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

AUTHORITIES

1. *Atlantica Diversified Transportation Systems Inc. (Re)*, 2018 NSSC 77
2. *Braid Builders Supply & Fuel Ltd. et al v. Genevieve Mortgage Corp Ltd.* (1972) 29 DLR (3d) 373, 17 CBR (ns) 305 (MBCA)
3. *Re Hunters Trailer & Marine Ltd.,* 2001 ABQB 1094
4. *Re Medican Holdings Ltd.*, 2013 ABQB 224
5. *Royal Bank of Canada v. Reid-Build Homes Ltd.*, [2018] A.J. No. 200, 2018 ABQB 124
6. *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB

TAB 1

<u>**SUPREME COURT OF NOVA SCOTIA**</u>

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

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

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

LIBRARY HEADING

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

the 9% of non-lease obligations.

Issues:	(1) Is the relationship between ADTS and CW one of true lessor and lessee? (2) If it is a circumstance of "true leases", what allocation (if any) should be made against CW for payment of the Administrative Charge?
Result:	(1) The relationship is one of true lessor and lessee. CW is not a secured creditor of ADTS in relation to any of the lease payments and charges arising there from that are outstanding. (2) A just and equitable allocation of the Administrative Charge amount to CW is 20% or $15,000, based on ADTS's non-lease obligations to CW and the potential general benefits arising from the CCAA proceeding.

SUPREME COURT OF NOVA SCOTIA

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

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

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

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 23, 2018, in Halifax, Nova Scotia
Counsel:	D. Bruce Clarke, Q.C., and Leon Tovey for the Applicant Gavin MacDonald for Canadian Western Bank Adam Crane and Heather Wyse for BDO Canada Ltd. Matthew Moir for Trailer Wizards Ltd.

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

By the Court:

Introduction

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Patterson Law – $12,552.67

BDO Canada Limited – $41,973.88

Burchells LLP – $12,197.04

PWC – $8,276.42

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

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

i) The position of the parties at the hearing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

Rosinski, J.

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

APPENDIX "A"

THE PARTIES AND THEIR POSITIONS

Heller

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

8 Heller supports the monitor's recommendation.

GE

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

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

11 GE supports the monitor's proposed allocation.

Paccar

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

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

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

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

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

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

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

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

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

Ramwinn

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

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

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

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

Maxim

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

BDC

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

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

TRUE VERSUS FINANCING LEASES

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

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

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

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

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

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

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

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

33 And further, at para. 61:

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

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

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

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

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

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

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

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

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

THE LAW

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

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

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

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

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

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

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

[my italicization]

TAB 2

BRAID BUILDERS SUPPLY & FUEL LTD. et al. v. GENEVIEVE MORTGAGE CORP. LTD.

Manitoba Court of Appeal, Freedman, C.J.M., Dickson and Hall, JJ.A. June 27, 1972.

N. Nurgitz, for (plaintiffs) respondents, Braid & Winters.

L. M. Smordin, for (plaintiffs) respondent, B.A.C.M.

C. K. Tallin, Q.C., and *G. M. Pullan*, for (defendant) appellant.

J. S. Lamont, for receiver, F. G. Patrick.

The judgment of the Court was delivered by

DICKSON, J.A.:—The disposition of this appeal does not present any difficulty if one bears in mind that a receiver appointed by the Court is the receiver of the Court, not the receiver of the parties who sought the appointment: *Boehm v. Goodall*, [1911] 1 Ch. 155, followed by the British Columbia Court of Appeal in *Johnston v. Courtney*, [1920] 2 W.W.R. 459. In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that at the time of the appointment the Court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B.D. 67.

