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COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, AS AMENDED	
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 2324159 ALBERTA INC.	
DOCUMENT	**BENCH BRIEF**	
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BENCH BRIEF OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF 2324159 ALBERTA INC.

IN RESPECT OF THE MONITOR'S APPLICATION SEEKING APPROVAL OF A COST ALLOCATION METHODOLOGY, THE MONITOR'S ACTIONS, A DISTRIBUTION, AND AN EXTENSION OF THE STAY PERIOD

TO BE HEARD BY THE HONOURABLE JUSTICE K.M. EIDSVIK

September 2, 2021 at 10:00 a.m.

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I. INTRODUCTION

1. This bench brief of FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of 2324159 Alberta Inc. ("**ResidualCo**"), is submitted in support of the Monitor's application, returnable September 2, 2021 (the "**Application**"), seeking: (i) the approval and implementation of the proposed cost allocation methodology (the "**Proposed Cost Allocation**"), as set out in paragraphs 22 – 26 and Appendix "B" of the Eighteenth Report of the Monitor, dated August 16, 2021 (the "**Eighteenth Monitor's Report**"), with respect to JMB Crushing Systems Inc.'s ("**JMB**") and 2161889 Alberta Ltd.'s ("**216 AB**", JMB and 216 AB are collectively referred to as, the "**Initial Applicants**") secured creditors (collectively, the "**Affected Creditors**"); (ii) approving the activities and conduct of the Monitor; (iii) authorizing the Monitor to make certain distributions (the "**Proposed Distributions**") to ATB Financial ("**ATB**") and Canadian Western Bank ("**CWB**"); and, (iv) extending the stay of proceedings concerning ResidualCo, up to and until December 3, 2021. Capitalized terms used herein and not otherwise defined shall have the same meaning as ascribed to such term(s) in the Eighteenth Monitor's Report.

2. The Proposed Cost Allocation is fair and equitable in the circumstances. Among other things, these CCAA Proceedings encompassed: (i) a marketing process containing all Affected Creditors' collateral; (ii) the orderly wind down of projects and collection of accounts receivable; (iii) the collection, securing, and preservation of the Initial Applicants' Property; and, (iv) a going concern transaction of the Initial Applicants' business and operations. As a result, the Affected Creditors received both actual and potential, direct and indirect, benefits during these CCAA Proceedings, the costs of which, in large part, were funded by Affected Creditors secured against accounts receivable and inventory. The purpose of the Proposed Cost Allocation is to correct this imbalance and allocate the costs incurred in connection with these CCAA Proceedings in a fair and equitable manner.

3. The Proposed Cost Allocation goes beyond a simple *pro rata* allocation based on collateral value. Instead, the Proposed Cost Allocation attempts to account for each Affected Creditor's relative benefits, whether actual or potential, and their interests, based on their corresponding collateral. Furthermore, all estate costs have been broken down into specific and general costs, with the former allocated to the Affected Creditors who obtained the benefit of same, and the latter

allocated to Affected Creditors based upon the value of their collateral and their actual and potential benefit. Accordingly, the Proposed Cost Allocation is a fair and equitable means by which all of the Estate Costs (as defined below) can be allocated among the Affected Creditors who received the actual and potential benefits of same.

II. FACTS

A. Background and Lien Processes

4. The Monitor was initially appointed as the monitor of the Initial Applicants pursuant to the CCAA Initial Order, issued by the Honourable Madam Justice K.M. Eidsvik on May 1, 2020 (the "**Initial Order**").

5. The Initial Order was subsequently amended and restated on May 11, 2020 (as so amended and restated, the "**ARIO**"). The ARIO, among other things: (i) approved the Initial Applicants' Sale and Investment Solicitation Process (the "**SISP**"); (ii) appointed Sequeira Partners (the "**Sale Advisor**") as sale advisor in connection with the SISP; (iii) appointed the Monitor as monitor of the Initial Applicants; and, (iv) established a stay of proceedings in respect of the Initial Applicants, up to and until July 31, 2020 (the "**Stay Period**").

6. The Stay Period was subsequently extended on numerous occasions. Most recently, the Stay Period, with respect to ResidualCo, was extended up to and until September 3, 2021.[1]

7. Upon the Initial Applicants' applications, this Honourable Court granted: (i) the Order - Lien Claims - MD of Bonnyville, dated May 20, 2020 (the "**Bonnyville Lien Process Order**"); and, (ii) the Order - Lien Claims - EllisDon Industrial, dated May 29, 2020 (the "**EllisDon Lien Process Order**", the Bonnyville Lien Process Order and the EllisDon Lien Process Order are collectively referred to as, the "**Lien Process Orders**").

8. The Monitor administered each of the Lien Process Orders[2], which are now complete. As all claims under the Lien Process Orders have now been resolved, all remaining funds collected

[1] Order (Stay Extension), granted by the Honourable Madam Justice K.M. Eidsvik on May 14, 2021 (CaseLines 03-485).

[2] Order - Lien Claims - MD of Bonnyville, granted by the Honourable Madam Justice K.M. Eidsvik on May 20, 2020, at paras. 7, 11-15 (CaseLines 03-77 - 03-79); Order - Lien Claims - EllisDon Industrial, granted by the Honourable Madam Justice K.M. Eidsvik on May 29, 2020, at paras. 13-17 (CaseLines 03-91 - 03-92) ["**EllisDon Lien Process Order**"].

in connection with the Lien Process Orders, after payment of any valid lien or priority claims, have been released to and are currently held by ResidualCo.[3]

B. The SISP

9. The SISP was developed by the Initial Applicants, with the assistance of their legal advisors and the Monitor.[4]

10. In accordance with the terms of the SISP, the Monitor and the Sales Agent marketed the business and assets of the Initial Applicants, as detailed in the Seventh Monitor's Report.[5] Specifically, all of the Initial Applicants' Property, including all equipment of the Initial Applicants (collectively, the "**Equipment**") was marketed in connection with and formed part of the SISP.

11. The administration of the SISP required significant analysis with respect to each bid, given that the Initial Applicants' had eleven (11) secured creditors and a number of bids crossed over assets, gravel pits, and an extensive Equipment list. Furthermore, the CEO of the Initial Applicants resigned during the course of the SISP.[6]

12. The Phase 2 bid deadline, for the submission of binding offers under the SISP, concluded on July 20, 2020.[7] Mantle Materials Group, Ltd. ("**Mantle**") put forward the selected Phase 2 bid; which was the most comprehensive bid and contemplated the sale of the majority of the Initial Applicants' core assets and operations.

13. The Mantle Phase 2 bid was subsequently negotiated and expanded until it ultimately evolved into the Amended and Restated Asset Purchase Agreement, dated September 28, 2020 (the "**Mantle APA**"), between the Initial Applicants, as vendors, and Mantle, as purchaser. The

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[3] See the Tenth Report of the Monitor, dated November 20, 2020, at paras. 18-20 (CaseLines 04-429 - 04-430) ["**Tenth Monitor's Report**"]; Seventeenth Report of the Monitor, dated May 11, 2021, at para. 17(a) (CaseLines 04-560) ["**Seventeenth Monitor's Report**"]; and, Endorsement on RBEE Appeal of Monitor's Builder's Lien determination of the Honourable Madam Justice K.M. Eidsvik, filed May 21, 2021 (CaseLines 10.-32).

[4] First Report of the Monitor, dated May 8, 2020 at paras. 1, 31 (CaseLines 04-3, 04-11) ["**Monitor's First Report**"];

[5] Seventh Report of the Monitor, dated September 30, 2020 at paras. 18(a)-(d), 38 (CaseLines 04-131, 04-139 - 04-140) ["**Monitor's Seventh Report**"]. See also, Monitor's First Report, *supra* at para. 33 (CaseLines 04-11 - 04-13); Second Report of the Monitor, dated July 6, 2020, at paras. 11(d)-(e) (CaseLines 04-30) ["**Second Monitor's Report**"]. A summary of the bids received by the Monitor as part of Phase 2 of the SISP is set out in Confidential Appendix "B" to the Seventh Monitor's Report.

