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COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.	JUDICIAL CENTRE OF EDMONTON FILED MAR 16 2018 Clerk of the Court

DOCUMENT	**BRIEF OF THE MONITOR, ERNST & YOUNG INC.**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DARREN R. BIEGANEK Q.C./ RYAN F.T. QUINLAN Barrister & Solicitor Phone: (780) 441-4386 Fax: (780) 428-9683 File No.: 196164	**DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta, Canada, T5J 3V9

TABLE OF CONTENTS

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 as the "Applicants" or the "Companies" or the "Group") 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. ("EYI" or the "Monitor") as monitor of the Applicants.

2. The Stay has been extended on multiple occasions, and has currently been extended to March 23, 2018.

3. The next hearing in these *CCAA* proceedings is scheduled for March 20, 2018. At that time, this Honourable Court will consider the Monitor's Application for an increase in the Administration Charge granted in the Initial Order (the "Administration Charge"), and the Applicants' Application to extend the Stay and authorize the completion of certain proposed transactions. Several related issues arise in the context of these Applications and the *CCAA* proceedings generally.

4. The Monitor submits this Brief in respect of three of the subjects to be considered at the March 20, 2018 hearing, namely:

   a. whether the Administration Charge ought to be increased;

   b. whether the Monitor's powers, duties and role in these *CCAA* proceedings ought to be expanded; and

   c. the principles applicable to the Monitor's proposed cost allocation methodology.

II. FACTS

5. On July 5, 2017, the Applicants obtained the Initial Order in these *CCAA* proceedings. As part of the Initial Order, this Honourable Court granted a priority Administration Charge in the aggregate amount of $500,000.00

   Monitor's Eleventh Report dated March 12, 2018 at para. 1; Monitor's Tenth Report dated March 12, 2018 at para. 10

6. Prior to the application noted above, on June 26th, 2017, each of CNG, CNC, Campcorp, and DJ filed a Notice of Intention to Make a Proposal ("NOI") pursuant to Section 50.4(1) of *the Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and EYI consented to act as Trustee in each instance. These NOI proceedings commenced by CNG, CNC, Campcorp and DJ under the *BIA* were taken up and continued under the *CCAA*.

   Monitor's Eleventh Report dated March 12, 2018 at para. 2

7. On July 27, 2017, the Applicants made an application to the Court for an extension of the Stay and to add 1919209 Alberta Ltd. ("1919") as an applicant to the *CCAA* Proceedings. The relief sought by the Applicants at this application was granted by the Court.

   Monitor's Eleventh Report dated March 12, 2018 at para. 3

8. Over the Course of these *CCAA* proceedings, the Applicants have made a number of applications to this Court requesting various relief and corresponding extensions of the Stay. The Stay has

currently been extended to March 23, 2018 as a result of this Honourable Court's Order granted on February 27, 2018.

Monitor's Eleventh Report dated March 12, 2018 at para. 4

9. At the February 27, 2018 hearing, the Court set the next hearing date in these *CCAA* proceedings at March 20, 2018 to consider, amongst other items, whether the Stay should be extended and whether this Honourable Court should authorize the Applicants to finalize the transaction contemplated by the Modified LOI (as defined in the Monitor's Eleventh Report) with the Restructuring Investor (as defined in the Monitor's Eleventh Report).

10. At the February 27, 2018 hearing, this Honourable Court directed the Monitor, in anticipation of the March 20, 2018 hearing date, to file a Report that, amongst other things, included assessments and recommendations in resect of various offers to purchase or letters of intent, refinancing attempts, realization strategies and a proposed allocation methodology regarding priority claims.

11. The Applicants have now concluded that the pursuit of new further funding from any potential lenders should be discontinued. Given the Applicants' conclusion in this regard, the Monitor also ceased conducting any further work and communications with potential lenders.

Monitor's Eleventh Report dated March 12, 2018 at paras. 37-39

12. In the Monitor's Eleventh Report and its Confidential Supplement thereto, the Monitor has recommended that the Applicants be authorized to finalize the transaction with the Restructuring Investor.

Monitor's Eleventh Report dated March 12, 2018 at paras. 40-45

13. If the transaction is finalized with the Restructuring Investor, the Applicants' main operations will transition to a new corporate entity arises as a result of the transaction with Restructuring Investor ("NewCo"), and will leave a significant amount of residual assets that need to be dealt with by the Applicants and the Monitor. The Monitor has recommended that any such residual assets should be liquidated by the Monitor, with assistance from the Applicants' management and NewCo if required, under these *CCAA* proceedings. As part of this process, a select number of camps that do not form part of the transaction with the Restructuring Investor may continue to operate for a limited time while a plan to realize on the residual assets is finalized.

Monitor's Eleventh Report dated March 12, 2018 at paras. 46-49; Confidential Supplement to the Monitor's Eleventh Report dated March 12, 2018 at paras. 16-19.

14. On March 12, 2018, the Monitor filed its Application to increase the Administration Charge from $500,000.00 to $950,000.00 (the "Administration Charge Application").

15. During the months prior to the filing of the Administration Charge Application, professional fees were higher than anticipated due to numerous court applications, the on-going claims process, the assistance provided to the Applicants in canvassing the market for financing, negotiating with numerous potential lenders and the Restructuring Investor, developing a proposed cost allocation methodology and other related work.

Monitor's Tenth Report dated March 12, 2018 at para. 10

16. Further, the Applicants' revenues and related cash collections fell behind projections primarily due to lower than expected occupancy and failing to receipt at least one large receivable that was expected to be paid.

Monitor's Tenth Report dated March 12, 2018 at para. 10

17. As such, the Applicants have fallen behind on payments to the professionals, whose unpaid fees form part of the Administration Charge.

Monitor's Tenth Report dated March 12, 2018 at para. 10

18. As at February 27, 2018, the unpaid fees of all professionals, who have outstanding invoices with the Applicants, were approximately $594,000.00. This amount did not include work in progress not yet invoiced. The work in process was estimated at approximately $260,000.00 as at the date of the Monitor's Tenth Report.

Monitor's Tenth Report dated March 12, 2018 at para. 11

19. The Applicants had previously advised that approximately $109,000.00 of fees would be paid to professionals in the week ended February 24, 2018, and that an additional $150,000.00 would be paid towards professional fees in the week ended March 3, 2018. However, only $52,000.00 of fee payments the Applicants committed to pay in the week of February 24, 2018 was actually paid, and nothing was paid in the week of March 3, 2018.

Monitor's Tenth Report dated March 12, 2018 at para. 12

20. The Applicants owe approximately $854,000.00 to professionals as at March 12, 2018, and further work has been completed since that date in anticipation of the March 20, 2018 hearing date, and it is expected that further work will continue to be done following that hearing.

Monitor's Tenth Report dated March 12, 2018 at para. 15

III. ISSUES ADDRESSED

21. This Brief addresses the following limited subjects that form part of the subjects to be considered by this Honourable Court at the hearing scheduled for March 20, 2018 in these *CCAA* proceedings:

a. Should this Honourable Court increase the Administration Charge from $500,000.00 to $950,000.00?

b. Should this Honourable Court expand the Monitor's powers, duties and role in these *CCAA* proceedings?; and

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

IV. LAW AND ARGUMENT

A. INCREASING THE ADMINISTRATION CHARGE

22. Section 11.52 of the *CCAA* states:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

23. A non-exhaustive list of factors that Courts often consider when determining whether to grant an administration charge to professionals includes:

    a. the size and complexity of the business being restructured;
    b. the proposed role of the beneficiaries of the charge;
    c. whether there is an unwarranted duplication of roles;
    d. whether the quantum of the proposed charge appears to be fair and reasonable;
    e. the position of the secured creditors likely affected by the charge; and
    f. the position of the monitor.

Canwest Publishing Inc. / Publications Canwest Inc., Re, 2010 ONSC 222 at para. 54 **[TAB 1]**; *Emmanuel Village Residence Inc. v. 1250 Weber Street East*, 2016 ONSC 5661 at para. 36 (*Emmanuel Village*) **[TAB 2]**

24. Courts regularly increase priority administration charges in insolvency proceedings where it was appropriate or necessary to do so in the circumstances.

Respec Oilfield Services Ltd., Re, 2010 ABQB 277 at para. 96 (*Respec Oilfield Services*) **[TAB 3]**; *SLMSoft Inc., Re*, 2003 CarswellOnt 4186 at para. 1 (*SLMSoft*) **[TAB 4]**; *Emmanuel Village* at para. 41 **[TAB 2]**

25. Increases to administration charges are made as appropriate because of the vital function that they serve in insolvency proceedings. Justice Topolniski, in these proceedings, already noted their importance as follows:

> Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

Canada North Group Inc (Companies' Creditors Arrangement Act), 2017 ABQB 550 at para. 104 **[TAB 5]**

26. Justice Bielby, while considering a request to increase an administration charge in *Respec Oilfield Services*, similarly commented:

> 94 Refusing the Monitor's application could well have a chilling effect on future CCAA applications as insolvency professionals which might otherwise be willing to take on the role of Monitor could feel disinclined to

> so act, being unable perhaps to adequately predict their entire future costs and so leaving themselves exposed to the risk of being inadequately secured. ...
>
> 95 GE complains that the Monitor has not led evidence to show what further fees it will actually incur or to show that they are necessary or reasonable. However, that is not a reason to deny this application. The Monitor will have to bring on a future application approving any additional fees or disbursements it wishes to have paid out of the administration costs. At that time GE can challenge the payment if it believes the facts support doing so.

Respec Oilfield Services at paras. 94-95 **[TAB 3]**

27. It is respectfully submitted that the professionals whose accounts are the subject of the Administration Charge in this matter have been critical in enabling the Applicants, within these *CCAA* proceedings, to maintain operations and realize income (indeed the accounts receivable of the Applicants has increased since the commencement of these *CCAA* proceedings), implement a claims process, search for additional financing, reach agreements with potential investors and potentially liquidate assets to pay down creditors.

28. Further, the size, diversity and complexity of the Applicants' respective, but interwoven, businesses being restructured is significant.

29. The reason that the professionals have gone unpaid is that the Applicants have fallen short of revenue and cash collection projections, and the DIP financing advanced and other post-filing revenues generated have been applied toward essential payments for business operations.

30. In such circumstances, Courts have recognized that it is just and appropriate to increase administration charges. As an example, the Court in *SLMSoft Inc., Re* held:

> 1 As indicated, I am prepared to issue an Order increasing the Administrative Charge under paragraph 33 of the Initial Order from $200,000 to $600,000. In my view, it is apparent that the revenues of the Applicants fell far short of what was anticipated when that figure was set and the DIP financing which has been advanced to date has had to be applied toward essential payments such as salaries and rent. The professional services have been crucial in enabling the Applicant to remain in operation, within the CCAA proceedings, in hopes of completing and realizing income from the two major contracts which appear to me to be the only tangible assets of the Applicants. The professionals have forborne payment of their accounts in order to do so and should not, in my view, be penalized for having made that sacrifice.

SLMSoft at para. 1 **[TAB 4]**

31. Similar conclusions were reached in *Simpson's Island Salmon Ltd., Re*, where the Court initially granted an administration charge in the amount of $300,000.00, but a motion was filed to increase that charge when the outstanding professional fees reached $364,000.00. The Court held:

> 2 The Applicants assert that due to numerous Court proceedings, additional costs to the administrative charge have been incurred including costs incurred due to the replacement of the Court appointed Monitor part way through the process. In addition, the Applicants assert that other unexpected costs have occurred.

> ...
>
> 17 Expenditures have exceeded what was initially anticipated and because of the problems encountered with harvesting the salmon, the Applicants' revenues did not meet expectations.
>
> 18 Failure to grant an increase in the Administrative Charge would result in the Applicants no longer being able to continue their attempts at restructuring as well as completing the harvesting and marketing of the current crop of salmon.
>
> 19 I am satisfied that the professional services incurred to date have been crucial in enabling the Applicants to remain in operation. I am also satisfied that the Applicants have acted and continue to act in good faith and with due diligence.
>
> 20 Based on the current and projected expenses for professional fees, I am prepared to issue an order amending Article 31 of the Initial Order by increasing the Administrative Charge from $300,000.00 to $510,000.00.

Simpson's Island Salmon Ltd., Re, 2006 NBQB 244 at paras. 2, 17-20 **[TAB 6]**

32. There is a risk that the professionals in these proceedings will go unpaid unless an increase in the Administration Charge is granted. As noted by Justice Morawetz in *Timminco Ltd., Re,* "...To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic."

Timminco Ltd., Re, 2012 ONSC 506 at para. 44 **[TAB 7]**

33. The purpose of the *CCAA* and the importance of professionals in the process continues to exist regardless of whether the Applicants are actually restructuring or are continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. The fact that the Applicants have not provided any plan for restructuring at this time does not change the analysis.