Mr. F. G. Patrick was appointed receiver of all of the undertaking, property and assets of Redman Construction Ltd. (Redman) on March 30, 1970, at the nadir in the affairs of that company. Work on the apartment block which Redman was constructing had stopped. The block was far from complete; creditors were clamouring for payment; subcontractors were removing equipment which was on site but not installed. The secured creditor Genevieve Mortgage Corp. Ltd. (Genevieve) had begun mortgage sale proceedings the result of which, if carried to foreclosure, would wipe out the claims of unsecured creditors. There were unresolved questions of priorities between Genevieve and unsecured creditors: *vide* the judgment of this Court in *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.* (1971), 23 D.L.R. (3d) 160, [1972] 1 W.W.R. 651. It was desirable to vest someone with authority to complete construction if this were found to be feasible. In this confused and somewhat frenetic state of affairs the appointment of a receiver was not a surprising development. Additionally, the evidence before the Court at that time indicated that if completed at an estimated additional cost of $669,000, the apartment block would have a sale value of $2,200,000 to $2,400,000. The secured claim of Genevieve amounted to $1,100,000. There was therefore promise of some equity from which unsecured creditors could recover at least part of their claims totalling $1,193,000.

When all the smoke had cleared, it turned out that the apartment block, sold in March, 1972, in its incomplete state, realized only $1,035,000, which was less than Genevieve's mortgage claim. Hunt, J., therefore ordered that the fees of the receiver and his counsel, totalling $20,000, and the disbursements of the receiver, aggregating $25,000, be paid from the sale of an apartment block in Selkirk owned by Redman, against which Genevieve had a mortgage claim exceeding the value of the block. Genevieve concedes that $18,733.68 of the disbursements of the receiver are properly payable out of the proceeds of the sale of the Selkirk property but contends that the balance of the disbursements, and all of the fees, should be borne by the three respondents who, on behalf of the unsecured creditors, brought the motion for the appointment of the receiver.

Genevieve submits that the judgment appealed from is erroneous in several respects.

(1) The estimates of the value of Redman's assets were unrealistic. It is far too late to advance that argument. At the time of the appointment of the receiver estimates of value were contained in an affidavit of Mr. W. G. Braid filed in support of the motion. Genevieve did not file affidavit evidence refuting these estimates; nor did it ap-

peal the order of Hunt, J., appointing the receiver. It is late in the day now to challenge the estimates. It may be that in light of what later transpired the estimates were sanguine but there were circumstances which may have affected the final sale price of the block. After the appointment of the receiver a tender was received for the purchase of the block at $1,376,500, subject to financing. The financing could not be arranged due to a substantial increase in interest rates shortly after the appointment of the receiver. Also the block stood vacant for a period of two years prior to sale. We are unable to say that the estimates made in March, 1970, were unrealistic. In any event, Hunt, J., was entitled to rely on them and did so.

(2) The Judge erred in holding that any action of the Receiver protected the property of Redman or resulted in any value being realized from the Selkirk property greater than Genevieve itself could have achieved. We would question the relevance of this contention, even if valid, as a consideration to be taken into account in determining by whom the fees of the receiver are to be paid, particularly as the quantum of such fees has not been questioned. The contention is not valid. The Judge held that the receiver did protect the property and that his actions did result in the sale of the Selkirk property at a price, apparently some $20,000, in excess of the amount which others, including Genevieve, were prepared to accept, and there was evidence upon which such findings could be made.

(3) The Judge erred in charging the costs of the receiver on property in which Redman had no equity. The argument is that a receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1; *Re Glasdir Copper Mines Ltd.*, [1906] 1 Ch. 365. It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver

would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property? The argument also appears to proceed on the assumption that when property subject to a mortgage becomes of a value less than the mortgage debt against it, it ceases to belong to the debtor. Property of a debtor, whatever the amount of the mortgage debt against it, remains the property of the debtor until all steps have been taken in law to foreclose the interest of the debtor. All of the debtor's property under administration of the Court, and not merely the equity of the debtor in that property is available by order of the Court to meet the fees and disbursements of a receiver.

(4) The receiver's costs should be borne by those at whose request he was appointed. This argument is largely repetitive and we would say only in response that the appointment is a Court appointment; when made, the appointee becomes an officer of the Court; his fees and disbursements in the absence of an order to the contrary become payable out of the assets subject to the administration of the Court.

The appeal is dismissed with costs to each of Braid Builders Supply & Fuel Ltd. and B.A.C.M. Ltd.

Appeal dismissed.