[6] Third Report of the Monitor, dated July 24, 2020 at para. 16 (CaseLines 04-47); Second Monitor's Report, *supra* at para. 17 (CaseLines 04-32 - 04-33).

[7] Amended and Restated CCAA Initial Order, granted by the Honourable Justice K.M. Eidsvik on May 11, 2020 ["**ARIO**"], at Schedule "A" thereto ["**SISP**"], at para. 17 (CaseLines 03-62).

Mantle APA contemplated a number of related and ancillary transactions (collectively, the "**Mantle Transactions**").[8]

14. The Mantle Transactions, in their final form, were approved on March 31, 2021, pursuant to the following Orders: (i) the Amended Reverse Vesting Order (the "**Amended RVO**"), which also added ResidualCo as a debtor company to the within CCAA Proceedings;[9] (ii) the Amended Sale Approval and Vesting Order; (iii) the Amended Assignment Order;[10] (iv) the Amended Plan Sanction Order; and, (v) the Stay Extension and Extended Stay Extension Order[11] (collectively, the "**March 31 Orders**").

15. In addition to the Mantle Transactions and the March 31 Orders, the Initial Applicants and the Monitor sought approval of and completed five (5) additional court-approved sales[12] and certain additional sales without court approval where the corresponding sale prices were less than the threshold amounts set out in the ARIO (collectively, the "**Equipment Sales**").[13]

16. The Mantle Transactions, as approved pursuant to the March 31 Orders, closed on April 29, 2021.[14] Upon closing of the Mantle Transactions: (i) the Initial Applicants sold substantially all of their operating business; (ii) the Initial Applicants assigned and transferred all remaining assets (collectively, the "**Residual Assets**") and liabilities (collectively, the "**Residual Liabilities**") not subject to or assumed in connection with the Mantle Transactions to ResidualCo, pursuant to the Amended RVO;[15] (iii) ResidualCo became the sole remaining debtor in these CCAA Proceedings; and, (iv) the sole director of ResidualCo resigned and ResidualCo was left with no

[8] Monitor's Seventh Report, *supra* at paras. 22, 28-30 (CaseLines 04-131, 04-133 - 04-144).

[9] Fourteenth Report of the Monitor, dated March 4, 2021, at paras. 19-20 (CaseLines 04-507 - 04-510) ["**Fourteenth Monitor's Report**"].

[10] Fourteenth Monitor's Report, *supra* at paras. 16-18 (CaseLines 04-507).

[11] Stay Extension and Extended Stay Extension Order, granted by the Honourable Madam Justice K.M. Eidsvik on March 31, 2021, at paras. 2-3 and Schedule "A" (CaseLines 03-290 - 03-292).

[12] Order (Sale Approval and Vesting Order), granted by the Honourable Madam Justice K.M. Eidsvik on August 26, 2020 (CaseLines 03-99); Order (McDonald Sale Approval and Vesting Order), granted by the Honourable Madam Justice K.M. Eidsvik on October 1, 2020 (CaseLines 03-130); Order (Sandhill Sale Approval and Vesting Order), granted by the Honourable Madam Justice K.M. Eidsvik on October 1, 2020 (CaseLines 03-116); Order (Sale Approval and Vesting - McDonald Aggregates - January 19), granted by the Honourable Madam Justice K.M. Eidsvik on February 24, 2021 (CaseLines 03-257); Order (Sale Approval and Vesting Order - McDonald Aggregates - January 25), granted by the Honourable Madam Justice K.M. Eidsvik on February 24, 2021 (CaseLines 03-274).

[13] ARIO, *supra* at para. 10(a) (03-40).

[14] Seventeenth Monitor's Report, *supra* at para. 4 (CaseLines 04-557).

[15] Seventeenth Monitor's Report, *supra*, at para. 12 (CaseLines 04-558); Amended Reverse Vesting Order, granted by the Honourable Justice K.M. Eidsvik on March 31, 2021, at paras. 2(r)-(u), 2(ii) (CaseLines 03-371, 03-373).

management, directors, or governance structure.[16]

17. Despite the closing of the Mantle Transactions and the emergence of the Initial Applicants as operating entities, a number of Residual Assets, Residual Liabilities, claims, lien disputes, cost allocations, and other matters remain that should be addressed prior to the conclusion of the within CCAA Proceedings (collectively, the "**Remaining Matters**").

18. Due to ResidualCo's lack of management and the Remaining Matters, on May 14, 2021, the Monitor sought and obtained: (i) an Order extending the Stay Period, in respect of ResidualCo, until and including September 3, 2021; and, (ii) the Order (Enhanced Monitor's Powers) (the "**EMP Order**").

19. The EMP Order granted the Monitor the power and authority to, among other things:

(a) exercise all powers of ResidualCo under paragraphs 4 to 7 and 10 of the ARIO (in each case for and on behalf of ResidualCo and without any personal liability therefor);[17]

(b) take possession and control of all of ResidualCo's bank accounts, accounts receivable, and any and all proceeds arising from or in connection with the Residual Assets;[18]

(c) pay creditors or other claimants in accordance with any order made in these CCAA Proceedings;[19]

(d) attend to all accounting by each PMSI Creditor in respect of its sale or disposition of PMSI Property (as defined in the Amended RVO), and the remittance by any PMSI Creditor to the Monitor of any proceeds of such PMSI Property, in excess of the amounts owing to such PMSI Creditor;[20]

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[16] Seventeenth Monitor's Report, *supra*, at para. 12 (CaseLines 04-558).

[17] Order (Enhanced Monitor's Powers), granted on May 14, 2021 by the Honourable Justice K.M. Eidsvik, at para. 3 ["**EMP Order**"] (CaseLines 03-490).

[18] EMP Order, *supra* at para. 4(b) (CaseLines 03-490).

[19] EMP Order, *supra* at para. 4(c) (CaseLines 03-490).

[20] EMP Order, *supra* at para. 4(j) (CaseLines 03-491).

(e) attend to any actions, applications, or other proceedings against a PMSI Creditor that are necessary or desirable in order to enforce the obligation of a PMSI Creditor to pay any excess to the Monitor and to contribute to the costs of these CCAA Proceedings;[21]

(f) attend to, complete, seek approval of, and implement, a cost allocation with respect to the Initial Applicants, ResidualCo, and these CCAA Proceedings;[22] and,

(g) take any steps reasonably incidental to the exercise of such powers or the performance of any statutory obligations, or as may otherwise be necessary or desirable to conclude the within CCAA Proceedings.[23]

C. The Monitor's Activities Since the EMP Order

20. Since the EMP Order was granted, the Monitor's activities have included, *inter alia*:

(a) attending to post-closing matters with respect to the Mantle Transactions;

(b) taking possession of the Initial Applicants' bank accounts;

(c) administering payments in respect of Estate Costs (as defined below);

(d) resolving the contested builders' lien claim of RBEE Aggregate Consulting Ltd. ("**RBEE**");

(e) preparing the Proposed Cost Allocation in consultation with major secured creditors and engaging with all Affected Creditors regarding the Proposed Cost Allocation;

(f) evaluating potential sources of additional recoveries to ResidualCo's estate;

(g) corresponding with secured creditors and other stakeholders; and,

(h) preparing the Eighteenth Monitor's Report.[24]

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[21] EMP Order, *supra* at para. 4(k) (CaseLines 03-491).

[22] EMP Order, *supra* at para. 4(l) (CaseLines 03-491).

[23] EMP Order, *supra* at para. 4(q) (CaseLines 03-492).

[24] Eighteenth Report of the Monitor, dated August 16, 2021, at para. 13 ["**Eighteenth Monitor's Report**"].