Timminco Ltd., Re, 2012 ONSC 506 at para. 50 **[TAB 7]**

34. The Monitor further respectfully submits that the amount of the increase in the Administration Charge being proposed, from $500,000.00 to $950,000.00, is reasonable, especially in light of the fact that significant work by professionals has been undertaken, between the February 27, 2018 and March 20, 2018 hearing dates, at the request of creditors and the direction of this Honourable Court.

35. As at March 12, 2018, there was approximately $840,000.00 owing by the Applicants to the professionals, and there was still significant further professional time and costs expected to be incurred to advance these proceedings to the March 20, 2018 hearing date.

36. It must also be remembered that the Monitor and the Monitor's counsel are still required to pass their accounts from time to time pursuant to paragraph 29 of the Initial Order.

37. In this respect, the comments of the Court in *Emmanuel Village* are applicable to these proceedings:

> 39 At this stage, it would not appear that the quantum of the charge appears to be unreasonable. The value of the work done to date already

exceeds the amount of the Administration Charge originally set. The work of the Receiver and its counsel to August 26, 2016 has already been approved by the Court. The increased Administration Charge does not *ipso facto* mean that the amount sought by the Professional Group that has not already been approved by the Court will be paid. Those fees and disbursements will be subject to Court approval.

B. EXPANDING THE MONITOR'S POWERS AND ROLE

38. The Monitor has recommended that the Applicants be authorized to finalize the transaction with the Restructuring Investor, and the Applicants have concluded that the pursuit of further funding from a new lender will be discontinued. If the transaction is finalized with the Restructuring Investor, the Applicants' main operations transition to NewCo, there will be a significant amount of residual assets that will need to be dealt with by the Applicants and the Monitor.

39. The Monitor recommends that such residual assets be liquidated in due course in order to minimize on-going costs in relation to those assets, as well as begin to bring these *CCAA* proceedings to an end.

40. It is the Monitor's opinion that the best probable outcome for the stakeholders would be achieved through a liquidation process under these *CCAA* proceedings controlled by the Monitor, with assistance from the Applicants' management, and NewCo where required.

41. If the Court directs a liquidation under these *CCAA* proceedings controlled by the Monitor, the Monitor's role and powers would need to be expanded, including vesting the Monitor with the power to control the process and execute on the sale of assets, run the camps which remain in operation and are not the subject of the transaction with the Restructuring Investor, collect receivables, effect distributions, secure the necessary funding to complete the process and otherwise wind up operations.

42. The Monitor confirms it is prepared and qualified to accept an expanded mandate.

43. The powers granted to a monitor are in the discretion of the Court. Indeed, under section 11 of the *CCAA*, this Honourable Court may make any order that it considers appropriate in the circumstances, subject to the restrictions contained in the *CCAA*.

44. The *CCAA* contemplates a monitor being granted powers beyond those required to fulfill the traditional role of monitoring the debtor's business and preparing reports for creditors and the Court. Section 23(1)(k) of the *CCAA* leaves discretion in the court to authorize functions other than those specifically enumerated by Parliament.

843504 Alberta Ltd., Re, 2003 ABQB 1015 at para. 10 (*843504 Alberta Ltd.*) **[TAB 8]**

45. Further support for this proposition exists in the explicit recognition in section 11.8 of the *CCAA* that a monitor may be authorized to carry on the debtor's business. Indeed, Courts have empowered monitors to exercise any powers which might properly be exercised by a board of directors and to operate a debtor's business, where appropriate.

Nortel Networks Corp., Re., 2017 ONSC 673 at para. 7 **[TAB 9]**; *843504 Alberta Ltd.* at para. 10 **[TAB 8]**

46. A monitor may be authorized by the Court to conduct, supervise and direct a sale process for the debtor's property or business in *CCAA* proceedings.

Nortel Networks Corp., Re., 2017 ONSC 673 at para. 6 **[TAB 9]**; *League Assets Corp., Re.*, 2016 BCSC 2262 at paras. 73-73 (*League Assets*) **[TAB 10]**; 8640025 Canada Inc., 2017 BCCA 303 at para. 19 **[TAB 11]**

47. Courts have accepted that there may be "natural transition points" in *CCAA* proceedings where going forward it is appropriate and necessary for the monitor to take on an enhanced role in the proceedings and be granted additional powers.

Nortel Networks Corp., Re., 2009 CarswellOnt 9378 **[TAB 12]**; *League Assets* at paras. 73-74 **[TAB 1o]**

48. If this Honourable Court authorizes the transaction with the Restructuring Investor be finalized and the Applicants' main operations are transitioned to NewCo, the Monitor respectfully submits that there will be such a natural transition point in these *CCAA* proceedings provide it with an enhanced role in the manner being proposed.

49. The Applicants are not further pursuing additional financing. Without such additional financing, the Applicant's business operations are not sustainable. However, there are residual assets that have to be dealt with going forward.

50. The Monitor recommends that these residual assets ought to be liquidated. While that is occurring, the best course of action is to continue to operate the select camps noted in the Confidential Supplement to the Monitor's Eleventh Report for the reasons noted in that Confidential Supplement (which will not be repeated here).

51. It is further respectfully submitted that enhancing the Monitor's role and granting it the additional powers being recommended will achieve the best probable outcome for the stakeholders, since:

a. a liquidation conducted under these *CCAA* proceedings will involve a sale of the residual assets in an organized fashion without the stigma of a receivership or bankruptcy;

b. costs of the proposed process are likely to be less than in comparison to other options available, as the Monitor has significant existing knowledge and experience with the Applicants, their business, their operational requirements and their assets, and a new Receiver or Trustee being appointed would result in significant professional costs being incurred to acquire the same level of experience and knowledge; and

c. the Monitor is more likely to effect a prompt liquidation and bring a close to these *CCAA* proceedings in a quicker manner than the other options available, again given its existing experience and knowledge.

52. The Monitor understands that Canadian Western Bank ("CWB") supports its recommendation in this regard.

C. Allocation

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

54. In this section of the Brief, the Monitor simply 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. The Monitor is not seeking any relief confirming the actual cost allocation at this time.

55. 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 13]**; *Respec Oilfield Services* at para. 22 **[TAB 3]**; *Winnipeg Motor Express Inc., Re,* 2009 MBCA 110 at paras. 8, 28 and 34 (*Winnipeg Motor Express*) **[TAB 14]**; *Hunjan International Inc., Re,* 2006 CarswellOnt 2718 at paras. 4 and 71 (*Hunjan*) **[TAB 15]**; *Hunters Trailer & Marine Ltd., Re,* 2001 ABQB 1094 at para. 15 (*Hunters Marine*) **[TAB 16]**

56. 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 13]**; *Hunjan* at para. 4 **[TAB 15]**; *Respec Oilfield Services* at para. 32 [**TAB 3**]; *Winnipeg Motor Express* at paras. 8 and 28 **[TAB 14]; ** *Hunters Marine* at paras. 20 and 26 **[TAB 16]**

57. 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 13]**; *Respec Oilfield Services* at para. 22 [**TAB 3**]; *Winnipeg Motor Express* at paras. 9, 11 and 28 **[TAB 14]**; *Hunjan* at paras. 5 and 57-58 **[TAB 15]**; *Hunters Marine* at para. 15, 20-21 **[TAB 16]**

58. 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 13]**; *Winnipeg Motor Express* at paras. 8 and 10 and 28, 32 **[TAB 14]**; *Hunjan* at paras. 5 and 57 **[TAB 15]**; *Hunters Marine* at para. 15 **[TAB 16]**

59. 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 16]**

60. 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 repeatedly have 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 objectives of the *CCAA*."

Winnipeg Motor Express at para. 52 **[TAB 14]**

61. 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 13]**; *Winnipeg Motor Express* at paras. 9-10 **[TAB 14]**; *Hunjan* at paras. 58 and 72-73 **[TAB 15]**

62. 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 13]**

63. 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 17]**

64. 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.

65. First, the Monitor is proposing that the 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.

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

67. 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 Allocation Analysis contained in the Confidential Supplement to the Eleventh Report (which will not be reproduced here for confidentiality purposes).

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

Medican Holdings at para. 27 **[TAB 13]**; *Hunters Marine* at para. 23 **[TAB 16]**

69. 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.

70. 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.

71. 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.

72. 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.

73. 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 Allocation Analysis contained in the Confidential Supplement to the Eleventh Report.

74. 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.

75. Further, the Monitor respectfully recommends that outstanding DIP financing, CRA deemed trust claims, and professional fees be paid out as soon as funds become available to minimize interest and other carrying costs, as well as to reduce the exposure of the estate to the priority charges. This is valid and proper consideration.

Respec Oilfield Services at para. 50 **[TAB 3]**

76. Finally, the Monitor is recommending that the post-CCAA trade creditors and suppliers be paid from the existing accounts receivable from CNC, DJ and CampCorp 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 assisting in generating an increase in the Applicants' accounts receivable from the commencement date of the *CCAA* proceedings to the date of the Monitor's Eleventh Report.

77. The Monitor recognizes that the payment of priority charges upfront will create a temporary disproportionate cost to certain creditors from realizations to date, but provided sufficient funds are maintained going forward as expected, the impact of this temporary inequity should be corrected over time.

V. CONCLUSION AND RELIEF SOUGHT

78. The Monitor respectfully provides its proposed cost allocation methodology for this Honourable Court's consideration and supports:

a. an increase the Administration Charge from $500,000.00 to $950,000.00; and

b. an expansion of the Monitor's role and powers in a manner that would include, without limitation, vesting the Monitor with the power to control the process and execute on the sale of residual assets, run the select camps which remain in operation and are not the subject of the transaction with the Restructuring Investor, collect receivables, effect distributions, secure the necessary funding to complete the process and otherwise wind up the Applicants' operations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16 day of March, 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 Canada North Group Inc.; Canada North Camps Inc.; CampCorp Structures Ltd.; D.J. Catering Ltd.; 816956 Alberta Ltd.; 1371047 Alberta Ltd.; and 1919209 Alberta Ltd.
and not in its personal or corporate capacity

LIST OF AUTHORITIES

Tab

1. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222
2. *Emmanuel Village Residence Inc. v. 1250 Weber Street East*, 2016 ONSC 5661
3. *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277
4. *SLMSoft Inc., Re*, 2003 CarswellOnt 4186
5. *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550
6. *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 244
7. *Timminco Ltd., Re*, 2012 ONSC 506
8. *843504 Alberta Ltd., Re*, 2003 ABQB 1015
9. *Nortel Networks Corp., Re.*, 2017 ONSC 673
10. *League Assets Corp., Re.*, 2016 BCSC 2262
11. *8640025 Canada Inc.*, 2017 BCCA 303
12. *Nortel Networks Corp., Re.*, 2009 CarswellOnt 9378
13. *Medican Holdings Ltd., Re*, 2013 ABQB 224
14. *Winnipeg Motor Express Inc., Re*, 2009 MBCA 110
15. *Hunjan International Inc., Re*, 2006 CarswellOnt 2718
16. *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094
17. *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531

4146-0679-7586, v. 4

TAB 1

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — 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.) — followed

Statutes considered:

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

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

LIST OF AUTHORITIES

Tab

1. *Canwest Publishing Inc. / Publications Canwest Inc., Re,* 2010 ONSC 222
2. *Emmanuel Village Residence Inc. v. 1250 Weber Street East,* 2016 ONSC 5661
3. *Respec Oilfield Services Ltd., Re,* 2010 ABQB 277
4. *SLMSoft Inc., Re,* 2003 CarswellOnt 4186
5. *Canada North Group Inc (Companies' Creditors Arrangement Act),* 2017 ABQB 550
6. *Simpson's Island Salmon Ltd., Re,* 2006 NBQB 244
7. *Timminco Ltd., Re,* 2012 ONSC 506
8. *843504 Alberta Ltd., Re,* 2003 ABQB 1015
9. *Nortel Networks Corp., Re.,* 2017 ONSC 673
10. *League Assets Corp., Re.,* 2016 BCSC 2262
11. *8640025 Canada Inc.,* 2017 BCCA 303
12. *Nortel Networks Corp., Re.,* 2009 CarswellOnt 9378
13. *Medican Holdings Ltd., Re,* 2013 ABQB 224
14. *Winnipeg Motor Express Inc., Re,* 2009 MBCA 110
15. *Hunjan International Inc., Re,* 2006 CarswellOnt 2718
16. *Hunters Trailer & Marine Ltd., Re,* 2001 ABQB 1094
17. *Royal Bank of Canada v. Atlas Block Co.,* 2014 ONSC 1531

4146-0679-7586, v. 3

limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re*[15], I approved the KERP

TAB 2

2016 ONSC 5661
Ontario Superior Court of Justice [Commercial List]

Emmanuel Village Residence Inc. v. 1250 Weber Street East

2016 CarswellOnt 14259, 2016 ONSC 5661, 271 A.C.W.S. (3d) 104

EMMANUEL VILLAGE RESIDENCE INC. (Applicant) and ATTORNEY GENERAL OF ONTARIO (Applicant) and 1250 WEBER STREET EAST, KITCHENER, ONTARIO OR THE PROCEEDS OF THE SALE THEREOF (IN REM) (Respondent)

Newbould J.

