COURT FILE NO.	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 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.
DOCUMENT	**BRIEF OF THE MONITOR, ERNST & YOUNG INC.**

JUDICIAL CENTRE OF EDMONTON
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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DARREN R. BIEGANEK Q.C./ RYAN F.T. QUINLAN Barrister & Solicitor Phone: (780) 441-4336 Fax: (780) 428-9683 File No.: 196164	**DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta, Canada, T5J 3V9

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I. INTRODUCTION

1. On July 5, 2017, Canada North Group Inc. ("CNG"), Canada North Camps Inc. ("CNC"), Campcorp Structures Ltd. ("Campcorp"), D.J. Catering Ltd. ("DJ"), 816956 Alberta Ltd. ("816"), and 1371047 Alberta Ltd. ("137") (hereinafter collectively referred to as the "Applicants" or the "Companies") made an application before this Honourable Court requesting certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*") and obtained an initial order (the "Initial Order"), a stay of proceedings ("Stay") against the Applicants for a period of 30 days up to and including August 3, 2017, and the appointment of Ernst & Young Inc. (the "Monitor") as monitor of the Applicants.

2. Since that time, 1919209 Alberta Ltd. ("1919") and Canada North Group LP Holdings Ltd. ("Holdings") have been added as "Applicants" to these proceedings, while Campcorp and DJ have been removed from the proceedings.

3. The Stay has been extended on multiple occasions, and is currently in place up to December 31, 2018.

4. The next hearing in these *CCAA* proceedings is scheduled for September 21, 2018. At that time, this Honourable Court will consider, amongst other relief sought:

   a. the Application of First Island Financial Services Ltd. and Zenex Capital Corporation ("First Island"), as first mortgagee, for an Order Approving Sale and Vesting Title in respect of the Farm owned by 816;

   b. the Application of Staheli Construction Co. Ltd. ("Staheli") for an interim distribution of the sale proceeds received from the Applicants' sale of the Winterburn property, which the Monitor has held in trust since the sale of that property closed; and

   c. assuming the Applications of First Island and Staheli noted above are successful, the proper amounts of the respective holdbacks from the sale proceeds of the Farm and Winterburn properties to be maintained by the Monitor pending a final cost allocation in these proceedings.

5. The Monitor submits this Brief in respect of two of the issues to be considered at the September 21, 2018 hearing, namely:

   a. the Monitor's proposed revised cost allocation methodology and the appropriate amounts of the holdbacks from the sale proceeds of the Farm and Winterburn properties; and

   b. the sealing of the Confidential Supplement to the Monitor's Seventeenth Report (the "Confidential Supplement").

II. FACTS APPLICABLE TO THE ISSUES INCLUDED IN THIS BRIEF

6. At the February 27, 2018 hearing in these proceedings, this Honourable Court directed the Monitor to provide a proposed cost allocation methodology, which the Monitor completed in its Eleventh Report and the Confidential Supplement thereto. That proposed allocation methodology set out by the Monitor was subject to a final allocation proposal once all realizations have been achieved and the *CCAA* proceedings are ready to be completed.

7. In paragraph 34 of this Honourable Court's Order granted on March 20, 2018, it declared that:

> Notwithstanding the distributions and payments to be made by the Monitor as directed in the foregoing paragraph, the allocation of the interim financing, the Administration Charge, and the deemed trust source deduction payments shall, among the various Applicants and their assets, and the effect on creditors claiming against those assets, are reserved to be determined at a later date. Nothing contained in this Order shall be considered as prejudicing the position of any parties nor shall be considered as affecting any parties' rights in respect of any subsequent application to determine that allocation.

8. By an Order dated April 6, 2018, the stay of proceedings was lifted in favour of First Island to permit it to foreclose on the Farm, as mortgagee of that property (the "Order Lifting Stay"). Thereafter, First Island obtained a Redemption Order dated June 6, 2018 in respect of its mortgage and the Farm.

9. By an Order dated June 21, 2018, Staheli was permitted to submit a Proof of Claim to the Monitor for its consideration notwithstanding the passing of the Claims bar date under the Claims Process Order dated December 6, 2017. Thereafter, the Monitor reviewed Staheli's claim, and after a revision to the amount claimed under the applicable mortgage was submitted (within the applicable time limit), the Monitor accepted Staheli's claim as valid.

10. By an Order dated July 23, 2018, the Order Lifting Stay was amended to permit the Monitor to continue to utilize the Farm until October 31, 2018.

11. First Island is applying for an Order Approving Sale and Vesting Title in respect of the Farm owned by 816, returnable September 21, 2018.

12. Further, Staheli is applying for an interim distribution of the sale proceeds from the Applicants' sale of the Winterburn property, which the Monitor has held in trust since the sale of that property closed.

13. Assuming that the respective applications of First Island and Staheli are successful, a corresponding issue that then arises is how much from each of the respective sale proceeds ought to continue to be held back by the Monitor (or in the case of First Island's sale approval application, how much of the purchase price shall be paid over by First Island to the Monitor for it to hold in trust) pending final allocation of the interim financing, Administration Charge, and deemed trust source deduction payments amongst the various Applicants and their assets.

14. In an attempt to address what might be reasonable holdback amounts to recommend to this Honourable Court, the Monitor has prepared a revised proposed allocation methodology analysis ("Revised Allocation"), which is included in the Confidential Supplement.

15. The Monitor is not seeking any relief confirming the actual and final cost allocation at this time.

III. <u>ISSUES ADDRESSED</u>

16. This Brief addresses the following limited subjects that form part of the issues to be considered by this Honourable Court at the hearing scheduled for September 21, 2018 in these *CCAA* proceedings:

    a. What are the applicable legal principles relating to the allocation of costs and other priority charges in a *CCAA* proceeding?;

    b. What are the proper holdback amounts in respect of the sale proceeds from the sales of the Farm and Winterburn properties?; and

    c. Should this Honourable Court temporarily seal the Confidential Supplement?

IV. LAW AND ARGUMENT

A. Revised Interim Allocation and the Holdbacks for Interim Disbursements

(i) General Principles of Allocations

17. In this section of the Brief, the Monitor proposes to advise this Honourable Court of the legal principles applicable to cost allocations in insolvency proceedings, and how the Monitor has attempted to follow such principles, based on the facts, in arriving at its proposed allocation methodology.

18. The allocation of priority charges and costs arising in insolvency proceedings is done on a case-by-case basis, and is a task involving a monitor's and this Honourable Court's discretion. In any given case, there may be more than one legitimate method of cost allocation, as it is unlikely that one specific method that can objectively point to absolute fairness to all parties.

Medican Holdings Ltd., Re, 2013 ABQB 224 at paras. 25 and 35 (*Medican Holdings*) **[TAB 1]**; *Respec Oilfield Services*, 2010 ABQB 277 at para. 22 (*Respec Oilfield Services*) **[TAB 2]**; *Winnipeg Motor Express Inc., Re*, 2009 MBCA 110 at paras. 8, 28 and 34 (*Winnipeg Motor Express*) **[TAB 3]**; *Hunjan International Inc., Re*, 2006 CarswellOnt 2718 at paras. 4 and 71 (*Hunjan*) **[TAB 4]**; *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094 at para. 15 (*Hunters Marine*) **[TAB 5]**

19. Courts have consistently recognized that a strict accounting of costs is neither necessary nor desirable, and that a creditor need not benefit directly before the costs of an insolvency proceeding may be allocated against that creditor's share of the recovery. Any means of calculating appropriate allocation percentages will be arbitrary to a significant degree.

Medican Holdings at paras. 25, 32 and 44 **[TAB 1]**; *Hunjan* at para. 4 **[TAB 4]**; *Respec Oilfield Services* at paras. 29 and 32 **[TAB 2]**; *Winnipeg Motor Express* at paras. 8 and 28 **[TAB 3]**; *Hunters Marine* at paras. 20 and 26 **[TAB 5]**

20. The basic and guiding principle is that costs should be allocated in an equitable manner, which does not adjust the priorities between creditors.

Medican Holdings at paras. 25, 39 and 44 **[TAB 1]**; *Respec Oilfield Services* at para. 22 **[TAB 2]**; *Winnipeg Motor Express* at paras. 9, 11 and 28 **[TAB 3]**; *Hunjan* at paras. 5 and 57-58 **[TAB 4]**; *Hunters Marine* at para. 15, 20-21 **[TAB 5]**

21. An equal allocation amongst creditors is not necessary in order to be equitable. The Court is permitted to take into account the different nature of the security held by creditors and the potential benefit to creditors when considering whether the proposed allocation is equitable.

Medican Holdings at para. 25 **[TAB 1]**; *Winnipeg Motor Express* at paras. 8 and 10 and 28, 32 **[TAB 3]**; *Hunjan* at paras. 5 and 57 **[TAB 4]**; *Hunters Marine* at para. 15 **[TAB 5]**

22. For example, it has been held that passive mortgage lenders may be allocated a lesser share of the costs in *CCAA* proceedings because of the different nature of their security held and the potential benefit to them.

Hunters Marine at paras. 5-7, 20 **[TAB 5]**

23. However, the Court need not actually determine which creditors benefitted more than others. A meaningful answer to that issue would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what Courts have repeatedly said should not be done, since 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 [the] objectives of the *CCAA*."

Winnipeg Motor Express at para. 31 **[TAB 3]**

24. Where a proposed cost allocation is *prima facie* equitable and reasonable, the onus is on an opposing creditor to satisfy this Honourable Court that the allocation put forward by the monitor is unfair or prejudicial.

Medican Holdings at para. 39 **[TAB 1]**; *Winnipeg Motor Express* at paras. 9-10 **[TAB 3]**; *Hunjan* at paras. 58 and 72-73 **[TAB 4]**

25. Exceptions to a monitor's proposed allocation are not to be lightly granted and should only be made where the necessity for departure is reasonably articulable.

Medican Holdings at paras. 44-45 **[TAB 1]**

26. In *Royal Bank of Canada v. Atlas Block Co.*, the Court reviewed the authorities and summarized the above principles as follows:

> 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.

Royal Bank of Canada v. Atlas Block Co., 2014 ONSC 1531 at para. 43 **[TAB 6]**

27. The Monitor has taken the above principles into account in arriving at its proposed cost allocation methodology which it considers to be *prima facie* equitable.

28. First, the Monitor is proposing that the net sale or appraised (as applicable) value of the assets of each of the Applicants be segregated to each company to determine the expected asset value in each individual company. This is required given the number of Applicants and the difference in their creditors. Creditor receipts (versus expectations) will be governed in the main by values attributable to assets.

29. Once asset values are segregated, the applicable percentage of the total expected value of the assets is then calculated for each company.

30. Thereafter, the Monitor is proposing to apply specific percentages of the cumulative total expected professional fees and the DIP financing incurred in connection with these *CCAA* proceedings (the "General Costs"), both of which are not directly attributable to any specific company or asset, and which were incurred for the benefit of all creditors, to each company in the manner set out in the Revised Allocation (which will not be reproduced here for confidentiality purposes).

31. Professional fees and the outstanding DIP financing amounts are considered general costs in insolvency proceedings.

Medican Holdings at para. 27 **[TAB 1]**; *Hunters Marine* at para. 23 **[TAB 5]**

32. The variance, from a strict accounting perspective, in the specific percentages of the General Costs being applied to each company in the proposed allocation is to account for certain creditors only holding valid mortgages against real property.

33. In respect of such secured creditors, the Monitor is recommending that they only share in half of what would otherwise be their applicable percentage of the total expected value of the Applicants' assets. The Monitor does not believe that mortgage lenders should pay the same percentage of costs as the other creditors given the nature of the assets involved in these *CCAA* proceedings.

34. All company or asset specific charges (which in this case are primarily CRA deemed trust claims, property tax claims and post-*CCAA* trade supplier and creditor claims) have been applied in the Monitor's recommended allocation methodology to the specific applicable company.

35. Due to the more nuanced nature of the claim regarding municipal property taxes, which applies not only against the applicable land, but against the improvements to that land where such improvements are assessed, the Monitor is recommending that property taxes owed on the Applicants' properties be first allocated to the specific corporate entities assessed. In the case of camps where there are property tax claims, a supplementary allocation will be made between real estate values and improvement or equipment values, particularly in cases where the improvements consist of specific personal property which may be the property of other corporate entities. The Applicants do have assets which belong to a number of Applicant entities at various camp locations. This will need to be reviewed further once all realizations are complete.

36. Under the proposed methodology, the General Costs, and any company or asset specific priority charge or cost, are then applied (in the percentages being proposed) as against the segregated company asset values, which then reveals the preliminary net distribution available by company, as shown in the Revised Allocation.

37. As is set out above, the Monitor has attempted to craft a proposed allocation methodology that is reasonable in the circumstances, which properly groups the applicable company assets and values, and generally treats all non-super priority secured creditors equally, except where the nature of the security held, and the potential benefit received, by mortgage lenders necessitated an equitable variance in their favour.

38. Finally, the Monitor continues recommending, at this time, that the post-*CCAA* trade creditors and suppliers be paid from the existing accounts receivable in priority to pre-*CCAA* creditors, to the extent that such accounts receivables exist and to the extent that any such payables exist. This is appropriate given that such post-*CCAA* trade creditors and suppliers have assisted in generating an increase in the Applicants' accounts receivable from the commencement date of the *CCAA* proceedings to the date of the Monitor's Seventeenth Report.

(ii) <u>Holdbacks from Sale Proceeds of the Farm and Winterburn Properties</u>

39. When considering making an order for an interim distribution to creditors, the order itself and the amount of the distribution must be carefully scrutinized and found to be justifiable for good and sustainable reasons. The Court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders.

SemCanada Crude Co., Re, 2009 ABQB 90 at para. 27 ("*SemCanada*") **[TAB 7]**

40. Where distributions to creditors occur in *CCAA* proceedings prior to their completions, holdbacks can be, and often are, appropriate and desirable in the circumstances.

Windsor Machine & Stamping Ltd., Re. 2009 CarswellOnt 4505 at para. 8 **[TAB 8]**

41. The Monitor's recommendations in respect of an interim distribution, and the amount thereof, are entitled to significant deference.

SemCanada at para. 38 **[TAB 7]**

42. Assuming that First Island and Staheli's respective applications are successful, the Monitor recommends the following holdbacks:

a. $500,000.00 from the sale proceeds of the Farm; and

b. $700,000.00 from the sale proceeds of the Winterburn property

(collectively the "Holdbacks").

43. The Monitor's rationale for the respective Holdbacks is set out in its Confidential Supplement, which is hereby adopted, but not restated for confidentiality reasons.

44. The Monitor acknowledges that the respective recommended Holdbacks exceed the amounts that, strictly speaking, are currently allocated to the applicable Applicants and assets, as set out in the Revised Allocation. The excess amounts recommended to be retained by the Monitor are for the purposes of maintaining adequate reserves in the event of contingencies occurring prior to a final cost allocation that may materially vary the Revised Allocation. The primary contingencies that may result in material variations to the Revised Allocation, and the reasons they may exist in these proceedings, are set out in the Confidential Supplement, and will not be restated here for confidentiality reasons.

45. Beyond the reasons expressed in the Confidential Supplement, it should also be considered that the final allocation of professional costs, DIP financing, deemed trust payments and other amounts has not been completed, and will not be completed until all realizations are accomplished and these proceedings are close to being finalized. While the Monitor submits its Revised Allocation, and the principles, positions and rationales underlying it, are appropriate and proper as set out above, it is possible that this Honourable Court alters one or more of the underlying principles, positions and rationales that results in variations to the allocation. This further increases the need to ensure sufficient reserve amounts are maintained by the Monitor.

46. It is respectively submitted that maintaining adequate reserves to account for contingencies and potential future claims is not only appropriate, but a key element to ensuring that no other stakeholders suffer prejudice as a result of the interim distributions.

Maple Bank GmbH, Re, 2017 ONSC 2536 at para. 34 **[TAB 9]**

47. Further, it is respectfully submitted that it is normal in insolvency proceedings for a creditor to receive less than it may ultimately recover in the proceedings as an interim distribution, with further amounts later paid over as part of a final distribution once the proceedings are completed. That may well be the case with First Island and Staheli in these proceedings.

48. It is submitted that the Monitor's conservative approach to the amount that can be paid out to First Island and Staheli, respectively, at this time is appropriate in the circumstances, especially where there is difficulty valuing contingencies, as is set out in the Confidential Supplement.

Manitoba (Securities Commission) v. Crocus Investment Fund, 2011 MBQB 305 at para. 22 **[TAB 10]**

49. The Monitor respectfully submits that the Holdbacks are just and appropriate, and ought to be directed by this Honourable Court, along with directions that such Holdbacks are without prejudice to final numbers being allocated to 816, 137, the Farm and/or the Winterburn property, respectively, and that these creditors' receipt of their interim distributions remains subject to a final allocation determination being made by the Court. The later direction is necessary to ensure that no stakeholders, including First Island and Staheli, are prejudiced by these interim distributions and holdback determinations pending a final allocation being approved by this Honourable Court.

B. Sealing of the Confidential Supplement

50. On an Application to temporarily seal a court file, this Honourable Court has broad discretion and may make a direction on any matter that the circumstances require, and it may grant the Order notwithstanding the provisions of Division 4 of Part 6 of the Rules of Court.

Alberta Rules of Court, Alta. Reg. 124/2010, Rule 6.28.
See Orders granted by the Alberta Court of Queen's Bench in the following proceedings:

Order, granted by Justice K.M. Eidsvik in *Royal Bank of Canada v. Hannaco (2008) Ltd. O/A Canada Grey Motor Inn, Naheed Zia and Nasreen Zia*, January 14, 2011, at para. 11

Order, granted by Justice K.D. Yamauchi in *The Matter of Cow Harbour Construction Ltd.*, May 28, 2010, at para. 5

Order, granted by Justice J. Topolniski in *Bank of Montreal v. Kallbom Sand & Gravel Ltd. et al*, May 15, 2012, at para. 1

51. Temporary sealing Orders should only be granted when:

a. an Order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and

b. the salutary effects of the Order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (S.C.C.) at para. 45 **[TAB 11]**

52. The most appropriate sealing Order in a Court approval sale situation is that the supporting valuation material remain sealed until such time as the sale transaction has closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J.) at para. 17 ("*Look Communications*") **[TAB 12]**

53. Commercial Courts have accepted that temporary sealing Orders are appropriate in circumstances where the information subject to sealing Orders contain sensitive commercial information, the release of which could be prejudicial to the stakeholders of the confidential information.