D. ResidualCo Funds

21. As of July 30, 2021, the Monitor holds approximately $1,827,000 in cash on hand plus $382,000 in trust funds which are now releasable (collectively, the "**ResidualCo Funds**"). The portion of the ResidualCo Funds which are available for distribution, after allocating costs in accordance with the Proposed Cost Allocation, are derived from the following sources: (i) accounts receivable; and, (ii) proceeds, in the amount of $276,000, from a piece of Equipment, sold as part of the Equipment Sales, in respect of which CWB holds a priority security interest (the "**Sold CWB Equipment**").[25]

E. Proposed Cost Allocation

22. The costs to be allocated pursuant to the Proposed Cost Allocation, up to May 28, 2021, total approximately $7,540,000 (collectively, the "**Estate Costs**").[26]

23. The Monitor determined that its estimate of the net recoveries from the SISP, along with the expected recoveries of the Initial Applicants' working capital, were expected to be significantly less than the amounts owed to the Initial Applicants' secured creditors. In light of such shortfall, the Monitor and the Initial Applicants engaged in numerous cost-sharing discussions with the Initial Applicants' major secured creditors, ATB and Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc. ("**Fund VI**") and Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., acting in its capacity as collateral agent for and on behalf of and for the benefit of Fund VI (collectively, "**Fiera**").

24. On April 26, 2021, Mantle, the Initial Applicants, ATB, and Fiera entered into the Cost Allocation Agreement (the "**Cost Allocation Agreement**") addressing the allocation of costs between such parties.[27]

25. The Proposed Cost Allocation takes into account the relative benefits, whether actual or potential, to be derived by each of the Affected Creditors. All estate costs have been broken down into specific and general costs, with the former allocated to the Affected Creditors who obtained

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[25] Eighteenth Monitor's Report, *supra* at para. 33.

[26] Eighteenth Monitor's Report, *supra* at para. 22 and Appendix "B".

[27] Eighteenth Monitor's Report, *supra* at para. 15.

the benefit of same, and the latter allocated to all creditors based upon the value of their collateral and their actual and potential benefit.[28]

26. The Proposed Cost Allocation factors and accounts for: (i) the assets used or sold to provide liquidity during any given period; (ii) the agreement by Mantle to fund certain costs of the CCAA Proceedings after October 2020; (iii) the potential and actual benefits derived by the Affected Creditors, during each stage of the CCAA Proceedings; and, (iv) extensive negotiations between ATB, Fiera, and Mantle, with respect to the appropriate allocation of Estate Costs between such significant creditors.[29]

27. Pursuant to the Proposed Cost Allocation, ATB, Fiera, and Mantle have collectively been allocated approximately ninety-seven percent (97%) of the overall Estate Costs. In total, the Affected Creditors are comprised of the PMSI Creditors, ATB, Fiera, and Mantle, who are ascribed the following allocations:

Creditor / Category	**CAD$[30]**	**%**
ATB	$4,655,000[31]	61.7%
Fiera	$2,246,000[32]	29.8%
Mantle	$404,000[33]	5.4%

[28] Eighteenth Monitor's Report, *supra* at paras. 17, 18(c)-(d), 18(f)-(g), 19, and 25.

[29] Eighteenth Monitor's Report, *supra* at paras. 15, 18(a), 18(c), 18(e), 18(g), 19(b)-(c).

[30] See Eighteenth Monitor's Report, *supra* at para. 22 and Appendix "B".

[31] ATB has been allocated: (i) $868,000 (92%) of pre-wind-up operating disbursements; (ii) $393,000 (83%) of pre-wind-up employee costs; (iii) $138,000 (92%) of pre-wind-up head office and insurance costs; (iv) $41,000 (15%) of post-wing-up operating costs; (v) $68,000 (13%) of post-wind-up employee costs; (vi) $33,000 (15%) of post-wind-up head office and insurance costs; (vii) $78,000 (15%) of the Sales Agent fees and SISP costs; (viii) $196,000 (50%) of reclamation obligations; and, (ix) $207,000 (50%) of financing-related costs.

[32] Fiera has been allocated: (i) $73,000 (8%) of pre-wind-up operating disbursements; (ii) $33,000 (7%) of pre-wind-up employee costs; (iii) $12,000 (8%) of pre-wind-up head office and insurance costs; (iv) $69,000 (25%) of post-wind-up operating costs; (v) $114,000 (22%) of post-wind-up employee costs; (vi) $55,000 (25%) of post-wind-up head office and insurance costs; (vii) $444,000 (85%) of the Sales Agent fees and SISP costs; (viii) $196,000 (50%) of reclamation obligations; and, (ix) $207,000 (50%) of financing-related costs.

[33] Mantle has been allocated: (i) $165,000 (60%) of post-wind-up operating costs; (ii) $309,000 (60%) of post-wind-up employee costs; and, (iii) $130,000 (60%) of post-wind-up head office and insurance and insurance costs.

PMSI Creditors (collectively)	\$235,000[34] (in the aggregate)	3.1%

28. With respect to the general Estate Costs, the Monitor's Proposed Cost Allocation is based on the following:

(a) the cessation of active business operations on June 26, 2020, after which the majority of the Initial Applicants' employees were terminated and costs were reduced to maintain operations through SISP completion. As a result, operating costs, employee costs, disbursements, and insurance costs are split between pre-June 26 ("**pre-wind-up**") and post-June 26 ("**post-wind-up**") costs;[35]

(b) ATB has been allocated the majority of pre-wind-up general costs, as the Initial Applicants operations primarily benefited the collection of outstanding receivables, against which ATB holds a first-ranking security interest;[36]

(c) the post-wind-up general costs have been allocated by accounting for the actual and potential benefits received by each of ATB, Fiera, Mantle, and the PMSI Creditors, after the cessation of the Initial Applicants' operations;[37]

(d) all allocations of general Estate Costs, amongst the PMSI Creditors, have been allocated on a *pro rata* basis, in accordance with corresponding collateral values, as set out in the May 5, 2020 appraisal prepared by GB Appraisal Canada, ULC, which ascribed a value to all of the PMSI Creditors' collateral on a similar basis;[38] and,

(e) the majority of non-specific, general restructuring professional fees have been allocated to ATB (69%) as a result of the efforts to collect on receivables, including

[34] The PMSI Creditors have collectively been allocated: (i) \$47,000 (10%) of pre-wind-up employee costs as JMB employees were involved in marketing the PMSI Creditors' equipment during the SISP; (ii) \$26,000 (5%) of post-wind-up employee costs as JMB employees were involved in aggregating, parking, storing and securing the equipment as well as organizing the retrieval of same; and, (iii) \$162,000 (4%) of general restructuring professional fees, relating to the sales process and other matters.

[35] Eighteenth Monitor's Report, *supra* at para. 19(d) and Appendix "B", note 6.

[36] Eighteenth Monitor's Report, *supra* at paras. 14(e), 19(d)-(e) and Appendix "B".

[37] Eighteenth Monitor's Report, *supra* at paras. 18(g), 19(c)-(d) and Appendix "B".