Heard: September 6, 2016
Judgment: September 12, 2016
Docket: CV-16-11424-00CL

Counsel: Jennifer A. Whincup, Bruce Darlington, for Applicant, Emmanuel Village Residence Inc.
Jonathan Bell, Joseph N. Blinick, for Plaintiffs in action CV-10-8547-00CL
Gary Valiquette, Jennifer Malabar, for Attorney General of Ontario
Leanne M. Williams, for Receiver, BDO Canada Inc.
R. Brendan Bissell, for Sure Mortgage Capital Inc.
L. Joseph Latham, for Revera Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees

Equity
III Equitable doctrines
III.7 Relief against penalty and forfeiture
III.7.b Statutory penalty or forfeiture

Headnote

Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — Priority of fees
Retirement Homes Regulatory Authority revoked owner and operator's licence to operate retirement home after president was convicted of theft — Operator was to take steps to sell business as going-concern or risk displacing its residents at expiry of its licence in October 2016 — Operator applied to appoint receiver for limited purpose of completing going concern sale of business to purchaser licensed to carry on business as retirement home — Attorney General of Ontario (A-G) commenced application under s. 3(1) of Civil Remedies Act (CRA) to forfeit municipal property, portion of which belonged to operator — Receiver was appointed over all assets of retirement home — Administration charge of $350,000 was contained in appointment order to secure costs of receiver and lawyers for receiver and operator — Applications of operator and A-G dealt with same property and were consolidated — Operator executed agreement for sale of substantially all of assets and obtained

approval and vesting order and approval of receiver's fees and activities — Operator brought motion for, among other things, increase in administration charge — Motion granted — Operator was in no position to pay legal and receivership expenses required to sell property — Operator was using its funds to pay ongoing regular bills and expenses of business prior to closing of sale, as required by amended preservation order — Reasonable person would not think it fair or just that professionals engaged to sell retirement home would not be paid for their work, which was what would happen if administration charge was not in sufficient amount to pay their reasonable fees and disbursements — It was in interests of victims of president's fraud to have assets monetized so they could be compensated from proceeds and that sale was properly conducted that achieved most available funds — It was appropriate to grant relief from forfeiture under s. 3 of CRA — Secured creditors likely to be affected by increased administration charge took no position against increase — Administration charge was increased from $350,000 to $700,000.

Equity — Equitable doctrines — Relief against penalty and forfeiture — Statutory penalty or forfeiture
Retirement Homes Regulatory Authority revoked owner and operator's licence to operate retirement home after president was convicted of theft — Operator was to take steps to sell business as going-concern or risk displacing its residents at expiry of its licence in October 2016 — Operator applied to appoint receiver for limited purpose of completing going concern sale of business to purchaser licensed to carry on business as retirement home — Attorney General of Ontario (A-G) commenced application under s. 3(1) of Civil Remedies Act (CRA) to forfeit municipal property, portion of which belonged to operator — Receiver was appointed over all assets of retirement home — Administration charge of $350,000 was contained in appointment order to secure costs of receiver and lawyers for receiver and operator — Applications of operator and A-G dealt with same property and were consolidated — Operator executed agreement for sale of substantially all of assets and obtained approval and vesting order and approval of receiver's fees and activities — Operator brought motion for, among other things, increase in administration charge — Motion granted — Operator was in no position to pay legal and receivership expenses required to sell property — Operator was using its funds to pay ongoing regular bills and expenses of business prior to closing of sale, as required by amended preservation order — Reasonable person would not think it fair or just that professionals engaged to sell retirement home would not be paid for their work, which was what would happen if administration charge was not in sufficient amount to pay their reasonable fees and disbursements — It was in interests of victims of president's fraud to have assets monetized so they could be compensated from proceeds and that sale was properly conducted that achieved most available funds — It was appropriate to grant relief from forfeiture under s. 3 of CRA — Secured creditors likely to be affected by increased administration charge took no position against increase — Administration charge was increased from $350,000 to $700,000.

Table of Authorities

Cases considered by *Newbould J.*:

DBDC Spadina Ltd. v. Walton (2013), 2013 CarswellOnt 17952, 2013 ONSC 8036 (Ont. S.C.J. [Commercial List]) — referred to

Ontario (Attorney General) v. McDougall (2011), 2011 ONCA 363, 2011 CarswellOnt 3107, (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road (Windsor))* 333 D.L.R. (4th) 326, (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road (Windsor))* 269 C.C.C. (3d) 159, (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road, Windsor)* 279 O.A.C. 268 (Ont. C.A.) — considered

Statutes considered:

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

Civil Remedies Act, 2001, S.O. 2001, c. 28
Generally — referred to

s. 2 "proceeds of unlawful activity" — considered

s. 3(1) — pursuant to

s. 4 — pursuant to

s. 4(1) ¶ 1 — considered

s. 4(1) ¶ 3 — considered

s. 4(1) ¶ 4 — considered

s. 4(1) ¶ 8 — considered

s. 5 — considered

s. 5(1) — considered

s. 5(2) — considered

s. 5(2)(a)(i) — 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
Generally — referred to

s. 101 — considered

MOTION by operator of retirement home under receivership to increase administration charge and for sealing order.

***Newbould J.*:**

1 Emmanuel Village Residence Inc. ("EVR") is the owner and operator of Emmanuel Village in Kitchener, Ontario. Emmanuel Village is a retirement community that houses between 110 and 130 residents and employs approximately 50 individuals. Bryan Hunking is the President of EVR and the sole shareholder of 1553748 Ontario Inc., which owns all of the shares of EVR. Mr. Hunking pleaded guilty to a single count of fraud over $5,000 on or about April 22, 2015. On June 10, 2016 Mr. Hunking was sentenced to five years imprisonment and is now serving that sentence.

2 Largely as a result of Mr. Hunking's conviction, the Retirement Homes Regulatory Authority revoked EVR's licence to operate a retirement home. The current effective date for the revocation of EVR's licence is October 3, 2016. This required EVR to take steps to sell its business as a going-concern or risk displacing its residents at the expiry of its licence.

3 On June 10, 2016, EVR commenced an application in the Commercial List in Toronto to appoint a receiver for the limited purpose of completing a going concern sale of EVR's business to a purchaser who is licensed to carry on the business as a retirement home.

4 Also on June 10, 2016, the Attorney General of Ontario (the "AGO") commenced an application in Kitchener under section 3(1) of the *Civil Remedies Act* ("CRA") to forfeit property municipally known as 1250 Weber Street East, Kitchener, Ontario, a portion of which is owned by EVR (the "EVR Property"). Pursuant to the forfeiture application, the AGO sought and obtained a temporary preservation order under section 4 of the CRA that placed a "No Dealings" notation on title to the EVR Property on an *ex parte* basis (the "Preservation Order").

5 On June 24, 2016 BDO was appointed Receiver of all of the assets of EVR (the "Appointment Order"). Under the terms of the Appointment Order, the Receiver did not take possession and control of the EVR Property. The Receiver was appointed to review EVR's out-of-court sales process under which EVR received a letter of intent from a potential purchaser

> **95** I agree with counsel for the AG that forfeiture orders under the *CRA* are intended to further the purposes of the *Act* as set out in s. 1. It follows that in deciding whether to grant relief from forfeiture under s. 3(1), the court must consider the effect of granting relief on the achievement of those purposes. The power to relieve from forfeiture cannot be allowed to subvert the purposes of the *CRA*.
>
> **96** I do not, however, agree that the "interests of justice" in s. 3(1) are limited to the purposes of the *CRA* identified in s. 1. Those purposes are part of, but cannot be equated with, the "interests of justice". That phrase is a broad one and includes maintaining public confidence in the civil justice process. That confidence is promoted by orders that are, broadly speaking, in accord with the community's sense of fairness. A forfeiture order made in circumstances where any reasonable person would regard the order as excessive, while perhaps serving the purposes of the *CRA* in the narrow sense, would do a real disservice to the administration of justice and thereby undermine rather than promote the "interests of justice".
>
> **97** A court asked to grant relief from forfeiture under s. 3 must consider all factors that are relevant to the "interests of justice". It is not possible to catalogue all of the factors that could properly be taken into account in evaluating the interests of justice in any given case. Those factors certainly include the closeness of the connection between the property and the illegal activity: see, for example, *Ontario (Attorney General) v. 170 Glenville Road, King (In Rem)*, [2010] O.J. No. 2865at para. 72 (S.C.).

31 In my view, it is inconceivable that any reasonable person would think it fair or just that the professionals engaged to sell the EVR Property would not be paid for their work which is what would happen if the Administration Charge was not in a sufficient amount to pay their reasonable fees and disbursements. It is in the interests of the victims of the fraud of Mr. Hunking to have the asset monetized so that they can be compensated from the proceeds and in their interests to see that a sale is properly conducted that achieves the most available funds. A properly conducted sale requires professional assistance.

32 This is not a typical case of a contest between an owner of property wanting to maintain rights of ownership to property that has been obtained from the proceeds of crime and the AGO on behalf of victims of the fraud. I find the position of the AGO completely untenable in this situation. In the revised Preservation Order that the AGO obtained on its motion, the sale of the EVR Property by the Receiver was permitted to continue. To then say that the Receiver and its counsel, and EVR and its counsel, should not be paid their reasonable fees and expenses for undertaking the work necessary for the sale makes no sense.

33 Further, if such an order could be made under section 4 of the CRA on a motion by the AGO, which in my view could be made, then such an order ought to be available on a motion by an interested party under section 3 which does not limit motions to those made by the AGO so long as the proceedings were brought by the AGO in the first place, as occurred in this case.

34 The AGO has referred to cases in which it has been said that at the preservation stage of a proceeding under the CRA, the court is only being asked to protect the property pending a determination of the case on the merits and that it follows that the "clearly not in the interests of justice" exception should be even more narrowly applied than on the later determination on the merits. See *Ontario (Attorney General) v. McDougall* at para. 38. Whether or not the statement is a correct statement of the law, and however one wants to narrowly look at the phrase "clearly not in the interests of justice", in my view it would clearly not be in the interests of justice to deny an increase to the Administration Charge contained in the revised Preservation Order. It would be inequitable and unjust.

35 The fees and disbursements that the Professional Group seek to protect under the increased Administration Charge are the fees and expenses incurred in the course of the receivership. These include the fees and disbursements of the Receiver and its counsel, who passed their accounts without objection on August 26, 2016. The Professional Group, as a whole, now seek an increase to that charge which will necessarily cover some of the already-approved activities and the activities of the Professional Group through to the closing of the transaction.

36 Administration charges are routinely granted under receivership orders made under the BIA and in CCAA proceedings. This receivership is neither. It is a receivership under the *Courts of Justice Act* and now permitted under the consolidated CRA proceedings. There is no reason not to consider factors often considered in BIA and CCAA proceedings,

which factors relevant to this case include: the size and complexity of the business being restructured, whether there is unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable and the position of the secured creditors likely to be affected by the charge.

37 In this case, the sale has been made more complex by the fact that EVR operates a licensed retirement home that involves numerous stakeholders that are wholly unconnected with the alleged proceeds of unlawful activity. This has increased the complexity of the proceedings above and beyond the sale transaction of a regulated business to include issues surrounding the continued operations of the business and post-closing requirements. The CRA proceedings taken by the AGO has also greatly increased the amount of work involved.

38 There does not appear to be any unwarranted duplication of roles. Madorin, Snyder LLP is local, Kitchener-based corporate counsel to EVR and has been primarily involved in dealing with transactional issues throughout the sales process, including reviewing and responding to letters of intent, engaging in negotiations related to the sale agreement, overseeing due diligence by the purchaser, and addressing RHRA licence extension issues. DLA Piper (Canada) LLP of Toronto has primarily been involved in the receivership application, the approval of the sale and litigation issues flowing from these proceedings.

39 At this stage, it would not appear that the quantum of the charge appears to be unreasonable. The value of the work done to date already exceeds the amount of the Administration Charge originally set. The work of the Receiver and its counsel to August 26, 2016 has already been approved by the Court. The increased Administration Charge does not *ipso facto* mean that the amount sought by the Professional Group that has not already been approved by the Court will be paid. Those fees and disbursements will be subject to Court approval.

40 The secured creditors likely to be affected by the increased Administration Charge have not taken any position against the increase. The Receiver joins with EVR in requesting the increase.

41 In the circumstances, the motion by EVR to increase the Administration Charge from $350,000 to $700,000 is granted and paragraphs 27 and 29(b) of the Appointment Order are amended accordingly. The Appointment Order is further amended to require the fees and disbursements of EVR to be approved by the Court

42 EVR requests an order sealing the transcripts of the cross-examination of Judy Hunking, conducted on August 24, 2016 along with the attached exhibits and answers to undertakings. Justice Hainey made an interim order sealing the material and EVR requests an order that it continue.