TAB 3

Re Hunters Trailer & Marine Ltd., 2001 ABQB 1094

Date: 20011214
Action No. 0003 19315

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

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

- and -

IN THE MATTER OF HUNTERS TRAILER & MARINE LTD.

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

APPEARANCES:

Kentigern A. Rowan
Ogilvie LLP
for Canadian Western Bank

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

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

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

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

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

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

THE APPLICATION TO DETERMINE COST ALLOCATION

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

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

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

THE ARGUMENTS OF THE PARTIES

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

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

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

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

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

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

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

WHETHER UMC SHOULD BEAR A PROPORTION OF THE *CCAA* COSTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

HEARD on the 26th day of November, 2001.
DATED at Edmonton, Alberta this 14th day of December, 2001.

J.C.Q.B.A.

TAB 4

Court of Queen's Bench of Alberta

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

Date: 20130423
Docket: 1001 07852
Registry: Calgary

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

Between:

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

Petitioners

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

Introduction

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

Background

[2] Medican Holdings Ltd. is the parent entity of the Medican Projects division of the Medican Group of 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.

---

[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)

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

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

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

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

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

Issue

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

Argument

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

a. MCAP

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

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

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

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

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

b. The Monitor

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

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

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

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

> Clearly, without the Kaleido Project contribution to the CCAA Charge Levy, the CCAA Charge Levy Surplus is significantly lower, negatively impacting those Medican Group entities (and ultimately the secured creditors remaining in those entities, if there are any or no subsequent settlements reached with such secured creditors) that are to receive a refund.
>
> Unless the Kaleido Project makes a proportionate contribution to the CCAA Charge Levy, certain of the Company's secured creditors will have disproportionately funded the CCAA Charge Levy. This would appear inherently unfair given that all assets of the Medican Group were encumbered by the Priority Charges.

c. The Medican Group

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

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

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

The Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
>
> (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
>
> (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

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

deteriorated during the stay. In discussing the applicable legal principles, the court held, at para 41:

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

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

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

> 49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.
>
> 50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.
>
> [...]
>
> 52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Heard on the 21st day of February, 2013.
Dated at the City of Calgary, Alberta this 23rd day of April, 2013.

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

Appearances:

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

Sean Collins of McCarthy Tetrault
for MCAP

A. Aaron Stephenson of Norton Rose
for the Monitor

TAB 5

Court of Queen's Bench of Alberta

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

Date: 20180221
Docket: 1703 21274
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

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

Defendants

- and -

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

Applicants

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

Introduction and Background

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

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

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

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

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

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

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

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

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

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

Position of the Applicants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

...

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

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

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

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

Preliminary objection to Edmonton's application

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

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

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

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

(a) vary the judgment or order, or

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

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

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

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

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

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

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

[46] The principles governing an application under s. 187(5) are that:

(i) The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.

(ii) Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.

(iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order.

(iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.

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

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

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

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

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

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

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

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

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

Onus on come-back application

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

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

Policy considerations

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

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

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

CCAA* v *BIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ICI Opt out/lifting the stay application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[81] The Court held:

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

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

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

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

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

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

[85] He observed:

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

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

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

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

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

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

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

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

[90] The Court held:

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

[91] It also noted:

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

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

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

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

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

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

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

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

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

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

Priority issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Standard General

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Edmonton

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

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

[145] Blair J stated at 794:

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

[146] However, Blair J stated at 795:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ICI

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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TAB 6

Date: 20090619
Docket: CI 08-01-56696
(Winnipeg Centre)
Indexed as: Winnipeg Motor Express Inc. et al.
Cited as: 2009 MBQB 204

COURT OF QUEEN'S BENCH OF MANITOBA

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 5273634 MANITOBA LTD. ("the applicants")

Counsel:

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for Heller Financial Canada Holding Company ("Heller") and GE Canada Leasing Services Company ("GE")

DONALD G. DOUGLAS
for Paccar Financial Services Ltd. ("Paccar")

DOUGLAS G. WARD, Q.C.
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ROBERT A. DEWAR, Q.C.
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WILLIAM G. HAIGHT
for Key Equipment Finance Canada Ltd.