[38] Eighteenth Monitor's Report, *supra* at para. 18(f) and Confidential Appendix "A".

attending to contested lien determinations and related matters. Fiera (27%), and to a lesser extent the PMSI Creditors (4%), have been allocated general restructuring fees relating to the SISP, Equipment Sales, and other matters which provided actual and potential benefits to same.[39]

29. The Proposed Cost Allocation addresses the period from the Filing Date until and including May 28, 2021. With respect to costs incurred after May 28, 2021, which are not included in the amounts set out and described above, the Proposed Cost Allocation contemplates the following allocations:

(a) ATB, Fiera, and Mantle shall each be allocated one third (1/3) of all costs incurred in connection with: (i) the termination and conclusion of these CCAA Proceedings; (ii) the Application in respect of the Cost Allocation; and, (iii) the accounting to be provided by PMSI Creditors under the Amended RVO;

(b) ATB and Fiera shall each bear the costs incurred in connection with seeking authorization and approval of any distributions, based upon the proportionate benefit received by such Affected Creditors;

(c) Mantle shall be responsible for all costs incurred in connection with amendments to the Amended RVO with respect to gravel inventory; and,

(d) ATB shall be responsible for all costs incurred in connection with: (i) the lien determination application by RBEE; and, (ii) any remaining receivable claims held by ResidualCo.[40]

30. On or around June 21, 2021, following building consensus with ATB, Fiera, and Mantle, the Monitor circulated the draft Proposed Cost Allocation to the PMSI Creditors for comment. As a result of feedback received, the Monitor amended and revised the Proposed Cost Allocation to address the specific concerns raised with respect to the allocation of Estate Costs in connection with a specific piece of Equipment.[41] No further objections or feedback have been received.

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[39] Eighteenth Monitor's Report, *supra* at para. 19(e) and Appendix "B".

[40] Eighteenth Monitor's Report, *supra* at para. 24.

[41] Eighteenth Monitor's Report, *supra* at para. 21.

31. Each of ATB, Fiera, and Mantle support the Proposed Cost Allocation.[42]

III. ISSUES

32. The issues to be determined by this Honourable Court, are whether: (i) the Proposed Cost Allocation should be approved and implemented; (ii) the Proposed Distributions should be approved; (iii) the Monitor's activities and conduct should be approved; and, (iv) the Stay Period should be extended, up to and until December 3, 2021.

IV. LAW

A. Cost Allocation Must Be Fair and Equitable

33. While each cost allocation must be decided on its own facts, the determinative test with respect to the approval of a cost allocation is whether the allocation is fair and equitable. In *Re Medican Holdings Ltd* ("***Medican***"),[43] the leading Alberta decision concerning the approval of a cost allocation in CCAA proceedings, Justice Horner cited the following principles from *Re Hunters Trailer & Marine Ltd* ("***Hunters***"),[44] wherein Wachowich C.J. (as he then was) stated:

> "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.**" [emphasis added].[45]

34. In *Re Winnipeg Motor Express Inc.* ("***Winnipeg Motor***"),[46] the Manitoba Court of Queen's Bench considered a monitor's recommended *pro rata* allocation of its charges, in the context of objections raised by certain secured lenders on the basis that they received no real or potential benefit from the restructuring proceedings. In this regard, the Court noted:

> The nature of **proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating**. **It is also accepted**

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[42] Eighteenth Monitor's Report, *supra* at para. 20.

[43] *Re Medican Holdings Ltd*, 2013 ABQB 224 ["***Medican***"] **[TAB 3]**.

[44] *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 1094 ["***Hunters Trailer & Marine***"] **[TAB 2]**.

[45] *Medican*, *supra* at para. 25 **[TAB 3]**, citing *Hunters Trailer & Marine*, *supra* at para. 15 **[TAB 2]**.

[46] *Re Winnipeg Motor Express Inc*, 2009 MBQB 204 [**"*Re Winnipeg Motor*"**] **[TAB 4]**, leave to appeal to MBCA ref'd, 2009 MBCA 110 **[TAB 6]**.

> **that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis**.[47]

35. Thereby, determining whether an allocation is equitable involves a consideration of potential benefits rather than just actual benefits, along with the type of security held by the affected creditors and the degree of potential benefit that might be derived by same.[48]

36. Furthermore, a *pro rata* allocation among similarly situated creditors is *prima facie* fair and equitable.[49] In *Winnipeg Motor*, the Court stated:

> "[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…". [emphasis added].[50]

V. ARGUMENT

A. The Proposed Cost Allocation Is Fair and Equitable and Should Be Approved

37. The Proposed Cost Allocation is fair and equitable. In these CCAA Proceedings, the adoption of the Proposed Cost Allocation is necessary to correct the prejudice faced by certain Affected Creditors; in particular, those secured against accounts receivable and inventory, whose collateral largely funded the costs of these CCAA Proceedings.[51]

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[47] *Re Winnipeg Motor*, *supra* at para. 41 **[TAB 4]**.

[48] *Medican*, *supra* at para. 44 **[TAB 3]**. *Hunters Trailer & Marine*, *supra* at paras. 20-21 **[TAB 2]**: "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. … 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…".

[49] See *e.g. Respec Oilfield Services Ltd. (Re)*, 2010 ABQB 277 at para. 24 ["***Respec***"] **[TAB 5]**: "Allocating costs on a uniform percentage of the sale price received for the asset in question has been interpreted and applied to mean allocating the costs on the basis of a *pro rata* share using the total recovery as a factor in the calculation…"; and, *Re Winnipeg Motor*, *supra* at paras. 46-47 **[TAB 4]**.

[50] *Re Winnipeg Motor*, *supra* at paras. 46-47 **[TAB 4]**.

[51] Eighteenth Monitor's Report, *supra* at paras. 18(a) and 19(b).

38. In the present case, the Monitor has worked extensively with the Initial Applicants and the largest Affected Creditors to develop a cost allocation methodology which is fair and equitable in the circumstances. Specifically:

(a) the Proposed Cost Allocation recognizes that although the PMSI Creditors received both actual and potential benefits, the majority of such benefits were obtained during the pre-wind up period;

(b) allocates no general Estate Costs to the PMSI Creditors, on or after September 2, 2020;

(c) treats all similarly secured Affected Creditors,[52] within a given class, equally,[53] and allocates amongst such Affected Creditors a *pro rata* share of the Estate Costs, based on collateral value;

(d) recognizes the potential and actual benefits ascribed to the PMSI Creditors[54] and, as such, the **total** allocation to the PMSI Creditors, as a class, is merely 3.1% of the total Estate Costs; and,

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[52] There is no requirement that similarly secured creditors be treated *identically*, but Courts have held that other allocations which treated similarly secured creditors similarly and uniformly were fair and equitable. For instance, see *Respec*, *supra* at para. 32 **[TAB 5]**, citing *Hunters Trailer & Marine*, *supra* at para. 20 **[TAB 2]**: "However, what is important, and is not disputed is that the approach advocated by GE would result in the creditor who will receive the least from the auction proceeds bearing the greatest portion of them, contrary to the principles in *Hunters Trailer & Marine Ltd. (Re)* 2001 ABQB 1094 at para. 20 where Chief Justice Wachowich concluded that in allocating costs it is unfair to ignore the differences in the type of security held by various creditors and the degree of potential benefit that each creditor may derive from the proceedings." See also *Medican*, *supra* at paras. 40 and 51 **[TAB 3]**: "…In addition, [MCAP] argues that the Monitor should not be able to rely on arguments in equity when its proposed allocations do not treat all creditors equally… 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." [emphasis added].

[53] See *e.g. Re Winnipeg Motor*, *supra* at para. 47 **[TAB 4]**.

[54] The relative degree of actual and potential benefit with respect to different asset classes is a relevant consideration in cost allocation. See, for instance, *Re Winnipeg Motor*, *supra* at para. 42 **[TAB 4]**, quoting *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164 at para. 17 ["***Hickman***"] **[TAB 1]**: "…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**…" [emphasis added].

(e) is supported by the Affected Creditors who have been allocated ninety-seven (97%) of the total Estate Costs, along with certain PMSI Creditors who have responded to the Monitor's June 21, 2021 correspondence.

39. Furthermore, in *Medican*, this Court affirmed the proposition from *Winnipeg Motor* that whether a given creditor would have been better off realizing on their security outside the CCAA proceedings is irrelevant. Individual Affected Creditors cannot object to a fair and equitable cost allocation following the completion of a court-sanctioned sale process that they participated in and derived benefit from on the theory that they may have had better recoveries through their own process.[55]

40. Since sending out the June 21 correspondence to all PMSI Creditors, the Monitor is not aware of any person opposing the Proposed Cost Allocation or any unaddressed concerns regarding same.