43 The material sought to be sealed does not contain an agreement of purchase and sale which routinely is sealed pending completion of a sale to protect the vendor in case the sale falls through and a further sales process is required. EVR contends however that the material contains sensitive banking records that if released could be detrimental to the value of EVR in the event that the current sale agreement does not for some reason close. The concern is that the information could prove valuable to competitors on EVR. In the sale process it was only prospective bidders who signed non-disclosure agreements that were permitted access to the financial records of EVR. Counsel to the purchaser supports the request for the continuation of the sealing order. In this case the sale has obtained Court approval and is scheduled to close shortly. The AGO says that if the sealing order is continued, it should survive only until the EVR Property has been sold.

44 I am satisfied that the *Sierra Club* tests have been met in this case to seal the material that EVR seeks to have sealed. The order shall continue until the EVR Property has been sold, either to the current purchaser or, in the event that the purchase falls through, to some other purchaser.

Motion granted.

End of Document

TAB 3

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

had the effect of according a return to the DIP lender equivalent to 100% per annum, an arguably criminal rate of interest. If it were to be successful in avoiding payment of its *pro rata* contribution to the DIP costs, its rate of recovery would jump, in effect, to almost 200% per annum.

43 Further, had GE truly anticipated it would not have to bear any portion of these costs it could easily have included that provision in the loan agreement through which it advanced the DIP funding.

44 This situation differs from that addressed by Justice Campbell in *Hunjan International Inc. (Re)*, *supra*, in which he found at para. 52 that the DIP lender would not likely have agreed to loan the DIP financing had it believed that in the event of a collapse of the corporate reorganization and ultimate deficiency it would not have a priority claim for the entire amount of the DIP advanced. I make no such finding here. Rather, the advancing of the DIP financing in this case provided a handsome rate of return in and of itself to the lender and the DIP has been repaid in full, with no issue of deficiency arising.

45 I cannot see that it would be equitable to exempt GE from its obligations to contribute to the overall DIP costs given the rate of return on its investment and the fact it was in a position to make an assessment of business risk at the time it made that loan and no doubt did so.

v. Do the Provisions in the First Day Order Exempt GE from Any Obligation to Contribute to the DIP Financing Costs?

46 GE argued that paras. 27, 29 and 35 of the First Day Order should be interpreted to mean that it is not obliged to now contribute to the DIP financing costs. The order contains no express provision to that effect.

47 Paragraph 27 provides that the Monitor and its counsel will be paid their reasonable fees and disbursements. Paragraph 29 provides that as security for same the Monitor is granted a charge on Respec's property in the maximum amount of $200,000. Paragraph 35 provides that any interested person may apply on notice for an order to allocate this charge amongst various of Respec's assets.

48 GE did not offer an interpretation of any of these three paragraphs which leads to the conclusion that it should not be obliged to pay its share of that portion of the allocated costs which are made up of the DIP financing allocated costs. I cannot see any interpretation which supports that position.

vi. Declaration and Judgment

49 There is no suggestion that GE has an arguable defence to liability for the $215,688.46. I therefore declare that GE is obligated to pay to the Monitor the sum of $215,688.46 on account of its *pro rata* share of the allocated costs in the amount of $215,688.46.

50 GE argues that I am precluded from granting judgment against it for this sum because the Monitor/Receiver should have deducted it from the funds used to repay the DIP. However, timely repayment of the DIP in full avoided ongoing interest costs. In the absence of any express agreement relieving GE from its obligation to share in the DIP costs I conclude that to the extent there was, in effect, an overpayment to GE in an amount of GE's share of the DIP costs, those overpaid funds remain subject to the repayment of those costs.

51 GE also argues that I cannot grant the Monitor judgment in this or any sum against it in the absence of express provisions in the CCAA or other legislation granting that jurisdiction. It argues that the Monitor is obliged to now issue a Statement of Claim against it claiming judgment based on my declaration of liability. If a defence is filed it must then apply for summary judgment or conduct a trial, all pursuant to the provisions of the Alberta Rules of Court.

52 The Monitor urges me to find jurisdiction to grant a direct judgment based on my wide and broad discretion to deal with various matters that are not expressly addressed in the CCAA; see *Skeena Cellulose Inc., Re*, 2003 CarswellBC 1399 (B.C. C.A.).

53 It also argues that the ability to grant a judgment flows from the provisions of my October 8 and 20, 2009 orders in which I:

(a) directed a sale of the equipment of Respec under the supervision of the Monitor;

(b) directed that the PMSI creditors could either let the equipment on which they had security be sold in that auction or remove it from the sale;

(c) ordered that where equipment was removed the creditor removing it must post a deposit with the Monitor as against any eventual finding that it was liable for the payment of a portion of the allocated costs; and

(d) directed that such a deposit was to be paid to legal counsel for the Monitor to be held in trust until further Court order which could be made after taking into account the portion of the allocated costs for which each such creditor was found to be liable.

54 Of course, the fact this order was granted cannot confer any jurisdiction to grant it which does not otherwise exist but these provisions evidence that there was a plan in place to liquidate certain assets and account for the costs incurred to that point. I find that the creation and implementation of such a plan was within my jurisdiction as a part of the overall scheme of the CCAA. A Court in a CCAA proceeding has the ability to deal with assets, debt and costs incurred in that proceeding. I conclude this includes the right to grant judgment against a party which it determines liable to contribute to those costs.

55 I therefore grant the Monitor judgment against it in that amount.

56 If the $30,000 deposit was not accounted for in the determination of that figure it should now be applied to reduce the judgment accordingly.

b. Does Fairness Require the Two Banks to Bear More Than Their Pro Rata Share of the Allocated Costs?

57 While the majority of the PMSI creditors support the Monitor's proposed allocation of costs, certain of the PMSI creditors, Cat, Kingland Ford and Komatsu, argues that the principles in *Hunters Trailer & Marine Ltd. (Re), supra*, require the two banks to bear more than their *pro rata* share of the allocated costs.

58 First, these PMSI creditors suggest that a cost allocation which requires the PMSI creditors to pay a *pro rata* portion of the Monitor's costs means that CWB will not make any contribution to those costs. The proposed allocation does impose a *pro rata* contribution on CWB based on the estimated value of the assets upon which it holds security. However, it will ultimately be indemnified for that contribution because its security gives it a first charge for such recovery. In the result, BDC will bear the ultimate cost of that indemnity by way of an accordingly reduced recovery from those assets upon which it holds a second-in-line security position after CWB. Therefore the fact CWB is indemnified in full and the PMSI creditors are not is that CWB had enough security to protect it for its entire exposure whereas the PMSI creditors did not.

59 Second, these PMSI creditors argue that the costs incurred by the Monitor to the date of the termination of the stay should be paid for through the collection of the receivables generated by Respec during that period or by application of the $275,000 in cash in Respec's bank account on the day the stay was terminated. The value of the receivables on the day the stay was granted was not significantly different than their value on the day the stay was terminated. Of course the identity of the individual receivables changed during the stay as old ones were paid and new ones created.

60 Both the receivables and cash on deposit are subject to the first ranking security interest of CWB and the second ranking security interest of BDC. The Monitor allocated $30,982.58 of the funds in the bank account to be applied to the DIP loan as CWB's proportionate share of that aspect of the allocated costs. These PMSI creditors argue the entire amount of $275,000 should have been applied to the DIP costs as well as $513,559.27 of the receivables.

61 The main thrust of this argument is that the receivables and cash were generated during the stay using equipment for which these PMSI creditors were not paid. They were thus prejudiced through the resulting depreciation of their equipment although no evidence was lead to this effect.

62 The result of this argument, if accepted, is that those receivables and the cash against which the two banks had first charge would be entirely used to fund costs incurred on behalf of the PMSI creditors as well as the two banks. In comparison, the proposed allocation would attribute costs in proportion to the recovery made by each creditor.

63 These PMSI creditors argue that they have suffered undue prejudice but in the absence of evidence to show the equipment upon which they held security depreciated more than the assets upon which the two banks held security through the position of the stay, I cannot reach that conclusion.

64 Third, these PMSI creditors argue that it is inequitable for their recovery to be based on the actual sale proceeds of their secured equipment because in May 2009 the Monitor obtained estimates of higher values for that equipment than were received at auction. That assertion is largely factually incorrect.

65 The earlier estimates were obtained prior to moving and placing the equipment for auction. They were contained in a valuation estimate, not an appraisal, obtained at the direction of the Court. Those figures did not reflect the costs of sale which were, naturally, unknown at that time. When comparing the gross auction sale proceeds against the estimated values the Monitor has calculated that those gross sale proceeds were 14.92% higher than the estimate for the Cat secured goods, 18.06% higher than the estimate for the Kingland Ford secured goods and 9.04% less than the estimate for the Komatsu secured goods.

66 Therefore, fairness does not compel an order that the two banks 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?

67 While the Monitor requested a detailed cost breakdown from the party transporting the equipment to be auctioned to the Ritchie Bros. site in Grande Prairie, such a breakdown was not received. It is not possible, therefore, for it to account for transportation costs as part of the direct costs attributed to each item sold. Rather, the Monitor has apportioned them as part of the indirect costs which make up a portion of the allocated costs. Therefore, each PMSI creditor, including Wells Fargo, will not have the gross sale proceeds received in relation to each piece of equipment reduced by the actual cost of transporting that item to auction but by another amount, a *pro rata* share of all transportation costs.

68 Other costs, which were accounted for in relation to individual pieces of equipment, i.e. direct costs of sale, were offset against the sale proceeds from that piece of equipment. That includes the cost of disassembling various camp equipment subject to a PMSI charge held by Wells Fargo.

69 Wells Fargo complains that this approach requires it to bear the entire actual costs of disassembling these assets but allocates transportation costs on a *pro rata* basis. Somewhat ironically, that includes the costs of transportation to market that Wells Fargo bears in relation to other equipment upon which it had PMSI security. Of course it cannot be determined whether any PMSI creditor, including Wells Fargo, will bear a greater or lesser cost as a result of this *pro rata* attribution than it would had actual costs been recorded as against each item transported.

70 Wells Fargo submits that it has not been treated fairly as a result of having to bear the actual costs of dismantling the camps while other creditors (including itself in relation to other assets) bear only *pro rata* costs of transportation. It asks that those other creditors each be required to bear a *pro rata* share of the disassembly costs as well or that its obligation to contribute to the DIP costs be reduced to account for its proportionately higher costs in the realization of its security. It argues that under the principles outlined in *Hunters Trailer & Marine Ltd. (Re)*, *supra.* I should exercise my discretion to modify the proposed distribution to achieve one of these two possible results on the basis this is necessary to effect equity in relation to the apportionment of costs among creditors.

71 Any finding of inequity would have to be based on a finding that Wells Fargo bore a disportionately higher portion of the costs than did other creditors. However, the Monitor proposes that each PMSI creditor bear any actual costs related to the sale of the equipment it charged. The reason Wells Fargo is the only creditor charged camp dismantling costs is because it is the only creditor which had a charge on any of the camp assets which were disassembled.

72 I cannot therefore discern any inequity which requires Wells Fargo to bear the direct costs relating to its charged assets simply because one of those costs is of a type unique to a certain kind of asset. The same approach is followed in relation to all other kinds of asset where the PMSI creditor is asked to bear the direct costs incurred in placing that asset for sale. To find otherwise would be to violate the *Hunters Trailer & Marine Ltd. (Re)* principles and accord Wells Fargo a disproportionate benefit.

d. Should JPL, a "True Lessor" of Equipment, Thus Be Exempted from Contributing to the Allocated Costs?

73 JPL was the lessor of five pieces of equipment leased to Respec. Upon paying the Monitor a deposit of $20,900 it removed that equipment from the Ritchie Bros. auction. It now seeks recovery of that deposit on the basis that its leases were true leases, it was not therefore a secured creditor of Respec and that it received no benefit from the efforts of the Monitor or the DIP financing other than lease payments which it was entitled to receive pursuant to the provisions of s. 11.01(a) of the CCAA. If successful it will bear no portion of the allocated costs.

74 The Monitor acknowledges that these five leases were true leases in the sense that the parties always intended the leased equipment would be returned to JPL at the end of the lease term. In other words, the leases were not disguised forms of purchase financing.

75 After the granting of the First Day Order, Respec retained and continued to use the leased equipment, paying the monthly lease costs for the May 1, 2009 through October 31, 2009 period in the total sum of $20,712.36. During that period Respec maintained insurance coverage for these vehicles as well as performing any required maintenance or repairs, as required by the terms of the leases. The Monitor, in its proposed distribution of allocated costs, has attributed $20,900 to JPL.

76 Section 11 and 11.02 give the Court jurisdiction to order a stay of all proceedings against the debtor company such as was granted here in the May 8, 2009 First Day Order.

77 This stay is subject to the operation of s. 11.01 of the CCAA which provides:

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

78 While it did receive lease payments during the period of the stay, including the benefits of insurance and vehicle maintenance, JPL argues that those payments were made because Respec was obligated to make them pursuant to s. 11.01(a) of the CCAA. It otherwise, arguably, received no benefit from the efforts to reorganize Respec and thus should not be obliged to contribute to the allocated costs.