Alberta Treasury Branches v. Elaborate Homes Ltd., 2014 ABQB 350 at para. 54 ("*Elaborate Homes*") **[TAB 13]**;
Nortel Networks Corp. (Re) (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J.) at para. 39 **[TAB 14]**;
Maxtech Manufacturing Inc. (Re) (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J.) at para. 30 **[TAB 15]**

54. In the context of an insolvency proceeding and the sale of assets, it is common for the Court to seal the Receiver or Monitor's confidential documents in case a further bidding process may be required.

Look Communications at para. 17 **[TAB 12]**; *Elaborate Homes* at para. 54 **[TAB 13]**

55. A temporary sealing Order is required until a sale of the applicable assets is fully executed due to the confidential nature of the information and the deleterious effect it would have on the integrity of any future sale process.

Look Communications at para. 17 **[TAB 12]**; *Elaborate Homes* at para. 54 **[TAB 13]**

56. In this case, the Confidential Supplement contains significant commercial information regarding the achieved values for assets already sold, appraised or expected values of assets which remain the subject of marketing and future sales, and the conditions and other factors affecting such future sales. Having such commercial information widely accessible to the public may cause significant prejudice to the future sales or bidding process of the unsold assets, as well as may prejudice the Monitor's ability to obtain the best offers possible on such assets.

57. Further, it could create a situation where an unfair advantage is created for some bidders or interested parties by obtaining such information from the Court record while others have to rely on their own resources.

58. It is respectfully submitted that the deleterious effects that the release of this sensitive commercial information would have on the results and integrity of any future sale process justifies the temporary sealing of the Confidential Supplement.

V. CONCLUSION AND RELIEF SOUGHT

59. The Monitor respectfully provides its Revised Allocation and this brief for this Honourable Court's consideration and support for:

a. a holdback of $500,000.00 from the distribution of the sale proceeds of the Farm, as well as direction from the Court that such amount is without prejudice to a final number being allocated to 816 and/or the Farm and that First Island's receipt of the remainder of the sale proceeds from the Farm remains subject to a final allocation determination being made by the Court;

b. a holdback of $700,000.00 from the sale proceeds of the Winterburn property, as well as direction from the Court that such amount is without prejudice to a final number being allocated to 137 and/or the Winterburn property, and that Staheli's receipt of the interim distribution funds remains subject to a final allocation determination being made by the Court; and

c. temporarily sealing the Confidential Supplement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2018.

DUNCAN CRAIG LLP

Per: ____________________________

DARREN R. BIEGANEK, Q.C./RYAN F.T. QUINLAN
Counsel for Ernst & Young Inc., in its capacity as Monitor of 667402 Alberta Ltd., 18512398 Alberta Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd.,1919209 Alberta Ltd., and Canada North Group LP Holdings Ltd., and not in its personal or corporate capacity

LIST OF AUTHORITIES

Tab

1. *Medican Holdings Ltd., Re*, 2013 ABQB 224
2. *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277
3. *Winnipeg Motor Express Inc., Re*, 2009 MBCA 110
4. *Hunjan International Inc., Re*, 2006 CarswellOnt 2718
5. *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094
6. *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531
7. *SemCanada Crude Co., Re*, 2009 ABQB 90
8. *Windsor Machine & Stamping Ltd., Re.* 2009 CarswellOnt 4505
9. *Maple Bank GmbH, Re*, 2017 ONSC 2536
10. *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2011 MBQB 305
11. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
12. *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J.)
13. *Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB 350.
14. *Nortel Networks Corp. (Re)* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J.)
15. *Maxtech Manufacturing Inc. (Re)* (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J.)

TAB 1

2013 ABQB 224
Alberta Court of Queen's Bench

Medican Holdings Ltd., Re

2013 CarswellAlta 513, 2013 ABQB 224, [2013] A.W.L.D. 2731, 16 B.L.R. (5th) 327, 229 A.C.W.S. (3d) 331

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

In 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

K.M. Horner J.

Heard: February 21, 2013
Judgment: April 23, 2013
Docket: Calgary 1001-07852

Counsel: David W. Mann, Scott D. Kurie, for Medican Holdings Ltd. et al
Sean Collins, for MCAP
A. Aaron Stephenson, for Monitor

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.i General principles

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles
Creditor was senior secured lender on debtor's condominium project — After debtor obtained Companies' Creditors Arrangement Act (CCAA) order which provided that secured creditors were liable to pay certain charges, creditor obtained

order permitting it to appoint receiver and market condominiums — Application by creditor for declaration that no monetary amount be allocated to it on account of charges arising under CCAA order — Application dismissed — Proposed charge levy treated creditor like other senior secured lenders and was prima facie equitable — Creditor had participated in CCAA process for 18 months and had obtained direct and potential benefits.

Table of Authorities

Cases considered by *K.M. Horner J.*:

Bank of Nova Scotia v. Norpak Manufacturing Inc. (2003), 2003 CarswellOnt 4953, 180 O.A.C. 40 (Ont. C.A.) — referred to

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 5 C.B.R. (5th) 56 (N.L. T.D.) — followed

Hunjan International Inc., Re (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

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

Western Express Air Lines Inc., Re (2005), 7 P.P.S.A.C. (3d) 229, 2005 BCSC 53, 2005 CarswellBC 72, 10 C.B.R. (5th) 154 (B.C. S.C.) — distinguished

Winnipeg Motor Express Inc., Re (2009), 2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242, 56 C.B.R. (5th) 265, 243 Man. R. (2d) 31 (Man. Q.B.) — considered

Winnipeg Motor Express Inc., Re (2009), 245 Man. R. (2d) 274, 466 W.A.C. 274, [2009] 12 W.W.R. 224, 59 C.B.R. (5th) 36, 2009 MBCA 110, 2009 CarswellMan 512 (Man. C.A. [In Chambers]) — referred to

Statutes considered:

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

APPLICATION by creditor for declaration that no monetary amount be allocated to it on account of charges arising under *Companies' Creditors Arrangement Act* order.

***K.M. Horner J.*:**

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 companies.[1] 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.

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.

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: *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277, 28 Alta. L.R. (5th) 239 (Alta. Q.B.); *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.); *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204, 243 Man. R. (2d) 31 (Man. Q.B.), aff'd 2009 MBCA 110, 245 Man. R. (2d) 274 (Man. C.A. [In Chambers]); *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56 (N.L. T.D.); *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.); *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.); and, *Bank of Nova Scotia v. Norpak Manufacturing Inc.* (2003), 180 O.A.C. 40 (Ont. C.A.).

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 Ltd., Re*, 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 Trailer & Marine Ltd., Re* 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 Ltd., Re* dealt with a number of applications to apportion CCAA costs incurred with respect to a failed attempt to reorganize. In *Respec Oilfield Services Ltd., Re*, 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 Inc., Re* 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 Inc., Re* 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 (1985) Ltd., Re* 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 Inc., Re* 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 Equipment (1985) Ltd., Re*, 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 International Inc., Re*, paras 58 and 73; *Winnipeg Motor Express Inc., Re*, 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 Inc., Re*, 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 Equipment (1985) Ltd., Re*, 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 Ltd., Re*, 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 Ltd., Re* and *Western Express Air Lines Inc., Re* 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 Oilfield Services Ltd., Re* and *Western Express Air Lines Inc., Re* 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.

Application dismissed.

Footnotes

1 There 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)

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Medican Holdings Ltd., Re | 2013 ABQB 224, 2013 CarswellAlta 513, [2013] A.W.L.D. 2731, 16 B.L.R. (5th) 327, 229 A.C.W.S. (3d) 331 | (Alta. Q.B., Apr 23, 2013)

2010 ABQB 277
Alberta Court of Queen's Bench

Respec Oilfield Services Ltd., Re

2010 CarswellAlta 830, 2010 ABQB 277, [2010] A.W.L.D. 2826, 17 P.P.S.A.C. (3d) 148, 188 A.C.W.S. (3d) 31, 28 Alta. L.R. (5th) 239, 68 C.B.R. (5th) 189

In the Matter of the Bankruptcy of Respec Oilfield Services Ltd.

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of Respec Oilfield Services Ltd.

Myra B. Bielby J.

Heard: March 25, 2010
Judgment: April 28, 2010
Docket: Edmonton BK03-115337, 0903-06823

Counsel: Richard Reeson, Q.C., Satpal Bhurjee for PricewaterhouseCoopers Inc.
Terrence Warner for National Leasing Group Inc.
Charles Russell, Q.C. for Canadian Western Bank
Kibben Jackson for Business Development Bank
Ryan Zahara, Michael O'Brien for Komatsu International (Canada) Inc.
Sean Collins, Jeffrey Whyte for GE Capital
Stephen Livingstone for Little Red River Cree Nation
Colin Brousson, Eugene Macchi for North Shore Leasing Ltd.
Paul Pidde for Ford Credit Canada
Robert Kennedy for Jim Pattison Leasing
Justice Agyemang for Bank of Nova Scotia
Ed Bresky for Great West Kenworth
Karl Driedger for K & N Contracting
Tara Hamelin for Wells Fargo Equipment Finance Company

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
  IV.2 Fees and expenses

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses
Debtor was placed into receivership — Number of pieces of equipment were sold in auction, monitor applied for approval to apportion its costs among all creditors on pro rata basis — CWB bank was secured lender that held first priority claim and BDC was secured creditor that held second priority claim over much of debtor's assets — Pursuant to court order, any lender or lessor who wished to remove equipment subject to its security from auction was permitted to do so upon paying monitor deposit on account of any portion of allocated costs it was found liable to pay — Two banks supported proposed distribution, bank CWB was likely to recover entire indebtedness whereas BDC anticipated shortfall — Monitor brought application for approval to deduct allocated costs due from each creditor from sale proceeds of equipment upon which that creditor had charge, where creditor removed equipment deposit paid to monitor would be applied to its share of allocated costs, and where deposit was inadequate to cover its share then judgment against that creditor for shortfall — Application granted — Argument that costs be allocated based on proportion of debt owed to each creditor to total debt owed by debtor was rejected as it would result in creditor who would receive least from auction bearing greatest portion of costs — Monitor granted judgment against GE for amounts owed, court in Companies' Creditors Arrangement Act proceeding has ability to deal with assets, debt and costs incurred in that proceeding including right to grant judgment against party which it determines liable to contribute to those costs — Fairness did not require that two banks bear more than their pro rata share of allocated costs, plan did impose pro rata contribution on CWB but it would ultimately be indemnified because its security gave it first charge for such recovery, however, BDC would bear ultimate cost because it held second-in-line security — Fact that CWB would be indemnified in full was because it had enough security to protect it for its entire exposure while others did not — JPL, true lessor of equipment, was exempted from contributing to allocated costs as there were true leases in sense that parties always intended leased equipment would be returned to JPL — Restructuring attempt did not benefit JPL and JPL did not receive uninterrupted flow of lease payments — Wages payable to debtor's principals were incurred prior to granting of receivership order and on account of work done while monitor was in place, funds ordered to be withheld from distribution of auction proceeds.

Table of Authorities

Cases considered by *Myra B. Bielby J.*:

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 5 C.B.R. (5th) 56 (N.L. T.D.) — followed

Hunjan International Inc., Re (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — distinguished

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — followed

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — referred to

Western Express Air Lines Inc., Re (2005), 7 P.P.S.A.C. (3d) 229, 2005 BCSC 53, 2005 CarswellBC 72, 10 C.B.R. (5th) 154 (B.C. S.C.) — distinguished

Winnipeg Motor Express Inc., Re (2009), 2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242, 56 C.B.R. (5th) 265, 243 Man. R. (2d) 31 (Man. Q.B.) — distinguished

Statutes considered:

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

s. 11 — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

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

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

APPLICATION by monitor to have its proposed apportionment of allocated costs approved.

Myra B. Bielby J.:

Decision

1 An attempted reorganization of a debtor company under the *Companies' Creditors Arrangement Act* ("CCAA") failed whereupon the debtor was placed into receivership. A number of pieces of heavy equipment were sold in an auction held before the termination of the CCAA stay. The Monitor applied for approval to apportion its costs, the costs of conducting the auction and Debtor-in-Possession financing costs ("the allocated costs") among all creditors on a *pro rata* basis, to deduct those costs from the auction proceeds payable to creditors who had security on the auctioned equipment, and to distribute the balance of the auction proceeds accordingly.

2 The Court approved an apportionment of costs calculated through a comparison of the net funds received on the sale of each secured asset or the estimated value of unsold secured assets against the value of the debt secured on that asset. Where costs of sale could be traced to a specific asset those costs were deducted from the value received on the sale of that asset. Otherwise the costs of sale were attributed on the same *pro rata* basis as other costs.

3 Approval was granted as sought except in relation to a proposed apportionment of allocated costs to a "true" lessor of equipment. That lessor was not obliged to bear any portion of those costs because it received no benefit from the CCAA proceedings. The lease payments it received during the period of the stay were no more than that to which it was entitled as a continuing supplier pursuant to s. 11.01(a) of the CCAA.

4 The auctioneer had provided a guaranteed price for assets placed in the auction. GE Canada Equipment Financing G.P. ("GE") had first-in-priority security on assets for which that guaranteed price was $1.4 million. It elected to retrieve those assets from the auction rather than allow them to be sold. They remained in GE's possession and unsold as of the date of this application. GE led evidence to show that those assets are worth only $990,000. It was unsuccessful in its application to reduce its *pro rata* share of the allocated costs through using $990,000 rather than $1.4 million as the basis upon which that share should be calculated. It would not be fair and equitable to permit a creditor to avoid the consequences of a poor business decision by foisting them in part on other creditors. The Monitor was granted judgment against GE for its share of the allocated costs in the amount of $215,688.46, less any portion of the deposit paid by GE which has not been accounted for in the determination of that figure.

5 The charge granted to the Monitor under the initial CCAA order ("the First Day Order") was increased from $200,000 to $240,000 to reflect the estimated actual costs to be incurred by the Monitor to complete the distribution and other work remaining from events which occurred during the operation of the stay. This was notwithstanding the fact that the Monitor otherwise did not have any function in relation to the disposition of remaining assets, which were placed in the control of the Receiver shortly after the conclusion of the equipment auction.

Facts

6 On May 8, 2009 Respec Oilfield Services Ltd. ("Respec") applied for and received a First Day Order granted pursuant to s. 11 of the CCAA imposing a stay of proceedings on any actions by its creditors to collect any debts owing to them and appointing PricewaterhouseCoopers ("PWC") as Monitor. The initial stay was to expire May 23, 2009 but was extended by various Court orders up until November 30, 2009 at which time PWC was appointed Receiver of the undertaking upon the collapse of Respec's efforts to devise a plan of compromise of its debts.

7 Canadian Western Bank ("CWB") is the secured lender which holds a first priority claim and the Business Development Bank ("BDC") is the secured creditor which holds a second priority claim over all Respec's assets except for a significant number of pieces of heavy equipment which were subject to personal property security interests ("PMSI"s) held by various lenders and finance companies. CWB and BDC are together referred to as "the two banks".

8 Pursuant to the provisions of orders granted by me on October 8 and 20, 2009, Respec entered into a contract with Ritchie Bros. Auctioneers ("Ritchie Bros.") which provided that many pieces of the heavy equipment were to be auctioned on November 24 and 25, 2009 in Grande Prairie, Alberta. Under that contract Ritchie Bros. undertook to pay Respec a minimum amount of money in respect of each item auctioned irrespective of the net bid price received at the auction.

9 Pursuant to Court order any lender or lessor who wished to remove equipment subject to its security from the auction, and take it away was permitted to do so upon paying the Monitor a deposit on account of any portion of the allocated costs it was ultimately found liable to pay.

10 Certain lenders paid this deposit and removed their equipment including GE, Wells Fargo Equipment Finance Co. ("Wells Fargo") and Jim Patterson Lease ("JPL"). The balance was sold netting $5,643,858.46, a figure below the guaranteed price offered by Ritchie Bros. of $6,338,000. Ritchie Bros. has paid the Monitor an additional $114,048, being the difference between the guaranteed and actual net auction proceeds.

11 The Monitor incurred certain professional and legal fees during the period of the stay, secured by the granting to it of a $200,000 administration charge in the First Day Order. It anticipates incurring additional fees to a maximum of $35,000 to conclude its involvement in this matter. In its 15th report dated March 12, 2010 the Monitor has recommended that these costs as well as all the other allocated costs including the Debtor-in-Possession financing ("the DIP funds") and the indirect costs incurred to sell assets in the auction be allocated on a *pro rata* basis among the secured creditors based on their actual or estimated recovery (for those assets not yet liquidated). Any direct costs of sale of a particular asset are proposed to be charged against the sum recovered on the sale of that asset.

12 Then, based on that proposed distribution, the Monitor seeks approval for the following:

• to deduct the allocated costs due from each creditor from the sale proceeds of the equipment upon which that creditor had a PMSI charge and to distribute the net balance to that creditor;

• where a creditor removed the equipment upon which it had security from the auction the deposit it paid to the Monitor would be applied to its share of the allocated costs;

• where the deposit is inadequate to cover its share in full the Monitor would be granted a judgment against that creditor for the shortfall; and

• when the Receiver sells the assets upon which the two banks have security their shares of the allocated costs will be recovered from those sale proceeds.

13 In its 15th report the Monitor sets out its suggested calculation of the allocated costs relating to each piece of equipment or other asset, plus the direct costs of sale for that asset, if any, identifies the auction price received for or estimated value of each and proposes the net difference as the payment to be made to each affected creditor. Each of the two banks and a majority of the PMSI creditors support the Monitor's proposed distribution. GE, Caterpillar Financial Services Ltd. (Cat), Komatsu International (Canada) Inc. (Komatsu), Kingland Ford Sales Ltd. (Kingland), Wells Fargo, and JPL do

not. I note that the proposed allocation will require the two banks to contribute to the indirect costs of the auction notwithstanding that it is highly unlikely that either will receive any of the auction proceeds given their status as second-in-priority creditors behind the PMSI holders.

14 The DIP costs represent the amount of monies Respec borrowed to keep its operations afloat during the period of the stay while it was attempting to reorganize. They total $1.368 million. That money just happened to be borrowed from a company related to GE. The DIP costs have now been repaid in their entirety including interest; the remaining issue is which parties should bear ultimate responsibility for that liability and in what proportion.