B. The Affected Creditors Received Both Actual and Potential Benefits

(i) The Affected Creditors Received Actual Benefits

41. The Affected Creditors, including the PMSI Creditors, received actual benefits as a result of these CCAA Proceedings, including, among others, the following:

(a) ATB, Fiera, and Mantle each received direct and indirect benefits as a result of the ARIO and the March 31 Orders, including by way of the preservation of the Initial Applicants' business, Property, and a portion of the Initial Applicants' pre-filing indebtedness to ATB and Fiera, which was ultimately assumed by Mantle;

(b) ATB received actual benefits from the Lien Process Orders and the ongoing collection of accounts receivable;

(c) the PMSI Creditors received direct and indirect benefits as their Equipment was preserved, secured, insured, parked, transported, and ultimately released to the PMSI Creditors. Furthermore, a total of approximately $128,000 in payments were made to the PMSI Creditors on account of certain Equipment during these CCAA

[55] *Re Winnipeg Motor*, *supra* at paras. 44-45 **[TAB 4]**; see also *Medican*, *supra* at para. 36 **[TAB 3]**.

Proceedings; and,

(d) the Monitor and Initial Applicants continued to perform work in respect of the PMSI Creditors' Equipment after the conclusion of the SISP, such as those required in connection with the release and return and their Equipment. As a result, approximately $24,000 in post-wind up specific Estate Costs were incurred which specifically relate to the PMSI Creditor's Equipment.[56]

(ii) The Affected Creditors Received Potential Benefits

42. The Affected Creditors also received potential benefits during these CCAA Proceedings. This Court's decision in *Medican* is instructive with respect to what constitutes a potential benefit. In *Medican*, MCAP, a mortgagee secured against a specific asset, realized on its security outside the given insolvency proceedings, in a separate and independent process which was entirely funded by MCAP. Despite this, this Court in *Medican* found that MCAP was liable for its apportioned costs of the proceedings, despite receiving no corresponding distribution or direct benefit. Specifically, the Court in *Medican* stated:

> "**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.**"[57]

43. Ultimately, the mere fact that MCAP received potential benefits from the preservation of the *status quo*, and the inclusion of its assets in a sales process, justified an allocation.[58]

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[56] Eighteenth Monitor's Report, *supra* at para. 23.

[57] *Medican*, *supra* at para. 47 **[TAB 3]**.

[58] *Medican*, *supra* at paras. 47, 50-51 **[TAB 3]**.

44. Similarly, in this case, the Affected Creditors received the following potential benefits:

(a) the Initial Applicants were subject to a stay of proceedings and received the benefit of interim financing and preservation of the *status quo*; and,

(b) the Initial Applicants' Property, including the Equipment, was included in and marketed as part of the SISP, which was held in *Medican* to be sufficient to support a cost allocation.[59]

45. In *Hunters*, the Court recognised that creditors will be able to show that certain restructuring costs were not directly attributed to their assets; however, this argument was rejected where costs are obtained for general corporate purposes, as the benefit is one recognized by all of the creditors.[60]

46. Furthermore, it is important to note that all Affected Creditors took part in and received the benefit of the SISP.[61]

C. The Proposed Cost Allocation Is Reasonable and Practical

47. The Proposed Cost Allocation is reasonable and practical in the circumstances. The case law is clear; a strict accounting of a costs-benefit analysis is impractical and would be ultimately defeating. For instance, in *Hunters*, the Court stated:

> "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***…". [emphasis added].[62]

48. That statement was confirmed and expanded upon in *Winnipeg Motor*, as follows:

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[59] *Medican*, *supra* at para. 45 **[TAB 3]**: "***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**." [emphasis added].

[60] *Re Hunters Trailer & Marine*, *supra* at paras. 22-23 **[TAB 2]**; *Medican*, *supra* at para. 47 **[TAB 3]**.

[61] *Medican*, *supra* at para. 45 **[TAB 3]**.

[62] *Re Hunters Trailer & Marine, supra* at para. 26 **[TAB 2]**.

> "…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***…" [emphasis added].[63]

> "… 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: […] 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**…" [emphasis added].[64]

49. Pursuant to the Proposed Cost Allocation, ATB, Fiera, and Mantle have collectively been allocated ninety-seven percent (97%) of the costs of these CCAA Proceedings, with the PMSI Creditors bearing the remaining three percent (3%).

50. Due to the small percentage of costs allocated to individual PMSI Creditors, which in many cases is less than one percent, all PSMI Creditors are treated on a similar basis and are allocated costs based on the value of their Equipment. The Monitor has not differentiated between the interests of the various PMSI Creditors, as such an exercise would likely not be cost-effective in the circumstances due to the percentage of costs allocated to the PMSI Creditors, and may instead simply increase the costs to be allocated.

D. The Other Relief Sought Is Reasonable and Appropriate In the Circumstances

(i) The Monitor's Activities Should Be Approved

51. These CCAA Proceedings have been particularly contentious, with numerous contested applications and a leave to appeal application before the Alberta Court of Appeal. In total,

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[63] *Re Winnipeg Motor*, *supra* at para. 41 **[TAB 4]**. See also *Medican*, *supra* at para. 32 **[TAB 3]**.

[64] *Re Winnipeg Motor*, *supra* at para. 42 **[TAB 4]**, citing *Hickman*, *supra* at para. 17 **[TAB 1]**.

approximately forty-four (44) formal orders have been issued, with hearings on twenty-five (25) days.

52. As described above, among other things, the Monitor: (i) responded to numerous applications and an appeal; (ii) administered the Lien Process Orders; (iii) filed various applications in support of the Mantle Transactions and other relief required for the administration of the estate; (iv) attended to numerous matters in connection with the Amended RVO, the Mantle Transactions, ongoing cost reporting to creditors, the Proposed Distributions, the Proposed Cost Allocation, and related matters; and, (v) ultimately, assisted in arriving at a going concern transaction through the SISP.

53. In light of the aforementioned factors, the Monitor respectfully submits that its conduct and activities should be approved.

(ii) The Proposed Distribution is Appropriate in the Circumstances

54. The Monitor currently holds $1,827,000 cash on hand and $382,000 in trust[65] which is releasable and available for distribution (collectively, the "**ResidualCo Funds**").

55. The Proposed Distribution accounts for the relative priority entitlements of ATB and CWB, the creditors with a priority security interest in the ResidualCo Funds; after accounting for the Proposed Cost Allocation. Specifically, the Proposed Distribution provides for payment to CWB of up to $276,000, on account of the Sold CWB Equipment (*i.e.* a distribution of $291,000, minus the Proposed Cost Allocation to CWB of $15,000), with the remainder (subject to the Holdbacks) of the ResidualCo Funds to be distributed to ATB.

56. The Proposed Distribution contemplates that the Monitor will have the discretion to establishing appropriate holdbacks (the "**Holdbacks**") from the ResidualCo Funds in order to address any Remaining Matters in connection with these CCAA Proceedings. Such ability to establish Holdbacks is reasonable in the circumstances, given the limited funds, receipts, and receivables available to ResidualCo for the administration of its estate. The purpose of permitting

[65] Exclusive of the "GST Amount" held in trust pursuant to the EllisDon Lien Process Order, which is not currently releasable. See the EllisDon Lien Process Order, *supra* at paras. 2(i), 19 (CaseLines 03-86, 03-92).

the Monitor to establish the Holdbacks is primarily to increase administrative efficiency during the wind-down of these CCAA Proceedings.