79 The Monitor responds that had the reorganization been successful JPL would have secured the benefit of an uninterrupted stream of lease payments. It is in essentially the same position as other creditors in that had the reorganization been successful it would have benefitted. The fact that its lease payments were required and not caught by the stay is arguably no reason to exempt JPL from contributing its fair share of the allocated costs.

80 While I required JPL to post a deposit with the Monitor as a condition of the recovery of its leased equipment, my

order did not have the effect of determining ultimate responsibility for any portion of the allocated funds. The deposit was simply a deposit, to be applied in the event that JPL was ultimately found liable for a contribution to same.

81 In *Western Express Air Lines Inc., Re*, [2005] B.C.J. No. 72 (B.C. S.C.), Chief Justice Brenner held that an equipment lessor under a "true lease" was not required to contribute to CCAA costs. While the PPSA in British Columbia allowed registration of such leases, the Chief Justice held that mere registration did not make the lessors secured creditors. Registration existed merely to allow the legislation's provisions in relation to conflicts, perfection and priority to apply with respect to the leased goods. Unlike the situation where a lease is a vehicle used to finance the purchase of goods, registration of a "true lease" does not permit a secured creditor who took a security interest in leased goods to declare a priority over the lessor. As such, the Chief Justice held that the lessors did not become secured creditors of the debtor which was subject to the CCAA reorganization attempt.

82 He stated at paras. 20-21:

> 20. If costs are to be allocated on the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. ...They continue to own the aircraft. That will not change whether the restructuring succeeds or fails.
>
> 21. Post filing they have continued to receive payments for aircraft leases that Westex has chosen not to disclaim. However under the First Day Order they were obligated to continue leasing these aircraft to Westex. They were prevented from relying on the outstanding unpaid pre-filing lease payments and repossessing the aircraft.

83 He went on to conclude that under the general equitable principles of the CCAA there was no basis for requiring the aircraft lessors to bear a part of the restructuring costs.

84 As stated, in *Hunters Trailer & Marine Ltd. (Re)*, Chief Justice Wachowich held only that it was equitable for each major *secured* creditor to be liable for a portion of the CCAA costs.

85 The Monitor urges me to extend this principle to lessors notwithstanding that they are not secured creditors as was done in *Winnipeg Motor Express Inc. (Re)* at paras. 63-65 where Suche J. held that the true lessor of equipment there would nonetheless be required to bear a portion of the allocated costs. She distinguished *Western Express Air Lines Inc. (Re)* by observing that Chief Justice Brenner there concluded that the lessor received no benefit from the restructuring whereas she found the true lessor in the case before her to have received a real and meaningful benefit from the successful restructuring of the debtor company. The lease was assigned to the new purchaser "without interruption" which presumably means the lease payments continued to be made without interruption. She ordered the true lessor thus to contribute to the allocated costs without finding it to be a secured creditor and notwithstanding its status under s. 11.01(a) of the CCAA.

86 In comparison, in *Western Express Air Lines Inc. (Re)* the ongoing payment of lease costs was not found by Chief Justice Brenner to create a sufficient benefit to the lessor to require it, in equity, to contribute to the allocated costs even though at the time of the making of his judgment it was still possible for that restructuring to succeed.

87 As we now know that the Respec structuring did not succeed and JPL did not receive an uninterrupted flow of lease payments, JPL received less benefit from the unsuccessful efforts to restructure Respec than that which accrued to the lessors in *Western Express Air Lines Inc. (Re)*. Just as Chief Justice Brenner found no basis under the general equitable principles of the CCAA for requiring the lessors to contribute to the allocated costs, that must also be the result on this more egregious set of facts.

88 The Monitor is thus required to return the deposit of $20,712.36 to JPL in its entirely. JPL has no obligation to contribute to the allocated costs.

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

89 Paragraph 27 of the First Day Order provides that the Monitor and its counsel shall be paid their reasonable fees and disbursements. Paragraph 29 provides that as security for same the Monitor is granted a charge on Respec's property in the maximum amount of $200,000.

90 I find that the Monitor has provided evidence establishing that it has incurred fees to this point of $196,189.52. Notwithstanding the appointment of the Receiver on November 30, 2009, the Monitor has continued to function to bring to a conclusion those matters arising during the stay. That includes making this application to address distribution of the proceeds of the auction pursuant to an order I granted on December 9, 2009. The Monitor advises that it expects to incur a further $35,000 in professional fees to conclude its obligations, over and above any fees incurred in the operation of the receivership. It applies to increase the charge to a maximum of $240,000 as a result.

91 Presumably it is making this application to permit it to, essentially, withhold $35,000 of the auction proceeds which would otherwise be distributed as a result of my order because there is not likely to be any further funds coming into the hands of the Monitor which it could use to pay these future costs. An increase in the charge created by para. 29 of the First Day Order is not a prerequisite to its entitlement to be paid its actual further professional fees but rather would ensure the continuation of a pool of funds from which they may be paid.

92 GE opposes this application, seeking to have any additional professional fees paid as a cost in the receivership. I note this would result in BDC bearing those costs in their entirety given its position of second-in-line general secured creditor which has as its sole source of recovery of its debt the net funds generated in the receivership.

93 There is nothing in the First Day Order or any subsequent order which expressly limits any subsequent increase in the administration charge. Indeed, para. 42 of the First Day Order expressly permits any interested party "including ... the Monitor" to apply to the Court to vary or amend the order.

94 Refusing the Monitor's application could well have a chilling effect on future CCAA applications as insolvency professionals which might otherwise be willing to take on the role of Monitor could feel disinclined to so act, being unable perhaps to adequately predict their entire future costs and so leaving themselves exposed to the risk of being inadequately secured. Further, it would have the effect of offloading costs which benefitted all secured creditors onto the shoulders of only one of those creditors, BDC, which is not within the equitable principles of overall fair, reasonable cost allocation discussed in *Hunters Trailer & Marine Ltd. (Re)*; see also *Triton Tubular Components Corp., Re* [2006 CarswellOnt 2120 (Ont. S.C.J. [Commercial List])], Ontario Superior Court of Justice, Court File No. 04-CL-5672.

95 GE complains that the Monitor has not led evidence to show what further fees it will actually incur or to show that they are necessary or reasonable. However, that is not a reason to deny this application. The Monitor will have to bring on a future application approving any additional fees or disbursements it wishes to have paid out of the administration costs. At that time GE can challenge the payment if it believes the facts support doing so.

96 The application to increase the administration charge to $240,000 is hereby granted.

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?

97 The Monitor acknowledges that certain principals of and parties related to Respec are owed approximately $22,000 for wages in respect to work done for the company while it was subject to the CCAA stay. It has agreed to pay those costs upon receipt of certain information which it requires to justify certain travel expenses charged to Respec and to prove that certain equipment removed from the auction site was not the property of Respec. That information has been promised but not yet been provided.

98 The Monitor seeks direction as to whether funds should be withheld from the distribution of auction proceeds to other creditors on account of these claims or whether the claims should be left to be paid from the further liquidation of assets, now by it in its capacity as Receiver of Respec. BDC objects to the latter proposal noting that it would result in BDC in effect

TAB 4

2003 CarswellOnt 4186
Ontario Superior Court of Justice

SLMSoft Inc., Re.

2003 CarswellOnt 4186, [2003] O.J. No. 4920, 126 A.C.W.S. (3d) 386, 4 C.B.R. (5th) 99

SLMSoft Inc. et al. — CCAA Application

Ground J.

Heard: October 22, 2003
Judgment: October 29, 2003
Docket: 03-CL-005013

Counsel: Tony Reyes, Virginie Gauthier for Applicants
Larry J. Levine for DIP Lender
Edward Park for CCRA
A. Kauffman for Independent Monitor
John MacDonald, Allan D. Coleman for Insight Venture Associates
Craig Hill for Ernst & Young Inc., Trustee of Ramport Securities

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Insolvent companies brought motion for order extending stay under Companies' Creditors Arrangement Act — Motion granted — Stay extended for two days on terms — Lengthy extension of stay or of proceedings under Act was not appropriate — No realistic prospect existed of insolvent companies ever being able to put forward viable plan of restructuring — Only realistic scenario was sale of assets as block or as going concern through judicially supervised sale process — Stay extended to permit parties to provide additional information to court to assist it in determining what sale process should be and by whom it should be conducted.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Initial order made under Companies' Creditors Arrangement Act set administrative charge at $200,000 — Motion was brought to increase administrative charge to $600,000 — Motion granted — Revenues of insolvent companies fell far short

of what was anticipated when original administrative charge figure was set — Debtor in possession financing which had been advanced to date had to be applied toward essential payments such as salaries and rent — Professional services were crucial in enabling insolvent companies to remain in operation within proceedings under Act in hopes of completing and realizing income from two major contracts which were only tangible assets of insolvent companies — Professionals had forborne payment of their accounts in order to do so and should not be penalized for having made that sacrifice.

Table of Authorities

Statutes considered:

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

MOTION to extend stay under *Companies' Creditors Arrangement Act*; MOTION to increase administrative charge under initial order under Act.

***Ground J.*:**

1 As indicated, I am prepared to issue an Order increasing the Administrative Charge under paragraph 33 of the Initial Order from $200,000 to $600,000. In my view, it is apparent that the revenues of the Applicants fell far short of what was anticipated when that figure was set and the DIP financing which has been advanced to date has had to be applied toward essential payments such as salaries and rent. The professional services have been crucial in enabling the Applicant to remain in operation, within the CCAA proceedings, in hopes of completing and realizing income from the two major contracts which appear to me to be the only tangible assets of the Applicants. The professionals have forborne payment of their accounts in order to do so and should not, in my view, be penalized for having made that sacrifice.

2 I have also indicated that I am not prepared to terminate the CCAA proceedings and appoint an Interim Receiver today. I share many of the concerns raised by Mr. Reyes, Mr. Dowdall and Mr. Levine as to the impact of the appointment of an Interim Receiver on the escrow of the source codes, on the retention of management and essential employees required to manage the business and complete the major contracts and on the Rampart and the Insight litigation and as to the message to the marketplace and to existing and potential customers of the appointment of a receiver of any nature.

3 I am not, however, prepared to grant any lengthy extension of the stay or of the CCAA proceedings. There is, in my view, no realistic prospect of these Applicants ever being able to put forward a viable plan of restructuring. There is no assurance, as of today, that the balance of the DIP financing will be advanced and no evidence of any other source of funds for the Applicants. There is still no certainty as to when, if ever, the major contracts will be completed or any revenue received from those contracts and certainly nothing before the court from the customers by way of hard, firm information, undertaking or commitment as to when payments will be received. The potential for realizing funds in the short term from the sale of non-core assets seems to me to be remote and, in the case of the shares of Infocorp., non-existent. The flow of revenue to the Applicants from other sources such as maintenance fees, even on the most optimistic forecasts which seem always to be unreliable, would not nearly cover the operating costs of the Applicants. It seems to me that the only realistic scenario is the sale of the assets en bloc or as a going concern through some sort of judicially supervised sale process. However, the court is not in a position today to determine what that process should be or by whom it should be conducted and that cannot be determined until the court has certain additional information before it. I will extend the stay to October 31, 2003 to permit the parties an opportunity to provide such information to the court.

4 Accordingly, an Order will issue extending the Stay to October 31, 2003 on terms that:

1. the DIP lender advance to the Applicants the balance of the total authorized DIP amount by October 31, 2003 or advise the court what part of the balance will not be advanced;

TAB 5

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

2017 CarswellAlta 1631, 2017 ABQB 550, [2017] A.W.L.D. 4936, [2017] A.W.L.D. 5003, [2018] 2 W.W.R. 731, 283 A.C.W.S. (3d) 214, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

AND In the Matter of a Plan of Arrangement of Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd (Applicants)

J.E. Topolniski J.

Heard: August 11, 2017
Judgment: September 11, 2017
Docket: Edmonton 1703-12327

Counsel: Darren R Bieganek, Q.C., for Monitor, Ernst & Young
George F Body, for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue
Jeffrey Oliver, for Business Development Bank of Canada
Stephanie A Wanke, for Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Subject: Income Tax (Federal); Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.v Miscellaneous

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings
Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in

proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous
Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

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ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List]) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to

Christiansen v. Paramount Developments Corp. (1998), 1998 CarswellAlta 1093, 234 A.R. 149, 8 C.B.R. (4th) 220, 1998 ABQB 1005 (Alta. Q.B.) — referred to

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — referred to

Concrete Equities Inc., Re (2012), 2012 ABCA 266, 2012 CarswellAlta 1572, 96 C.B.R. (5th) 139, 354 D.L.R. (4th) 683, (sub nom. *Sandhu v. MEG Place LP Investment Corp.*) 542 A.R. 12, (sub nom. *Sandhu v. MEG Place LP Investment Corp.*) 566 W.A.C. 12 (Alta. C.A.) — referred to conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

90 It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

91 *ITA* s 227(4.1) opens with these words:

> **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law**, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty notwithstanding any security interest in such property . . . . [emphasis added] (Notwithstanding Provision)

92 CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in *Century Services* (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

93 While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

94 CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] . . . is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

95 The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

96 In *Thibodeau v Air Canada*,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "*only* when the existence of the conflict, in the restrictive sense of the word, *cannot be avoided by interpretation*"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

97 Further, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:

> As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P. -A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
>
> As in any statutory interpretation exercise . . . courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co.***, at para. 102. [emphasis added]

98 Deschamps J observed in *Century Services*, at para. 15:

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

99 She also quoted with approval the reasons of Doherty JA in *Elan Corp v Comiskey*[42] (Doherty JA was dissenting):

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

100 In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[43]

101 In *Indalex*, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> . . . case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[44]

102 The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

103 Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

104 Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

105 Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under

TAB 6

2006 NBQB 244
New Brunswick Court of Queen's Bench

Simpson's Island Salmon Ltd., Re

2006 CarswellNB 420, 2006 NBQB 244, 24 C.B.R. (5th) 13, 300 N.B.R. (2d) 165, 782 A.P.R. 165

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 THE APPLICANTS, SIMPSON'S ISLAND SALMON LTD., AND TIDAL RUN AQUA INC.