15 The two banks each advise that CWB is very likely to recover its entire indebtedness from the liquidation of its security. BDC is left in the unenviable position of anticipating a significant shortfall after the liquidation of all remaining secured property including real estate, accounts receivable and some remaining equipment. The relative security positions of the two banks have the effect of ultimately redistributing to BDC any contribution CWB makes to the allocated costs as a result of this application. It is therefore in BDC's particular interest to ensure that the PMSI creditors bear as many of those costs as possible.

16 Accompanying its application to approve payment of the allocated costs and distribution of the balance of the auction proceeds, the Monitor also seeks an order requiring GE to pay it $215,688.46 as the balance remaining from its share of the apportioned costs. Unlike other PMSI creditors which removed equipment from the auction, GE did not pay the Monitor a deposit equivalent to its estimated *pro rata* share of the allocated costs but only $30,000 which apparently represented only its share of the administration costs, which are just a portion of the allocated costs. GE argues that it should not be obliged to pay this additional sum.

17 Wells Fargo objects to the Monitor's proposed distribution because it does not directly apportion the costs of transporting the equipment from Red Earth, Alberta to the auction site, i.e. the cost of transporting each piece of equipment is not charged against that piece. Rather, the entire transportation costs are allocated *pro rata* among the creditors.

18 JPL objects to paying any portion of the allocated costs because it is not a secured creditor but rather a "true lessor" of five pieces of heavy equipment.

19 The Monitor also seeks an order increasing the priority administration charge it has on Respec's assets on account of its professional and legal expenses from the current $200,000 to $240,000.

20 It also seeks direction as on whether funds payable to principals of Respec as wages, conditional upon their providing certain information which has yet to be provided, should be accounted for in the distribution of auction proceeds or from the liquidation of other assets in the subsequent receivership.

21 When this application was argued, BDC sought and was granted an order placing Respec in bankruptcy which gives it a strategic advantage in relation to a claim by Canada Revenue Agency in relation to unpaid Goods and Services Tax ("GST").

Issues

1. Should the proposed distribution of auction proceeds be approved?

   a. should GE be required to pay a further $215,688.46 on account of its share of the allocated costs?

   b. does fairness require the two banks to bear more than their *pro rata* share of the allocated costs?

   c. should the costs allocated to Wells Fargo be reduced rather than, as proposed, attributing the direct costs of disassembling the camps upon which it held security to its share of the auction proceeds given the costs of transporting all the equipment to the Ritchie Bros. auction are attributed on a *pro rata* basis among creditors?

d. should JPL, a "true lessor" of equipment, thus be exempted from contributing to the allocated costs?

2. Should the Monitor's administration charge be increased to $240,000?

3. Should the funds payable to Respec's principals as wages be "held back" from the distribution of the auction proceeds or taken from proceeds realized in the receivership? and,

4. Should Respec be placed into bankruptcy?

Analysis

1. Should the proposed distribution of auction proceeds be approved?

22 Each application to apportion costs incurred in a failed attempt to reorganize under the CCAA must be decided on its own facts. In cases where a pre-existing Court order prescribes the apportionment method to be used, that method will be used. Where, as here, no such order yet exists, the issue will be decided based on the facts in the case. I note that I have no obligation to attempt to allocate those costs on the basis of a cost-benefit analysis as to which creditor benefited to what degree as a result of the activities of the Monitor; see *Hunjan International Inc., Re*, 2006 CarswellOnt 2718 (Ont. S.C.J.). No such analysis has been undertaken in any case either by counsel or by myself. However, it is fundamental that any allocation of Court-ordered charges be fair and equitable; see *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 (Man. Q.B.) at para. 41.

23 Hall J. set out the following principles for apportioning costs in *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.) 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 relate 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 . Noneth eless it must be recogni zed that certain activiti es of the Receiv er in managi ng the affairs of the receive rship may have been less intensi ve or less advant ageous with respect to certain groups of assets as oppose d to other groups of assets and that the extent of this intensit y or disadv antage may not be immed iately or easily determ inable.
>
> To require the Receiv er to calcula te and determ ine an absolut ely fair value for its service s for one group of assets vis-à-vis another would likely not be cost effecti ve, would drive up the overall receive rship 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.

24 Allocating costs on a uniform percentage of the sale price received for the asset in question has been interpreted and applied to mean allocating the costs on the basis of a *pro rata* share using the total recovery as a factor in the calculation; see *Winnipeg Motor Express Inc. (Re)*, *supra*, at paras. 46 and 47. That is the approach the Monitor proposes be used here.

25 While none of the creditors challenging the Monitor's proposed cost allocation has described an alternate method of apportionment which they believe to be more equitable, the following challenges have been raised:

a. Should GE Be Required to Pay a Further $215,688.46 on Account of Its Share of DIP and the Administrative Charge?

i. Does the Proposed Allocation and Distribution Fail to Attribute a Proper Portion of the Allocated Costs to the Two General Secured Lenders, CWB and BDC?

26 In addition to seeking approval for apportionment of the allocated costs to the PMSI creditors, the Monitor has apportioned part of those costs to each of the two banks based on estimated liquidation values for the assets subject to their charges. GE originally challenged the Monitor's proposed distribution under the mistaken impression that all allocated costs were proposed to be borne by the PMSI creditors. This point has now been clarified.

27 GE did not press the issue of the proposed apportionment to be borne by the two banks being based on estimated values rather than realized values perhaps because its own share of the allocated costs, however calculated, must also be based on estimated values as the equipment it removed from the auction has yet to be sold by it.

28 GE also challenged the distribution on the basis that it was impossible to calculate the proper *pro rata* share of the allocated costs to be borne by the two banks because the total amount of Respec's indebtedness to them was not known. CWB was quick to advise that it is owed $1,872,000 plus interest to be calculated at prime rate plus 1% from May 21, 2009 to the date of payment. Similarly, BDC advised it was owed $3,430,000 as of March 22, 2010. The Monitor's calculation of their proposed share of allocated costs is based on these figures.

ii. Method of Determination of Pro Rata Share - the Debt Owed to Any PMSI Creditor as Against Respec's Total Indebtedness Versus the Net Sale Proceeds Recovered on the Sale of a Given Piece of Equipment as Against the Total Amount Owed on That Equipment;

29 The Monitor's calculation of each creditor's *pro rata* share of the allocated costs is based on a comparison of the sale proceeds recovered on the sale of each asset or the estimated value of that asset as against the total amount owed by Respec on that asset. GE argued that its share should be calculated based on a comparison of the debt owed to it against the total debt owed by Respec to all its creditors. While each application for apportionment must be considered in the context of its own facts, no case law was produced in which any court has attributed costs on this basis.

30 BDC vigorously opposed this proposal which would have the effect of offloading most of the allocated costs onto it, reducing its recovery accordingly. That is because it and CWB are together owed much more than the PMSI lenders. However, the two banks will recover little, if anything, from the auction proceeds as they are in a position to recover only any surplus earned after applying the sale proceeds produced from the auction of a given piece of equipment from the debt owed to the PMSI lender holding security on it.

31 In other words, if the allocated costs were to be calculated as suggested by GE they would be borne in large measure by the two banks, and ultimately therefore by BDC which will not receive much, if any, benefit from the Monitor's actions in organizing the auction which produced the sale proceeds which are now to be distributed virtually in their entirety to the PMSI creditors.

32 This is not a situation where BDC or the Monitor must prove that GE and the other PMSI creditors would be unjustly enriched at the cost of BDC before I can take this consideration into account. The laws of unjust enrichment do require that certain prerequisites be met which may or may not have been established on the evidence in this application. However, what is important, and is not disputed is that the approach advocated by GE would result in the creditor who will receive the least from the auction proceeds bearing the greatest portion of them, contrary to the principles in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094 (Alta. Q.B.) at para. 20 where Chief Justice Wachowich concluded that in allocating costs it is unfair to ignore the differences in the type of security held by various creditors and the degree of potential benefit that each creditor may derive from the proceedings.

33 I therefore reject GE's proposal that the allocated costs be allocated among creditors based on proportion of debt owed to each creditor to total debt owed by Respec.

iii. should GE's pro rata share of allocated expenses be calculated on the basis that its secured assets have a value of $990,000 or $1.4 million?

34 In the supplement to the Monitor's 15th report dated March 18, 2010 the Monitor provided evidence that the guaranteed minimum price offered by Ritchie Bros. for the equipment GE removed from the auction was $1,398,200. There was also some additional equipment removed which was not included in the guarantee which the Monitor values at $100,000.

35 There is no evidence as to why GE elected to remove the equipment against which it held PMSI security from the auction. GE's counsel advised the Court that it removed the equipment for business reasons, based on a policy that required GE to be responsible for liquidating its own security. That equipment has not yet been liquidated.

36 On October 27, 2009 GE advised the Monitor's staff that it had received an evaluation of $1.4 million on that equipment from Century Services Inc. However, in support of this application it filed evidence that it had received only an appraisal of $990,000 "on an orderly liquidation" basis dated November 25, 2009 from that firm. The date of that $990,000 evaluation is the same as the date upon which Ritchie Bros. made its offer of the $1.4 million guarantee.

37 GE asks that the $990,000 value be used to calculate its proportionate share of the allocated costs rather than the $1.4 million figure used by the Monitor. The Monitor argues that the other creditors should not be penalized as a result of a poor decision made by GE which could have received a minimum of $1.4 million for its equipment had it been left in the auction. Further, it has not provided evidence to support its earlier advice that it had a higher appraised value for it at the time the decision was made to withdraw it.

38 In furtherance of the principle that costs should be allocated in a fair and equitable manner, it is fair and equitable that one creditor not be permitted to avoid the consequences of a poor business decision by foisting them in part on other creditors. GE should bear the consequences of its decision to walk away from a guaranteed price almost 50% higher that the most recent appraised value for this equipment. GE's share of the allocated costs should be calculated based on those assets being valued at $1.5 million, being the total of the Ritchie Bros. guaranteed price plus the estimated value of the additional equipment at $100,000.

iv. Should GE Be Exempt from Contributing to the DIP Financing Costs Because of Its Relationship to the DIP Lender?

39 GE's counsel argued that had GE known it would have had to bear a portion of the DIP financing costs it would not have permitted its related company to advance the DIP financing. There is no evidence which supports this allegation.

40 GE argues that it took a risk in advancing the DIP loan and urges the Court to exercise its discretion to excuse it from responsibility for its *pro rata* share of that obligation on the basis it would be equitable given that only it, and no other creditor, was prepared to advance these operating funds to the debtor company as it attempted to restructure. I recall, however, that another lender was available and willing to advance DIP financing and that I approved the GE source on the basis that it would charge a lower cost for lending than that lender.

41 GE argues that by advancing the DIP financing it assumed a risk attendant with the potential benefit which might ensue had the restructuring of Respec been successful. Had that restructuring been successful presumably all creditors would have secured a benefit beyond that which they will recover through the liquidation of Respec's assets. GE should therefore be compensated for taking that risk on behalf of all creditors in the form of its not being required to bear its share of the DIP financing costs.

42 GE was repaid the entire DIP loan of $1.138 million within four months of it being borrowed plus an administration fee of $300,000 plus interest which was charged at 9.72% per annum over the bank's acceptance rate. CWB argued that this

TAB 3

2009 MBCA 110
Manitoba Court of Appeal [In Chambers]

Winnipeg Motor Express Inc., Re

2009 CarswellMan 512, 2009 MBCA 110, [2009] 12 W.W.R. 224, 182 A.C.W.S. (3d) 15, 245 Man. R. (2d) 274, 466 W.A.C. 274, 59 C.B.R. (5th) 36

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD., and 5275634 MANITOBA LTD.

Freedman J.A.

Heard: October 6, 2009
Judgment: November 10, 2009
Docket: AI 09-30-07191

Proceedings: refusing leave to appeal *Winnipeg Motor Express Inc., Re* (2009), 2009 CarswellMan 383, 2009 MBQB 204, 56 C.B.R. (5th) 265 (Man. Q.B.)

Counsel: R.A. McFadyen for Paccar Financial Services Ltd.
H.G. Chaiton for Heller Financial Canada Holding Company, GE Canada Leasing Services Company
D.G. Ward, Q.C. for Business Development Bank of Canada
D.R.M. Jackson for Ernst & Young
K.A. McCandless (on a watching brief) for RamWinn Diesel Inc.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Personal property security
I Scope of legislation
I.6 True lease versus sales financing

Headnote

Personal property security --- Scope of legislation — True lease versus sales financing
W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using

actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges, and were entitled to payment for use of property during restructuring under Act — Agreement between W Inc. and M Inc. was determined to be true lease, but agreement with S Corp. was financing lease or sufficiently akin to one — Creditor P brought application for leave to appeal — Application dismissed — Reasons of judge amply demonstrated that there was no substance to P's arguments — Judge was well aware of differences in nature of security held by secured creditors — There was no misdirection by judge and no injustice in result, which was based on reasonable recommendation of monitor.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges and are entitled to payment for use of property during restructuring under Act — Agreement between W Inc. and M Inc. was determined to be true lease, but agreement with S Corp. was financing lease or sufficiently akin to one — Creditor P brought application for leave to appeal — Application dismissed — Reasons of judge amply demonstrated that there was no substance to P's arguments — Judge was well aware of differences in nature of security held by secured creditors — There was no misdirection by judge and no injustice in result, which was based on reasonable recommendation of monitor.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
W Inc. filed for protection under Companies' Creditors Arrangement Act — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Charges consisted of DIP loan and administrative charges incurred since stay of proceedings was granted — Motion was brought for ruling on appropriate distribution of DIP loan and administrative charges — Methodology proposed by monitor on its face was determined to be fair, had objective basis and was applied uniformly — Creditor P brought application for leave to appeal — Application dismissed — Reasons of judge amply demonstrated that there was no substance to P's arguments — Judge was well aware of differences in nature of security held by secured creditors — There was no misdirection by judge and no injustice in result, which was based on reasonable recommendation of monitor.

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Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — referred to

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Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — referred to

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Statutes considered:

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

s. 13 — referred to

APPLICATION by creditor for leave to appeal judgment reported at *Winnipeg Motor Express Inc., Re* (2009), 2009 CarswellMan 383, 2009 MBQB 204, 56 C.B.R. (5th) 265 (Man. Q.B.).

Freedman J.A.:

Overview

1 This is an application by Paccar Financial Services Ltd. (Paccar) for leave to appeal an order (the Order) made by the judge supervising the proceedings under the *Companies' Creditors Arrangement Act* (the *CCAA*) in respect of Winnipeg Motor Express Inc. and related entities (WME). The Order allocates among secured creditors of WME liability to pay certain court-ordered charges (the Charges) relating to the *CCAA* proceedings. I have concluded that leave to appeal the Order should be denied.

Background

2 WME was in the transportation business. Paccar leased certain equipment to WME, and Heller Financial Canada Holding Company and GE Canada Leasing Services Company (Heller) provided financing to WME.

3 WME has been under the protection of the *CCAA* since May 15, 2008, when the judge made her initial order (the Initial Order). In the Initial Order, the judge provided for the Charges to facilitate efficient and orderly proceedings under the

CCAA. The Charges comprise expenses incurred since the date of the Initial Order, such as a debtor-in-possession (DIP) loan, the fees of Ernst and Young (the monitor), the monitor's and WME's legal fees and other items. The aggregate amount of the Charges, some $1.8525 million, was not at issue before the judge. What was at issue was by whom and in what proportion the Charges should be borne.

4 The resolution of this matter is the last step in the *CCAA* proceedings relating to WME. During the course of those proceedings, the monitor made a number of reports about the restructuring and the judge made a number of orders. At one point, subsequent to the Initial Order, when it appeared that WME could not reorganize and continue in business successfully, its assets were sold. An order of bankruptcy against WME was made by the judge on July 2, 2009.

5 The monitor filed its Twelfth Report dated February 10, 2009, in which it recommended to the judge a method for the allocation of the Charges among the secured creditors of WME. That report led to a number of questions from creditors which were answered in the monitor's Fourteenth Report dated April 22, 2009, and the supplement thereto dated April 28, 2009.

6 The monitor recommended that the Charges be allocated among WME's secured creditors based on *pro rata* recovery of the amounts of their claims, using actual or estimated recovery. As the judge stated (at para. 5), the monitor relied on certain principles in making its recommendations, including that a strict accounting on a cost/benefit basis was impractical and that the allocation should be equitable rather than equal.

7 Paccar opposed the recommendation, arguing that Heller, which had a multi-million dollar loan outstanding with WME at the time of the Initial Order, had suffered virtually no loss and should pay a larger proportion of the Charges. In contrast, said Paccar, it had suffered a very substantial loss and was being asked to absorb a disproportionate amount. Some other creditors opposed while some supported the monitor's recommendation.

The Judge's Decision

8 The judge took into account the applicable legal principles; this is not challenged by Paccar. She noted (at para. 41) that the determination of a method of allocation is a matter for the judge's discretion, and said that any means of calculating a precise percentage would be arbitrary. She relied on several of the cases frequently cited in such applications, including *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206 (Alta. Q.B.), *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56 (N.L. T.D.), *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), and *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.).

9 She observed that the monitor's recommendation, in effect, simply required the secured creditors to pay a fee to collect their outstanding receivables, which was "not a novel concept in debt collection" (at para. 46). She found the methodology to be fair, objective and uniformly applied. Thus, the onus shifted to those opposing the recommendation (see *Hunjan* at para. 73) to demonstrate that the proposal was unfair or prejudicial.

10 She was cognizant of the fact that she could take into account the different nature of security held by creditors, as well as the potential benefit to them when deciding whether the proposed allocation was equitable. She then said (at para. 51):

> My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' [including the present applicant, Paccar] effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. ....

11 She declined any attempt to undertake an analysis of precisely what benefit each creditor had received as a result of the *CCAA* proceedings. She considered and rejected Paccar's suggestion that relative loss suffered be used as a basis for allocation, saying that would amount to readjusting priorities among creditors. She did, however, note that equipment lessors

(such as Paccar) in a business operation like WME's "do suffer undue prejudice" (at para. 62), but in this case that was mitigated by the payment for leased equipment which started about 10 weeks after the Initial Order. Thus her conclusion was that: "the undue prejudice suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount [*sic*] to justify the uniform application of the methodology proposed by the monitor" (*ibid.*).

