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COURT FILE NUMBER	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC. CAMPCORP STRUCTURES LTD. D.J. CATERING LTD. 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.
DOCUMENT:	**BRIEF OF THE APPLICANTS, FIRST ISLAND FINANCIAL SERVICES AND ZENEX CAPITAL CORPORATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	LAWSON LUNDELL LLP Barristers and Solicitors 3700, 205 – 5th Avenue S.W. Calgary, Alberta T2P 2V7 Attention: **Heather M.B. Ferris/William L. Roberts** Telephone: (403) 269-6900 Fax: (403) 269-9494

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1. OVERVIEW

Opening Statement

1. By way of Application heard before this Honourable Court on July 5, 2017, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (the "Petitioners") applied for certain protections under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). The initial order (the "Initial Order") provided for, *inter alia*, a stay of proceedings ("Stay") against the Petitioners, the appointment of Ernst & Young Inc. (the "Monitor") as monitor of the Petitioners, and the granting of charges (the "Charges") on the property of the Petitioners with priority over the interest of the creditors.

2. The Charges include a charge to the benefit of the directors and officers against obligations and liabilities that they may incur pursuant to their positions after the commencement of this proceeding; a charge granted to the Monitor, its counsel, and the Petitioners' counsel as security for their professional fees and disbursements (the "Administration Charge"); and a charge to secure all obligations owed to Business Development Bank of Canada as interim lender (the "Interim Lender's Charge").

3. At a hearing on April 6, 2018, First Island Financial Services and Zenex Capital Corporation ("First Island"), a secured creditor of the Petitioners, was successful in having the Stay partially lifted to allow it to enforce its security against a property in Sturgeon County, Alberta owned by 816956 Alberta Ltd., one of the Petitioners (the "Farm"), and three recreational properties in Vernon, B.C. (the "Vernon Properties") owned by the principals of the Petitioners.

4. The next hearing in these *CCAA* proceedings is April 20, 2018. At that time, this Honourable Court will consider whether the Farm should be exempt from Charges incurred following the April 6, 2018 Order partially lifting the Stay.

5. First Island submits this Brief in support of its position that the Farm should not be subject to any Charges arising after April 6, 2018.

2. FACTS

6. The Initial Order in these *CCAA* proceedings was granted on July 5, 2017 and, *inter alia*, granted a Stay, a priority Administration Charge of $500,000 and an Interim Lender's Charge of up to $1,000,000.

Initial Order at paras. 30-34

7. The Administration Charge was subsequently increased to $950,000.

Amended Order of the Honourable Justice S.D. Hiller, March 20, 2018 at para. 4

8. The Interim Lender's Charge was subsequently increased to $3,500,000.

Order of the Honourable Justice K.G. Nilesen, December 12, 2017 at para. 5

9. First Island holds a mortgage against the Farm with a principal amount of $4,400,000. The principals of the Petitioners, Paul McCracken and Shayne McCracken, guaranteed the loan of 816956 Alberta Ltd. to First Island and also granted collateral mortgages against the Vernon Properties in support of those guarantees.

Affidavit #2 of Darrell Morgan sworn March 14, 2018 at para. 2 and Exhibit "A"

10. First Island brought an application seeking to lift the Stay as against the Farm, permitting it to enforce its security against the Farm and the Vernon Properties. This application was supported by the Monitor and the Petitioners.

11. On April 6, 2018 First Island was successful in its application to lift the Stay as against the Farm,

Order of Justice K.G. Nielsen April 6, 2018 at para. 1

12. At that application, First Island also sought to have the Farm removed or exempted from any Charges incurred after April 6, 2018, which was supported by the Petitioners and the Monitor.

13. An issue that arose at that application on April 6, 2018 was a previous Order of this Honourable Court that authorized 1371047 Alberta Ltd., one of the Petitioners, to sell its head office property (the "Head Office") against which BDC held a mortgage and disburse the proceeds to, among others, BDC, pursuant to that mortgage. That Order stated that any payment to BDC was without prejudice to a future allocation of Charges in these proceedings among the property of the Petitioners.