)	E. PETER AUVINEN
)	for CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton Trailers Canada Corp. ("Stoughton")
)	
)	DONALD R. KNIGHT, Q.C.
)	for Maxim Transportation Services Inc. ("Maxim")
)	
)	Oral Reasons for Judgment
)	Delivered: June 19, 2009

SUCHE J.

[1] The issue before me today is the appropriate distribution of the DIP loan and administrative charges (collectively referred to as the "Court Ordered Charges") incurred since May 15, 2008, when I granted a stay of proceedings pursuant to s. 11 of the ***CCAA***. The DIP loan represents working capital advanced to WME by Heller during the restructuring period; the administrative charges consist of the monitor's fees, its legal fees, WME's legal fees, and director's charges. The amount of these fees is not in issue and both have been paid by Heller out of receivables collected from WME's operations and sale of assets. Thus, the effect of this order will be to require other parties to reimburse Heller for some portion of the $1.8525 million in issue.

[2] The monitor, in its twelfth report dated February 12, 2009, recommends that the Court Ordered Charges be allocated among the secured creditors based on pro rata recovery, using actual or estimated recovery. Total recovery for any creditor includes its direct recovery plus allocated sale proceeds, plus any lease

payments recovered, less direct costs, which includes expenditures for such things as repairs or reconditioning.

[3] In the result, certain secured creditors will be excluded, namely:

(i) Daimler Chrysler Financial Services, as I ruled its equipment was not subject to the stay, or the Court Ordered Charges;

(ii) three secured creditors, Richard Sobey, Frontier Capital Partners, and Shaw Satellite Services, whose security is subordinate to BDC, which itself only recovered a minimal amount of WME's outstanding indebtedness.

[4] In addition, several office or non-fleet equipment lessors have been excluded on the basis of administrative efficiency because of the very small amount of their respective recoveries.

[5] In making its recommendations, the monitor indicates it relied on the following principles:

(i) all secured creditors should contribute to the cost of restructuring;

(ii) a strict accounting on a cost benefit basis is impractical and not necessary or desirable for allocation purposes;

(iii) security arrangements and priorities should not be readjusted as part of this process;

(iv) the proportion each creditor should be allocated need not be equal; and

(v) the allocation should be equitable, rather than equal.

[6] The monitor also recommends that no DIP charge should be allocated to any equipment parked and available for pickup at the date of filing, or for units that have not yet been returned to a lessor/lender.

THE PARTIES AND THEIR POSITIONS

Heller

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

[8] Heller supports the monitor's recommendation.

GE

[9] GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately,

GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

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

[11] GE supports the monitor's proposed allocation.

Paccar

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

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

particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

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

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

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

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

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

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

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

Ramwinn

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

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

other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

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

Maxim

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

BDC

[24] BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset

sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. Since the date of the hearing, I have made an order of bankruptcy against WME.

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

TRUE VERSUS FINANCING LEASES

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

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

1985, c. B-3, as amended (the "***BIA***"), which has a similar provision concerning proposals.

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

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

[30] At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so

it is very difficult to generalize about how any particular type of relationship will be structured.

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

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

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

[33] And further, at para. 61:

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

[34] ***Smith Brothers*** has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow

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

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

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

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

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

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

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

THE LAW

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

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

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

[43] I also agree with the decision in ***Sulphur Corp. of Canada Ltd. (Re)***, 2002 ABQB 682, (2002), 5 Alta. L.R. (4th) 251, where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

ANALYSIS AND DECISION

[44] I begin with the observation that the s. 11 stay in this case has accomplished exactly what the ***CCAA*** intends that it do – it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

[45] Having said that, good news under the ***CCAA*** is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have

been in a much better position had they been able to simply realize on their security. 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.

[46] The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

[47] In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

[48] I agree with the view expressed in ***Hunjan International Inc., Re*** (2006), 21 C.B.R. (5^{th}) 276 (Ont. Superior Court of Justice), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

[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.

[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' 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. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful

benefit from the efforts of WME and the monitor in conducting the sale and the purchase by Newco would not have happened without the restructuring.

[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***.

[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 Alterinvest'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.