12 She approved the methodology proposed by the monitor, with one relatively minor adjustment relating to a discount rate on certain leases.

The Leave Application

13 Paccar now seeks leave to appeal the Order, leave being required by s. 13 of the *CCAA*. Paccar was the only creditor which sought leave to appeal. Its application was opposed by Heller and Business Development Bank of Canada. Counsel for another creditor, RamWinn Diesel Inc., attended on a watching brief, and counsel for the monitor was present to provide assistance if needed.

14 In a previous leave application in these proceedings (*Winnipeg Motor Express Inc., Re*, 2008 MBCA 133, 236 Man. R. (2d) 3 (Man. C.A. [In Chambers])), my colleague Monnin J.A. referred to the principles governing decisions by judges on leave applications such as this. He noted that leave is to be granted sparingly; see, e.g., *Edgewater Casino Inc., Re*, 2009 BCCA 40, 265 B.C.A.C. 274 (B.C. C.A.) at para. 18. He referred to the dicta of the Alberta Court of Appeal in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) (at paras. 6-7):

> .... [T]here must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.*, (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.*, (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.*, (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).
>
> Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) at 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point 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.
>
> . . . . .

Paccar's Argument

15 Paccar observed that leave may be granted where the appellate court decides that the judge has given no or insufficient weight to relevant considerations, resulting in a wrongful exercise of discretion by the judge. It relied on the decision of the Saskatchewan Court of Appeal in *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 43 C.B.R. (5th) 42 (Sask. C.A.) (which I will discuss below), where leave was granted to appeal part of an order of allocation of *CCAA* charges.

16 Paccar argued that its application satisfied all the tests described in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) (see para. 14 above). It said that there are few

reported decisions on the allocation of charges such as those here, as between major secured creditors, so the matter is of significance to the practice under the *CCAA*. As well, the point is important to the proceedings themselves, if only because of the magnitude of money involved. And clearly an appeal of the Order will not interfere with the progress of the proceedings, since the restructuring process has come to an end.

17 Paccar said that the real issue here was whether its proposed appeal was meritorious. It said that the judge had treated all secured creditors equally by requiring each to pay a *pro rata* allocation based on total recovery, but this approach was flawed. Paccar argued that the judge gave no weight to the differences in the security held by it and other equipment lessors and by Heller, and to the potential benefit Paccar and Heller received from the proceedings. On this latter point, Paccar said that Heller's projected losses were about \$50,000 whereas Paccar's were over \$2.7 million. Thus it was reasonable to infer that Heller "benefitted mightily" from the *CCAA* proceedings as compared to Paccar, even taking into account the different nature of their respective security.

18 The judge erred, said Paccar, in deciding that allocations of the Charges should be based on total recovery, thus treating all secured lenders on an equal basis. She erred in placing little or no weight on the differences in security and on the benefit received. Paccar reiterated its position that it never stood to gain from the *CCAA* process and suffered significantly from it.

19 It said that the allocation ought to follow the result in *Hunters Trailer & Marine Ltd.*, where a mortgagee was allocated the burden of charges on other than a proportionate basis (at para. 21):

> ... UMC [the mortgagee] 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.

20 Paccar suggested that the equipment lessors should share in not more than ten per cent of the Charges. The effect of the Order is to allocate about 15.5 per cent of the Charges to Paccar and about 65.6 per cent to Heller. Paccar acknowledged that it took no issue with the principle that in *CCAA* proceedings the collective good prevails and that secured creditors should bear a share of the Charges; it was unhappy with the amount of the charges it was ordered to bear. It did not allege any error of law by the judge, but argued rather that in her exercise of discretion she erred in failing to give weight to the differences in security and to the benefits received.

Decision

21 I am far from persuaded that a case has been made out for leave to be granted.

22 Of the four factors subsumed in the general criterion which is applicable in these situations (see para. 14), two are at issue. Heller does not dispute that the appeal would be significant to the action itself, since it is the Order which determines who bears the Charges. Further, the appeal would obviously not delay the proceedings, which are complete except for this particular matter.

23 The other two factors are at issue, and in my opinion Paccar must fail on each.

24 First, and most importantly, in my view the proposed appeal lacks merit.

25 If leave were to be granted, this court would apply a standard of review regarding the Order which would vary depending on the nature of the issue under consideration. See *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at paras. 22-28. The court would only modify or set aside the Order if one (or more) of three circumstances existed.

26 First, applying a standard of correctness, the court would have to conclude that the judge erred at law. That is not argued or at issue here. Or, second, applying a standard of palpable and overriding error, the court would have to conclude that the judge made such an error on a factual matter. That is also not argued or at issue here. Or, finally, applying a standard of considerable deference, the court would have to conclude that in exercising her discretion the judge misdirected herself, or

the Order was so clearly wrong as to amount to an injustice. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at 1374-75. Paccar argued, in effect, that this is what had occurred.

27 The judge had a detailed and intimate knowledge of the affairs of WME in the *CCAA* proceedings. She gave full consideration to the objections of those creditors who opposed the monitor's recommendation. She was fully familiar with the positions of the parties, and with the implications of her Order. She advised herself properly on the law and relied on the applicable decisions to assist her reasoning process. She made no error in her factual analysis. Against that backdrop of her thorough consideration of all relevant matters she exercised her discretion in favour of adopting the monitor's recommendation.

28 That recommendation was based on sound practice and precedent, as the judge found. See the observations of C. Campbell J. in *Hunjan* (at paras. 4-5, 57):

> 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.
>
> 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."
>
> 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.) at 209-212.]

29 As noted, Paccar acknowledges that the judge made no legal error. It did not assert that she had made a palpable and overriding error (or, indeed, any error) in relation to factual matters. There is no issue of jurisdiction. But the decision, argued Paccar, shows that the judge "failed to adequately consider the arguments advanced by Paccar." It shows, in Paccar's submission, that the judge failed to give any weight to the degree of potential benefit to Paccar and Heller from the *CCAA* proceedings and to the difference in security held by those creditors.

30 But, as a review of the reasons of the judge amply demonstrates, there is no substance to Paccar's arguments. The judge did, in fact, consider all the issues raised by Paccar. She rejected Paccar's arguments and adopted a different approach. She did not give to certain matters the weight which Paccar urged her to give, but she was fully cognizant of the issues and clearly explained why she was taking a different approach.

31 For example, Paccar agreed that it was open to the judge to find that it received some benefit from the *CCAA* proceedings, but it complained that she did not analyze the potential benefit to the parties. The judge expressly dealt with this, saying, when referring to the benefits received by the secured creditors (at para. 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 [the] objectives of the ***CCAA***.

32 Similarly, the judge was well aware of the differences in the nature of the security held by the secured creditors. She

rejected Paccar's suggested solution in these words (at para. 53):

> I am also of the view that the relative loss - the issue raised by Paccar - results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and [another creditor's] loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

33 The present dispute is not based on any principle; rather, it relates only to the dollar amount of the Charges which Paccar has to bear. As Heller stated succinctly in its motion brief: "[t]he Court is not being asked to establish a general principle or a new test for the allocation of the Charges - it is simply being asked to lower the amount allocated to Paccar."

34 In any given case there may be more than one legitimate method of cost allocation. That simply emphasizes the high degree of deference an appellate court would give to a supervising judge's cost-allocation order. As C. Campbell J. said in *Hunjan* (at para. 71):

> ... [E]ach 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.

35 I see no flaw in the judge's reasoning or in her analysis. The relevant factors were properly considered, and the weight to be accorded to the factors was for her discretion. See *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4583 (Ont. C.A.) at para. 9. She exercised her discretion judicially and in accordance with the applicable principles. See *Stelco Inc., Re* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para 63.

36 More to the point, there was no misdirection by the judge and I see no injustice in the result, which is based on a reasonable recommendation of the monitor. While Paccar is unhappy with the result, it cannot justifiably complain about the judge's reasoning process, nor has it persuaded me that this court might find that such result is unjust.

37 I can see no basis upon which this court would act to upset the judge's exercise of discretion in this matter. Thus, the proposed appeal lacks merit.

38 Paccar also fails in respect of the other factor, that is, whether the point on appeal is of significance to *CCAA* practice. I agree with the argument of Heller's counsel, to the effect that the decision of the judge raises no issues of general application and thus has little, if any, precedential value. See *Blue Range Resource Corp., Re*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Alta. C.A.) at paras. 5, 17, and *Repap British Columbia Inc., Re* (1998), 9 C.B.R. (4th) 82 (B.C. C.A. [In Chambers]) at para. 9.

39 Paccar argued that *Stomp Pork* shows that the allocation of court-ordered charges may be a proper subject for appellate review. As described by Jackson J.A. for the court, the issue to be determined was the extent to which a chambers judge had authority "to allocate priority among the assets of pre-filing creditors for debtor in possession ... financing *early in the process*" (at para. 1) (emphasis added) of *CCAA* proceedings. The court (at para. 12) refused leave to appeal the decision regarding priority for financing that had already been advanced, but did grant leave to appeal the allocation regarding future financing. That is clearly not this case.

40 The court said (at para. 16) that the question whether the restructuring judge can allocate priority *before* the outcome of the restructuring is known was a matter of first instance. The restructuring judge had acknowledged as much, noting in her decision that "[t]he issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152 (Sask. Q.B.) at para. 21). The Court of Appeal granted leave to appeal her decision. In my view, the decision granting leave is of no assistance or application here.

41 Paccar's proposed appeal simply seeks a lesser participation in the burden of the Charges. There is nothing in this

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Respec Oilfield Services Ltd., Re | 2010 ABQB 277, 2010 CarswellAlta 830, 17 P.P.S.A.C. (3d) 148, 68 C.B.R. (5th) 189, 28 Alta. L.R. (5th) 239, [2010] A.W.L.D. 2826, 188 A.C.W.S. (3d) 31 | (Alta. Q.B., Apr 28, 2010)

2006 CarswellOnt 2718
Ontario Superior Court of Justice

Hunjan International Inc., Re

2006 CarswellOnt 2718, 21 C.B.R. (5th) 276

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 compromise or arrangement with respect to Hunjan International Inc., Hunjan Moulded Products Ltd., Hunjan Tools & Mould Ltd. and Hunjan Holdings Ltd. (Applicants)

C. Campbell J.

Heard: March 8, 2006
Judgment: May 3, 2006
Docket: 05-CL-5886

Counsel: 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 Imperical 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

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Debtors obtained initial order granting protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Initial order allowed debtors to borrow funds from lender in order to briefly continue operations while attempts were made to secure necessary financing to continue to operate long-term — Debtors reached such accommodation agreement with lender — Accommodation agreement anticipated shortfall between financing advances and post-filing receipts to be generated by debtors, and therefore lender reached agreement with debtor's customer to take responsibility for half of such deficiency —

Debtors never achieved restructuring or going-concern sale — Lender was granted receivership order terminating CCAA proceedings and appointment of receiver to oversee debtors' assets — Because debtors had ceased all operating activities before receivership order was granted, no on-going revenues existed with which to fund receiver's fees or costs from CCAA proceedings — Receiver proposed allocation of costs required that debtor's customers pay owed deficiency but did not mandate that lender provide other half — Hearing was held to rule on propriety of receiver's proposed allocation of costs — Receiver's proposed allocation of costs was upheld as it was not unfair or inequitable — Receiver had reasonably determined that lender had not contractually agreed to fund deficiency — Creditors who were grieving receiver's proposal had not been parties to accommodation agreement — Surrounding facts did not illustrate involved parties felt lender would be responsible for half of deficiency — Lender would not have provided financing if it were aware of significant liability in event of deficiency.

Table of Authorities

Cases considered by *C. Campbell J.*:

Canadian Imperial Bank of Commerce v. Acchione Construction Co. (1989), 36 C.L.R. 144, 1989 CarswellOnt 708 (Ont. S.C.) — considered

Hickman Equipment (1985) Ltd., Re (2004), 5 C.B.R. (5th) 56, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 2004 NLSCTD 164, 2004 CarswellNfld 263 (N.L. T.D.) — referred to

Hunters Trailer & Marine Ltd., Re (2001), 2001 ABQB 1094, 2001 CarswellAlta 1636, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp. (1993), 106 D.L.R. (4th) 132, 67 O.A.C. 49, 1993 CarswellOnt 1844 (Ont. C.A.) — referred to

Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241, 1992 CarswellOnt 176 (Ont. C.A.) — referred to

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — considered

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

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

HEARING to rule on propriety of receiver's proposed allocation of costs from failed CCAA proceedings.

***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 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

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.

End of Document

TAB 5

2001 ABQB 1094
Alberta Court of Queen's Bench

Hunters Trailer & Marine Ltd., Re

2001 CarswellAlta 1636, 2001 ABQB 1094, [2001] A.J. No. 1638, [2002] A.W.L.D. 61, 110 A.C.W.S. (3d) 795, 305 A.R. 175, 30 C.B.R. (4th) 206

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of the Hunters Trailer & Marine Ltd.

Wachowich C.J.Q.B.

Heard: November 20, 2001
Judgment: December 14, 2001
Docket: Edmonton 0003-19315

Counsel: *Kentigern A. Rowan*, for Canadian Western Bank
Terrence M. Warner, for CIT Financial Ltd.
Douglas H. Shell, for Deutsche Financial Services
R. Craig Steele, for Bank of America Canada Specialty Group Ltd.
Juliana E. Topolniski, Q.C., for Mr. Blair Bondar
Darcy G. Readman, Darren R. Bieganek, for UMC Financial Management Inc.
Jeremy H. Hockin, Deborah J. Polyn, for Deloitte Touche Inc.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
U Inc. held first and second mortgage on real property of H Ltd. and assignment of certain life insurance proceeds — Order granted super-priority for debtor in possession financing or administrative costs over all of H Ltd.'s property — Interim receiver brought application to determine allocation of costs, including debtor in possession financing and administrative charges in Companies' Creditors Arrangement Act proceedings, between H Inc.'s major secured creditors — U Inc. allocated 15 per cent of monitor's fees and five percent of debtor in possession financing — Equitable that all major secured creditors be liable for portion of costs — Unfair to ignore differences in type of security held by creditors and degree of potential benefit that could be derived from proceedings under Act — U Inc. was in different position than other major secured creditors — Not equitable that it be allocated same proportion of costs — Interim receiver's proposal that U Inc. be charged percentage of monitor's fees was accepted — Debtor in possession financing was granted to meet H Ltd.'s urgent needs during sorting out period which was for benefit of all creditors — Majority of financing was used for wages, some of which could be attributable to building maintenance — Some of financing was used to provide security on premises — Some of financing was applied to life insurance premiums and protecting policy was of potential benefit to U Inc. — U Inc. was to bear portion of financing costs — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Wachowich C.J.Q.B.*:

Canadian Asbestos Services Ltd. v. Bank of Montreal, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) — considered

Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co. (1991), 5 C.P.C. (3d) 299, (sub nom. *Rieger (Wm. C.) Co. (Receivership), Re)* 126 A.R. 69 (Alta. Q.B.) — referred to

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246 (N.S. C.A.) — considered

Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — referred to

Statutes considered:

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

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

APPLICATION by interim receiver to determine allocation of costs between major secured creditors.

***Wachowich C.J.Q.B.*:**

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 InsolvencyAct* 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* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), at 359:

> 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 (*Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]); *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 *Keddy Motor Inns Ltd., Re* (1992), 90 D.L.R. (4th) 175 (N.S. C.A.). 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 *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). 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 v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Alta. 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.

Order accordingly.

End of Document

TAB 6

2014 ONSC 1531
Ontario Superior Court of Justice [Commercial List]

Royal Bank of Canada v. Atlas Block Co.

2014 CarswellOnt 2780, 2014 ONSC 1531, 238 A.C.W.S. (3d) 373

Royal Bank of Canada, Applicant and Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

D.M. Brown J.

Heard: February 13, 2014
Judgment: March 10, 2014
Docket: CV-13-10201-00CL

Counsel: S. Babe, for Applicant, Royal Bank of Canada
R. Fisher, for Business Development Bank of Canada
S. Friedman, for Receiver, KPMG Inc.

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

Related Abridgment Classifications

Debtors and creditors
XIV Miscellaneous

Headnote

Debtors and creditors --- Miscellaneous
Respondent debtors manufactured various brick and concrete building and landscaping supplies at three facilities — Largest facility built and equipped with loans of $17.5 million from creditor BDC, $4.8 million from provincial government and $2.2 million from creditor RBC — BDC and RBC also provided other financing — In October 2013, receiver appointed over all of debtors' assets and undertakings — Receiver sold most assets through two agreements in which purchaser allocated purchase price between real property, equipment leases, equipment and inventory — Receiver accepted purchaser's allocations and proposed to distribute some $8.2 million to BDC and $3.46 million to RBC, deducting fees and expenses pro rata — BDC, owed approximately $17.39 million — Receiver brought motion for court approval of distribution of net sales proceeds from certain of debtors' assets between two main secured creditors — Motion granted — Nothing inappropriate in purchaser's assumption of equipment leases from RBC on undiscounted basis — BDC's objection to allocation of only $1 million to real property previously valued significantly higher weakened by failure to advance objection at earlier time — Evidence did not establish allocation inappropriate in any event — Receiver's proposed distribution reasonable in circumstances.

Table of Authorities

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

B & M Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4587, 56 C.B.R. (5th) 313 (Ont. S.C.J.) — referred to

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

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

47 The Receiver also stated:

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

TAB 7

2009 ABQB 90
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2009 CarswellAlta 167, 2009 ABQB 90, [2009] A.W.L.D. 1593, [2009] A.W.L.D. 1594, [2009] A.J. No. 129, 52 C.B.R. (5th) 131

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 Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC (Applicants)

B.E. Romaine J.

Heard: January 19, 2009
Judgment: February 11, 2009
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Cynthia L. Spry, Douglas Schweitzer for Applicants
David R. Byers, Ashley J. Taylor, Maya Poliak for The Bank of America
Patrick T. McCarthy, Josef A. Kruger for Monitor
Chris Simard for Iteration Energy Ltd. Plains Canada Marketing, L.P. Plains Midstream Canada ULC, Sabre Energy Partnership (by its Managing Partner Sabre Energy Ltd.), 1316751 Alberta Ltd., Northern Sun Exploration Inc., ATCO Midstream Ltd., Devon Canada Corporation
Craig McMahon for Barnwell of Canada, Limited, Celtic Exploration Ltd.
Douglas S. Nishimura, Brian O'Leary for ARC Resources Ltd., City of Medicine Hat, PennWest Petroleum, Avenir Operating Corp., NuVista Energy Ltd., Black Rider Resources Inc., Wolf Coulee Resources Inc., Profound Energy Inc., Orleans Energy Ltd., Baytex Energy Ltd., Daylight Energy Ltd., Crew Energy Inc., Trilogy Energy LP
Brendan O'Neill for Fortis Capital Corp.
Travis Lysak for Nexen Marketing, Keyera Energy Partnership
William E.J. Skelly for Fractal Systems Inc. Bellamont Exploration Ltd., Enersul Limited Partnership, Dynamysk Automation Ltd.

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
  XI.2 Fraudulent preferences
    XI.2.a General principles

Bankruptcy and insolvency
XIV Administration of estate
  XIV.13 Miscellaneous

Headnote

Bankruptcy and insolvency --- Administration of estate — Miscellaneous issues

Interim distribution — Group of energy companies obtained protection under **Companies' Creditors Arrangement Act** — Owner of group was located in United States, where it faced insolvency-related proceedings — Credit arrangement existed for benefit of one company in Canada and one in United States, with five companies in group as guarantors — Over $2.5 billion was owed on credit American facility — From liquidation of owner, Canadian borrower received $113 million — Three debtors in group brought application for **interim distribution** of $90 million to lenders on credit arrangement — Application adjourned — More information regarding potential harm to Canadian unsecured creditors required — Application was premature — Rights of unsecured creditors could be prejudiced by granting order — American unsecured creditors could be in superior position if order granted — As proceedings had progressed as insolvency protection and not receivership, stay should be honoured — Distribution of funds did not necessarily require resolution of American proceedings.

Bankruptcy and insolvency — Avoidance of transactions prior to bankruptcy — Fraudulent preferences — General principles Group of energy companies obtained protection under **Companies' Creditors Arrangement Act** — Owner of group was located in United States, where it faced insolvency-related proceedings — Credit arrangement existed for benefit of one company in Canada and one in United States, with five companies in group as guarantors — Over $2.5 billion was owed on credit American facility — From liquidation of owner, Canadian borrower received $113 million — Three debtors in group brought application for **interim distribution** of $90 million to lenders on credit arrangement — Application adjourned — More information regarding potential harm to Canadian unsecured creditors required — Application was premature — Rights of unsecured creditors could be prejudiced by granting order — Debtors not required to file further information regarding fraudulent preference — Declaration that no fraudulent preference occurred affected distribution proceedings only and would not prevent future action if warranted — Clause rendering guarantee void if company rendered insolvent was matter of American law and had no applicability in Canada, and did not limit liability of guarantors to asset value on certain dates.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Statutes considered:

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

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to

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

APPLICATION by debtors for **interim distribution** of funds.

***B.E. Romaine J.*:**

Introduction

1 Three of this group of **CCAA** debtors have applied for an order authorizing an **interim distribution** of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States.

Background to Application

2 SemCanada Energy Company ("SemCanada Energy") and its subsidiaries A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") are three of a group of seven companies referred to as the SemCanada Group that obtained protection from their creditors pursuant to an Order granted under the **Companies' Creditors Arrangement Act**, R.S.C. 1985, c.C-36, as amended, on July 30, 2008. Prior to the initial order, SemCanada Energy, AES and CEG had commenced proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, on July 24, 2008 and those proceedings were then converted to proceedings under the **CCAA**.

3 On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the "U.S. Debtors") filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

4 According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup's credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the **CCAA**.

5 The SemCanada Group are indirect wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

(a) SemCanada Crude Company ("SemCanada Crude"), a crude oil marketing and blending operation;

(b) SemEnergy Group, whose business is gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS ULC; ("SemCAMS"); and

(c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

6 SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the "Lenders") entered into a credit agreement in 2005 (the "Credit Agreement"). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.5 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

7 Five of the SemCanada Group of companies, including SemCanada, have provided a guarantee of all obligations under the Credit Agreement to the Lenders, who rank as senior secured lenders, and to a US $600 million bond indenture issued by SemGroup. The amount owing under these instruments is in excess of US $3.3 billion. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by five members of the SemCanada Group.

8 While it is intended to present a plan of arrangement or compromise with respect to at least one of the other two businesses, the SemEnergy Group is in self liquidation and has no significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, SemCanada Energy, AES and CEG now hold $113 million in cash.

9 The SemEnergy Group proposes to make an **interim distribution** payment to the Lenders of $90 million. The remainder of the $113 million would be **held back** to satisfy claims that may rank in priority to that of the Lenders, costs and fees related to the **CCAA** proceedings and the employee retention plan, potential claims under the Directors' Charge and a general contingency reserve. Since the time of the first application, the Lenders have requested that the outstanding and continuing fees of their Canadian advisors be paid by the SemEnergy Group. The current outstanding fees amount to approximately $1.8 million. It is common ground that if such interim payment is allowed, there will be nothing left from the

$113 million to be distributed to unsecured creditors, subject to certain recovery measures in the United States proceedings that will be referred to later in this decision.

10 A number of unsecured creditors objected to the application, and it was adjourned to allow the unsecured creditors access to the security opinion of the Monitor's counsel, cross-examination on affidavits and the preparation of a report from the Monitor on the status of the restructuring efforts of the U.S. Debtors to date.

11 The unsecured creditors of the SemCanada Group that object to the application have raised a number of issues. They can be summarized as follows:

(a) the obligations of the SemCanada Group under the guarantee to the Lenders may be voidable as fraudulent preferences or fraudulent conveyances. The Court has insufficient evidence on that issue to grant the order sought, and the SemCanada Group should be compelled to provide further financial information and to answer specific questions on the issue during cross-examination on the affidavits;

(b) the amounts that the SemCanada Group are obligated to pay under the guarantee are expressly limited by the terms of the guarantee itself;

(c) the **interim distribution** may unfairly prejudice Canadian unsecured creditors and bestow an unwarranted benefit on unsecured creditors in the United States proceedings; and

(d) there is no urgency and a delay may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings.

Analysis

(a) The Fraudulent Preferences Issue

12 The opinion obtained by the Monitor from counsel on the validity of the Lenders' security does not address any issue of fraudulent preference. It would not be normal practice in this kind of proceeding for the Monitor's counsel to address the possibility of fraudulent preference unless the Monitor is alerted to some evidence that this may be an issue. The Monitor has not identified any such concern in this case. Thus, in the normal course, it would be up to creditors, if they believe circumstances exist, to bring appropriate proceedings to attack the guarantee and Security Agreement. The SemCanada Group points out that the unsecured creditors have not brought any action (which might leave them open to sanctions of costs if unsuccessful) and submit that they are attempting to use the proceeding as a fishing expedition to delay and obfuscate the application. The applicants and the Lenders submit that the analysis of the possibility of fraudulent preference submitted by the unsecured creditors is flawed at any rate and lacking in merit.

13 There is, however, a complication in the argument as to who has the onus to address the possibility of fraudulent preferences. The unsecured creditors point out that the draft order proposed by the applicants for the **interim distribution** seeks a declaration that the Lenders' security (as embodied in the guarantee and the Security Agreement, which was executed by all five major companies in the SemCanada Group) constitutes a valid and enforceable obligation of the SemEnergy Group and that the payment of the **interim distribution** will not be void or voidable at the instance of creditors and does not constitute an unjust preference, fraudulent conveyance or reviewable transaction. Pursuant to the proposed order, this declaration would be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the debtors. Thus, the unsecured creditors argue, the issue of fraudulent preferences is relevant and the SemCanada Group should be obligated to file more complete affidavits providing financial statements at relevant periods at and around the time the loan documents and guarantee were entered into and to answer cross-examination questions on the value of the assets of the SemEnergy Group at such times.

14 The declaratory language at issue is common to this type of order, and the SemEnergy Group and the Lenders submit that it applies only to the **interim distribution**, not the underlying guarantee and Security Agreement that precedes it. They

plain meaning.

23 While Section 2(f) may take effect in addition to the standard statutory remedies if the guarantee is determined to be a fraudulent conveyance or fraudulent transfer under applicable Canadian insolvency law, that argument refers back to the issue of fraudulent preferences in the more generally understood "all or nothing" sense, and the current lack of any persuasive evidence that would indicate a fraudulent preference. Thus, Section 2(f) of the guarantee does not, as submitted by the unsecured creditors, limit the liability of each individual guarantor to its net asset value on certain relevant dates, either by its plain language, the operation of any ambiguity or cross-reference to another agreement or a reference to applicable Canadian law, and there is no reason arising from this provision of the guarantee to require further financial information from the applicants.

(c) Potential Prejudice to Canadian Unsecured Creditors

24 The unsecured creditors submit that the payment of the **interim distribution** may give rise to the development of inequities among the unsecured creditors of the SemCanada Group and the U.S. Debtors. They note that, according to material filed with the application for the initial order, all the **CCAA** applicants were solvent but for their secured guarantee obligations. The declaration filed at the commencement of Chapter 11 proceeding in the United States disclosed that the consolidated assets of the SemGroup as of May 31, 2008 totalled approximately $6.14 billion. It appears that subsequent events have reduced the value of the SemGroup's assets by approximately $2 billion and it must be noted that the value declared is book value. However, given that secured and senior debt totals approximately $3.3 billion, it does not appear that there are insufficient assets in the U.S. estate to fully pay the Lenders.

25 There have been no distributions made to the Lenders in the United States since the commencement of the U.S. proceedings. The unsecured creditors submit that, if the **interim distribution** is authorized, an inequitable situation arises whereby the SemEnergy Group of debtor companies will have applied all of their assets to the secured debt, leaving their unsecured creditors without the possibility of recovery, while other debtor companies, including in the U.S. proceedings, will have their burdens reduced, making it possible that U.S. unsecured debtors will benefit disproportionally.

26 The applicants and the Lenders point out, firstly, that the guarantee is an unconditional guarantee and that the Lenders are not required to exhaust their remedies against any other party before invoking its provisions against the applicants. That is clear from the language of the guarantee and the law. However, the contractual rights of the Lenders, in common with the contractual rights of many stakeholders, have been stayed by the **CCAA** proceedings. The rights of a secured creditor are not awarded a unique status under the **CCAA**: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C. C.A.) at page 92. It is not uncommon for contractual rights to be affected by **CCAA** proceedings and it is important to note that what is being proposed by the applicants is a deviation from the normal course of such proceedings, which are designed to prevent manoeuvring for position among creditors while a reorganization is attempted.

27 While orders allowing **interim distributions** to creditors for one reason or another are not without precedent, at the least, an application for an **interim distribution** to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. The court is required to consider the advantages, disadvantages and potential prejudice of such an **interim distribution** to all the stakeholders of the debtor entity.

28 The applicants and the Lenders point out that the Lenders have established the indebtedness of the SemEnergy Group and that their security is valid and ranks first in priority. While the Lenders have not made a formal demand of payment or filed a notice of intention, they are only precluded from doing so by the stay provisions of the initial order. The SemEnergy Group has been liquidated, and, they submit, these companies were only included in the **CCAA** proceedings for administrative convenience. The unsecured creditors counter that the SemEnergy Group sought the protection of the **CCAA** in July of 2008 purportedly to "reorganize and/or liquidate", that the **CCAA** applicants argued that adding the SemEnergy Group to the **CCAA** proceedings made sense given the inter-relationship of the SemCanada Group's businesses, and that, having chosen to use the **CCAA** process, the SemEnergy Group should be compelled to live with its choice.

29 I agree that I cannot ignore the fact that this is a **CCAA** proceeding and not a receivership merely because it is more convenient for the applicants and the Lenders at this point to characterize the proceedings in those terms. While the SemEnergy Group standing alone may have liquidated with no current intention of formulating a reorganization plan, the

whole of the SemGroup is under the protection of the **CCAA** in Canada and Chapter 11 in the United States. This is not only for the convenience of the debtors and the Lenders, but to allow the corporate group time to accomplish the goals of such legislation in terms of attempting to reorganize its business, maximizing the value of its estate for the benefit of all stakeholders, and ensuring fairness of treatment. I am not only permitted but required in my supervisory role under the **CCAA** to consider the implications of the corporate group's cross-border reorganization efforts as a whole.

30 The applicants argue that if the application does not succeed, the Lenders will apply to appoint a receiver. The Lenders in fact invite the Court to convert the proceedings to a receivership on its own motion. That application is not before me and not likely to be unopposed in any event.

31 The applicants and the Lenders submit that the **interim distribution** would not prejudice the SemEnergy's Group's other creditors because SemCanada Energy has rights of indemnification and subrogation from the other members of the corporate group.

32 Sections 6(a) and 6(c) of the guarantee, however, read as follows:

> **Section 6. Limited Subrogation**
>
> (a) Until all of the Obligations have been paid and performed in full, no Guarantor shall have any right to exercise any right of subrogation, reimbursement, indemnity, exoneration, contribution or any other claim which it may now or hereafter have against or to any Obligor or any Security in connection with this Guaranty (including any right of subrogation under any law, as amended), and each Guarantor hereby waives any rights to enforce any remedy which such Guarantor may have against either Borrower or any other Obligor and any right to participate in any Security until such time. ...
>
> (c) Upon full and final payment of the Obligations, each guarantor of the Obligations which has made payments upon the Obligations shall be entitled to contribution from each other guarantor of the Obligations, to the end that all such payments upon the Obligations shall be shared among all such guarantors in proportion to their respective net worth, provided that the contribution obligations of each Guarantor shall be limited to the maximum amount that it can pay at such time without rendering its contribution obligations voidable under applicable Law relating to fraudulent conveyances or fraudulent transfers. As used in this subsection, the "Net Worth" of each guarantor means, at any time, the remainder of (i) the fair value of such guarantor's assets (other that such right of contribution), minus (ii) the fair value of such guarantor's liabilities (other than its liabilities under its guaranty of the Obligations).

33 It appears, therefore, that the SemEnergy Group's right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless and until all the indebtedness to the Lenders is paid in full. It also appears that the right to contribution from other members of the SemGroup may be limited under U.S. law to amounts that would not result in the insolvency of such a entity in proportion to such entity's net worth. At this stage of proceedings, both in Canada and in the United States, it is not possible to say with certainty that the reorganization of the corporate group will result in the payment of indebtedness to the Lenders in full or in such a fashion that the limitation upon subrogation is not triggered. It is possible, for example, that a reorganization may compromise the claims of the Lenders or may have them continue the loans on revised terms to a reorganized corporate group. The SemEnergy Group's right of subrogation and indemnity could prove to be a hollow or inadequate remedy.

34 The unsecured creditors submit that the language of the guarantee prevents the SemEnergy Group from filing a claim for subrogation in the U.S. proceedings. The applicants submit that, if payment under the guarantee is authorized, they would file a claim and the Lenders agree that, in their view, such a filing would not be a breach of Section 6 of the guarantee. What is not clear is whether the U.S. debtors would also agree. Even if they did, the filing of a claim does not eliminate the contractual limits on subrogation.

35 The Lenders submit that making the payment and subsequently filing a claim in the U.S. proceedings may ultimately be beneficial to the SemEnergy Group's other creditors, as it allows the timely filing of a claim. The unsecured creditors do

not appear to agree.

36 The Lenders submit that there is no good reason to delay the rights of the Lenders to collect on the guarantee, and that to refuse the application would be to improve the position of the unsecured creditors to the detriment of the secured creditor. I am satisfied that an **interim distribution** to the Lenders gives rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighs the benefits of an early payment on the guarantee to the Lenders. To suggest, as the Lenders do, that if the right to subrogation is contractually barred or is compromised by a plan of arrangement in the United States, the unsecured creditors are where they would be if the Lenders had exercised their contractual rights in any event is to treat the Canadian **CCAA** proceedings as a mere administrative convenience.

37 The unsecured creditors made certain representations regarding a claim by NGX Financial Inc. Given the decision I have reached, it is not necessary that I address this issue at this time.

(d) The Lack of Urgency and Benefit of Delay

38 The unsecured creditors submit that the applicants have shown no urgency to this application, and the only evidence before this court to justify the application is the statement of the Chief Executive Officer of the SemEnergy Group that, given the status of the group and the significant proceeds in their bank accounts, an **interim distribution** is appropriate. The Monitor, in commenting that the **interim distribution** is appropriate, repeats these reasons and notes that the claims bar date has passed and that it has received its security opinion from counsel. While the Monitor's recommendations are entitled to great deference, the Monitor has not delved into or addressed the issues of potential prejudice raised by the unsecured creditors in its analysis of the issue.

39 The unsecured creditors submit that even a short delay in the distribution of funds may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings. They refer to media reports that indicate that a third party may be purposing a plan of arrangement or reorganization to the U.S. Debtors in the near future, and the Monitor reports that it understands that business plans and confidential information memorandums have been prepared for some of the significant U.S. Debtors and the SemGroup's intention is to either seek a sale of certain operating units or companies or restructure under the ownership of Semgroup. The Monitor advises, however, that it is premature and unrealistic to estimate the timing for the conclusion of the U.S. proceedings.

40 It is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of Chapter 11 proceedings in the United States. The Canadian **CCAA** proceedings may advance at a different pace if the Court is satisfied by evidence before it that it is appropriate to do so. In the case of this application, however, it is prudent to delay an **interim distribution** until there is sufficient information to better evaluate the potential of prejudice to Canadian creditors.

Conclusion

41 I find the application to be premature, and adjourn it sine die with leave to the applicants and the Lenders to reapply with more current information if it becomes apparent that the potential prejudice identified to the unsecured creditors is unlikely to materialize, can be avoided by other measures or that the balance of prejudice and benefit has shifted.

Application adjourned.

TAB 8

2009 CarswellOnt 4505
Ontario Superior Court of Justice [Commercial List]

Windsor Machine & Stamping Ltd., Re .

2009 CarswellOnt 4505, 179 A.C.W.S. (3d) 513

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED (Applicants)

Morawetz J.

Heard: March 11, 2009
Judgment: March 11, 2009
Docket: CV-08-7672-00CL

Counsel: Tony Reyes, Evan Cobb for Monitor, RSM Richter Inc.
Raong Phalavong for Saginaw Pattern
Andrew Hatnay, Andrea McKinnon, D. Youkaris for U.A.W., Local 251
Joseph Marin for Windsor Machine & Stamping Ltd.
D. Dowdall, J. Dietrich for Bank of Montreal
J. Archibald for Magna
John D. Leslie for Ford Motor Company
P. Shea for Johnson Controls Inc.
Jackie Moher for Ryder Finance Corporation

Subject: Insolvency; Contracts; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Real property
III Sale of land
III.1 Agreement of purchase and sale
III.1.e Miscellaneous

Real property
III Sale of land
III.6 Judicial sale
III.6.f Vesting order

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Real property --- Sale of land — Agreement of purchase and sale — Miscellaneous

Real property --- Sale of land — Judicial sale — Vesting order

Table of Authorities

Statutes considered:

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

***Morawetz J.*:**

1 On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

2 RSM Richter Inc., in its capacity as Monitor, brought this motion for:

(a) an Approval and Distribution Order;

(b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;

(c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;

(d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;

(e) an Order approving the fees and disbursements of the Monitor and its counsel.

3 The motion has the support of the Applicants, Bank of Montreal (the "Bank"), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

4 I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm's length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants' assets.

5 The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

6 The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

7 With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

8 The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

9 In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

10 It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

11 Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

12 Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

14 As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

End of Document

TAB 9

2017 ONSC 2536
Ontario Superior Court of Justice

Maple Bank GmbH, Re

2017 CarswellOnt 6220, 2017 ONSC 2536, 278 A.C.W.S. (3d) 472, 47 C.B.R. (6th) 45

IN THE MATTER OF MAPLE BANK GmbH

IN THE MATTER OF THE WINDING-UP AND RESTRUCTURING ACT, R.S.C. 1985, C.W-11, AS AMENDED

IN THE MATTER OF THE BANK ACT, S.C. 1991, C.46, AS AMENDED

Geoffrey B. Morawetz R.S.J.

Heard: March 10, 2017
Judgment: April 27, 2017
Docket: CV-16-11290-00CL

Counsel: Alex MacFarlane, Robert Weir, Rachel Belanger, for KPMG Inc., in its capacity as the Liquidator of the Business in Canada of Maple Bank GmbH and its Assets as defined under s. 618 of the Bank Act
David Byers, for German Insolvency Administrator
Jonathan Wigley — Court Appointed Costs Counsel
Jane Milburn, for Paul Lishman, Jeff Campbell and Cyrus Sekhia
Kimberley Boara Alexander, for Don Scott
Maurice Fleming, for Radius Financial
Kyla Maher, Erin Pleet, for Paul Lishman
Massimo Starnino, Megan Shortreed, for Employees

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

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.5 Orders
    XVII.5.c Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous
Interim distribution order — On winding up date of March 16, 2016, upon application of Attorney General of Canada, court granted winding-up order pursuant to s. 10.1 of Winding-Up and Restructuring Act ("WURA") — This was to wind up business in Canada of German-owned bank, M Bank ("business") and appoint K Inc. as liquidator of M Bank's business and assets ("T branch assets") as defined in s. 618 of Bank Act — K Inc. brought motion for **interim distribution** order — Motion granted — Order was to authorize and direct K Inc. to make partial distribution to German Insolvency Administration ("GIA") of portion of estimated surplus of funds realized by K Inc. from liquidation and/or sale of T branch assets and business ("**interim distribution**") on, or after March 10, 2017 ("**interim distribution** date") — **Interim distribution** was **appropriate** in context of these proceedings — No creditors of Toronto branch would suffer prejudice as result of **interim distribution**, as T branch had significant surplus and K Inc. had calculated that it would be able to maintain adequate reserves that would ultimately pay all proven claims and future potential claims — In these circumstances, there was no principled basis on which to delay distribution of surplus to GIA, until such time as K Inc. resolved all outstanding claims

against T branch — Indeed, it would have been inequitable to GIA to delay distribution — Superior Court of Justice has all powers that are necessary to do justice between parties — Except where provided specifically to contrary, court's jurisdiction is unlimited and unrestricted in substantive law and civil matters — Estimated reserve being maintained by K Inc. provided adequate security to ensure that all claims proved in winding-up could be paid — K Inc. had established reserve for benefit of those who had unproven claims and future potential claims — It was reasonable in circumstances to deem that these claims had been paid for purposes of section 158.1(2) of WURA, which thus enabled K Inc. to make **interim distribution**.

Table of Authorities

Cases considered by *Geoffrey B. Morawetz R.S.J.*:

Canada (Attorney General) v. Confederation Life Insurance Co. (2002), 2002 CarswellOnt 3681, 39 C.B.R. (4th) 182, 46 C.C.L.I. (3d) 36, 32 B.L.R. (3d) 127 (Ont. S.C.J. [Commercial List]) — referred to

Canada (Attorney General) v. Reliance Insurance Co. (2009), 2009 CarswellOnt 4250, 76 C.C.L.I. (4th) 282 (Ont. S.C.J. [Commercial List]) — referred to

Canada (Attorney General) v. Reliance Insurance Co. (2015), 2015 ONSC 7489, 2015 CarswellOnt 18299, 57 C.C.L.I. (5th) 323 (Ont. S.C.J. [Commercial List]) — referred to

Canada Deposit Insurance Corp. v. Columbia Trust Co. (1987), 13 B.C.L.R. (2d) 79, 37 D.L.R. (4th) 378, 1987 CarswellBC 100 (B.C. S.C.) — referred to

Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc. (1996), 39 C.B.R. (3d) 253, (sub nom. *Dubois v. Coopérants (Les), Société mutuelle d'assurance-vie (Liquidation))* 196 N.R. 81, (sub nom. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois)* 133 D.L.R. (4th) 643, (sub nom. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois)* [1996] 1 S.C.R. 900, 1996 CarswellQue 369, 1996 CarswellQue 369F (S.C.C.) — referred to

InterTAN Canada Ltd., Re (2009), 2009 CarswellOnt 324, 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]) — referred to

Kansa General International Insurance Co., Re (2002), 2002 CarswellQue 1462 (C.S. Que.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

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

Union of Canada Life Insurance, Re (2012), 2012 ONSC 957, 2012 CarswellOnt 4017, 8 C.C.L.I. (5th) 305, 92 C.B.R. (5th) 162 (Ont. S.C.J. [Commercial List]) — referred to

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), [1972] 2 O.R. 280, 25 D.L.R. (3d) 386, 1972 CarswellOnt 1010 (Ont. C.A.) — referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46
Pt. XII.1 [en. 1999, c. 28, s. 35(1)] — referred to

s. 2 "authorized foreign bank" — considered

s. 618 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
s. 10.1 [en. 1996, c. 6, s. 138] — considered

s. 75 — considered

s. 77 — considered

s. 158.1 [en. 1999, c. 28, s. 92] — considered

s. 158.1(2) [en. 1999, c. 28, s. 92] — considered

MOTION brought by liquidator for **interim distribution** order.

***Geoffrey B. Morawetz R.S.J.*:**

1 On March 10, 2017, this motion was granted with reasons to follow.

2 These are the reasons.

3 On March 16, 2016 (the "Winding-Up Date") upon the application of the Attorney General of Canada, the court granted an order (the "Winding-Up Order") pursuant to s. 10.1 of the *Winding-Up and Restructuring Act*, R.S.C. ("WURA"):

(i) winding-up the business (the "Business") in Canada of Maple Bank GmbH ("Maple Bank"); and

(ii) appointing KPMG Inc. (the "Liquidator") as the Liquidator of the Business and the assets (as defined in section 618 of the *Bank Act*) of Maple Bank (the "Toronto Branch Assets").

4 The Liquidator brought this motion for an order (the "**Interim Distribution** Order") authorizing and directing the Liquidator to make a partial distribution to the German Insolvency Administration (the "GIA") of a portion of the estimated surplus of funds, which have been realized by the Liquidator from the liquidation and/or sale of the Toronto Branch Assets and the Business (the "**Interim Distribution**") on, or after March 10, 2017 (the "**Interim Distribution** Date").

5 Maple Bank is a Canadian owned German Bank, and an authorized foreign bank in Canada under s. 2 and Part XII.I of the *Bank Act* (an "Authorized Foreign Bank"). In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority Service. As an Authorized Foreign Bank, Maple Bank was regulated with respect to its Business in Canada (the "Toronto Branch") by the Office of the Superintendent of Financial Institutions ("OSFI").

6 In February 2016, the emergence of significant German tax claims led to the appointment of the GIA over Maple Bank, which appointment led OSFI to request that the Attorney General of Canada obtain the Winding-Up Order in respect of the Business of the Toronto Branch Assets (the "Winding-Up Proceedings").

7 Since the Winding-Up Date, the Liquidator has worked to liquidate the Toronto Branch Assets and wind-up the Toronto Branch.

8 The realization process for all of the Toronto Branch assets is essentially complete and the Liquidator has approximately $820.1 million available to satisfy outstanding claims.

9 On June 8, 2016, the court issued a claims procedure order (the "Claims Procedure Order"), in order to facilitate a

out in sections 625 and 627 of the *Bank Act*.

Distribution and Release of Surplus Assets

(2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.

29 The Liquidator submits that section 158.1 is not a bar to an **interim distribution** of surplus to an Authorized Foreign Bank where sufficient reserves are established to ensure that all priority **amounts** will be paid in due course.

30 Counsel to the Liquidator submits that federal insolvency law statutes are complementary and operate in tandem and further, that the court has long recognized that in dealing with insolvency legislation, a technical interpretation should not be applied. Rather, insolvency legislation needs to be given a broad, flexible and purposive interpretation. In support of these propositions, counsel cites: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.); *Union of Canada Life Insurance, Re*, 2012 ONSC 957 (Ont. S.C.J. [Commercial List]); *Kansa General International Insurance Co., Re*, [2002] Q.J. No. 1732 (C.S. Que.); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]).

31 Counsel then submitted that an interpretation of section 158.1(2) that would serve as a temporal bar to an **interim distribution** of surplus to an Authorized Foreign Bank where sufficient reserves have been established to satisfy the Priority **Amounts**, solely on the basis that the Priority **Amounts** have not yet been paid out, would be: (i) overly technical and strict; and (ii) where an Authorized Foreign Bank is in liquidation in the jurisdiction of its head office, contrary to the recognized policy of this court to, where possible, assist with and accommodate insolvency proceedings in a foreign jurisdiction, in order to maximize value for the benefit of all creditors.

32 Counsel to the Liquidator further submits that in determining whether or not to approve the **Interim Distribution**, the Court should focus on whether or not the creditors of the Toronto Branch would be prejudiced by the **Interim Distribution**. The Liquidator proposes to maintain the Estimated Reserve to cover Unproven Claims, Future Potential Claims, interest on Unproven Claims and Future Claims at five percent per annum, as well as costs to administer the Toronto Branch Liquidation.

33 The Liquidator is of the view that the **Interim Distribution** will not prejudice the Toronto Branch's creditors, but the failure to approve the **Interim Distribution** would expose creditors in Germany to delay and to considerable foreign exchange risks on the **amounts** that would eventually be distributed to them.

34 I am satisfied that the **Interim Distribution** is **appropriate** in the context of these proceedings. I am satisfied that no creditors of the Toronto Branch will suffer prejudice as a result of the **Interim Distribution**, as the Toronto Branch has a significant surplus and the Liquidator has calculated that it will be able to maintain adequate reserves which will ultimately pay all Proven Claims and Future Potential Claims.

35 In these circumstances, there is no principled basis on which to delay the distribution of the surplus to the GIA, until such time as the Liquidator resolves all outstanding claims against the Toronto Branch. Indeed, it would be inequitable to the GIA to delay the distribution.

36 As a Superior Court of general jurisdiction, the Superior Court of Justice has all the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law and civil matters (see: *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] O.J. No. 1713 (Ont. C.A.) and *InterTAN Canada Ltd., Re*, [2009] O.J. No. 293, 174 A.C.W.S. (3d) 617 (Ont. S.C.J. [Commercial List])).

37 In this case, the Estimated Reserve being maintained by the Liquidator provides adequate security to ensure that all claims proved in the Winding-Up can be paid. The Liquidator has established the reserve for the benefit of those who have

TAB 10

2011 MBQB 305
Manitoba Court of Queen's Bench

Manitoba (Securities Commission) v. Crocus Investment Fund

2011 CarswellMan 731, 2011 MBQB 305, 212 A.C.W.S. (3d) 112, 88 C.B.R. (5th) 295

Application under section 27 of the Securities Act, C.C.S.M., c. S50 and Queen's Bench Rule 14.05(2)(b)

The Manitoba Securities Commission (applicant) and Crocus Investment Fund (respondent)

McCawley J.

Judgment: December 12, 2011
Docket: Winnipeg Centre CI 05-01-43350

Counsel: Dave G. Hill, Karen R. Wittman for Deloitte Touche Inc., Receiver and Manager, for Crocus Investment Fund
Kenneth A. Filkow, Q.C., Diane M. Stasiuk for Charles Curtis, Peter Olfert, Diane Beresford, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Sylvia Farley, Hugh Eliasson, John Clarkson, Robert Hilliard
Ted E. Bock for Robert Ziegler
Jeffrey A. Baigrie for Ron Waugh

Subject: Corporate and Commercial; Insolvency; Securities

Related Abridgment Classifications

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

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Receiver and manager of investment fund brought motion for order dispensing with service of notice of motion and authorizing receiver to make second interim **distribution** of proceeds among certain shareholders — Motion granted — As result of settlement agreement between securities commission and former directors of investment fund, eight of ten directors were not required to make any financial payment and $3 million **holdback** was no longer required — Counsel for remaining two directors agreed to reduction in **amount** of **holdback** subject to suggested time limit — Investment fund was not insolvent and continued to carry on business, and receiver realized substantial proceeds for shareholders — Receiver was in position to **distribute** $9 million without compromising ability of investment fund to pay any legitimate claims for indemnification which might be brought in future — Service of notice of motion was ordered dispensed with, and receiver was authorized to make second interim **distribution** of $9 million of proceeds of receivership according to formula it presented to court — $1 million was ordered set aside as **holdback** for any claim for indemnification.

Table of Authorities

Statutes considered:

Securities Act, R.S.M. 1988, c. S50

s. 28(1) — referred to

s. 148.1(1) [en. 2001, c. 26, s. 64] — referred to

s. 148.2(2) [en. 2002, c. 32, s. 6] — referred to

s. 154 — referred to

MOTION by receiver and manager of investment fund for order dispensing with service of notice of motion and authorizing receiver to make second interim **distribution** of proceeds among certain shareholders.

McCawley J.:

1 On June 30, 2011, Deloitte & Touche Inc., as Receiver and Manager of the respondent, Crocus Investment Fund, brought a motion for an order:

(a) dispensing with service of the Notice of Motion and Motion Record on any other interested party other than those parties served;

(b) authorizing and directing the Receiver to make a second interim **distribution** of the proceeds of the within receivership amongst Class A and Class I shareholders in accordance with the following formula:

Individual shareholder's share	= ***Distributable amount*** Total number of Class A and Class I shares	× Number of shares held by a shareholder

(c) such further and other relief as this Honourable Court may deem just.

2 As the matter was contested, it was put over to July 7, 2011, for counsel to make their submissions. One of the issues in contention was the **amount** of the second interim **distribution** and, more particularly, whether the Receiver was obligated to hold back $3 million dollars pursuant to a Release Agreement dated May 8, 2009. That agreement provided for a $3 million dollar **holdback** which was intended to address potential indemnity claims including, among others, indemnity claims of a director which may result from certain proceedings of the Manitoba Securities Commission ("MSC") against them.

3 The Receiver argued that it was no longer obligated to maintain this **holdback** whereas counsel for the directors took the position that it was.

4 The Release contemplated that the $3 million dollar **holdback** could be reduced through negotiation and agreement between the parties failing which the Receiver would be at liberty to apply to the court. As it was apparent that little, if any, discussions had taken place among the parties and there was some uncertainty as to the basis on which the Receiver was advancing this position, the court directed that the parties meet over the summer months in an attempt to see if the matter could be resolved. Not only was no agreement reached, but it appeared that a meeting could not be arranged with all of the parties and the matter was set down for hearing on September 16, 2011. That date were adjourned by consent to October 17, 2011, when the parties once again came before the court.

5 At that time, the court was advised that since filing Receiver's Report No. 13 in June 2011, more monies had become available for **distribution.** Rather than the $7.9 million dollars recommended previously, the Receiver indicated it was now recommending a **distribution** of $9 million dollars. Once again, the Receiver took the position that no **holdback** was necessary, but in the alternative argued that, if the court felt otherwise, any **amount** set should be nominal.

6 The court was advised of another significant change which had occurred the previous day. A Settlement Agreement had been put forward for approval by the MSC as between it and eight former Crocus directors (Charles Curtis, Peter Olfert, Diane Beresford, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Sylvia Farley and Robert Hilliard). All agreed that if the MSC's approval was forthcoming it would have a significant impact on the matters before the court. Accordingly, after hearing further submissions, the matter was adjourned *sine die,* it being anticipated that a decision from the MSC would be available within a couple of weeks.

7 By letter dated October 25, 2011, counsel for the MSC wrote to advise that the Settlement Agreement had been approved and further, that the Order of the MSC giving effect to the Settlement Agreement did not contain any assessments of costs, administrative penalties or orders of compensation for financial loss against any of the settling directors.

8 The court was further advised that the MSC proceedings remained outstanding against Robert Ziegler and Ron Waugh and that an initial organizational meeting was scheduled for November 2, 2011.

9 Given that counsel had already had two opportunities to make submissions concerning the proposed second interim **distribution** and **holdback**, the court wrote to them asking for clarification of their respective positions by letter in light of the settlement. Responses were received from all counsel up to and including October 28, 2011. It should be noted that the court also had before it correspondence from five shareholders of Crocus.

10 In its correspondence, the Receiver continued to maintain the position that the Directors were no longer entitled to the $3 million dollar **holdback**, but if the court decided to order a **holdback**, as it was agreed it could do, the **amount** should be significantly reduced. Counsel for the Receiver also argued that, as far as they were aware, Mr. Waugh has an indemnity through the provincial government which appointed him as a director of Crocus and, accordingly, there was no need for Crocus to maintain a second indemnity on his behalf. In my view, this fact (if indeed it is one) has no bearing on the issue of the **amount** of a second interim **distribution** or the **amount** of **holdback**. Even if there is a double indemnity, there may be an issue in future as to which indemnity should be called upon first. That is not a concern at the present time.

11 Insofar as Mr. Ziegler is concerned, the Receiver suggested that $187,500.00 would be an **appropriate amount** based on his proportionate share of the original $3 million dollar **holdback**.

12 Counsel for Mr. Waugh and Mr. Ziegler both argued that, given the potential exposure to costs, penalties, settlements and judgments, including an administrative penalty of up to $100,000.00 under s. 148.1(1) of *The Securities Act*, C.C.S.M., c. S50; a potential compensation order of up to $250,000.00 per claimant under s. 148.2(2); an order for payment of the costs of and incidental to the MSC proceedings under s. 154; a potential order of costs of an investigation under s. 28(1); legal costs incurred in resisting and/or defending any "Independent Claims" as defined in the Release; and the cost of any **amounts**, judgments, fines or settlements arising out of such independent claims, $500,000.00 should be held back on account of each of their clients for a total of $1 million dollars. It further was suggested this **amount** be held for a period to expire one year and one day after the disposition of the MSC proceedings and any appeals therefrom.

13 As a result of the settlement with the MSC, it was clear that eight of the ten directors subject to those proceedings will not be required to make any financial payment in respect of them. Although there appears to be some confusion as into what category some legal fees may fall, there was agreement that the $3 million dollar **holdback** is no longer required.

14 Counsel for the settling directors advised that they also represent two other former directors, John Clarkson and Hugh Eliasson, who were named defendants in the now settled class action. They were not named in the Statement of Allegations by the MSC. As with the others, they are entitled to claim indemnities from Crocus if an Independent Claim is advanced against them. Accordingly, it was submitted that $1,250,000.00 be held back for these 10 directors, again for a period to expire one year and one day after the disposition of the MSC proceedings and any appeals therefrom.

15 In his letter to the court, counsel for the MSC indicated that, should the MSC be successful in the proceedings against Mr. Ziegler and Mr. Waugh, it will be seeking costs and administrative penalties, in addition to a removal of exemptions and other remedies that might be available.

16 The letter further indicated that no claims for compensation for financial loss have been received to date. In counsel's view, it is unlikely that such claims will be pursued in light of the outcome of the class action lawsuit, and I agree that is likely the case.

17 Counsel for the MSC went on to state that, in the event the proceedings against Mr. Ziegler and Mr. Waugh by the MSC are successful, the MSC will be taking a position concerning their claim for indemnity as against Crocus for any costs or administrative penalties in light of any findings made by the MSC panel hearing the matter.

18 Although a considerable **amount** of time was spent on whether the Receiver's obligation to maintain the $3 million **holdback** ended as of December 31, 2010, in my view it is not necessary to decide the issue. A settlement has been reached with eight of the ten former directors of Crocus named in the MSC proceedings with no financial penalties imposed. Counsel for the remaining two directors have agreed to a reduction in the **amount** of the **holdback** subject to a suggested time limit; and all agree the court is free to make whatever order makes sense in all the circumstances in any event.

19 It should also be observed that whatever interpretation might be placed on the terms of the Release, the former officers and directors of Crocus are entitled to bring any claim for indemnification to which they may be legally entitled. The validity of any such claims is a matter for another day.

20 One of the unique characteristics of this receivership is that Crocus is not insolvent and continues to carry on business and realize substantial proceeds for its shareholders. Financial information before the court indicates that as of September 30, 2011 (the end of the third fiscal quarter), Crocus had $16.3 million dollars in investments and cash equivalents with accounts receivable of $3.8 million dollars and a net carrying value of $9.8 million. Since its appointment in June 2005, some six and a half years ago, the Receiver has realized proceeds of $57.7 million dollars on investments with a book value of about $54.5 million dollars representing a recovery in excess of 100%. A further report will be out at the end of this year.

21 Not insignificantly, between the Receiver's first court appearance at the end of June 2011 and its later appearance in October 2011, the **amount** which the Receiver was recommending be **distributed** increased from $7.9 million dollars to $9 million dollars, because of the financial viability of Crocus.

22 The Receiver says that the **amount** of **holdback** suggested by counsel for the directors is unnecessary and that anyway, other money is available, if needed. In my experience, the Receiver has been conservative in its estimation as to what can be paid out, an approach that is **appropriate** in the circumstances given the difficulty of valuing a contingency. On the other hand, its initial argument, based on the wording of the Release and advanced prior to the settlement of the MSC proceedings, left many discomfited and raised a concern among the former directors about the Receiver's general approach to Crocus' indemnification obligations. When all is said and done, however, I am satisfied on the basis of the information before me that the Receiver is in a position to **distribute** $9 million dollars as it has requested approval to do without compromising the ability of Crocus to pay any legitimate claims for indemnification which may be brought in future.

23 I therefore order that:

(a) service of the Notice of Motion and Motion Record on any other interested party other than those parties served be dispensed with;

(b) the Receiver is authorized and directed to make a second interim **distribution** of $9 million dollars of the proceeds of the within receivership amongst Class A and Class I shareholders in accordance with the following formula:

Individual shareholder's share	= ***Distributable amount*** Total number of Class A and Class I shares	: Number of shares held by a shareholder

(c) $1 million dollars be set aside as a **holdback**, for any claim for indemnification as contemplated by the Release Agreement dated May 8, 2009, to expire one year and one day after the disposition of the MSC proceedings and any appeals therefrom.

Motion granted.

End of Document

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
  XII.2 Discovery of documents
    XII.2.h Privileged document
      XII.2.h.xiii Miscellaneous

Civil practice and procedure
XII Discovery
  XII.4 Examination for discovery
    XII.4.h Range of examination
      XII.4.h.ix Privilege

XII.4.h.ix.F Miscellaneous

Evidence
VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and

public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

TAB 12

2009 CarswellOnt 7952
Ontario Superior Court of Justice [Commercial List]

Look Communications Inc. v. Look Mobile Corp.

2009 CarswellOnt 7952, [2009] O.J. No. 5440, 183 A.C.W.S. (3d) 736

IN THE MATTER OF LOOK COMMUNICATIONS INC. (Applicant) and LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P. (Respondent)

AND IN THE MATTER OF AN APPLICATION BY LOOK COMMUNICATIONS INC. UNDER SECTION 192 OF THE BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C.44, AS AMENDED

Newbould J.

Heard: December 17, 2009
Judgment: December 18, 2009
Docket: 08-CL-7877

Counsel: John T. Porter for Look Communications Inc.
Aubrey E. Kauffman for Inukshuk Wireless Partnership

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation
Corporation made plan of arrangement under Canada Business Corporations Act — Court approved sale of most of corporation's assets to joint venture — Monitor's first report was ordered sealed until sale was completed — Completion occurred much earlier than expected — Corporation meanwhile was attempting to sell remaining assets and wished to keep earlier bids confidential — Joint venture wanted information to gain advantage in bidding for remaining assets — Corporation brought motion to extend sealing order for six months — Motion granted — Court had jurisdiction under s. 137 of Courts of Justice Act to extend order notwithstanding that plan of arrangement was finalized — Corporation had commercial interest in selling its remaining assets — Extending order would not have substantial detrimental effect on core values of freedom of expression.

Table of Authorities

Cases considered by *Newbould J.*:

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982

CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

887574 Ontario Inc. v. Pizza Pizza Ltd. (1994), 35 C.P.C. (3d) 323, 23 B.L.R. (2d) 239, 1994 CarswellOnt 1214 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 192 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 2(b) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137 — considered

MOTION by corporation for order extending sealing order made in court approved sale of assets.

Newbould J.:

1 Look Communications Inc.(Look) moves for an order extending a sealing order under which bids made in a court approved sales process were sealed. The order is opposed by Inukshuk Wireless Partnership which is a joint venture between Rogers Communications Inc. and Bell Canada.

Circumstances of Sealing Order

2 On December 1, 2008, Look was authorized by Pepall J. to conduct a special shareholder's meeting to pass resolutions (i) authorizing Look to establish a sales process for the sale of all or substantially all of its assets and to seek an order approving the sales process, and (ii) authorizing a plan of arrangement under section 192 of the CBCA which contemplated the sale of all or substantially all of Look's assets. The shareholders voted in favour of both a sales process and the arrangement.

3 On January 21, 2009, Look obtained an order approving the sales process and Grant Thornton Limited was appointed as Monitor to manage and conduct the sales process with Look. The sales process provided for bids from interested persons for five assets of Look, which were substantially all of its assets, being (i) Spectrum, being approximately 100MHz of License Spectrum in Ontario and Quebec; (ii) a CRTC Broadcast License; (iii) Subscribers; (iv) a Network consisting of two network operating centers and (v) approximately $300 million in "tax attributes" or losses. Court approval was required for any sale.

4 Under the sales process, a bidder was entitled to bid for any or all of the assets that were being sold, or a combination thereof. Pursuant to the sales process, four bids were received and Look and the Monitor engaged in discussions with each bidder. Look eventually accepted an offer from Inukshuk for the Spectrum and Broadcast License. It is agreed that while not all of the assets of Look were sold, what was sold to Inukshuk were substantially all of the assets of Look.

5 The parties obtained a consent order on May 14, 2009 from Marrocco J. in which the sale of the Spectrum and

Broadcast License to Inukshuk was approved. The order provided that the assets would vest in Inukshuk upon the Monitor filing a certificate with the court certifying as to the completion of the transaction. The sale contemplated a staged closing, with the first taking place immediately following the order of Marrocco J., the second being December 31, 2009 and the final taking place as late as what the sale agreement defined as the Outside Date, being the third anniversary of the date of the final order approving the transaction, i.e., May 14, 2012. I am told that the reason for the staged dates was that it was anticipated that the necessary regulatory approvals for the sale of the Spectrum and License could take some time.

6 As it turned out, the final closing took place much earlier than the Outside Date within a few months of the order of Marrocco J. On September 11, 2009, the Monitor filed its certificate with the Court certifying that the purchase price had been paid in full and that the conditions of closing had been satisfied. Thus the sold assets vested in Inukshuk. Under the terms of the plan of arrangement that was approved by the order of Marrocco J., once the certificate of the Monitor as to the completion of the transaction was delivered, the articles of arrangement became effective.

7 In connection with the application to Marrocco J. to approve the arrangement and the sale to Inukshuk, the Monitor filed a redacted version of its First Report, as is usual in the Commercial List for sales carried out under a court process, redacting the information about the bids received in the sales process. The order of Marrocco J. provided that an unredacted version of the First Report was to be sealed and not form part of the public record until the Monitor's Certificate after the sale was completed was filed with the Court. That certificate, as I have said, was filed with the Court on September 11, 2009. Therefore under the order of Marrocco J. the unredacted First Report of the Monitor was no longer to be sealed.

8 Look is now attempting to sell its remaining assets, which include a corporation which had been approved by the CRTC to hold a license and has $350 million of tax losses. Look is presently in discussions for the sale of its remaining assets with some of the same parties with whom discussions were held and bids were received under the previous sales process, including Rogers.

9 In early November 2009 Inukshuk asked the Monitor for the information contained in the Monitor's First Report that was sealed under the order of Marrocco J. Look immediately obtained an *ex parte* order from Campbell J. on November 4, 2009 extending the sealing of the Monitor's First Report pending a determination of this motion.

Analysis

10 Look seeks to extend the sealing order for six months while it completes the sale of its remaining assets. It has a concern that publication of the information could impede the sale process now underway and affect the amount received. Look is concerned that if the bids were disclosed, and with Rogers being one of the parties in discussions with Look for the purchase of Look's tax losses, other players in the telecommunications industry would not bid for the remaining assets.

11 Inukshuk has filed no affidavit material as to why it is interested in the sealed information in the Monitor's First Report dealing with all of the bids that were received for all assets. Inukshuk's position in a nutshell is that the sales process previously approved by the Court is over and that the public interest in seeing an open court process should prevent any further sealing of the Monitor's First Report. Mr. Kauffman said that his clients are here in this motion "in their own interest as two members of the public" seeking access to the documents that were filed in the court process.

12 It is understandable why Rogers would want the information. It has been negotiating with Look for the purchase of one or more of Look's remaining assets. Having access to prior bids in the prior sales process in which one or more of those remaining assets may have been the subject of a bid would obviously be of benefit to Rogers it in considering what price it is prepared to offer for the company with the tax loss benefits. While Mr. Kauffman pointed out that it is Inukshuk Wireless Partnership that is opposing the order sought, and that includes Bell as well as Rogers, the fact remains that the partnership does include Rogers which is in negotiations with Look. In any event, it is unrealistic to think that Bell, through its interest in Inukshuk, is funding at least in part the opposition to the extension of the sealing order out of altruistic or public purposes.

13 Section 137 of the *Courts of Justice Act* provides that a court may order any document filed in a civil proceeding to be treated as confidential, sealed and not form part of the public record. The fact that the plan of arrangement consummated under the court proceedings under s. 192 of the CBCA has now been finalized does not in itself mean that the court does not have jurisdiction to continue with the sealing order if it is otherwise appropriate to do so. There is no limitation in section 137

limiting a sealing order to the time during which the litigation in question is ongoing.

14 In *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), it was held that sworn information to obtain a search warrant could not be made available to the public until the search warrant had been executed. In that case, Dixon J. (as he then was) for the majority noted that the case law did not distinguish between judicial proceedings which are part of a trial and those which are not, and that subject to a few well-recognized exceptions, all judicial proceedings should be in public. He held that the presumption was in favour of public access and the burden of contrary proof lay upon the person contending otherwise.

15 In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), the court authorized a confidentiality order. It stated that an order should be granted in only two circumstances, being (i) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and (ii) when the salutary effects of the confidentiality order, including the effects on the right civil litigants to a fair trial, outweighs it deleterious effects, including the effects on the right of free expression, which includes public interest in open and accessible court proceedings. In dealing with the notion of an important commercial interest, Iacobucci J. stated:

> In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)* [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".

16 Look points out that it is not a private company. It is a public company with stakeholders, being public shareholders. It is not the kind of private corporation that Iacobucci J. was discussing in *Sierra*.

17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]), Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

18 This case is a little different from the ordinary. Some of the assets that were bid on during the sales process were not sold. However, because the assets that were sold constituted substantially all of the assets of Look, the arrangement under section 192 of the CBCA was completed. Those assets that were not sold remained, however, to be sold and it is in the context of that process that Rogers has been discussing purchasing one or more of these assets from Look.

19 In this case, had the closing of the sale of the Spectrum and the License been drawn out to the maximum three year period provided for in the sale agreement, these remaining assets in all likelihood would have been sold before the maximum period ran out and during a period of time in which the Receiver's First Report remaining sealed. In those circumstances the effect of the sealing order would have been to protect the later sale process, a process which originally involved a sale of all of the assets of Look. While the remaining sales will not take place under the original sale process that was conducted by Look and the Monitor, the commercial interest in seeing that the remaining assets are sold to the benefit of all stakeholders,

including the public shareholders of Look, remains now as it did before.

20 The advantage to Rogers in seeing what other bidders may have bid on the assets that have remained unsold is obvious. Rogers is in negotiations with Look regarding the acquisition of one or more of those assets. If other bidders previously bid on one or more of those assets, that information would be beneficial to Rogers. If the other bidders did not bid on any of those remaining assets, that too would be of interest to Rogers. As well, Look's concern that the disclosure of the sealed information could impede other bidders from coming forward is not without some merit.

21 In *Sierra*, Iacobucci J said there were core values that should be considered in a motion such as this. *Sierra* involved an application by the Government of Canada for a confidentiality order protecting documents from public disclosure in litigation between the *Sierra* and the Government. Iacobucci J. stated that under the order sought, public access to the documents in question would be restricted, which would infringe the public's freedom of expression guarantees contained in section 2(b) of the *Charter*. He discussed the core values of freedom of expression and how they should be considered in a motion seeking confidentiality of documents. He stated:

> Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (AttorneyGeneral)*, [1989] 1 S.C.R. 927, [page551] at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, per Dickson C.J. Charter jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the Charter: Keegstra, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to Charter principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify. (underlining added)

22 Rogers, or Inukshuk, cannot, in my view, claim that there will be a substantial detrimental effect on these core values by a continuation of the sealing order for a further six months. What Rogers will lose will be access to information that it could use against the interests of Look and its stakeholders. In my view, the salutary effects of extending the sealing order for six months to permit the sale of the remaining assets of Look outweighs the deleterious effects of such order in this case.

23 Inukshuk asks that if the extension order is made, there is no reason to seal the prior bids for the Spectrum that Inukshuk purchased and thus the order should permit that information to be made public. It is said by Mr. Kauffman that such information is of historical interest. I would not make this exception as requested by Inukshuk. Bidders under the prior sales process were entitled to bid on all of the assets either individually or together, and Mr. Porter points out that it may well be difficult to separate out the portion of any prior bid dealing with the Spectrum from a bid for other assets that are now sought to be sold. If the interest sought is only for historical purposes, a six month delay will not be of much or any consequence.

24 In the circumstances, the order sought by Look shall go. Look is entitled to its costs of the motion against Inukshuk. If costs cannot be agreed, short submissions may be made within ten days by Look and reply submissions may be made within a further ten days by Inukshuk.

Motion granted.

End of Document

TAB 13

2014 ABQB 350
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Elaborate Homes Ltd.

2014 CarswellAlta 921, 2014 ABQB 350, [2014] A.W.L.D. 3322, [2014] A.W.L.D. 3353, 14 C.B.R. (6th) 199, 243 A.C.W.S. (3d) 80, 590 A.R. 156

In the Matter of the Insolvency of Elaborate Homes Ltd. and Elaborate Developments Inc.

Alberta Treasury Branches, Plaintiff and Elaborate Homes Ltd., Elaborate Developments Inc., Manjit (John) Nagra, Jaswinder Nagra, Defendants

K.G. Nielsen J.

Heard: May 14, 2014
Judgment: June 11, 2014*
Docket: Edmonton 1103-02937

Counsel: Robert M. Curtis, Q.C. for Alco Industrial Inc.
Michael J. McCabe, Q.C. for PriceWaterhouseCoopers Inc.

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

Related Abridgment Classifications

Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.1 Proceedings against bankrupt
XVI.1.a Before discharge of trustee
XVI.1.a.ii Granting of leave

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.i General principles

Headnote

Bankruptcy and insolvency — Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave
Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to

attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Debtors and creditors — Receivers — Conduct and liability of receiver — Duties — General principles
Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Table of Authorities

Cases considered by *K.G. Nielsen J.*:

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

Look Communications Inc. v. Look Mobile Corp. (2009), 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) — considered

McCulloch v. Murray (1942), [1942] S.C.R. 141, 1942 CarswellNS 15, [1942] 2 D.L.R. 179 (S.C.C.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of) (1988), (sub nom. *Roynat Inc. v. Allan)* 61 Alta. L.R. (2d) 165, (sub nom. *Roynat Inc. v. Allan)* [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173, 1988 CarswellAlta 299, (sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245 (Alta. Q.B.) — considered

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

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — followed

Société Telus Communications v. Peracomo Inc. (2014), 369 D.L.R. (4th) 622, 2014 CarswellNat 1118, 2014 CarswellNat 1119, 2014 SCC 29, 2014 CSC 29 (S.C.C.) — considered

Statutes considered:

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

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 81.4(5) [en. 2005, c. 47, s. 67] — considered

s. 81.6(3) [en. 2005, c. 47, s. 67] — considered

s. 243(1) — referred to

s. 244(1) — considered

s. 245 — considered

s. 246 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9
s. 99(a) — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7
s. 65(7) — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 9.15 — considered

R. 9.15(1) — considered

R. 9.15(2) — considered

R. 11.21 — considered

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

R. 3 — considered

R. 6(1) — considered

R. 124 — considered

MOTION by corporation for leave to file action against receiver, in bankruptcy matter.

K.G. Nielsen J.:

I. Introduction

account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

43 PWC derived its authority from the Receivership Order which specifically references the *BIA*. Rule 6(1) of the *BIA Rules* requires that every notice or other document pursuant to the *BIA* or the *BIA Rules* be "served, delivered personally or sent by mail, courier, facsimile or electronic transmission". Both the Application and the Sale Order were sent by electronic transmission to an email address provided by Alco. There is nothing in the material before the Court to suggest that service was not effected in compliance with Rule 6(1) of the *BIA Rules*.

44 In contrast, *BIA* Rule 124 provides that a notice pursuant to s. 244(1) of the *BIA* by a secured creditor who intends to enforce a security on all or substantially all property of an insolvent may be "sent, *if agreed to by the parties*, by electronic transmission". Neither s. 245 regarding the initial notice of the receiver, nor general Rule 6(1) imposes a similar requirement.

45 The *Alberta Rules of Court* supplement the *BIA Rules* to the extent that they are not inconsistent with the *BIA* or the *BIA Rules*. Rule 11.21 requires that the recipient has specifically provided an address. Arguably, this is more onerous than Rule 6(1), and therefore inconsistent with it. However, even if Rule 11.21 of the *Alberta Rules of Court* applies, there is nothing in the material before the Court to suggest that the requirements of Rule 11.21 were not met in this case.

46 I also note that if Alco wished to pursue the position that the Sale Order had been obtained without notice to it, it could have availed itself of Rule 9.15 of the *Alberta Rules of Court* which provides a mechanism to seek to vary or discharge a judgment or order on that basis. Such an application must be made within 20 days after the earlier of service of the order on the applicant, or the date the order first came to the applicant's attention.

47 The Sale Order was, of course, also served by email on Alco. Therefore, Alco would argue that the Sale Order was not properly served upon it. However, on the record before me it is clear that Alco was aware of the Sale Order by January 11, 2012 at the latest, when it resisted the apportionment of receivership costs as against the proceeds from the sale of the Condo. Alco took no timely steps to set aside the Sale Order for lack of service upon becoming aware of it.

48 Further, the Sale Order makes it clear that service of the Application was declared to be good and sufficient and that service of the Sale Order could be effected upon all affected persons by way of facsimile or electronic mail, and such service was constituted to be good and sufficient. Therefore, it appears that Belzil J. considered the matter of both service of the Application and the Sale Order. Again, Alco could have either appealed the Sale Order, or sought to set it aside on the basis of a lack of notice. It took neither of these steps.

49 I would add that in today's world, electronic service is a reflection of practical realities. The *Alberta Rules of Court* and the *BIA Rules* recognize this reality. Perhaps there is no area of practice where electronic service of documents is more appropriate than the bankruptcy and insolvency area. I say this because of the volume of documents that are often produced in such matters, and the need for receivers, trustees, monitors and counsel to act expeditiously and often in the face of very short deadlines. Given the commercial and legal realities of bankruptcy and insolvency matters, there is an obvious need to exchange documents electronically. In my view, a party involved in such matters cannot ignore these realities by refusing to move effectively into the electronic age.

50 In summary, I find nothing in the material before the Court to suggest that PWC through its counsel did not properly effect service of both the Application and the Sale Order on Alco by emailing those documents to Mr. Taubner at Alco. There is no factual basis to suggest that PWC was either grossly negligent, or that it wilfully misconducted itself, in effecting service of the documents by email.

B. Sale Transaction

51 Alco also alleges that PWC breached its duties to Alco in the manner in which it conducted the sale of Elaborate's assets. Specifically, Alco alleges that PWC concealed the Bid Summary, and sold the Condo for an amount which was below its appraised value.

52 The Second Report indicated that PWC preferred that the Bid Summary remain confidential until such time as the sale transaction had closed. Upon signing the Confidentiality Letter, the Bid Summary would be disclosed to the signatory on the basis that the information disclosed in the Bid Summary would not later be used by the signatory as a potential purchaser of Elaborate assets.

53 Alco argues that PWC should not have required it to give up any right to make an offer on the Condo. Alco submits that its rights "ought not to have been extorted away under threat that otherwise the information necessary for it to respond to a court application would be kept hidden from view".

54 It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952, [2009] O.J. No. 5440 (Ont. S.C.J. [Commercial List]), Newbould J. explained the reasons for such confidentiality:

> 17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In ***8857574 Ontario Inc. v. Pizza Pizza Ltd***, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

55 Alco alleges that PWC and its counsel ignored Alco, hid the Bid Summary and cloaked their activities in the receivership with secrecy. However, there is nothing in the material before the Court to suggest that PWC's preference to keep the Bid Summary confidential until the sale transaction had been approved and closed was for any purpose other than to ensure the integrity of the marketing process, and to avoid misuse of the information in the Bid Summary by a subsequent bidder to obtain an unfair advantage in the event it was necessary to remarket Elaborate's assets. Further, there is nothing to suggest that Belzil J. granted the Sealing Order for any other reason.

56 Alco may have been in a unique position given that it held a second mortgage on the Condo. Given that unique position, it may very well have been entitled to receive information with respect to the offers received in relation to the Condo and, therefore, could have suggested revised terms to any required confidentiality agreement. However, Alco's position does not render PWC's actions inappropriate. There is nothing to suggest that PWC's actions in this regard were not in accordance with common, prudent and reasonable practice in receiverships, or that they reflect or resulted from gross negligence or wilful misconduct on the part of PWC.

57 With respect to the manner in which the sale of the Condo was conducted, Alco submits that PWC breached a "fundamental duty of Receivers" in that it failed to act with an even hand towards classes of creditors and in accordance with recognised lawful priorities. Again, the law and the material before the Court do not support this contention.

58 The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at paras 27-29, Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

> 30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in

TAB 14

2009 CarswellOnt 4838
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4838, [2009] O.J. No. 4487, 56 C.B.R. (5th) 224

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (Applicants)

And In the Matter of a Plan of Compromise or Arrangement of **Nortel Networks** Corporation, **Nortel Networks** Limited, **Nortel Networks** Global Corporation, **Nortel Networks** International Corporation and **Nortel Networks** Technology Corporation

Morawetz J.

Heard: July 28, 2009
Judgment: July 28, 2009
Docket: Toronto 09-CL-7950

Counsel: Mr. D. Tay, Ms J. Stam for **Nortel Networks** Corporation et al.
Mr. J.A. Carfagnini, Mr. C.G. Armstrong for Monitor, Ernst and Young Incorporated
Mr. Arthur O. Jacques for Felske, Sylvain
S.R. Orzy for Noteholders
Ms S. Grundy, Mr. J. Galway for Telefonaktiebolaget LM Ericsson
Ms L. Williams, Ms K. Mahar for Flextronics
Mr. M. Zigler for Former Employees
Mr. L. Barnes for Board of the Directors of **Nortel Networks** Corporation, **Nortel Networks** Limited
Mr. A. MacFarlane for Official Committee of Unsecured Creditors
Ms T. Lie for Superintendent of Financial Services of Ontario
Mr. B. Wadsworth for CAW Canada
Mr. S. Bomhof for Nokia Siemens
Mr. R.B. Schwill for **Nortel Networks** UK Limited

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.b Sale by tender
XIV.6.b.ii Miscellaneous

Judges and courts
XVII Jurisdiction
XVII.10 Jurisdiction of court over own process
XVII.10.e **Sealing** files

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous
Telecommunication company entered protection under Companies' Creditors Arrangement Act — Court order was granted approving bidding procedures for sale of certain of Code Division Multiple Access business and Long-Term Evolution Access — Three qualified bids were received by bid deadline — Highest offer was selected as starting bid — Auction was held — Bid submitted by buyer was determined to be successful bid — Company brought motion for order approving and authorizing execution of asset sale agreement — Motion granted — Sale process was conducted in accordance with bidding procedures and with principles set out in jurisprudence — Consideration provided by buyer constituted reasonably equivalent value and fair consideration for assets.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — **Sealing** files
Telecommunication company entered protection under Companies' Creditors Arrangement Act — Company brought motion for order approving and authorizing execution of asset sale agreement and order **sealing** confidential appendixes to seventh report — Motion granted — **Sealing** order granted — Appendixes contained sensitive commercial information release of which could have been prejudicial to stakeholders.

Table of Authorities

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — considered

Statutes considered:

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

MOTION by telecommunications company for approval of asset sale agreement, vesting order, approval of intellectual property licence agreement, order declaring that ancillary agreements were binding and **sealing** order.

Morawetz J.:

1 **Nortel Networks** Corporation ("NNC), **Nortel Networks** Limited (NNL), **Nortel Networks** Technology Corporation, **Nortel Networks** International Corporation and **Nortel Networks** Global Corporation, (collectively the "Applicants"), bring this motion for an Order approving and authorizing the execution of the Asset Sale Agreement dated as of July 24, 2009, ("the Sale Agreement"), among Telefonaktiebolaget LM Ericsson (PUBL) (the "Purchaser"), as buyer, and NNL, NNC, **Nortel Networks**, Inc.) ("NNI) or ("Ericsson"), and certain of their affiliates as vendors, (collectively, the "Sellers"), in the form attached and as an Appendix to the Seventeenth Report of Ernst and Young Inc. in its capacity as Monitor in the CCAA proceedings.

(3d) 1 (Ont. C.A.), which, in turn, accepts certain standards as set out by this court in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.).

34 Although the *Soundair* and *Crown Trust* tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a CCAA proceeding. For authority see *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.) .

35 The duties of the court in reviewing a proposed sale of assets are as follows:

1) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;

2) It should consider the interests of all parties;

3) It should consider the efficacy and integrity of the process by which offers have been obtained; and

4) It should consider whether there has been unfairness in the working out of the process.

36 I am satisfied that the unchallenged record clearly establishes that the sale process has been conducted in accordance with the Bidding Procedures and with the principles set out in both *Soundair*, and *Crown Trust*. All parties are of the view that the purchase price represents fair consideration for the assets included in the Sale Agreement. I accept these submissions. The consideration provided by Ericsson pursuant to the Sale Agreement, in my view, constitutes reasonably equivalent value and fair consideration for the assets.

37 In my view, it is appropriate to approve the Sale Agreement as between the Sellers and Purchaser. I am also satisfied that it is appropriate to grant the relief relating to the Vesting Order, the IP Licences, the Ancillary Agreement and the Alternate Bid, all of which are approved.

38 The Applicants also requested an order **sealing** the Confidential Appendixes to the Seventeenth Report pending further order. In considering this request I referred to the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a **sealing** order. The Supreme Court of Canada held that such orders should only be granted when:

1) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;

2) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

39 I have reviewed the Confidential Appendixes to the Seventeenth Report. I am satisfied that the Appendixes contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that the request for a **sealing** order is appropriate and it is so granted.

40 Other than with respect to the payment and reimbursement of amounts in respect of the Bid Protections nothing in this endorsement or the formal order is meant to modify or vary any of the Selling Debtors' (as such term is defined in the ISFA) rights and obligations under the ISFA. It is further acknowledged that **Nortel** has advised that the Interim Sales Protocol shall be subject to approval by the court.

TAB 15

2010 ONSC 1161
Ontario Superior Court of Justice [Commercial List]

Maxtech Manufacturing Inc., Re

2010 CarswellOnt 1072, 2010 ONSC 1161, 185 A.C.W.S. (3d) 22, 64 C.B.R. (5th) 239

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 COMPROMISE OR ARRANGEMENT OF **MAXTECH MANUFACTURING** INC. (Applicants)

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985 C.B-3, AS AMENDED

Morawetz J.

Heard: January 28, 2010
Judgment: February 23, 2010
Docket: 09-CL-8352

Counsel: Alissa Mitchell for Receiver, Tim Gleason
Tim Gleason for United Steel Workers of America
Brett Harrison for Export Development Canada
Fred Myers for Maple Trade Finance Inc.
Ian Aversa for VLM Finance Ltd.
George Benchetrit for General Electric
Jonathan Wigley for Alpha Sitered Metals Inc.
Jane Dietrich for Tenneco Automotive
Jeffrey J. Simpson for Kacee Visudeva, **Maxtech** Consumer Products Limited, **Maxtech Manufacturing** Inc., 12600976 Ontario Limited

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Sale of assets by receiver — Receiver wished to sell assets of insolvent business, and solicited offers — Highest offer was withdrawn before it could be accepted — Receiver negotiated with another offeror and reached agreement better than previous agreement — Offeror of original highest offer submitted another bid, which was not accepted — Receiver brought motion for approval of sale — Motion granted — Sale approved — Cash component of offer was higher, and was payable earlier — Offeror of original highest offer's ability to service debt assumption was suspect — Process was fair — Creditors with first ranking charge over assets at issue approved of sale — No evidence of what bid other offerors wished to make, and

if they could provide deposit interest of guarantor was not prejudiced — Appendices contained confidential information and were sealed.

Table of Authorities

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Romspen v. 6176666 Canada Ltee. (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

MOTION by receiver for approval of sale of assets.

Morawetz J.:

1 At the conclusion of the motion on January 28, 2010, I endorsed the record as follows:

Motion granted. Transaction with Alpha Sitered approved. **Sealing** Order granted. Second Report approved. Reasons will follow. Order to go in form presented as amended.

2 The following are the reasons.

3 Grant Thornton Limited, in its capacity as Receiver of **Maxtech Manufacturing** Inc. (the "Receiver") brought this motion to approve the transaction as contemplated by an asset purchase agreement (the "Agreement") between the Receiver, as Seller and Alpha Sitered Metals, Inc., as Purchaser ("Alpha" or the "Purchaser").

4 The Receiver also sought an order to seal certain appendices annexed to its Second Report and for an order approving the actions and activities of the Receiver as described in the Second Report and the Supplementary Report.

5 The motion was supported by Export Development Canada ("EDC") and General Electric ("GE"). Counsel to Maple Trade did not oppose the motion on the basis that there was no other offer.

6 The motion was opposed by counsel on behalf of Mr. Kacee Vasudeva, **Maxtech** Consumer Products Limited, **Maxtech Manufacturing** Inc. ("**Maxtech**") and 1260976 Ontario Limited.

7 At the outset of argument, Mr. Simpson on behalf of Mr. Vasudeva, **Maxtech** and related companies brought a motion to adjourn the motion to February 3, 2010 in order that his clients could put forward a further and better offer that complied with requirements previously set forth by the Receiver. The adjournment request was supported by counsel to Maple Trade.

respect of which GE and EDC appear to hold a first-ranking charge.

21 In opposition to the motion, Mr. Simpson submitted that the Alpha Offer should not be approved in the face of representations that his client could put forward a further and better offer that complied with the requirements previously set forth by the Receiver. However, as I noted in my reasons for refusing the adjournment request, Mr. Simpson's clients had taken no steps to put anything on the record which would substantiate the submissions made by counsel.

22 Mr. Simpson's clients provided no evidence of what offer they wanted to submit. There was no evidence as to why they needed additional time. There was no evidence that they could submit a deposit and they provided no evidence that they would be in a position to consummate the transaction.

23 The test on a motion to approve a sale by a receiver is set out in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) which was later adopted by the Court of Appeal in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.):

> 1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. The court should consider the interests of all parties.
>
> 3. The court should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. The court should consider whether there has been unfairness in the working out of the process.

24 In this case, I have concluded that the Receiver has acted properly. Indeed, there is no evidence to the contrary.

25 The Receiver implemented the sales process which had been approved by the court. There is ample evidence to support the Receiver's contention that the Alpha Offer represents the best bid.

26 To the extent that the submissions were being made on behalf of Mr. Vasudeva in his capacity as guarantor, his affidavit sworn January 28, 2010 states that his interests as a guarantor have been ignored throughout the receivership process and, if the proposed transaction is approved, he may be one of the largest unsecured creditors of **Maxtech**, with no ability to collect. Accordingly, he states that his interests will be prejudiced by the sale.

27 I am satisfied that the Receiver conducted the sales process in an acceptable manner and obtained a fair and reasonable price for the assets in the circumstances. The interests of Mr. Vasudeva have, in my view, not been prejudiced by the sales process nor the actions taken by the Receiver. The fact that he may be a large unsecured creditor results from other factors. In my view, the opposition expressed by Mr. Vasudeva is not such that the transaction should not be approved.

28 In the result, I am satisfied that it is appropriate to approve the Agreement.

29 The Receiver also requested an order **sealing** the confidential appendices to the Second Report pending further order. In considering this request, I am guided by the decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a **sealing** order.

30 I reviewed the confidential appendices to the Second Report. I am satisfied that the appendices contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that it is appropriate to grant the requested **sealing** order.

31 Finally, counsel to the Receiver advises that there has been no adverse comment received in respect of the actions and