(iii) It Is Appropriate to Extend the Stay Period

57. The Monitor seeks an extension of the Stay Period until and including December 3, 2021. Such an extension will allow additional time for ResidualCo to: (i) recover costs from the PMSI Creditors pursuant to the Proposed Cost Allocation; (ii) administer the Proposed Distributions to ATB and CWB; (iii) evaluate any potential additional sources of recoveries; and, (iv) address any other outstanding matters.[66]

58. The extension of the Stay Period is appropriate in the circumstances, as: (i) a number of miscellaneous issues remain; (ii) no creditor will be materially prejudiced by an extension of the Stay Period; and, (iii) ResidualCo is forecasted to have sufficient liquidity during the proposed Stay Period.[67]

VI. RELIEF REQUESTED

59. The Monitor respectfully requests that this Honourable Court grant the Monitor's Application, seeking orders granting the following relief: (i) the approval and implementation of the Proposed Cost Allocation; (ii) approving the activities and conduct of the Monitor; (iii) authorizing the Monitor to make the Proposed Distributions; and, (iv) extending the Stay Period up to and until December 3, 2021.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 2021

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*
Sean Collins / Pantelis Kyriakakis / Nathan Stewart
Counsel for FTI Consulting Canada Inc., in its capacity as the court-appointed monitor of 2324159 Alberta Inc., and not in its personal or corporate capacity

[66] Eighteenth Monitor's Report, *supra* at para. 35(a).
[67] Eighteenth Monitor's Report, *supra* at para. 35(b).

VII. INDEX OF AUTHORITIES

1. *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164;
2. *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 1094;
3. *Re Medican Holdings Ltd*, 2013 ABQB 224;
4. *Re Winnipeg Motor Express Inc*, 2009 MBQB 204;
5. *Respec Oilfield Services Ltd. (Re)*, 2010 ABQB 277; and,
6. *Winnipeg Motor Express Inc. et al., Re*, 2009 MBCA 110.

TAB 1

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

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

2004 NLSCTD 164 (CanLII)

CITATION: ***In Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164**
DATE: 2004 09 01
DOCKET: 2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

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

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

Before: The Honourable Mr. Justice Robert M. Hall

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

Date of Hearing: June 8, 2004

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

Authorities Cited:

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

2004 NLSCTD 164 (CanLII)

REASONS FOR JUDGMENT

Hall, J.

Background

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

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

paragraphs in the Receivership Order stated:

1. "THIS COURT ORDERS that, in respect of the Assets, the Receiver is hereby empowered from time to time until further order of this Court generally to do all things which may be reasonably necessary in order to facilitate the development of a plan and procedural structure for the liquidating of the Assets or any part thereof and for the determination of the legal and equitable rights of all creditors and claimants including, without limitation:
2. ...
3. (c) to develop and recommend the optimal method for disposition of the Assets and the distribution of property or proceeds to those claimants or creditors entitled thereto and to report to the Court as soon as possible, but in any event within 45 days after this Order, with a recommended procedure to dispose of all realizable Assets, including the allocation of the costs of the entire process (the "Realization Plan"), provided that the Receiver shall only sell Assets upon further order of the Court.
4. (e) to conduct such investigations and analyses of the Assets as may in its judgement be necessary or advisable to enable it to develop a plan for the determination of the rights and entitlement of creditors to the Assets or parts thereof, and present such plan and to apply to this Court for any direction or directions with respect to the preparation, development or implementation of such pan, including the allocation of costs of the entire process (the "Claims Plan")."

3. On May 14, 2002 this Court approved the Realization Plan and Cost Allocation Plan developed by PWC and the formal Order to that effect was filed on May 17, 2002.

4. After the approval of the Realization Plan and Cost Allocation Plan PWC proceeded with and completed the liquidation of substantially all of the assets of HEL. The majority of assets were sold by public auction, although some were sold by tender and others by way of negotiated sale agreement or pursuant to Court Order. As sales were completed and assets disposed of, many of the secured creditors of HEL, including the Applicant GMAC Leasco Ltd. in this current matter, brought Interlocutory Applications seeking payment to them of proceeds arising from the sale of assets over which these creditors claimed security. As these applications were arising prior to the completion of all elements of the receivership, it was necessary for the Receiver to develop a procedure whereby it could retain a holdback from the sale of the assets as a contribution towards costs incurred in the

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

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

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

1. **<u>The Present Application.</u>**

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

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

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8. GMAC Leaseco Ltd. takes the position that, for a variety of reasons, these particular units should not be subject to any holdback at all or any Cost Allocation Plan liability. In the alternative, counsel for GMAC Leaseco Ltd, at the hearing of this application, consented to a token cost allocation in the amount of $7,500.
9. Principally GMAC Leaseco's objection to paying the 15% holdback with respect to these units was based upon:

(1) that its right to security over these vehicles as first secured creditor was clear, easily determined and unchallenged by other creditors, and therefore the receiver simply ought to have turned over the vehicles to GMAC Leaseco to be realized upon in accordance with their securities without any charge for receivership costs being asserted;

(2) the Receiver did not expend any effort on its own behalf in the refurbishing of or realization upon these units; and

(3) it is fundamentally unfair in this situation that the units should be subject to cost allocation holdback in the amount of $53,909.08 or any amount.

1. **Receiver's Position.**

10. The Receiver takes the position that, excepting some limited cases, there has been little or no distinction made by the Receiver in its securing, possessing and maintaining any of the assets of HEL that HEL had in its possession at the commencement of the receivership. The Receiver contends that the costs incurred by it in the management of the receivership have generally been incurred in relation to all the property of HEL without any distinction as to the category of property either by its possession by other parties or any other characteristic. In addition, it contends that all sales of the property have been by asset class and not by legal interest.
11. PWC contends that a principal role of PWC as a Court appointed Receiver is to assist the creditors and the Court in designing and executing a process that provides a fair opportunity to all creditors to adjudicate issues related to the receivership and that its role in this regard is defined in the Receivership Order and its mandate emanates from that Order and subsequent Orders of the Court. The duties of the Court appointed Receiver have included:

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

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(b) administrative tasks including development of a website where creditors could post and share documentation related to the receivership;

(c) seizure and cataloging of the records of HEL;

(d) regulate and required Court reporting;

(e) completion of various statutory duties;

(f) investigative and legal work associated with a potential Court action against the auditors of HEL as mandated by an Order of the Court;

(g) meetings with creditors and responding to requests for information; and

(h) working on defined tasks of the Receiver's mandate as ordered by the Court.

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

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

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

1. **Applicable Principles.**

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

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

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

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

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

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

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

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

1. **Reasons for Variation.**

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

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

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Auction commissions	$1,193,473
Total	$4,670,919

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

1. **Order.**

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

Justice

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

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

2004 NLSCTD 164 (CanLII)

DATE: 2004 09 02
DOCKET: 2002 01T 0352

2004 NLSCTD 164 (CanLII)

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

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

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

Before: The Honourable Mr. Justice Robert M. Hall

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

C O R R I G E N D U M

Hall, J.

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

Justice

2004 NLSCTD 164 (CanLII)

TAB 2

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

2001 ABQB 1094 (CanLII)

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.

2001 ABQB 1094 (CanLII)

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.

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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.

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[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.

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[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).

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[20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from ***CCAA*** proceedings. 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

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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.

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TAB 3

Court of Queen's Bench of Alberta

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

2013 ABQB 224 (CanLII)

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

2013 ABQB 224 (CanLII)

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.

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[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.

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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.

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[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*

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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).

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[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

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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

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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.

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[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.

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[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

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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.

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[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.

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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 4

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

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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:

DAVID R. M. JACKSON
for Ernst & Young Inc. (the "monitor")

G. BRUCE TAYLOR and
JENNIFER J. BURNELL
for Winnipeg Motor Express ("WME")

HARVEY G. CHAITON
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.
for Alterinvest Fund L.P. (BDC)

ROBERT A. DEWAR, Q.C.
for Ramwinn Diesel, Inc. ("Ramwinn")

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

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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.