P.S. Glennie J.

Heard: June 2, 6, 2006
Judgment: June 6, 2006
Docket: S/M/69/05

Counsel: Rodney J. Gillis, Q.C., John C. Gillis for Applicants
Raymond P. Gorman, Q.C. for Monitor
Catherine A. Lahey for Heritage Salmon Limited
R. Gary Faloon, Q.C. for Farm Credit Corporation and Bank of Nova Scotia
John B.D. Lodan for Business New Brunswick
Mel K. Norton for 047759 N.B. Ltd.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.iii Miscellaneous

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Applicants were insolvent companies attempting to restructure in order to continue in business — Companies alleged that without ongoing operating funds, they would be unable to meet their obligations including payroll, which might seriously interfere with their ability to continue operations — Companies alleged they incurred additional administrative costs due to numerous court proceedings, replacement of monitor, and other unexpected costs — Out of \$410,000 of professional fees billed, \$346,000 remained outstanding — Monitor held \$287,000 in trust from sale of salmon, with further \$417,000 expected within week — Total amount realized from all sales of harvested salmon was expected to be \$3 to \$3.5 million — Companies applied for order for directions with respect to escrow account and for order increasing maximum administrative

charge — Application granted — Provision was inserted that in event that ongoing operating costs be paid from monitor's account exceeded $110,000, court authorization was required unless all secured creditors agreed otherwise — Initial order providing administrative charge of up to $300,000 was increased to $510,000 — Failure to grant increase would have resulted in companies no longer being able to continue their restructuring attempts or completing harvesting and marketing of current salmon crop.

Table of Authorities

Cases considered by *P.S. Glennie J.*:

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 964, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — considered

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 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

APPLICATION for directions with respect to escrow account and for order that initial order be amended to reflect increased maximum administrative charge.

***P.S. Glennie J.* (orally):**

1 The Applicants, Simpson's Island Salmon Ltd. and Tidal Run Aqua Inc., seek directions with respect to the Monitor's Escrow Account Order and the Harvesting, Processing and Marketing Agreement as well as an order that Article 31 of the Initial Order be amended to reflect an increased maximum administrative charge.

2 The Applicants assert that due to numerous Court proceedings, additional costs to the administrative charge have been incurred including costs incurred due to the replacement of the Court appointed Monitor part way through the process. In addition, the Applicants assert that other unexpected costs have occurred.

3 Simpson's Island and Tidal Run employ between 17 and 30 individuals in the community depending on the situation, activities and the timing of the season.

4 The projected cash flow statements attached to the correspondence from Paul Goodman, the Monitor, make the assumption that $700,000.00 worth of salmon were harvested in May and June 2006 and revenue recorded within 30 days of harvesting.

5 Without ongoing operating funds at their disposal, the Applicants assert that they will be unable to meet their obligations including payroll which may seriously interfere with their ability to continue the harvesting of the fish or operation of the barge.

6 As of May 31, 2006, the total amount of professional fees billed is approximately $410,000.00 of which approximately $364,000.00 remains outstanding.

7 The Monitor is currently holding the sum of $287,000.00 in trust in the Monitor's Escrow Account from the sale of salmon and Mr. Goodman expects a further $417,000.00 within the next seven days.

8 It is anticipated that all of the harvested salmon will be processed and sold by July 1, 2006 and that the total amount realized from all sales will be in the range of 3 to 3.5 million dollars.

9 As stated by MacKenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.):

> [12] ... the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.
>
> [28] The object of the CCAA is more than the preservation and realization of assets for the benefits of creditors, as several courts have underlined. In Chef Ready Foods, Giggs 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 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.

10 The Applicants in this case are both insolvent companies which are attempting to restructure so that they might continue on in business.

11 The Monitor has confirmed that the Applicants are acting in good faith and with due diligence.

12 With respect to the Monitor's Escrow Account Order, the provision in question is to provide that in the event that ongoing operating costs be paid from the Monitor's Account exceed in total the amount of $110,000.00, authorization of this Court will be required unless all secured creditors agree otherwise. In my opinion, the insertion of the $110,000.00 cap is reasonable taking into consideration projected cash flows.

13 With the insertion of this provision, the Monitor's Escrow Account Order has now been signed as has the Harvesting, Processing and Marketing Agreement.

14 This leaves the issue of the requested increase in the administrative charge.

The Request to Increase the Administrative Charge

15 The application of an administrative charge is seen as a way to promote the restructuring of a debtor company that might not otherwise be able to secure the necessary financing. This principle was stated by Justice Wachowich in *Hunters Trailer & Marine Ltd., Re,* [2001] 9 W.W.R. 299 (Alta. Q.B.) at ¶ 19:

> [19] The reality is that most companies that find themselves in such a position [insolvency] are unlikely to have the financial resources to pay for the advisors required to embark upon, formulate and present a restructuring plan under the CCAA. As a result, the practice has developed whereby debtor companies in the initial application for CCAA protection seek to secure payment of their professional advisors through an administrative charge on the assets of the company in priority to the claims of other secured creditors, except possibly the DIP lender.

16 In the Initial Order of December 5, 2006, an Administrative Charge of up to $300,000.00 was provided for.

17 Expenditures have exceeded what was initially anticipated and because of the problems encountered with harvesting the salmon, the Applicants' revenues did not meet expectations.

18 Failure to grant an increase in the Administrative Charge would result in the Applicants no longer being able to continue their attempts at restructuring as well as completing the harvesting and marketing of the current crop of salmon.

19 I am satisfied that the professional services incurred to date have been crucial in enabling the Applicants to remain in operation. I am also satisfied that the Applicants have acted and continue to act in good faith and with due diligence.

20 Based on the current and projected expenses for professional fees, I am prepared to issue an order amending Article 31 of the Initial Order by increasing the Administrative Charge from $300,000.00 to $510,000.00.

21 For these reasons, Article 31 of the Initial Order is to be amended by increasing the Administration Charge from

$300,000.00 to $510,000.00.

Application granted.

TAB 7

2012 ONSC 506
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1263, 2012 ONSC 506, [2012] O.J. No. 472, 217 A.C.W.S. (3d) 12, 85 C.B.R. (5th) 169, 95 C.C.P.B. 48

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: January 12, 2012
Judgment: February 2, 2012
Docket: CV-12-9539-00CL

Counsel: A.J. Taylor, M. Konyukhova, K. Esaw, for Applicants
D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada
C. Sinclair, for United Steelworkers' Union
K. Peters, for AMG Advance Metallurgical Group NV
M. Bailey, for Superintendent of Financial Services (Ontario)
S. Weisz, for FTI Consulting Canada Inc.
A. Kauffman, for Investissement Quebec

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Labour; Employment; Public

Related Abridgment Classifications

Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation

Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
X.2.c Costs and expenses of administrators
X.2.c.ii Priority over other claims

Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
X.2.d Wages and salaries of employees
X.2.d.i Entitlement to preferred status

Bankruptcy and insolvency
X Priorities of claims

X.6 Restricted and postponed claims
X.6.b Officers, directors, and stockholders

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.iv Miscellaneous

Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.n Confidentiality or sealing orders

Labour and employment law
I Labour law
I.6 Collective agreement
I.6.l Employee benefits
I.6.l.iii Pensions

Pensions
I Private pension plans
I.1 Administration of pension plans
I.1.g Valuation and funding of plans
I.1.g.ii Funding arrangements

Pensions
I Private pension plans
I.2 Payment of pension
I.2.l Bankruptcy or insolvency of employer
I.2.l.ii Registered plans

Pensions
I Private pension plans
I.2 Payment of pension
I.2.m Special payments

Headnote

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims
Super priority of administration charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — It was unlikely that advisors would participate in proceedings, and it was neither reasonable nor realistic to expect advisors to participate, unless administration charge was granted to secure their fees and disbursements — Role of advisors was critical to efforts to restructure insolvent companies — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Bankruptcy and insolvency --- Priorities of claims — Restricted and postponed claims — Officers, directors, and stockholders
Super priority of directors' and officers' charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — Directors and officers would be unlikely to continue their service without D&O charge — It was neither reasonable nor realistic to expect directors and officers to continue without requested protection — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans
Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Pensions --- Administration of pension plans — Valuation and funding of plans — Funding arrangements
Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous
Relationship between Act and provincial pensions acts — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of

provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Order requiring company to make special payments in accordance with provincial legislation would frustrate rehabilitative purpose of CCAA if such order would have effect of forcing company into bankruptcy — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation
Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy, contrary to purpose of CCAA — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation — Doctrine of paramountcy was properly invoked.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Entitlement to preferred status
Key Employee Retention Plans — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA) — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep employees who were considered critical to successful proceedings under CCAA because they were experienced employees who played central roles in restructuring initiatives — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — It was necessary that KERPs' participants be incentivized to remain in current positions during restructuring process — Continued participation of these employees would assist company in its objectives — Replacement of these employees if they left would not provide any substantial economic benefits to company — Confidential supplement to monitor's report, which contained copies of unredacted KERPs, was sealed pursuant to R. 151 of Federal Courts Rules.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders
Companies' Creditors Arrangement Act (CCAA) — Supplement to monitor's report — Insolvent companies obtained relief under CCAA — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep certain employees who were considered critical to successful proceedings under CCAA — Supplement to monitor's report contained copies of unredacted KERPs, which had sensitive personal compensation information — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — Confidential supplement to monitor's report was sealed pursuant to R. 151 of Federal Courts Rules for period of 45 days — Disclosure of personal information in supplement could compromise commercial interests of companies and cause harm to KERPs' participants — Confidentiality order was necessary to prevent serious risk to companies' and KERPs participants' interests.

Labour and employment law --- Labour law — Collective agreement — Employee benefits — Pensions
Insolvent employer.

Table of Authorities

Cases considered by *Morawetz J.*:

AbitibiBowater inc., Re (2009), 74 C.C.P.B. 254, D.T.E. 2009T-434, 57 C.B.R. (5th) 285, 2009 QCCS 2028, 2009 CarswellQue 4329, [2009] R.J.Q. 1415 (C.S. Que.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

40 Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities. liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

41 Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Analysis

(i) Administration Charge and D&O Charge

42 It seems apparent that the position of the unions. is in direct conflict with the Applicants. positions.

43 The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

44 Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

45 Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

46 It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

47 The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

48 Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corp., Re*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

49 It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

50 Further, as I indicated in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

51 The Court of Appeal in *Indalex Ltd., Re* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

> The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...
>
> . . .
>
> What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be

TAB 8

2003 ABQB 1015
Alberta Court of Queen's Bench

843504 Alberta Ltd., Re

2003 CarswellAlta 1786, 2003 ABQB 1015, [2003] A.J. No. 1549, 127 A.C.W.S. (3d) 1135, 30 Alta. L.R. (4th) 91, 351 A.R. 222, 4 C.B.R. (5th) 306

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 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

Topolniski J.

Heard: November 10, 2003
Judgment: December 9, 2003
Docket: Edmonton 0303-19663

Counsel: A. Robert Anderson for EdgeStone Capital Mezzanine Fund II Nominee Inc.
Emi R. Bossio for Ingersoll-Rand Canada Inc.
Michael McCabe for Proposal Trustee, PricewaterhouseCoopers LLP
Kent Rowan for GE Commercial Distribution Finance Canada Inc.
Michael Penny, Stuart Weatherill for Unknown Purchaser
Darren Bieganek for Transportation Lease Systems Inc.
David Stratton for CNH Canada Ltd. (New Holland Construction), New Holland (Canada) Credit Company
Jerry Hockin for JLG Industries Ltd., CAFO Inc.
Rick Reeson for Alberta Treasury Branches

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

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Company operated under threat of enforcement proceedings by two of its secured creditors, G Inc. and E Ltd. — Company made arrangement with E Ltd. to seek protection under Companies' Creditors Arrangement Act (CCAA) — Company then filed notice of intention to make proposal under Bankruptcy and Insolvency Act — E Ltd. applied for stay of proceedings under CCAA — Company was placed under protection of CCAA for 30 days and Monitor was appointed — E Ltd. and Monitor brought application to extend stay of proceedings — Application granted — Monitor's proposed restructuring

process and timeline contemplated sale of company's assets before plan was developed and presented to creditors — Monitor's proposed process was unacceptable — Monitor acted diligently by moving process towards development of plan — No evidence existed that E Ltd. had acted in bad faith — Monitor had clearly acted in good faith — Extension would provide Monitor with more opportunity to formulate plan to creditors — Controls could be put in place to prevent some creditors from manoeuvring for better position — Further assessment of diligence and good faith could be made at end of extension period — Conditions were imposed on extension of stay of proceedings.