[54] At the same time, I do not accept Ramwinn's argument that requiring it to pay the allocation recommended by the monitor is also a violation of this principle. The allocation proposed is not at all disproportionate, in my view, to the benefit accrued to Ramwinn.

[55] I also conclude that there is no basis on which I can or should direct that the funds be held to pay for the outstanding claim Ramwinn advances against WME.

[56] As to equipment obtained directly by lessors, I am of the view that regardless of how lessors recovered equipment, any equipment recovered post stay should be included in the allocation as suggested by the monitor. Self-help is not to be condoned, and a potential benefit not realized due to a creditor's actions, should not be discounted in this analysis, as to do so falls into a detailed cost benefit analysis.

[57] There is one adjustment, however, that I do feel is in order. A discount rate of 9.25% on the present value of GE's leases was used by the monitor. I am not persuaded that this is justifiable. I accept what I take to be the monitor's secondary position of 6% as being reasonable.

EQUIPMENT LEASES

[58] Much attention was paid during these proceedings to the situation of equipment lessors who hold financing leases. Paccar, in particular, but also others, advocated forcefully that they were unduly prejudiced by the stay. They maintain that not only are they not being paid while their assets are being used to the benefit of the other stakeholders, but their underlying security is being rapidly and substantially deteriorated in the process. This, they say, violates one of the fundamental objectives of preventing one creditor from obtaining an advantage over other creditors during the stay period.

[59] It strikes me that the fact that true lessors are entitled to be paid further aggravates this problem in circumstances such as WME's where it has a variety of arrangements with equipment suppliers, including some true leases. It is

clearly in a debtor company's economic interests to use financed rather than leased equipment during restructuring. This is what seems to have occurred here (although I make no criticism of WME for doing so).

[60] It is difficult to know how this situation can be remedied, given that the whole point of the ***CCAA*** is to relieve a company of ongoing financial burden to allow it the opportunity to restructure. In this case, for example, WME would not have succeeded had been obliged to pay for its equipment during the entirety of the restructuring.

[61] On the particular facts of this case, this issue became somewhat easier to address given the nature of WME's business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if WME was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.

[62] I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as WME's do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice

suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

[63] The last issue is one that perhaps is more controversial. Maxim, the only true lessor, has, in my view, derived the same benefit as the financing lessors from these proceedings. Its trailers were part of WME's network which stretched across North America. As a result of WME's continued operations, its equipment was gathered in and ultimately it was able to assign its leases to Newco without any interruption. While s. 11.3(a) specifically allows for payments for use of equipment despite the stay, I do not see that there is any statutory prohibition against requiring a contribution to the Court Ordered Charges against such a party. Taking a broad and purposive approach to the ***CCAA***, which I am obliged at law to do in determining an equitable distribution of the costs of the restructuring, I conclude that Maxim should share in these charges on some basis.

[64] I do this, recognizing that the only authority on point that was provided to me, ***Western Express Air Lines***, came to a different conclusion. However, I note that there, Brenner C.J.S.C. specifically found that:

> 20 ... If costs are to be allocated in the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. As ordinary creditors for the outstanding lease payments they will likely receive nothing. ...

. . .

> 22 Accordingly under the general equitable principles of the *CCAA* I see no basis for requiring the aircraft lessors to bear a portion of the Existing Charges.

[65] Here, I have found the situation to be otherwise. There was a real and meaningful benefit to Maxim.

[66] However, just as GE's assumed lease was discounted for the risk of non-performance by Newco, so, too, should Maxim's. Subject to hearing further submissions on the matter, the amount of Maxim's total recovery should be discounted by the same discount rate, namely, 6%.

CONCLUSION

[67] At the outset of the hearing before me, several disputes remained which concerned the value of various creditors' total recovery.

[68] I understand that through a combination of information provided during the hearing and the findings I have made this afternoon, these have all been resolved.

[69] I trust that these reasons will allow the monitor to calculate the precise allocation among the parties. However, I recognize that it may be that some aspect of my reasons require either clarification or some addition. Should that be the case, I invite the parties to let me know.

_________________________________ J.