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[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.

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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,

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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.

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[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

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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.

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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.

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[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

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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

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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.

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[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.

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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

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> 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.

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[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. (5th) 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,

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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

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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.

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[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

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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

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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. …

. . .

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> 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.

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TAB 5

Court of Queen's Bench of Alberta

Citation: Respec Oilfield Services Ltd. (Re), 2010 ABQB 277

Date: 20100429
Docket: BK03 115337, 0903 06823
Registry: Edmonton

2010 ABQB 277 (CanLII)

Action No. BK03 115337

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

Action No. 0903 06823

In the Matter of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, as amended

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

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

Reasons for Judgment
of the
Honourable Madam Justice Myra B. Bielby

Decision:

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

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

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

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

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

Facts:

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

[7] Canadian Western Bank ("CWB") is the secured lender which holds a first priority claim and the Business Development Bank ("BDC") is the secured creditor which holds a second

priority claim over all Respec's assets except for a significant number of pieces of heavy equipment which were subject to personal property security interests ("PMSI"s) held by various lenders and finance companies. CWB and BDC are together referred to as "the two banks".

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

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

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

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

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

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

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

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

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

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[13] In its 15th report the Monitor sets out its suggested calculation of the allocated costs relating to each piece of equipment or other asset, plus the direct costs of sale for that asset, if any, identifies the auction price received for or estimated value of each and proposes the net difference as the payment to be made to each affected creditor. Each of the two banks and a majority of the PMSI creditors support the Monitor's proposed distribution. GE, Caterpillar Financial Services Ltd. (Cat), Komatsu International (Canada) Inc. (Komatsu), Kingland Ford Sales Ltd. (Kingland), Wells Fargo, and JPL do not. I note that the proposed allocation will require the two banks to contribute to the indirect costs of the auction notwithstanding that it is highly unlikely that either will receive any of the auction proceeds given their status as second-in-priority creditors behind the PMSI holders.

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

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

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

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

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

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

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

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

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Issues:

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

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

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

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

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

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

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

4. Should Respec be placed into bankruptcy?

Analysis:

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

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

[23] Hall J. set out the following principles for apportioning costs in ***Hickman (1985) Ltd. (Re) (In Receivership)*** 2004 NLSCTD 164 at para. 17:

> (1) the allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) the fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) there must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relate to all receivership costs whether direct sales cost or indirect cost;
>
> (4) exceptions to a uniform application of cost to creditors ought not to be lightly granted. 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-à-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.

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

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

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a. should GE be required to pay a further $215,688.46 on account of its share of DIP and the administrative charge?

i. does the proposed allocation and distribution fail to attribute a proper portion of the allocated costs to the two general secured lenders, CWB and BDC?

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

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

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

ii. method of determination of pro rata share - the debt owed to any PMSI creditor as against Respec's total indebtedness versus the net sale proceeds recovered on the sale of a given piece of equipment as against the total amount owed on that equipment;

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

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

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

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

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

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

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

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

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

[37] GE asks that the $990,000 value be used to calculate its proportionate share of the allocated costs rather than the $1.4 million figure used by the Monitor. The Monitor argues that the other creditors should not be penalized as a result of a poor decision made by GE which could have received a minimum of $1.4 million for its equipment had it been left in the auction.

Further, it has not provided evidence to support its earlier advice that it had a higher appraised value for it at the time the decision was made to withdraw it.

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

i*v. should GE be exempt from contributing to the DIP financing costs because of its relationship to the DIP lender?*

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

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

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

[42] GE was repaid the entire DIP loan of $1.138 million within four months of it being borrowed plus an administration fee of $300,000 plus interest which was charged at 9.72% per annum over the bank's acceptance rate. CWB argued that this had the effect of according a return to the DIP lender equivalent to 100% per annum, an arguably criminal rate of interest. If it were to be successful in avoiding payment of its *pro rata* contribution to the DIP costs, its rate of recovery would jump, in effect, to almost 200% per annum.

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

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

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

v. do the provisions in the First Day Order exempt GE from any obligation to contribute to the DIP financing costs?

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

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

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

vi. declaration and judgment

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

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

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

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[52] The Monitor urges me to find jurisdiction to grant a direct judgment based on my wide and broad discretion to deal with various matters that are not expressly addressed in the CCAA; see ***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** 2003 CarswellBC 1399.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[66] Therefore, fairness does not compel an order that the two banks bear more than their *pro rata* share of the allocated costs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[80] While I required JPL to post a deposit with the Monitor as a condition of the recovery of its leased equipment, my order did not have the effect of determining ultimate responsibility for any portion of the allocated funds. The deposit was simply a deposit, to be applied in the event that JPL was ultimately found liable for a contribution to same.

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

[82] He stated at paras. 20-21:

> 20. If costs are to be allocated on the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. ...They

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> continue to own the aircraft. That will not change whether the restructuring succeeds or fails.
>
> 21. Post filing they have continued to receive payments for aircraft leases that Westex has chosen not to disclaim. However under the First Day Order they were obligated to continue leasing these aircraft to Westex. They were prevented from relying on the outstanding unpaid pre-filing lease payments and repossessing the aircraft.

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

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

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

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

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

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

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

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

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

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

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

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

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

[95] GE complains that the Monitor has not led evidence to show what further fees it will actually incur or to show that they are necessary or reasonable. However, that is not a reason to deny this application. The Monitor will have to bring on a future application approving any

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additional fees or disbursements it wishes to have paid out of the administration costs. At that time GE can challenge the payment if it believes the facts support doing so.

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

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

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

[98] The Monitor seeks direction as to whether funds should be withheld from the distribution of auction proceeds to other creditors on account of these claims or whether the claims should be left to be paid from the further liquidation of assets, now by it in its capacity as Receiver of Respec. BDC objects to the latter proposal noting that it would result in BDC in effect paying that entire sum by way of reduced recovery from liquidation of its secured assets, the only remaining source of funds once CWB is paid in full.

[99] As the debt was incurred prior to the granting of the receivership order and on account of work done while the Monitor was in place pursuant to the CCAA orders, I direct that the funds be withheld from that distribution and paid once the required information is provided.

4. Should Respec be placed into bankruptcy?

[100] Alterinvest II Fund L.P., an entity related to BDC, applied to place Respec into bankruptcy, a move designed to give it priority over a claim by the Canada Revenue Agency for money owed by Respec on account of GST. In its application it stated that Respec is indebted to it in the sum of $3,434,888 plus interest from March 11, 2010 at a rate of 12.5% per annum and legal costs. BDC holds security for the payment of that indebtedness but its counsel advised that as its security ranks behind the security held by CWB and the PMSI holders, it expects its security to have a maximum value of $1 million at this time.

[101] There is no issue that within the six months prior to the date of the filing of the application on March 16, 2010 Respec committed acts of bankruptcy including ceasing to meet its liabilities generally as they became due and by advising its creditors that it is insolvent thus giving rise to acts of bankruptcy which support the granting of this application.

[102] Originally brought on March 19, 2010, the application was adjourned to March 25, 2010 so that BDC could give notice to CRA. That having occurred, with CRA not appearing or

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otherwise objecting to the making of this order and none of the other parties objecting to same, I thereupon adjudged Respec bankrupt and made a bankruptcy order in respect of its property.

Conclusion:

[103] The Monitor's application to approve its proposed apportionment of the allocated costs and the resulting distribution of sale proceeds to the creditors of Respec is approved as adjusted to reflect my decision that JPL is not required to contribute to those costs. The Monitor is directed to return the deposit of $20,712.36 to JPL in its entirety. The Monitor is granted judgment against GE in the sum of $215,688.46 or that amount less $30,000 if the deposit has not been accounted for in its calculation.

[104] The Monitor's charge for its professional fees and disbursements is increased from the $200,000 figure set out in the First Day Order to $240,000.

[105] A $22,000 debt owed to parties related to Respec shall be paid from funds realized while it was operating under the First Day Order rather than those realized in the subsequent receivership.

[106] Respec has been adjudicated to be bankrupt.

Heard on the 25th day of March 2010.
Dated at the City of Edmonton, Alberta this 28th day of April 2010.

M.B. Bielby
J.C.Q.B.A.

Appearances:

Richard Reeson, Q.C. & Satpal Bhurjee
Miller Thomson LLP
for PricewaterhouseCoopers Inc.

Terrence Warner
Miller Thomson LLP
for National Leasing Group Inc.

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Charles Russell, Q.C.
McLennan Ross LLP
for Canadian Western Bank

Kibben Jackson
Fasken Martineau DuMoulin LLP
for Business Development Bank

Ryan Zahara & Michael O'Brien
Blake Cassels & Graydon LLP
for Komatsu International (Canada) Inc.

Sean Collins & Jeffrey Whyte
McCarthy Tetrault LLP
for GE Capital

Stephen Livingstone
McLennan Ross LLP
for Little Red River Cree Nation

Colin Brousson, Gowling LaFleur
Eugene Macchi, Barrister & Solicitor
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Paul Pidde
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Robert Kennedy
Fraser Milner Casgrain LLP
for Jim Pattison Leasing
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Asset Recovery/Asset Inc.
for Bank of Nova Scotia

Ed Bresky
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for Great West Kenworth

Karl Driedger
K & N Contracting
for K & N Contracting

Tara Hamelin

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Bishop & McKenzie
for Wells Fargo Equipment Finance Company

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TAB 6

Citation: Winnipeg Motor Express Inc. et al., Re, 2009 MBCA 110

Date: 20091110
Docket: AI 09-30-07191

IN THE COURT OF APPEAL OF MANITOBA

2009 MBCA 110 (CanLII)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED	)	***R. A. McFadyen*** *for Paccar Financial Services Ltd.*
	)	***H. G. Chaiton*** *for Heller Financial Canada Holding Company and GE Canada Leasing Services Company*
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD., and 5275634 MANITOBA LTD.	)	***D. G. Ward, Q.C.*** *for Business Development Bank of Canada*
	)	***D. R. M. Jackson*** *for Ernst & Young*
	)	***K. A. McCandless*** *on a watching brief for RamWinn Diesel Inc.*
	)	*Chambers motion heard:* ***October 6, 2009***
	)	*Decision pronounced:* ***November 10, 2009***

FREEDMAN J.A.

OVERVIEW

1 This is an application by Paccar Financial Services Ltd. (Paccar) for leave to appeal an order (the Order) made by the judge supervising the proceedings under the *Companies' Creditors Arrangement Act* (the *CCAA*) in

See 2009 MBQB 204

respect of Winnipeg Motor Express Inc. and related entities (WME). The Order allocates among secured creditors of WME liability to pay certain court-ordered charges (the Charges) relating to the *CCAA* proceedings. I have concluded that leave to appeal the Order should be denied.

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BACKGROUND

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

3 WME has been under the protection of the *CCAA* since May 15, 2008, when the judge made her initial order (the Initial Order). In the Initial Order, the judge provided for the Charges to facilitate efficient and orderly proceedings under the *CCAA*. The Charges comprise expenses incurred since the date of the Initial Order, such as a debtor-in-possession (DIP) loan, the fees of Ernst and Young (the monitor), the monitor's and WME's legal fees and other items. The aggregate amount of the Charges, some $1.8525 million, was not at issue before the judge. What was at issue was by whom and in what proportion the Charges should be borne.

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

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

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

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

THE JUDGE'S DECISION

8 The judge took into account the applicable legal principles; this is not challenged by Paccar. She noted (at para. 41) that the determination of a method of allocation is a matter for the judge's discretion, and said that any means of calculating a precise percentage would be arbitrary. She relied on several of the cases frequently cited in such applications, including *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206, *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56, *Hunjan*

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International Inc., Re (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), and *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154.

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

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

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

11 She declined any attempt to undertake an analysis of precisely what benefit each creditor had received as a result of the *CCAA* proceedings. She considered and rejected Paccar's suggestion that relative loss suffered be used as a basis for allocation, saying that would amount to readjusting priorities among creditors. She did, however, note that equipment lessors (such as Paccar) in a business operation like WME's "do suffer undue prejudice" (at

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

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

THE LEAVE APPLICATION

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

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

> …. … [T]here must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River*

> *Coal Ltd.*, (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.*, (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).
>
> Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) at 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:
>
> > (1) whether the point on appeal is of significance to the practice;
> >
> > (2) whether the point raised is of significance to the action itself;
> >
> > (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> >
> > (4) whether the appeal will unduly hinder the progress of the action.
> >
> > ….

PACCAR'S ARGUMENT

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

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16 Paccar argued that its application satisfied all the tests described in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) (see para. 14 above). It said that there are few reported decisions on the allocation of charges such as those here, as between major secured creditors, so the matter is of significance to the practice under the *CCAA*. As well, the point is important to the proceedings themselves, if only because of the magnitude of money involved. And clearly an appeal of the Order will not interfere with the progress of the proceedings, since the restructuring process has come to an end.

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

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

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

> … UMC [the mortgagee] is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of ***CCAA*** costs.

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

DECISION

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

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

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

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

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

26 First, applying a standard of correctness, the court would have to conclude that the judge erred at law. That is not argued or at issue here. Or, second, applying a standard of palpable and overriding error, the court would have to conclude that the judge made such an error on a factual matter. That is also not argued or at issue here. Or, finally, applying a standard of considerable deference, the court would have to conclude that in exercising her discretion the judge misdirected herself, or the Order was so clearly wrong as to amount to an injustice. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1374-75. Paccar argued, in effect, that this is what had occurred.

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

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matters she exercised her discretion in favour of adopting the monitor's recommendation.

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

> Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.
>
> Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that "any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical."
>
> The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) pp 209-212.]

29 As noted, Paccar acknowledges that the judge made no legal error. It did not assert that she had made a palpable and overriding error (or, indeed, any error) in relation to factual matters. There is no issue of jurisdiction. But

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the decision, argued Paccar, shows that the judge "failed to adequately consider the arguments advanced by Paccar." It shows, in Paccar's submission, that the judge failed to give any weight to the degree of potential benefit to Paccar and Heller from the *CCAA* proceedings and to the difference in security held by those creditors.

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

31 For example, Paccar agreed that it was open to the judge to find that it received some benefit from the *CCAA* proceedings, but it complained that she did not analyze the potential benefit to the parties. The judge expressly dealt with this, saying, when referring to the benefits received by the secured creditors (at para. 52):

> Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to [the] objectives of the ***CCAA***.

32 Similarly, the judge was well aware of the differences in the nature of the security held by the secured creditors. She rejected Paccar's suggested solution in these words (at para. 53):

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

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

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

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

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

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

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

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

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

40 The court said (at para. 16) that the question whether the restructuring judge can allocate priority <u>before</u> the outcome of the restructuring is known was a matter of first instance. The restructuring judge had acknowledged as

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much, noting in her decision that "[t]he issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152 at para. 21). The Court of Appeal granted leave to appeal her decision. In my view, the decision granting leave is of no assistance or application here.

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41 Paccar's proposed appeal simply seeks a lesser participation in the burden of the Charges. There is nothing in this proposed appeal that is of significance to the practice in *CCAA* proceedings.

42 Assessing the matter in its entirety, to determine whether the applicant has advanced "serious and arguable grounds" (*Canadian Airlines Corp*. at para. 6), I am satisfied that, if leave were to be granted, the applicant would be very unlikely to succeed on any appeal.

43 For these reasons, I deny the application for leave, with costs to Heller and Business Development Bank of Canada.

______________________________ J.A.