Table of Authorities

Cases considered by *Topolniski J.*:

Alberta (Human Rights Commission) v. Alberta Blue Cross Plan (1983), [1983] 6 W.W.R. 758, 4 C.H.R.R. D/1661, 48 A.R. 192, 1 D.L.R. (4th) 301, 4 Admin. L.R. 135, 84 C.L.L.C. 17,002, 28 Alta. L.R. (2d) 1, 1983 CarswellAlta 159 (Alta. C.A.) — referred to

Allen v. Alberta (2001), 2001 CarswellAlta 1070, [2001] 9 W.W.R. 609, 2001 ABCA 171, 286 A.R. 132, 253 W.A.C. 132, 93 Alta. L.R. (3d) 213 (Alta. C.A.) — referred to

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 597, 245 A.R. 154 (Alta. Q.B.) — considered

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104, 1992 CarswellOnt 161 (Ont. Gen. Div.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 72 O.T.C. 99, 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — considered

Consumers Packaging Inc., Re (2001), 2001 CarswellOnt 3482, 27 C.B.R. (4th) 197, 150 O.A.C. 384, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Hovsepian v. Westfair Foods Ltd. (2003), 37 B.L.R. (3d) 78, 2003 ABQB 641, 2003 CarswellAlta 1300 (Alta. Q.B.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Liberty Oil & Gas Ltd., Re (2002), 2002 ABQB 949, 2002 CarswellAlta 1364, 38 C.B.R. (4th) 227 (Alta. Q.B.) — referred to

Mine Jeffrey inc., Re (2003), 2003 CarswellQue 90, 35 C.C.P.B. 71, [2003] R.J.D.T. 23, 40 C.B.R. (4th) 95, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.) — referred to

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

PSINET Ltd., Re (2001), 2001 CarswellOnt 3405, 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) — referred to

Rio Nevada Energy Inc., Re (2000), 2000 CarswellAlta 1584, 283 A.R. 146 (Alta. Q.B.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — referred to

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 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.) — 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 — pursuant to

s. 11(6) — considered

s. 11.7(3) [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

APPLICATION by creditor and monitor to extend stay of proceedings under *Companies' Creditors Arrangement Act*.

***Topolniski J.* (orally):**

Introduction

1 EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an Initial Order pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral decision on the reasons given on November 10, 2003.

Facts

2 Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches — 19 in Alberta and 3 in British Columbia.

3 Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

4 On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

5 EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

a) circumstances exist to make the extension order appropriate and

b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure — That is the test for terminating, not extending, a stay of proceedings (*Rio Nevada Energy Inc., Re* (2000), 283 A.R. 146 (Alta. Q.B.)).

6 The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

7 EdgeStone and the Monitor rely on the Monitor's *Third Report to the Court* and an excerpt from an *Information Circular*. as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to warrant the extension.

1. The Initial Order

8 On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

9 Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than $100,000 and, in the case of assets subject to PIMSI's, $20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.

10 The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other then those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (*Mine Jeffrey inc., Re* (2003), 40 C.B.R. (4th) 95, [2003] R.J.Q. 420 (Que. C.A.)). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

2. Subsequent Motions

11 The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

12 GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

3. This Application

13 The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises

TAB 9

2017 ONSC 673
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2017 CarswellOnt 1122, 2017 ONSC 673, 275 A.C.W.S. (3d) 696, 44 C.B.R. (6th) 289

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

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

Newbould J.

Heard: January 12, 2017
Judgment: January 27, 2017
Docket: 09-CL-7950

Counsel: Jessica A. Kimmel for Monitor
Susan Philpott for Former Nortel employees
Lily Harmer for Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Byron Shaw for Administrator of the Nortel Networks Managerial and NonNegotiated Pension Plan and Nortel Networks Negotiated Pension Plan
Thomas McRae for Nortel Canadian continuing employees
Michael E. Barrack, D.J Miller for Nortel Networks UK Pension Trust Limited and Board of the Pension Protection Fund
Adam Slavens for Nortel Networks Inc.
Michael Wunder for Unsecured Creditors Committee
Gavin H. Finlayson, Amanda C. McLachlan for Ad Hoc Group of Bondholders
Matthew-Milne Smith for EMEA Debtors
John Salmas for Indenture Trustee, Wilmington Trust, N.A.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.g Monitor

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
Passing accounts — Telecommunications company N, which had over 140 corporate entities in 60 jurisdictions, became insolvent — Canadian N debtors filed for Companies' Creditors Arrangement Act (CCAA) protection in 2009 — Monitor was twice granted extraordinary expanded powers, resulting in Monitor and its counsel undertaking significantly greater scope of work than in typical CCAA case — In 2017, Monitor of Canadian debtors brought motion for order passing its accounts in amount of CA$122,972,821.96, accounts of its Canadian legal counsel in amount of CA$99,994,744.85, and

accounts of its U.S. legal counsel in amount of $31,352,136.73, incurred between 2009 to 2016 — Motion granted — Accounts approved — Monitor's duties were far more complex than normal due to matrix way in which N's business was operated — Extensive joint discovery process to resolve claims played large role in costs getting out of hand, and was not fault of Monitor — Monitor and counsel tried to be as efficient as possible in difficult circumstances and overall achieved very favourable outcomes for Canadian creditors — Proceedings were unprecedented in terms of size, complexity, international aspects and vast number of competing interests — Nature, extent and value of assets realized for creditors was significant — Billings over relevant period comprised combined total of 384,652.6 professional hours — Monitor and counsel's professional rates and disbursements were reasonable.

Table of Authorities

Cases considered by *Newbould J.*:

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — followed

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed

Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

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

Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to

Tepper Holdings Inc., Re (2011), 2011 NBQB 311, 2011 CarswellNB 592, 82 C.B.R. (5th) 293, 984 A.P.R. 1, 381 N.B.R. (2d) 1, 2011 CarswellNB 849, 2011 NBBR 311 (N.B. T.D.) — 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

Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — followed

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 — referred to

Pensions Act, 1995, c. 26
s. 75 — considered

Pensions Act 2004, 2004, c. 35
Generally — referred to

MOTION by monitor of insolvent company for passing of accounts of monitor and its counsel incurred during *Companies' Creditors Arrangement Act* proceedings.

Newbould J.:

Introduction

1 Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the "Canadian Debtors"), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

2 The background to this sorry saga has been described in a number of decisions.[1]

3 At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA[2] region, as well as the Caribbean and Latin America and Asia. NNC, the Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

4 On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the UK Insolvency Act, 1986. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

5 The Monitor was appointed in the Initial Order of January 14, 2009 which directed that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice." It is normal in CCAA proceedings for the Monitor to pass its accounts periodically. This was no normal CCAA proceeding and the Monitor chose not to pass its accounts periodically but rather wait until the end of the proceedings. One advantage in having all of the accounts passed at this stage is that up to date information as to the level of success achieved by the Monitor, one of the key factors to be considered, is now available as a result of the settlement recently achieved in the allocation dispute.

6 Normally a Monitor performs a neutral role as a court officer in a CCAA proceeding. However in this case there were two orders giving the Monitor extraordinary powers. On August 10, 2009, Nortel announced the departure of its then CEO, Mike Zafirovski, and on the same day five members of NNC's and NNL's boards of directors resigned. As a result of this change in circumstances, on August 14, 2009, this Court granted an Order that expanded the Monitor's role and powers to include, *inter alia*, the ability:

(a) to conduct, supervise and direct the sales processes for the Canadian Debtors' property or business and any procedure regarding the allocation and/or distribution of proceeds of any sales;

(b) to cause the Canadian Debtors to exercise the various restructuring powers authorized under paragraph 11 of the Initial Order and to cause the Canadian Debtors to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Canadian Debtors in dealing with their property, operations, restructuring, wind-down, liquidation or other activities; and

(c) to administer the claims process established pursuant to the Claims Procedure Order dated July 30, 2009 and any other claims bar and/or claims resolution process or protocol approved by the Court.

7 Following the resignation of the Canadian Debtors' remaining directors and officers in October 2012, the Monitor's role and powers were further expanded by order dated October 3, 2012, to authorize and empower the Monitor to, amongst other things, exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors.

8 The changing circumstances of the CCAA proceedings and the resulting expansion of the Monitor's powers have resulted in the Monitor and its counsel undertaking a scope of work that is beyond the typical role of a monitor in a CCAA proceeding. Indeed, since October 2012 substantially all activities undertaken by or on behalf of the Canadian Estate, including the massive litigation, have been undertaken by the Monitor's professionals with the assistance of the Monitor's counsel. It has been the Monitor that has been the effective defendant in the claims made against the Canadian Debtors and the effective plaintiff in the allocation trial seeking a portion of the $7.3 billion of the escrowed sale proceeds.

9 The provision in the Initial Order that the Monitor pass its accounts from time to time was not changed with these orders enhancing the Monitor's powers and so what is included in the accounts to be passed is far more and different than what would ordinarily be included in a Monitor's accounts to be passed.

10 Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the $7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

11 The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

12 The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel.[3] It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

13 There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 (Alta. Q.B.) that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

> 30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

TAB 10

2016 BCSC 2262
British Columbia Supreme Court

League Assets Corp., Re

2016 CarswellBC 3412, 2016 BCSC 2262, [2017] B.C.W.L.D. 288, 273 A.C.W.S. (3d) 470, 42 C.B.R. (6th) 217

In The Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, As Amended

And In The Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

And In The Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, As Amended

And In The Matter of a Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A" (Petitioners)

Fitzpatrick J.

Heard: November 18, 2016
Judgment: December 2, 2016
Docket: Vancouver S137743

Counsel: Katie Mak, for Petitioners
Jeff Lee, Q.C., Adam Kaukas, for ANB Canada Inc.
Jeremy Dacks, for Monitor, PricewaterhouseCoopers Inc.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Debtor company and applicant company entered into agreement of purchase and sale — Pursuant to agreement, applicant agreed to purchase beneficial title to property and legal and beneficial title to shares in company which held registered legal title to property — Debtor company filed for creditor protection under Companies' Creditors Arrangement Act (CCAA) — Property was eventually sold pursuant to court's approval — Applicant claimed break fee of $500,000 arising from purchase and sale transaction that did not complete — Application dismissed — Debtor company did not terminate agreement during CCAA proceedings, agreement remained in full force and effect and subject to fulfillment of conditions — Break fee was not payable by debtor company as termination of agreement arose solely by reason of non-fulfillment of conditions by applicant — Debtor company could not have validly repudiated agreement in circumstances alleged — Debtor company did not give notice to applicant of its intention to disclaim agreement, as required by s. 32 of CCAA — At no time did monitor consent to any disclaimer of agreement — Applicant was aware of CCAA filing almost immediately and would have known, or ought to have known, that agreement was not disclaimed — There was nothing in actions taken by debtor company that could reasonably be interpreted as indicating intention to disclaim or repudiate agreement.

> If, as it appears, the Monitor wishes to terminate the Purchase Agreement (and in the alternative, the Transaction will likely be frustrated as a result of League's (and the related parties' conduct)), the issue really will then come down to the break fee provided for in the Purchase Agreement. . . . My client has incurred extraordinary costs and expenses in connection with the Transaction and now, by not completing the Transaction, my client will suffer significant additional damages as well — all of these far exceeding the break fee.
>
> Our understanding is that while the Vendor itself is a solvent company, it does not have sufficient cash assets to immediately pay the break fee, nor is it likely to be able to obtain such proceeds from League Assets Corp. at this time. Consequently, in an effort to resolve this matter expeditiously and with some degree of certainty; as well as allowing NorRock to stop incurring expenses and damages, we are prepared to recommend that NorRock accept a direction and undertaking from [IGW industrial] and the Monitor; to have the break fee paid from the proceeds received on a disposition/sale of the Property; provided that same happens on or before January 31, 2014.
>
> . . .
>
> We appreciate your cooperation and timely attention to this matter so that NorRock may move forward with the alternate reactivation transaction in place of the previously contemplated Transaction involving [IGW industrial].

57 In my view, it is inconsistent for Ms. Boddaert to refer to this letter as being both a communication to obtain "confirmation" as to IGW Industrial's earlier indicated intention not to proceed with the transaction *and* a communication by NorRock to IGW Industrial of NorRock's acceptance of IGW Industrial's prior repudiation.

58 If nothing else, the author of this letter appears to have implicitly recognized the need for IGW Industrial to obtain the Monitor's approval of any disclaimer under the *CCAA*, s. 32.

