indirect costs that are not allocable, except over all Assets."

5. PWC has not as yet sought nor been granted a final Order making a final allocation of costs pursuant to paragraph 5 of the Cost Allocation Plan.

1. The Present Application.

6. GMAC Leaseco Ltd. brings this present application on the basis that no costs ought to be allotted against it with respect to the sale of 18 listed motor vehicles and that the amount of \$53,909.08 held back by the Receiver from the proceeds of the sale of those vehicles ought to be paid out to GMAC Leaseco Ltd. It asserts that these 18 motor vehicles (the "Applicant's Units") were sold solely through the effort and expense of the Applicant's agent, Hickman Motors Limited, and not through any effort or expense of the Receiver. This is not largely disputed by PWC.

7. The 18 units in question were held by HEL as "equipment" as defined under the **Personal Property Security Act**, SNL 1998, c. P-71, ("**PPSA**") as opposed to "inventory" as defined in the **PPSA**. They were essentially motor vehicles used in the operation of the business of HEL. HEL was a related company to Hickman Motors Limited, a substantial General Motors dealership and the units in question were General Motors' products normally sold and serviced by Hickman Motors Limited in the course of its usual business. The Receiver agreed that having the units consigned for sale on behalf of the Receiver to Hickman Motors Limited was likely to achieve the best sale price for the individual units. This was the procedure which was followed and the units were refurbished by Hickman Motors Limited with the consent of the Receiver and ultimately sold. Unfortunately the sale prices which were generated were not sufficient to produce any equity for the receivership. Nonetheless, under the provisions of the Cost Allocation Plan, the sale proceeds were subject to the holdback for cost allocation in the amount of \$53,909.08.

8. GMAC Leaseco Ltd. takes the position that, for a variety of reasons, these particular units should not be subject to any holdback at all or any Cost Allocation Plan liability. In the alternative, counsel for GMAC Leaseco Ltd, at the hearing of this application, consented to a token cost allocation in the amount of \$7,500.

9. Principally GMAC Leaseco's objection to paying the 15% holdback with respect to these units was based upon:

- (1) that its right to security over these vehicles as first secured creditor was clear, easily determined and unchallenged by other creditors, and therefore the receiver simply ought to have turned over the vehicles to GMAC Leaseco to be realized upon in accordance with their securities without any charge for receivership costs being asserted;
- (2) the Receiver did not expend any effort on its own behalf in the refurbishing of or realization upon these units; and
- (3) it is fundamentally unfair in this situation that the units should be subject to cost allocation holdback in the amount of \$53,909.08 or any amount.

1. Receiver's Position.

10. The Receiver takes the position that, excepting some limited cases, there has been little or no distinction made by the Receiver in its securing, possessing and maintaining any of the assets of HEL that HEL had in its possession at the commencement of the receivership. The Receiver contends that the costs incurred by it in the management of the receivership have generally been incurred in relation to all the property of HEL without any distinction as to the category of property either by its possession by other parties or any other characteristic. In addition, it contends that all sales of the property have been by asset class and not by legal interest.

11. PWC contends that a principal role of PWC as a Court appointed Receiver is to assist the creditors and the Court in designing and executing a process that provides a fair opportunity to all creditors to adjudicate issues related to the receivership and that its role in this regard is defined in the Receivership Order and its mandate emanates from that Order and subsequent Orders of the Court. The duties of the Court appointed Receiver have included:

- (a) the design and implementation of Investigation and Claims Plans;

- (b) administrative tasks including development of a website where creditors could post and share documentation related to the receivership;
- (c) seizure and cataloging of the records of HEL;
- (d) regulate and required Court reporting;
- (e) completion of various statutory duties;
- (f) investigative and legal work associated with a potential Court action against the auditors of HEL as mandated by an Order of the Court;
- (g) meetings with creditors and responding to requests for information; and
- (h) working on defined tasks of the Receiver's mandate as ordered by the Court.

12. PWC therefore argues that Cost Allocation Plan issues apply to many more issues than simply the cost of realizing on any particular asset or group of assets. It contends that it alone is able to provide a neutral position with respect to costs allocation that is independent of the particular interest of any one creditor or group of creditors and that this independent approach provides a consistent, evenhanded approach to cost allocations. It contends that a consistent approach to cost allocation issues should be adopted so that all secured creditor claimants are treated fairly and equally. Nonetheless, PWC does acknowledge that the circumstances of some creditors' claims may warrant some special consideration. There have already been two applications where special consideration was given in terms of cost allocation. However, both of these related to circumstances where the goods in question, even though some came into the possession of the Receiver, were found by the Court not to be assets of HEL in that one group of assets were found to be "consigned goods" which were in fact located in the United States and had never come into the possession of HEL; and the second of which was "30 day goods" under the **Bankruptcy and Insolvency Act**, RSC, 1985, c. B-3. These two exceptions are qualitatively different from the group of assets to which the present application applies. The Applicant's units were clearly the property of HEL and in its possession and used by it.