Order of September 26, 2017 of the Honourable Justice S.D. Hiller at paras. 3 & 4

14. Counsel for Canadian Western Bank, a creditor of the Petitioners, opposed First Island's position and stated that Charges should continue to be levied against the Farm, subject to a future Allocation of Charges in these proceedings, despite the fact that the Farm was now outside the CCAA and that the CCAA was now a liquidating proceeding for mainly the benefit of CWB (as a liquidating Monitor was less expensive than a new and replacement Receiver), as the Petitioners had failed to successfully implement a Plan of Arrangement.

3. ISSUES

15. Should the Farm be removed or exempted from Charges arising after April 6, 2018?

4. ARGUMENT

16. The Initial Order and subsequent Orders were made with the aim of supporting the restructuring of the Petitioners. However, that restructuring has failed and the *CCAA* proceedings have now transitioned from restructuring proceedings to liquidation

proceedings. This is a change of circumstances that requires this Honourable Court to revisit the terms of the Initial Order.

17. *CCAA* proceedings are a statutory interference with the contractual relations between sophisticated commercial parties who have come to an agreement about how they want to carry on their relationship. The courts interfere with these contractual relations in order to give protection to the insolvent company, including through a stay of proceedings and the granting of super-priority charges. The stay of proceedings stops the creditors from enforcing their contractual rights and the charges prime the creditors, pushing their claims down in priority below that of the Monitor and DIP lender.

18. When the Stay and Charges were ordered in the Initial Order and extended and increased in subsequent Orders, the judges of this Honourable Court were persuaded that the prejudice to creditors was outweighed by the benefit from a successful restructuring. This is no longer true.

19. First Island submits that the general principles governing the allocation of Charges are those initially set out in *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB, and cited with approval by this Honourable Court in *Atlantica Diversified Transportation Systems Inc. (Re)*, 2018 NSSC 77 at para. 36 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 on 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.

No Benefit to First Island After April 6, 2018

20. The *CCAA* process, if successful, would never have benefitted the value of the Farm. While a restructuring would have benefited other parties, including the Petitioners, the Petitioners' employees, and the other creditors, the value of First Island's security would never have increased. To this point, First Island's interest has been subject to the Charges

arising from the *CCAA* proceedings, along with the other creditors, but it is now clear that the proceedings are not benefitting any of the parties involved.

21. In *Re Hunters Trailer & Marine Ltd.,* 2001 ABQB 1094 ["*Hunters Trailers*"], this Honourable Court considered the issue of allocation of costs among creditors. UMC Financial Management Inc. ("UMC"), which held a first and second mortgage on the real property of the insolvent company, took the position that it was a passive creditor which advanced funds based on the value of land, rather than the value of the business as a going concern. It argued that an allocation of *CCAA* costs on a *pro rata* basis, as proposed by certain other creditors, would be disproportionate and that the operating lenders should bear a larger share of the *CCAA* costs. Wachowich C.J. concurred and ordered that UMC not be allocated the same proportion of the *CCAA* costs as the other creditors. In coming to this decision, Wachowich C.J. stated:

> [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.
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> ...
>
> [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.

22. In *Re Medican Holdings Ltd.*, 2013 ABQB 224 ["*Medican Holdings*"], this Honourable Court again considered the issue of *CCAA* charge allocation. MCAP Financial Corporation ("MCAP") was the senior secured lender of a multi-unit condominium project developed by, and on land belonging to, affiliated companies included in the *CCAA* petition. MCAP was unsatisfied with the insolvent company's efforts to market and sell the units and applied successful to have the stay of proceedings partially lifted to permit the units to be released into the possession of a receiver. MCAP later applied to be excluded from a levy on sales of continuum units over which creditors held security to pay for the *CCAA* charges. Horner J. declined to exclude MCAP in part on the basis that it had participated in the *CCAA* process even if it had not derived a direct benefit. She stated that MCAP obtained both an indirect benefit, in the form of the maintenance of the status quo, and a potential benefit from possible unit sales.