59 Further, even if I had accepted that Mr. Gant's comments did result in NorRock being advised of IGW Industrial's intention not to complete the transaction, I do not consider this letter to be a clear and unequivocal indication of NorRock's acceptance of the repudiation per *Gulston*. In substance, NorRock's counsel was: trying to engage in a discussion about the difficulties in proceeding with the transaction given the *CCAA* filing; speculating about the "likely" response of the TSXV; commenting on whether the Monitor could possibly be convinced to approve the transaction; and, asking whether other options could possibly be explored in order to complete the transaction (such as removing IGW Industrial from the *CCAA* proceedings). The reference to the break fee in this letter is made in the context of resolving the uncertainty that both IGW Industrial and NorRock faced in the situation.

60 Taken as a whole, there is nothing in the Harris + Harris LLP letter that indicates an acceptance by NorRock that the Agreement was terminated as of October 31 and the transaction was at an end by reason of IGW Industrial's unwillingness or inability to proceed with it, such that the break fee was payable.

61 Accordingly, I agree with IGW Industrial and the Monitor that the Agreement, as an executory contract, remained in full force and effect as of October 31, 2013.

(2) Was there termination by Conduct?

62 In the alternative, ANB contends that the conduct of IGW Industrial and the Monitor, subsequent to October 31, 2013 and throughout November 2013, communicated to NorRock that IGW Industrial had no intention of completing the transaction under the Agreement. As such, ANB alleges again that IGW Industrial, with the consent of the Monitor, terminated the Agreement prior to the Outside Date.

63 At this stage, the circumstances faced by the petitioners after the filing of the *CCAA* proceedings are very relevant.

64 In *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) at 185, Justice Farley made an oft-quoted statement about the condition of insolvency:

> . . . It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. . . .

65 The words "chaos, unpredictability and instability" certainly applied to the petitioners at the time of the *CCAA* filing and that became increasingly so after the filing.

66 At the time of the filing, the petitioners' business operations involved over a hundred different corporations, limited partnerships and real estate investment trusts. There were various real estate projects underway across Canada, which were mostly failures. Most, if not all, of the projects were encumbered by secured debt. There was substantial unsecured debt. Thousands of individual investors were involved who were owed millions of dollars.

67 I described the substantial issues facing the petitioners in my earlier reasons when I approved interim financing and appointed representative counsel for the investors on October 25, 2013: *League Assets Corp., Re*, 2013 BCSC 2043 (B.C. S.C.). In addition, the course of events after the *CCAA* filing and into November 2013 is described in the Monitor's Fourth and Sixth reports.

68 These *CCAA* proceedings were extremely contentious at the beginning. Despite the *CCAA* filing on October 18, many of the secured creditors were clamouring to convert the proceedings to a receivership; alternatively, they sought a court order to exempt their properties from the stay so that they could commence foreclosure proceedings. Conversely, the petitioners were still of the view that they had a reasonable prospect of continuing with the restructuring towards putting a plan to the stakeholders and preserving at least some portion of the business operations. They considered that if the plan was to succeed, they needed many of the real estate projects to remain intact.

69 In these early days, it was unclear which stakeholders were "in the money" and that was particularly so in respect of the investor group.

70 In late October 2013, it was shaping up to be a showdown at the comeback hearing to determine if there was a nascent plan, sufficient to continue the stay and the *CCAA* proceedings, or whether any plan was likely to fail: see *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]).

71 In the face of this chaos, the Monitor participated in numerous discussions with the petitioners, counsel for certain secured lenders, representative counsel and other stakeholders. The Monitor's objective was to determine whether there was a consensual path forward that was in the best interest of all of the stakeholders.

72 In the period of time leading up to the comeback hearing on November 18, 2013, it was not at all clear what would happen to the *CCAA* proceedings and the properties held by the petitioners. One of the major concerns raised was whether allowing a receivership would result in a loss of value, by increasing recovery costs and entering into a forced liquidation approach, to the detriment of many stakeholders. With ongoing negotiations underway, the comeback hearing was adjourned to November 22, 2013.

73 After difficult negotiations, various stakeholders reached an agreement on a path forward that would see the petitioners remain subject to the *CCAA* proceedings. As such, on November 22, 2013, this Court granted the Process Order, which, amongst other things, expanded the Monitor's powers and removed Mr. Gant from operational, executive and management responsibilities. The Process Order also provided that the Monitor would assist the petitioners in identifying, negotiating and implementing any reasonable refinancing and restructuring opportunities.

74 The Process Order allowed for an orderly sale process for certain properties of the petitioners while maintaining the petitioners' ability to put forward a restructuring transaction. It was in this context that the Process Order authorized and empowered the Monitor to market and list certain of the petitioners' properties, but only effective December 19, 2013. The listed properties included the LaSalle Property.

75 Given the possibility of the petitioners pursuing refinancing and restructuring opportunities, the Process Order permitted the petitioners to, on or before November 29, 2013, advise of properties that they did not wish to be marketed or

TAB 11

2017 BCCA 303
British Columbia Court of Appeal

8640025 Canada Inc. (Re)

2017 CarswellBC 2250, 2017 BCCA 303, [2017] B.C.W.L.D. 5264, [2018] 2 W.W.R. 683, 100 B.C.L.R. (5th) 256, 282 A.C.W.S. (3d) 13, 415 D.L.R. (4th) 758, 51 C.B.R. (6th) 171

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

8640025 Canada Inc. and Teliphone Data Centers Inc. (Respondents / Petitioners) and TNW Networks Corp. (Appellant / Respondent) and Ernst & Young Inc., Court Appointed Monitor for the Petitioners (Respondent)

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

8640025 Canada Inc. and Teliphone Data Centers Inc. (Respondents / Petitioners) and Teliphone Corp. (Appellant / Respondent) and Ernst & Young Inc., Court Appointed Monitor for the Petitioners (Respondent)

Goepel, Fitch, Hunter JJ.A.

Heard: August 14, 2017
Judgment: August 17, 2017
Docket: Vancouver CA44619, CA44620

Proceedings: reversing *8640025 Canada Inc. and Teliphone Data Centers Inc. (Re)* (2017), 2017 CarswellBC 2025, 2017 BCSC 1291, Macintosh J., In Chambers (B.C. S.C.)

Counsel: G.F. Gregory, for Appellant, TNW Networks Corp.
C.R. Clarke, Q.C., for Appellant, Teliphone Corp.
Sandeep Panesar, for 8640025 Canada Inc. and Teliphone Navigata-Western Inc.
S.F. Collins, for Respondent, Ernst & Young Inc.
H.L. Williams, for Bank of Nova Scotia
J.R. Sandrelli, for TELUS Communications
D.F. Hepburn, for Cascade Divide Enterprises

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Petitioners were part of complex group of interrelated telecommunications companies — Petitioners sought Companies' Creditors Arrangement Act (CCAA) protection — Monitor was authorized to sell, convey, transfer, lease or assign petitioners' assets with court's approval — Monitor brought successful application for approval of sale of petitioners' assets as set out in asset schedule — Court held that no better sale was available, that monitor had support of secured creditors, that monitor had requisite interest in sale assets, and that there were no issues of integrity or fairness — Related companies appealed — Appeal allowed — Court had no jurisdiction to authorize sale of assets which related companies not brought within CCAA proceedings had interests in — Order on its face did not purport to sell third party assets, but schedules included property which related companies alleged included third party assets and order contained provision expunging other entities' ownership and other adverse claims — Lower court made no finding on question of whether assets to be conveyed included third party assets; finding which was necessary to assess whether jurisdictional issue arose — Preponderance of evidence was that third party assets were included in asset schedules — Petitioners and subsidiaries were separate legal entities — Fact that assets of other companies might be subject to security held by secured creditors of petitioners could not be basis for authorizing their sale in transaction.

Table of Authorities

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 — referred to

s. 3 — considered

s. 3(1) — considered

s. 11 — considered

s. 36 — considered

APPEAL from judgment reported at *8640025 Canada Inc. and Teliphone Data Centers Inc. (Re)* (2017), 2017 BCSC 1291, 2017 CarswellBC 2025 (B.C. S.C.), approving sale of petitioner's assets.

***Hunter J.A.* (orally):**

1 These appeals from an order made under the *Companies' Creditors Arrangement Act* ("*CCAA*") come to the Court with leave.

2 The order under appeal authorizes a sale of certain assets pursuant to s. 36 of the *CCAA*. The appellants argue that some of the assets to be sold under this authorization are owned by parties other than the companies that are subject to the *CCAA* proceeding. This, they say, goes beyond the jurisdiction of the *CCAA* court. If that is a correct characterization of the effect of

13 Mr. Justice Affleck began his analysis by reference to s. 3(1) of the *CCAA* in these terms:

> [24] Subsection 3(1) on its face makes the *Act* applicable to a company which is a debtor or affiliated debtor company. A debtor company is defined in s. 2 of the *Act* as a company that is bankrupt or insolvent, has committed an act of bankruptcy, or has made an assignment in bankruptcy or is in the course of being wound up because of insolvency.
>
> [25] The record before me does not demonstrate that the proposed petitioners are insolvent. . . .

14 He described s. 3 as a gateway to applying the *Act* to an eligible company, and held that since the proposed petitioners were neither insolvent debtors nor affiliated insolvent debtors, the *Act* was not applicable to them.

15 He also observed that:

> [52] . . . If the prospective petitioners could be added, despite their opposition, the court would then become engaged in reorganizing their businesses, perhaps even selling them, and probably imposing the stay contemplated by s. 11.02(2) of the *Act*. I do not accept that *Act* is intended to be applied to a company that objects to coming under its constraints.
>
> [Emphasis added.]

16 No further attempt was made to bring Teliphone Corp. into the *CCAA* proceedings. The appellant Teliphone Corp. relies in part on this judgment, which was not appealed, for the proposition that the *CCAA* court does not have jurisdiction over it or its assets in the *CCAA* proceeding.

17 Further efforts were made, however, to bring TNW Networks Corp. into the proceeding, primarily because it emerged that the customer contracts, which were a significant asset of the Petitioners' business, had been assigned to TNW Networks Corp. prior to the initial *CCAA* order.

18 Following further applications and cross-applications, on March 21, 2017, the appellant TNW Networks Corp. provided the Monitor with an Undertaking and Acknowledgement that assigned to the Monitor "all of the assets of TNW Networks Corp. that are used in or necessary for the business of the petitioners, as determined by the Monitor, including without limitation, all customer agreements of the Petitioners and all material supplier contracts, insofar as they are held by TNWN."

19 On April 6, 2017, Mr. Justice Bowden made a further order providing a detailed process by which the Monitor was authorized to determine which assets of TNW Networks Corp. were derived from the property of the Petitioners and which were not. The Monitor was also given powers to market the property of the Petitioners, including any property of TNW Networks Corp. derived from the property of the Petitioners.

20 The text of this order is of some consequence to the issues in this appeal. Paragraph 6 is relied on by the Monitor as providing authority for the asset purchase agreement that was ultimately negotiated, and was also referenced by the chambers judge who approved the agreement. Paragraph 6 reads as follows:

> Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entitles subject to the Applicants' security (the "Networks Property"), and report the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis.

TAB 12

2009 CarswellOnt 9378
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 9378

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.

Judgment: August 14, 2009
Docket: Toronto 09-CL-7950

Counsel: Derrick Tay, Mario Forte, Jennifer Stam, for Applicants

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

Table of Authorities

Statutes considered:

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

Morawetz J.:

1 The motion was not opposed.

2 Counsel to the Applicant submits that a natural transition point has been reached and that going forward it is appropriate and necessary for the Monitor to take on an enhanced role in Nortel's CCAA proceedings.

3 The reasons giving rise to this submission are set out in the affidavit of Mr. Davies sworn Aug. 11/09 and they are also

referenced in the 19th Report of the Monitor.

4 Having reviewed the record and having heard submissions, I am satisfied that it is appropriate to grant the requested relief to expand the powers and rule of the Monitor in the form requested. In doing so, it is noted that Ernst & Young Inc. has indicated its willingness and consent to the proposed expansion of the powers and duties of the Monitor as reflected in the draft order.

5 In seeking this order, the Applicants have noted that "given the decisions that have been made and the direction that the restructuring has taken, Nortel has reached a natural transition point for certain matters". In light of these circumstances and in furtherance of expanding the powers of the Monitor, the Monitor advises that it will consult on a timely basis (with regard to the circumstances) with the Applicants' major creditor constituencies (in each case as appropriate in light of their respected potential interests with regard to the specific issue) in exercising powers in relation to matters of material substance and that it will provide timely (with regard to the circumstances) delivery of relevant information reasonably requested by such appropriate creditor constituent, subject to the terms of the Initial Order, as amended.

6 I also note that a further hearing has been scheduled to deal with this matter.

7 Paragraph 11 of this Order is to be considered as a true come back clause to address any matters arising out of this Order.

8 An order has been signed in the form presented to give effect to the foregoing.

TAB 13

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 14

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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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 15

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 16

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 17

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.