13. The Receiver takes the position that it is irrelevant whether or not the units in question were secured as “equipment” or as “inventory”. Counsel for the Receiver states that “a loan is a loan” and that the business affairs of HEL were a mess that needed to be straightened in an orderly manner under a process whereby all creditors had an opportunity to argue before an independent party, i.e. the Receiver, as to their entitlement to the various assets.

14. James A. Kirby, C.A., CIRP, Senior Vice-President of PWC, testified at the hearing of this matter. He is unable to say, without reviewing each and every individual fee invoice of PWC, what costs and fees are directly attributable to the Receiver’s involvement with these particular units. His best guess with respect to these direct costs would be in the range of \$5,000 – \$10,000. That of course does not deal with the other indirect costs of the receivership. The Receiver takes the position that it would be reasonable to reduce the 15% holdback by 15% of that amount (i.e. a reduction of 17.25%) to reflect the reduced sales effort by the Receiver with respect to these particular assets. This would reduce the holdback amount by \$9,299.32 to a holdback amount of \$44,609.76.

1. Applicable Principles.

15. Paragraph 5 of the Cost Allocation Plan envisages the Court, on the recommendation of the Receiver, apportioning the costs of the receivership to the various creditors. No guidance is provided in the Cost Allocation Plan to aid the Court in deciding on what would be a fair allocation of the receivership costs. Nothing in the Cost Allocation Plan prevents a partial allocation of costs at a point in time earlier than the completion of the receivership and bankruptcy. I am therefore satisfied that it is appropriate at this time to deal with this application rather than waiting for the completion of the receivership.

16. Counsel have been unable to provide to the Court any jurisprudential guidance in this regard, nor did counsel provide much discussion of the principles they felt would be applicable to assigning costs on a different basis than a uniform percentage relative to sale proceeds received.

17. In my view the following principles apply in this matter:

- (1) The allocation of costs ought to be fair and evenhanded 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.

1. Reasons for Variation.

18. There was one clearly articulable reason for varying the allocation of the receivership cost from a uniform amount in this particular case. The reason is that the receiver had no significant involvement in the actual sale of the Applicant's units. How then do we determine what the sales costs might have been if the Receiver had conducted the sale? There is only one piece of evidence available from the Receiver to demonstrate what sales costs might have been in this regard. That information is the amount of auction commissions paid by the Receiver to the auctioneer for the sale of the bulk of the assets and equipment of HEL. That amount was \$1,193,473 and was deducted from the sale proceeds. From Consent Exhibit No. 1 it would appear that the costs of the receivership including the auction commissions would be as follows:

Costs to date	\$3,162,446
Forecasted costs to conclusion of receivership	\$315,000

Auction commissions	<u>\$1,193,473</u>
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Total	<u>\$4,670,919</u>
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19. Of these total costs of \$4,670,919 the auction commissions constitute 25.5%. Reduction of the cost allocation holdback by a rounded percentage of 25% is a reasonable reduction for the fact that the Receiver did not have to expend its efforts in the sale of this equipment.

1. **Order.**

20. The Receiver is therefore directed to refund to the Applicant the sum of \$13,477.27 being 25% of the 15% holdback for cost allocation in the amount of \$53,909.08. The Applicant shall additionally be entitled to its costs of the application.

Justice

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Mr. Justice Robert M. Hall
Date of Document:	2004 09 02
Statement of purpose in filing:	Corrigendum to Reasons for Judgment (filed September 1, 2004) on Application issued January 22, 2004 by GMAC Leaseco Ltd. for recovery from Receiver of cost allocations for units sold by Leaseco (as opposed to being sold by the Receiver) in the amount of \$53,909.08.
Court Sub-File Number:	9:10 (Ref. Sub-File 7:60)

CITATION: *In Re Hickman Equipment (1985) Ltd.*
(In Receivership), 2004 NLSCTD 164

DATE: 2004 09 02
DOCKET: 2002 01T 0352

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Griffith Roberts for Hickman Motors Ltd. and Group Holdings Ltd.

C O R R I G E N D U M

Hall, J.

[1] The text box on page 1 of the decision filed in this matter on September 1, 2004 is amended by substituting “9:10” for “7:10” in the Court Sub-File Number section.

Justice