23. Now that the Stay has been lifted and the Farm removed from the proceedings, there is no reason that First Island should continue to be burdened by the charges as there is no possible benefit to First Island from the activities of the Monitor. This Honourable Court should recognize that, as contemplated by Wachowich C.J. in *Hunters Trailers*, the potential benefit to First Island should determine the allocation of Charges. Further, unlike in *Medican Holdings*, First Island is not applying to be exempted from Charges arising <u>prior</u> to the removal of its security from the proceedings. Instead, it seeks to be excluded from Charges that arise <u>following</u> the April 6, 2018 Order lifting the Stay as

against the Farm. Since the potential benefit to First Island from the *CCAA* proceedings is zero from April 6, 2018 onwards, no Charges should be allocated to its security, the Farm.

24. There is a continuing benefit under the April 6, 2018 Order to the Monitor for services to be rendered regarding the Farm without any cost to the Monitor for those services.

25. It is submitted that to continue to allocate Charges arising after this date would be inequitable as First Island will not derive any indirect or potential benefits from the continued activity of the Monitor.

Allocation Unfair and Prejudicial

26. The other creditors seek to keep the Charges on the Farm to force First Island to bear the burden of the continuing *CCAA* proceedings. While the other creditors have the option to convert these proceedings to a receivership they have declined to do so and First Island should not be forced to pay for their election to continue these proceedings. Such an allocation would not be *prima facie* fair and would instead be unfair and prejudicial.

No Calculation Required

27. There is no complicated calculation or cost/benefit analysis required here. All that is necessary is for First Island to be excluded or removed from all Charges arising after April 6, 2018.

Change in Circumstances

28. The creditors have referred to the September 26, 2017 Order of the Honourable Justice S.D. Hiller in these proceedings, wherein 1371047 Alberta Ltd., one of the Petitioners, sold the Head Office. The proceeds distributed to BDC were to be without prejudice to a future allocation of Charges. With respect to the Honourable Justice Hiller, the circumstances in which that Order was made are much different from the present ones. Now that the proceedings have changed from restructuring to liquidation, there is no reason to reserve a decision regarding allocation of Charges to the Farm arising after April 6, 2018.

29. This Honourable Court considered a similar situation in *Royal Bank of Canada v. Reid-Built Homes Ltd.*, [2018] A.J. No. 200, 2018 ABQB 124 ["*Reid-Built Homes*"]. In that case a creditor applied to have the stay lifted to permit it to enforce its security and foreclose on its mortgage on certain properties of the insolvent company and to have the receivership order varied to remove or exempt it from the charge under said order. While the Honourable R.A. Graesser J. declined to grant the stay or vary the order he did discuss the issue of super-priority charges arising under a receivership order. Mr. Justice Graesser acknowledged the argument that the appointment of a receiver benefits most and sometimes all creditors, as set out in *Braid Builders Supply & Fuel Ltd. et al v. Genevieve Mortgage Corp Ltd.* (1972) 29 DLR (3d) 373, 17 CBR (ns) 305 (MBCA) [*Braid Builders Supply*].

30. However, Justice Graessar considered that, when *CCAA* proceedings change from restructuring to liquidation, the allocation should change as well.

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

31. First Island submits that the change from a restructuring to a liquidation procedure in this matter is a change in circumstances that should result in the terms of the Initial Order being varied to exclude the Farm from Charges arising after April 6, 2018.

5. RELIEF SOUGHT

32. That the Farm be removed or exempted from any charges arising in this proceeding after April 6, 2018.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 11 day of April, 2018

LAWSON LUNDELL LLP

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AUTHORITIES

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

B. *Braid Builders Supply & Fuel Ltd. et al v. Genevieve Mortgage Corp Ltd.* (1972) 29 DLR (3d) 373, 17 CBR (ns) 305 (MBCA)

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

D. *Re Hunters Trailer & Marine Ltd.,* 2001 ABQB 1094

E. *Re Medican Holdings Ltd.*, 2013 ABQB 224

F. *Royal Bank of Canada v. Reid-Build Homes Ltd.*, [2018] A.J. No. 200, 2018 ABQB 124

G. *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB