COURT FILE NUMBER	2503 00016
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, AS AMENDED
	AND IN THE MATTER OF KMC MINING CORPORATION
DOCUMENT	**BRIEF OF THE MONITOR**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Monitor** FTI Consulting Canada Inc. Suite 1610, 520 5th Ave SW Calgary, AB T2P 3R7 Attention: Dustin Olver/Lindsay Shierman Phone: 403-454-6032/403-464-6036 Fax:403-232-6116 Email: dustin.olver@fticonsulting.com / Lindsay.shierman@fticonsulting.com **Counsel to the Monitor** MLT AIKINS LLP 2100, 222 - 3rd Ave SW Calgary, Alberta T2P 0B4 Phone: 403.693.5420/780.969.3051 Fax: 403.508.4349 Attention: Ryan Zahara Email: rzahara@mltaikins.com File: 0052752-00008

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I. INTRODUCTION

1. This Brief is submitted on behalf of FTI Consulting Canada Inc., in its capacity as the Court-Appointed Monitor (the "**Monitor**") of KMC Mining Corporation ("**KMC**") in support of the Monitor's Application, returnable on May 23, 2025 (the "**Application**"), seeking:

   (a) an extension of the Stay Period (as defined below) in these CCAA Proceedings up to and including July 31, 2025;

   (b) approval of the proposed cost allocation methodology as set out in the Third Report of the Monitor, dated May 13, 2025 (the "**Third Report**"); and

   (c) authorizing the Monitor to make certain distributions as set out in the Third Report.

2. The Proposed Cost Allocation (defined below) is fair and equitable in the circumstances. Among other things, these CCAA Proceedings encompassed a marketing and sales process containing substantially all of the Affected Creditors' (defined below) collateral. As a result, the Affected Creditors received actual and potential, direct and indirect, benefits during these CCAA Proceedings.

3. The various security underlying the Proposed Distribution (defined below) has been determined to be valid and enforceable and KMC will have sufficient liquidity remaining to complete these CCAA Proceedings.

II. BACKGROUND

A. Procedural History

4. On December 5, 2024, KMC filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to subsection 50.4(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended (the "**BIA**"). FTI consented to act as proposal trustee in the NOI proceedings (the "**Proceedings**") of KMC.[1]

5. On December 9, 2024, in the NOI Proceedings, the Court granted an Order (the "**December 9 Order**") which, among other things:

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[1] Third Report of the Monitor, dated May 13, 2025 (the "**Third Report**") at para 1.

(a) approved an administrative charge, ranking in priority only to the claims of KMC's first secured lender, being a syndicate of lenders led by ATB Financial and including Canadian Western Bank, Export Development Canada and Laurentian Bank of Canada (collectively, the "**Syndicate**") and the second secured lender, The Klemke Foundation on all of KMC's present and after-acquired assets, property and undertakings, not to exceed $500,000 (the "**Administration Charge**");

(b) authorized KMC to obtain and borrow under a credit facility provided by certain lenders of the Syndicate (the "**Interim Lenders**") to finance the Applicant's working capital requirements and such other general corporate and capital expenditures, not to exceed $6,000,000 (the "**Interim Financing Charge**");

(c) authorized KMC, with approval from the Proposal Trustee, to sell and dispose of redundant or non-material assets not exceed $1,000,000; and

(d) extended the stay of proceedings and the time within which KMC was required to file a proposal to its creditors to February 18, 2025.[2]

6. On December 20, 2024, the Court granted an Order which, among other things, authorized KMC to execute a letter of intent for an asset sales transaction with Gibraltar Mines Limited which exceeded the pre-authorized sale asset limit of $1,000,000.[3]

7. On January 10, 2025 (the "**CCAA Filing Date**"), KMC obtained the following orders from the Court:

(a) an Initial Order pursuant to the Companies' Creditors Arrangement Act, RSC 1984, c C-36, as amended (the "**CCAA**") granting the following relief, among other things:

(b) a continuation of the NOI Proceedings under the CCAA (the "**CCAA Proceedings**");

(c) an initial stay period until January 20, 2025 (the "**Stay Period**");

[2] Third Report at para 2.
[3] Third Report at para 3.

(d) the appointment of FTI as Monitor in the CCAA Proceedings;

(e) approval and continuation of the priority and amount in respect of the Administration Charge, the Interim Financing Charge, and KMC's obligation to indemnify KMC's directors and officers for post-filing liabilities in the amount of $500,000 (the "**Directors' Charge**" and together with the Administration Charge and the Interim Financing Charge, the "**Initial Order Charges**");

(f) expansion of the Interim Financing Charge to take priority over all Property of KMC;

(g) a Sales and Investment Solicitation Process Order (the "**SISP Order**"), granting approval of the proposed sale and investment solicitation process (the "**SISP**") and approval of the engagement letter, dated December 23, 2024, between KMC and Ernst & Young Orenda Corporate Finance Inc. (the "**Sales Agent**"); and

(h) a temporary Sealing Order in respect of certain confidential information with respect to KMC's Property.[4]

8. On January 20, 2025, KMC sought and obtained the following Orders from the Court:

(a) the ARIO, which approved the extension of the Stay Period up to and including June 16, 2025, a fourth-ranking charge against KMC's Property for a key employee retention plan (the "**KERP**"), and declared that pursuant to section 5(5) of the Wage Earner Protection Program Act, SC 2005, c 47, s.1 ("**WEPPA**") that KMC meet the criteria established by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-222 (the "**WEPP Regulations**") as of the date of the granting of the ARIO;

(b) the Lease Equipment Return Process Order, which approved a process for the return of certain equipment leased by KMC which KMC determined had no available surplus equity; and

(c) a temporary Sealing Order in respect of certain confidential information contained in KMC's evidence.[5]

[4] Third Report at para 4.
[5] Third Report at para 5.

9. On April 17, 2025, KMC obtained the following orders from the Court:

   (a) a sale approval and vesting order (the "**SAVO**") approving the asset purchase agreement (the "**HME APA**") for the sale of substantially all the assets of KMC to 2122256 Alberta Ltd. operating as Heavy Metal Equipment and Rentals ("**HME**");

   (b) an order (the "**KERP/WEPPA/Distribution Order**"):

      (i) modifying the KERP to provide certain adjustments to the entitlements and payments with respect to the KERP without modification to the total amounts payable thereunder;

      (ii) affirming the continued applicability of WEPPA as authorized in the ARIO; and

      (iii) authorizing an interim distribution (the "**Interim Distribution Order**") to secured creditors and equipment lessors of up to 66.66% of the net sale proceeds from the HME APA.[6]

10. On May 1, 2025, the transaction contemplated in the HME APA closed and an initial distribution of proceeds in the total amount of $65,815,000 was subsequently distributed to creditors in accordance with the Interim Distribution Order (the "**Interim Distribution**").

B. Sales Proceeds and Proposed Distribution

11. Following the Interim Distribution, the Monitor holds approximately $35,052,000 in net proceeds from the HME APA available to KMC's creditors following the distributions made pursuant to the Interim Distribution Order (the "**Sales Proceeds**").

12. The proposed distribution of the Sales Proceeds, after allocating costs in accordance with the Proposed Cost Allocation (defined and described in further detail below) (the "**Proposed Distribution**") is outlined in detail in paragraphs 31 to 34 of the Third Report. The Proposed Distribution contemplates distributions of the Sales Proceeds to be made as follows:

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[6] Third Report at para 6.

(a) to those creditors with specific security in respect of serial number goods (the "**Specific Collateral Creditors**" and together with the Syndicate, the "**Affected Creditors**") as calculated based on the allocated value of their respective collateral in the HME APA; and

(b) to the Syndicate in respect of all other assets comprising the HME APA.

13. The Monitor obtained legal opinions from MLT Aikins LLP that, subject to the standard assumptions and qualifications contained therein, which concluded that the security held by each of the Affected Creditors is valid and enforceable.

C. Proposed Cost Allocation

14. The costs to be allocated pursuant to the Proposed Cost Allocation, as outlined in detail in paragraphs 30 of the Third Report (the "**Proposed Cost Allocation**") total approximately $4,235,000 (collectively, the "**Costs**").

15. The Costs are comprised of:

(a) amounts incurred by the Monitor, the Monitor's counsel, and KMC's counsel;

(b) amounts incurred by the Sales Agent in respect of the SISP;

(c) amounts incurred by KMC's employees to facilitate the SISP;

(d) insurance costs related to the assets sold in the HME APA; and

(e) costs of the KERP.[7]

16. The Proposed Cost Allocation was determined based upon each of the Syndicates, the secured creditors, and the equipment lessors *pro-rata* share of the HME APA.

17. The Proposed Cost Allocation also accounts for the payment of certain lease payments to Komatsu International (Canada) Inc. ("**Komatsu**") for the use of certain assets used by

[7] Third Report at para 29.

KMC during the CCAA Proceedings, the calculations for which are outlined in further detail in the Third Report.[8]

III. ISSUES

18. The issues to be determined by this Honourable Court are as follows:

    (a) whether the Stay Period should be extended;

    (b) whether the Court should approve the Proposed Cost Allocation; and

    (c) whether the Court should approve the Proposed Distribution.

IV. LAW AND ARGUMENT

A. The Stay Extension is Appropriate

19. The stay of proceedings in these CCAA Proceedings pursuant to the ARIO is currently set to expire on June 16, 2025 (the "**Stay Period**").

20. KMC, with the support of the Monitor, seeks an extension of the Stay Period up to and including July 31, 2025.

21. Pursuant to section 11.02(3) of the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 (the "**CCAA**"), the Court may grant an extension of a stay of proceedings where: (a) the applicant satisfies the Court that circumstances exist that make the order appropriate; and (b) the applicant satisfies the Court that the applicant has acted, and is acting, in good faith and with due diligence.[9]

22. The requested extension of the Stay Period is necessary, and appropriate, to provide additional time to KMC and the Monitor to distribute amounts owing to creditors in accordance with the Proposed Cost Allocation and the Proposed Distribution, if approved by the Court, and to evaluate KMC's options regarding a potential claim against Suncor Energy Services Inc., as outlined in further detail in paragraphs 41 to 60 of the Affidavit of Daniel Klemke, sworn on December 6, 2024, and if necessary, to initiate said claim.

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[8] Third Report at para s 36 to 43.

[9] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"), s. 11.02(3).

23. KMC and the Monitor have acted, and are acting, in good faith and with due diligence to advance these CCAA Proceedings.

24. KMC has sufficient liquidity to fund its operations and the costs of these CCAA Proceedings during the proposed extension of the Stay Period, as outlined in the Third Report.

B. The Proposed Cost Allocation is Fair and Reasonable

25. The Monitor is seeking approval of the Proposed Cost Allocation for the costs incurred to date in these CCAA Proceedings to be allocated on a *pro rata* basis as against each of the Affected Creditors' entitlement to the purchase proceeds generated from the HME APA.

26. The determinative test with respect to the approval of a cost allocation is whether, based on the circumstances of the applicable case, the allocation is fair and equitable.[10] In general, an equitable allocation is typically based on a *pro rata* allocation.[11] However, it is within the Court's discretion to determine who bears costs of the proceedings and in what proportion.

27. In addition, Canadian Courts in insolvency matters have routinely recognized that a strict accounting or a cost-benefit analysis in respect of, for example, one group of assets vis-à-vis another would be impractical and improper.[12]

28. In the present case, the Monitor has worked extensively with KMC to develop a cost allocation methodology which is fair and equitable in the circumstances. The Proposed Cost Allocation allocates amongst the secured Affected Creditors a *pro rata* share of the Costs based on the collateral value contained in the HME APA, and recognizes the potential and actual benefits received by the Affected Creditors in these CCAA Proceedings.

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[10] *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 [***Winnipeg Motor***] at para 41 at **TAB 1**; *Medican Holdings Ltd, Re,* 2013 ABQB 224 [***Medican***] at para 25 at **TAB 2**.
[11] *Hickman Equipment (1985) Ltd, Re*, 2004 NLSCTD 164 [***Hickman***] at para 17 at **TAB 3**; *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277 at paras 23 – 24 at **TAB 4**.
[12] *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094 at para 26 at **TAB 5**; *HSBC Bank of Canada v Maple Leaf Loading Ltd.*, 2016 BCSC 361 at para 36 at **TAB 6**; *Hickman* at para 17; *Winnipeg Motor* at paras 41 and 52.

29. The Affected Creditors received direct and indirect benefits as a result of these CCAA Proceedings including, among other things, the preservation of KMC's business and Property including those assets that are subject to specific equipment security, the *status quo* was maintained, and the SISP was initiated in respect of the collateral and resulted in a transaction for the sale of substantially all of KMC's Property.

30. In *Medican,* the Alberta Court of King's Bench recognized that the potential benefits from the preservation of the *status quo* and the inclusion of assets in a sales process are sufficient to justify an allocation of costs.[13]

31. Furthermore, it is important to note that all of the Affected Creditors had knowledge of and received the benefit of the SISP.

C. The Proposed Distribution is Appropriate

32. The Monitor proposes to make a distribution of the Sale Proceeds to the Affected Creditors, after accounting for their respective share of the Proposed Cost Allocation, as partial payment of amounts owing to each of the Affected Creditors.

33. Orders granting distributions are routinely granted by Canadian Courts in insolvency proceedings to maximize efficiency, subject to the Court-officer or the debtor maintaining sufficient reserves to complete the administration of the proceedings.[14]

34. For example, in *AbitibiBowater*, the Superior Court of Quebec approved the distribution of proceeds from a CCAA sale process on the grounds that, among others: (i) the distributions were made in accordance with a valid and enforceable security interest; and (ii) the distributions would leave the debtor with sufficient liquidity.[15]

35. The Monitor has received legal opinions from MLTA confirming the validity and enforceability of the security of each of the Affected Creditors.

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[13] *Medican* at para 45.

[14] *GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc,* 2014 ONSC 1173 [***GE Canada***] at para 53 at **TAB 7**; *Re Windsor Machine & Stamping Limited,* 2009 Canlii 39772 (ONSC) at paras 8 and 13 at **TAB 8;** *AbitibiBowater Inc. (arrangement relatif a),* 2009 QCCS 6441 [***AbitibiBowater***] at paras 70 to 75 at **TAB 9**.

[15] *ibid* at para 75.

36. As outlined in the Third Report, KMC will remain in possession of approximately $3,800,000 cash-on-hand to wind down operations over the coming months, which the Monitor believes will provide sufficient liquidity to KMC to finalize matters in relation to the CCAA Proceedings.

V. RELIEF REQUESTED

37. The Monitor respectfully requests this Honourable Court grant the Order substantially in the form attached as **Schedule "A"** to the notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of May, 2025.

MLT AIKINS LLP

Ryan Zahara and Molly McIntosh, Counsel for FTI Consulting Canada Inc.

TABLE OF AUTHORITIES

1. *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204
2. *Medican Holdings Ltd, Re,* 2013 ABQB 224
3. *Hickman Equipment (1985) Ltd, Re*, 2004 NLSCTD 164
4. *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277
5. *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094
6. *HSBC Bank of Canada v Maple Leaf Loading Ltd.*, 2016 BCSC 361
7. *GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc*, 2014 ONSC 1173
8. *Re Windsor Machine & Stamping Limited*, 2009 Canlii 39772 (ONSC)
9. *AbitibiBowater Inc. (arrangement relatif a)*, 2009 QCCS 6441

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

COURT OF QUEEN'S BENCH OF MANITOBA

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the applicants")

Counsel:

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

SUCHE J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PARTIES AND THEIR POSITIONS

Heller

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

[8] Heller supports the monitor's recommendation.

GE

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

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

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

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

<u>Paccar</u>

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

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

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

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

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

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

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

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

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

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

Ramwinn

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

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

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

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

Maxim

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

BDC

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

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

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

TRUE VERSUS FINANCING LEASES

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

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

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

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

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

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

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

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

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

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

[33] And further, at para. 61:

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

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

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

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

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

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

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

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

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

THE LAW

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

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

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

> certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
>
> (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

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

ANALYSIS AND DECISION

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

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

been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the ***CCAA*** is that the collective good and the benefit to all stakeholders governs.

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

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

[48] I agree with the view expressed in ***Hunjan International Inc., Re*** (2006), 21 C.B.R. (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,

and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

[50] As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

[51] My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful

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

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

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

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

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

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

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

EQUIPMENT LEASES

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

CONCLUSION

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

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

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

_______________________________ J.

Court of Queen's Bench of Alberta

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

Date: 20130423
Docket: 1001 07852
Registry: Calgary

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

Between:

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

Petitioners

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

Introduction

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

Background

[2] Medican Holdings Ltd. is the parent entity of the Medican Projects division of the Medican Group of companies[1]. The various Medican Project entities are all affiliated companies engaged in the business of residential real estate development. Both Medican (Westbank) Development Inc. ("Medican Development") and Medican (Westbank) Land Ltd. ("Medican Land") are wholly owned subsidiaries of Medican Holdings.

[3] MCAP is the senior secured lender of the initial phases of a multiunit condominium project in Westbank, British Columbia, known as the Kaleido Project. The Kaleido Project was developed on lands owned by Medican Land as bare trustee on behalf of Medican Development (together the "Kaleido Companies"). MCAP held a first mortgage over the Kaleido Project.

[4] In 2010 the Medican Group sought protection under the CCAA in an attempt to restructure its affairs. The Kaleido Companies were among the petitioners. The initial order which included a stay of proceedings was granted on May 26, 2010 and provided, inter alia, that secured creditors of Medican were liable to pay certain court-ordered charges in relation to the proceedings, including the suppliers' charge, a directors' and officers' indemnification charge, an administration charge, and the debtor-in-possession ("DIP") lender's charge (the "Charges"). In order to pay for the Charges proceeds from the sale of condominium units of projects over which creditors held security were deposited into a separate account (the "Charge Levy").

[5] The Medican Group obtained a DIP loan from Paragon Capital Corporation Ltd. which ultimately totalled $3.5 million. It was secured as a first priority against all of the Medican Group's assets including those of the Kaleido Companies. As stated, the DIP lender's charge formed part of the Charges. On several occasions project-specific financing was arranged (known as "Mini DIPs"); however, the DIP loan was approved on the basis that it would be used to support the general funding requirements of the Medican Group.

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[1]There are 39 applicant entities comprising the Medican Group, 36 of which filed the consolidated plan of arrangement under the CCAA (excepting the Kaleido companies and Sanderson)

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

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

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

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

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

Issue

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

Argument

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

a. MCAP

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

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

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

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

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

b. The Monitor

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

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

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

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

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

c. The Medican Group

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

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

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

The Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appearances:

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

Sean Collins of McCarthy Tetrault
for MCAP

A. Aaron Stephenson of Norton Rose
for the Monitor

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)

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

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

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.

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. **<u>Receiver's Position.</u>**

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;

(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.

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;

(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

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**

DATE: 2004 09 02
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

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

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

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.

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

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

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

Facts:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Issues:

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

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

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

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

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

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

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

4. Should Respec be placed into bankruptcy?

Analysis:

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

[22] Each application to apportion costs incurred in a failed attempt to reorganize under the CCAA must be decided on its own facts. In cases where a pre-existing Court order prescribes the apportionment method to be used, that method will be used. Where, as here, no such order yet exists, the issue will be decided based on the facts in the case. I note that I have no obligation to attempt to allocate those costs on the basis of a cost-benefit analysis as to which creditor benefited to what degree as a result of the activities of the Monitor; see ***Hunjan International Inc. (Re)*** 2006 CarswellOnt 2718. 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

vi. declaration and judgment

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

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

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

[52] The Monitor urges me to find jurisdiction to grant a direct judgment based on my wide and broad discretion to deal with various matters that are not expressly addressed in the CCAA; see ***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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[84] As stated, in ***Hunters Trailer & Marine Ltd. (Re)***, Chief Justice Wachowich held only that it was equitable for each major <u>secured</u> 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

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

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
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for Business Development Bank

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Blake Cassels & Graydon LLP
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Ed Bresky
Barrister & Solicitor
for Great West Kenworth

Karl Driedger
K & N Contracting
for K & N Contracting

Tara Hamelin

Bishop & McKenzie
for Wells Fargo Equipment Finance Company

Re Hunters Trailer & Marine Ltd., 2001 ABQB 1094

Date: 20011214
Action No. 0003 19315

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

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

- and -

IN THE MATTER OF HUNTERS TRAILER & MARINE LTD.

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

APPEARANCES:

Kentigern A. Rowan
Ogilvie LLP
for Canadian Western Bank

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

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

R. Craig Steele
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Juliana E. Topolniski, Q.C.
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Darcy G. Readman and Darren R. Bieganek
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for UMC Financial Management Inc.

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

THE APPLICATION TO DETERMINE COST ALLOCATION

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

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

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

THE ARGUMENTS OF THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] Like the argument raised by UMC in the present case, the secured creditors in ***United Used Auto & Truck Parts Ltd.*** (2000), 16 C.B.R. (4^{th}) 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. (4^{th}) 177 (B.C.S.C.); ***Canadian Asbestos Services Ltd. v. Bank of Montreal***, *supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor’s fees and disbursements and those of its legal counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

J.C.Q.B.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HSBC Bank of Canada v. Maple Leaf Loading Ltd.,* 2016 BCSC 361

Date: 20160302
Docket: S144996
Registry: Vancouver

Between:

HSBC Bank of Canada

Petitioner

And:

Maple Leaf Loading Ltd., Pro-Trans Ventures Inc., Caterpillar Financial Services Limited, Element Fleet Management Inc., GE Canada Equipment Financing G.P., GE Canada Leasing Services Company, General Electric Canada Equipment Finance G.P., GE Canada Asset Financing Holding Company, GE Techology Finance, GE VFS Canada Limited Partnership, GE Capital Canada Equipment Financing & Leasing Company, Mercedes-Benz Financial Services Canada Corporation, Daimler Truck Financial, Finning International Inc., National Leasing Group Inc., Coast Capital Savings Credit Union, ATCO Structures & Logistics Ltd., Knight Manufacturing Ltd., Dynamic Capital II Corporation, Canadian Western Bank Leasing Inc., James Western Star Truck & Trailer Ltd., Zeemac Vehicle Lease Ltd., Inland Kenworth and Premium Truck & Trailer Inc.

Respondents

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment
(In Chambers)

Counsel for HSBC:	V. Tickle
Counsel for the Receiver:	H. Lance Williams
Counsel for Caterpillar Financial Services:	P. Rubin
Counsel for James Western Star Truck and Trailer Ltd and Inland Kenworth:	C. Cash
Counsel for Element Fleet Management Inc.:	A. Winters
Counsel for Knight Manufacturing:	M. Sennott
Place and Date of Hearing:	Vancouver, B.C. February 10, 2016
Place and Date of Judgment:	Vancouver, B.C. March 2, 2016

Introduction

[1] This decision deals with a dispute as to the allocation of the costs of the court appointed Receiver of Maple Leaf Loading Ltd. ("MLL"). The Receiver, Ernst & Young Inc., was appointed June 27, 2014. The amount for allocation is $1,172,856 and was approved by this court, November 28, 2014.

[2] The Receiver has proposed an allocation identifying location specific costs and general costs, and allocating those to all secured creditors, including equipment lessors, on a pro rata basis taking into account the secured creditors' recoveries. The basis for the approach taken by the Receiver is set out in its 6th Report of September 10, 2015 and Supplement to the 6th Report of January 18, 2016. The latter report contained the updated allocations proposed.

[3] The Receiver's allocation is supported by HSBC Bank Canada ("HSBC") and Element Fleet Management Inc. The GE group of creditors do not oppose the Receiver's allocation.

[4] Opposing the allocation are several creditors, including: Caterpillar Financial Services ("Caterpillar"), James Western Star Truck and Trailer Ltd. ("James Western"), Inland Kenworth ("Inland"), and Knight Manufacturing Ltd. ("Knight").

[5] James Western and Inland Kenworth are in the transportation industry and regularly repair trucks and equipment; this included the repair of MLL's trucks and equipment over the period before the appointment of the Receiver. They take the position that as repairers lien holders with validly registered liens in the Personal Property Security Registry of British Columbia, they have priority for payment over the Receiver pursuant to s. 32 of the *PPSA* and the *Repairers Lien Act*. The validity of the claims has been vetted and accepted by the Receiver. They also rely on the fact that they were not served with the initial application for the appointment of the Receiver and thus are not subject to the resultant order.

[6] Caterpillar also was not served with the initial application but accepts that some allocation of costs to it is warranted, however, takes exception to the $149,768 proposed by the Receiver. Caterpillar submits that at most the amount should be

$69,280. This equates to the recovery by the Receiver of the one piece of equipment left by Caterpillar with the Receiver for disposition.

Background

[7] The following summary of the background to this insolvency:

[8] MLL was a transportation company based in Prince George providing a range of specialized logistic solutions related to the management, handling and transport of ore and other mined products for clients involved in the mining and resource sector in British Columbia, Alberta, and the Yukon Territory. As such MLL had a fleet of heavy hauling equipment, tractors, trailers and pickup trucks that it used to service its customers (the "Hauling Equipment"). At the time of the appointment of the Receiver, there were 239 such units. The units were spread out across a variety locations including in or about Chetwynd, Grande Cache, Stewart, Tumbler Ridge, Watson Lake, Williams Lake, and Willow Creek.

[9] The majority of the Hauling Equipment was leased from equipment lessors which included: HSBC, GE Canada Leasing Services Co.; Caterpillar, and Knight Manufacturing Ltd.

[10] In addition, MLL financed its operations through credit facilities with HSBC.

[11] MLL began to struggle financially in late 2012 and was in violation of its debt covenants with HSBC. Efforts to restructure and refinance MLL were initiated but ultimately failed.

[12] In June 2014, HSBC issued demand letters along with Notices of Intention to Enforce its Security.

[13] On June 26, 2014, HSBC filed a petition for the appointment of the Receiver.

[14] On Friday, June 27, 2014, an *ex parte* application was brought on by HSBC and the order (the "Receivership Order") was granted.

[15] On Monday, June 30, 2014, counsel for HSBC served by registered mail all of the named parties to its application a copy of the petition, supporting affidavits, and

Receivership Order. This included: Caterpillar, Element, James Western, Inland, and Knight. Delivery of the materials to each of the materials was on July 10, 2014; July 7, 2014; July 4, 2014; July 4, 2010; and July 2, 2014, respectively.

[16] The Receiver in carrying out is duty to realize on MLL's assets, entered into an agreement to sell to Ritchie Bros. Auctioneers (Canada) Ltd. the bulk of MLL's equipment on August 7, 2014. The Receiver was granted short leave to bring on an application for the approval of the agreement for August 13, 2014. A number of creditors objected to the sale and contacted the Receiver from August 8 through August 15, 2014. The objectors were: Caterpillar, Coast Capital Equipment Savings, K-Line Trailer Ltd., Canadian Western Bank, Element, and Darby Kreitz. The Receiver agreed to adjourn the August 13, 2014 hearing to August 19, 2014 to provide additional time to certain creditors who were objecting to the proposed sale to assess the merits of the agreement and to negotiate with the Receiver and Ritchie Bros. The Receiver at that time was dealing with 239 separate pieces of equipment.

[17] As a result of the adjournment further negotiations involving the creditors, the Receiver and Ritchie Bros. occurred.

[18] Of the nine pieces of equipment that Caterpillar held an interest in, Caterpillar removed eight and left one behind. Element had 19 vehicles and left 16 to be included in the Ritchie Bros. sale.

[19] An amended asset purchase agreement was entered into with Ritchie Bros. There were approximately 150 pieces of equipment in the sale.

[20] On August 19, 2014, this court approved the amended purchase agreement. The sale closed on August 20, 2014.

[21] On November 28, 2014, this court approved the unopposed application of the Receiver for its fees and disbursements and its legal counsel.

[22] I now turn to the discussion of the issues.

Discussion

1. Priority of Repairers Liens Holders

[23] The Receiver relies upon the terms of the Receivership Order as establishing its priority; more particularly, paras. 16 and 19, which state:

> **RECEIVER'S ACCOUNTS**
>
> 16. The reasonable fees and disbursements of the Receiver and its legal counsel, in each case at their standard rates and charges, shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to Sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> ***
>
> **FUNDING OF THE RECEIVERSHIP**
>
> 19. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000. (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as the Receiver deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

[24] HSBC in support of the Receiver stated that there were urgent circumstances given the mobile nature of the assets. It is uncontroverted that there were a significant number of vehicles spread across many remote locations.

[25] The Receiver also submitted that the position taken by the respondents in this hearing was unfair as they were involved in the Receiver's process and received the benefit of the Receiver's efforts. The Receiver points out that only once the majority of the Receiver's work had been completed did they object.

[26] James Western and Inland argue that the order has no effect over them as they had not been provided notice, the application having been made *ex parte*. In this regard, they handed up: *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). These respondents also point to the footnote to para. 16 of the Model Order (the same as the above provision) which specifically sets out that court must not make such an order "unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations."

[27] Further, James Western and Inland argue that based on the common law the receivership does not permit priority over their liens. In support they cite *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492 (Ont.C.A.) which is also referenced in *Lochson*. In *Kowal*, the court stated exceptions to the general rule included the following:

> (a) the receiver is appointed at the request of or with the consent or approval of the holders of the security;
>
> (b) the receiver has been appointed to preserve and realize assets for the benefit of all interested parties including secured claims and the secured creditors have been given notice of the application for such appointment; or
>
> (c) the receiver has expended money for the necessary preservation or improvement of the property (generally an emergency situation where there is no time to apply to court beforehand and to provide the secured creditors with notice).

[28] These respondents also argue that because of their priority and rights as repairer liens holders they could have simply taken the vehicles subject to their liens and sold them. This they say is a common practice for them as repairers. They assert that assistance from the Receiver was unnecessary.

[29] These respondents also meet the argument that they did not take steps to vary the Receivership Order with the comments in *Halcyon Health Spa Ltd.*

(Receiver-Manager of) v. Arthur Andersen Inc. 2006 BCCA 458 where Donald J.A. stated at para. 14:

> In the circumstances of this case, BDC did not have a positive duty to apply to vary the order of Metzger J. in order to preserve its priority. Thus, BDC was entitled to wait until realization to deal with the difficulty created by the order. Having taken the order without naming BDC as a party, giving notice of the application, or securing its consent, Andersen took the risk of a shortfall.

[30] As well, these respondent refer to *Royal Bank v. Vulcan Machinery & Equipment Ltd.*, [1992] A.J. No. 1216 [*Vulcan*] at para. 49:

> In my opinion, while there may have been a need, indeed an urgent need, for the court-appointed receiver, there was, in my opinion however no such emergent, unusual, or extraordinary need for the appointment of a receiver-manager with the priority clause (Section 14) such as to justify the so-called "double-barrelled" Order as granted therein, which Order, with the priority clause contained therein, had the effect of seriously prejudicing the rights of secured creditors such as Mitsubishi and Mitsui to the point of trammelling their rights. It is all well and good to argue that these parties had rights to apply to vary on a subsequent application; however that, in my view, puts the onus on entirely the wrong party.

[31] I am of the view that the lack of notice argument should not prevail in this case. In *Vulcan*, notice of the order was delayed; moreover, the creditors had maintained their opposition to the receiver's involvement with the equipment in which they held an interest. In *Terra Nova*, the delivery of the order did not take place for some two months after the order was granted and I note that in dismissing the appeal, Donald J.A., did not accept the argument that in light of having been served with the order that the respondent could avoid being fixed with actual knowledge of the order, though it did not affect the result. I note that he states that "in the circumstances" of that case a positive duty to apply to vary did not apply. The circumstances inform the consideration of the exceptions. Here, the Receiver acted promptly in serving all of the named parties with the order and supporting materials underlying immediately after obtaining it. There was some urgency in the circumstances. James Western and Inland were represented by counsel throughout the receivership.

[32] I find that the Receiver was acting to preserve or protect the vehicles and this benefited all of the interested parties, including the repairers lien holders. I am not

persuaded by the bare submission that the repairers lien holders were "at all times ready, willing and able to execute on their repairers/liens but were prevented from doing so by the receivership". There is little to no evidence supporting this. The evidence indicates that the respondents were engaged in discussions with the Receiver shortly after the order. The Receiver's reports identify and comments on the efforts to investigate the numerous liens and issues related to them. It is apparent that there was ongoing communications. James Western and Inland had the opportunity to take the actions it says it was entitled to take but they did not. The evidence of Caterpillar retrieving virtually all of their vehicles from the Receiver militates against this position. I also note that these were at least two court appearances in which Inland or James Western could have applied for a variation.

[33] In my view, some allocation is warranted.

2. Allocation

[34] Allocation is an exercise in judicial discretion. The overall result must be one that is fair and equitable. This does not necessarily equate to equality. Usually, there will be some who do better than the average and other who do not.

[35] There are numerous approaches and methodologies to allocations. In some areas professional careers have been built in propounding allocation methodologies.

[36] A summary of the general principles governing the allocation of receiver's costs was recently provided in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43 by Justice D.M. Brown as follows:

> (a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (b) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

(c) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

(d) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(e) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(f) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

[37] Other cases handed up on this point included: *Hickman Equipment (1985) Ltd. (Re)*, 2004 NLSCTD 164; and *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

[38] The Receiver has outlined the allocation approach in its reports. In the Receiver's view some of the costs incurred should be borne by all secured creditors as they benefitted from aspects of the Receivership proceedings. As mentioned, the proposed approach is a "pro rata recovery allocation". It is submitted that allocation methodologies based pro rata on realizations are *prima facie* reasonable. It is submitted that the allocation proposed is reasonable.

[39] Caterpillar in opposing the proposed allocation submits that it is unfair, inequitable and prejudicial. Caterpillar's argument included that the proposed allocation is a readjustment of priorities, there is no connection between the allocated costs and Caterpillar, that it does not take into account the degree of benefit, the direction of Caterpillar and other secured creditors, and that the allocation is disproportionate to the benefit received.

[40] Caterpillar points to the fact that in the course of the receivership, the Receiver sold one piece of Caterpillar's equipment for approximately $142,860 (net $69,280) and that the proposed allocation to it is $149,768.

[41] During the proceedings before me alternative allocations were discussed and during the several week break between hearing dates, the Receiver and Caterpillar discussed additional allocations. One scenario was an allocation by the total number of pieces of equipment in the receivership. A variation to this was to allocate on the total number of pieces greater than $10,000. This value was selected by the Receiver.

[42] Having reviewed the actions of the Receiver and the nature of the costs as set out in the Receiver's reports, I am concerned with the overall fairness of the cost allocation as can be seen in the result upon Caterpillar; it seems to me that the pro rata allocation based on number of pieces of equipment greater than $10,000 in value is better correlated to the costs than recoveries. Viewed generally, the activities of the Receiver and the expenses incurred relate directly and indirectly more to the Hauling Equipment as opposed to their realization value. This results in a relative leveling of the percentage cost burden which in this case appears fairer.

Conclusion

[43] As a result, I am of the view that the allocation as prepared by the Receiver in its Supplement to the 6th Report of the Receiver at Appendix G (pieces valued at over $10,000) is the allocation which is to be used.

[44] The outstanding matters in the Receiver's application notice should be set down for hearing through Trial Scheduling.

"The Honourable Mr. Justice Masuhara"

CITATION: GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173
COURT FILE NO.: CV-12-9856-00CL
DATE: 20140224

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: GE Canada Real Estate Financing Business Property Company, Applicant

AND:

1262354 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Pillon and Y. Katirai, for the Receiver

L. Rogers, for the applicant, GE Canada Real Estate Financing Business Property Company

C. Reed, for the Respondent and for Keith Munt, the principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer

A. Grossi, for the proposed purchaser, 5230 Harvester Holdings Corp.

HEARD: February 18, 2014

REASONS FOR DECISION

I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property

[1] PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

[2] The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by

the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

[3] After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

[4] The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for $10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of $9.95 million. In January, 2013, the listing price was reduced to $8.2 million.

[5] In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

[6] Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

[7] Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to $6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

[8] One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property

under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to $6.8 million.

[9] On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

[10] As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

[11] The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at $6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

[12] In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

[13] By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately $593,000 of the $600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

[14] The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

[15] In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

[16] The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

[17] The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, "clean" - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations – and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

[18] The only persons who opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver's materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

[19] At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver's request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

[20] The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the "Receiver's Confidentiality Agreement"). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

[21] By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

> As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

[22] On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

[23] On January 23 Debtor's counsel wrote to the Receiver:

> My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

[24] The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

[25] The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

[26] Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

[27] On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

[28] At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver – i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been

the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

[29] The Receiver's Confidentiality Agreement contained a recital which read:

> The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

> 1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
>
> 2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person to effect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
>
> 3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
>
> 4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

[30] Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

> The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

[31] By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

[32] In *Sierra Club of Canada v. Canada (Minister of Finance)*[1] the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects.[2] As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer – receiver, monitor or trustee – filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

[33] The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.[3]

[34] To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

[35] From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

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[1] 2002 SCC 41
[2] *Ibid*., para. 53.
[3] *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Gen. Div.).

[36] Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

(i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank of Canada v. Soundair Corp.*,[4] specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;

(ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership – a proper request. The Debtor was prepared to agree to that term;

(iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

[37] In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

[4] (1991), 4 O.R. (3d) 1 (C.A.)

V. Receiver's request for approval of the sale: The *Soundai*r analysis

[38] The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

[39] The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

[40] Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

(i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;

(ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;

(iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

[41] Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

[42] As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

[43] As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,[5] motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

[44] First, one had to take into account the economic reality of this receivership – i.e. that given the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

[45] Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to $356,301.40, and its counsel had incurred fees approximating $188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

[46] Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

[47] Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

[48] Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation.[6] In this receivership the Receiver had served this motion over a week in advance of

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[5] 2011 ONSC 346, para. 7.
[6] *Hryniak v. Mauldin*, 2014 SCC 7, para. 31.

the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

[49] Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

[50] Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of a receivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

[51] For those reasons, I refused the Debtor's second adjournment request.

[52] Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

[53] Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

[54] For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

D. M. Brown J.

Date: February 24, 2014

COURT FILE NO.: CV-08-7672-00CL
DATE: 20090728

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Tony Reyes and Evan Cobb, for RSM Richter Inc., Monitor**

Raong Phalavong, for Saginaw Pattern

Andrew Hatnay, Andrea McKinnon and D. Youkaris, for U.A.W. Local 251

Joseph Marin, for Windsor Machine & Stamping Ltd.

D. Dowdall and J. Dietrich, for Bank of Montreal

J. Archibald, for Magna

John D. Leslie, for Ford Motor Company

P. Shea, for Johnson Controls Inc.

Jackie Moher, for Ryder Finance Corporation

HEARD &
DECIDED: MARCH 11, 2009

ENDORSEMENT

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

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

(a) an Approval and Distribution Order;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MORAWETZ J.

DATE: Heard and Decided: March 11, 2009

Typed Reasons Released: **July 28, 2009**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 23, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And
ERNST & YOUNG INC.
Monitor

CORRECTED JUDGMENT
ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

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[1] **WHEREAS** the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the

ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

[2] **WHEREAS** the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

[3] **WHEREAS** a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **$230** million.

[2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

a) a first draw of $130 million to be advanced at closing;

b) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

c) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and

manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

[15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> "**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC

DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

<u>Amendment to the Subrogation Provision</u>

[21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

> **Subrogation to ACI DIP Charge**
>
> [61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this

purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

[22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[23] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

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Me Anastasia Flouris
KUGLER, KANDESTIN, LLP
Attorneys for Alcoa

Date of hearing: November 23, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

1. **ABITIBI-CONSOLIDATED INC.**
2. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
3. **3224112 NOVA SCOTIA LIMITED**
4. **MARKETING DONOHUE INC.**
5. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
6. **3834328 CANADA INC.**
7. **6169678 CANADA INC.**
8. **4042140 CANADA INC.**
9. **DONOHUE RECYCLING INC.**
10. **1508756 ONTARIO INC.**
11. **3217925 NOVA SCOTIA COMPANY**
12. **LA TUQUE FOREST PRODUCTS INC.**
13. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
14. **SAGUENAY FOREST PRODUCTS INC.**
15. **TERRA NOVA EXPLORATIONS LTD.**
16. **THE JONQUIERE PULP COMPANY**
17. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
18. **SCRAMBLE MINING LTD.**
19. **9150-3383 QUÉBEC INC.**
20. **ABITIBI-CONSOLIDATED (U.K.) INC.**

SCHEDULE "B"

BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. **ABITIBIBOWATER INC.**
2. **ABITIBIBOWATER US HOLDING 1 CORP.**
3. **BOWATER VENTURES INC.**
4. **BOWATER INCORPORATED**
5. **BOWATER NUWAY INC.**
6. **BOWATER NUWAY MID-STATES INC.**
7. **CATAWBA PROPERTY HOLDINGS LLC**
8. **BOWATER FINANCE COMPANY INC.**
9. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
10. **BOWATER AMERICA INC.**
11. **LAKE SUPERIOR FOREST PRODUCTS INC.**
12. **BOWATER NEWSPRINT SOUTH LLC**
13. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
14. **BOWATER FINANCE II, LLC**
15. **BOWATER ALABAMA LLC**
16. **COOSA PINES GOLF CLUB HOLDINGS LLC**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 16, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And
ERNST & YOUNG INC.
Monitor

JUDGMENT
ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

JG1793

INTRODUCTION

[1] In the context of their *CCAA*[1] restructuring, the Abitibi Petitioners[2] present a Motion[3] for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("**MPCo**") sale transaction to the Senior Secured Noteholders **("SSNs").**

[2] More particularly, the Abitibi Petitioners seek:

1) Orders authorizing Abitibi Consolidated Inc. ("**ACI**") and Abitibi Consolidated Company of Canada Inc. ("**ACCC**") to enter into a Loan Agreement (the "**ULC DIP Agreement**") with 3239432 Nova Scotia Company ("**ULC**"), as lender, providing for a <u>CDN$230 million super-priority secured debtor in possession credit facility</u> (the "**ULC DIP Facility**").

   The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN$282.3 million (the "**ULC Reserve**"), with terms that will be substantially in the form of the term sheet (the "**ULC DIP Term Sheet**") attached to the ULC DIP Motion;

2) Orders authorizing the distribution to the SSNs <u>of up to CDN$200 million</u> upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

   The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "**ACI DIP Charge**") in respect of the ACI DIP Facility by an amount of CDN$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

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[1] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "***CCAA***").

[2] In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

[3] *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

> This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "**Term Lenders**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "**Lien Holders**") arising under paragraph 61.10 of the Second Amended Initial Order.

[3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

[4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee **(**the **"Bondholders")** opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

[5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

[6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

THE MPCo SALE TRANSACTION

[7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

[8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec **("HQ")** agreed to pay ACCC CDN$615 million (the "**Purchase Price**") for ACCC's 60% interest in MPCo.

[9] Of this amount, it is expected that (i) CDN$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN$31 million will be held by HQ for two years to secure various indemnifications (the "**HQ Holdback**"); (iii) certain inter-party accounts will be settled; (iv) the CDN$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

[10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been

contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable[4].

[11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

[12] To that end, the SSNs' claim of US$477,545,769.53 (US$413 million in principal and US$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

[13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

a) Approved the terms and conditions of the Implementation Agreement;

b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;

c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the **"MPCo Share Proceeds"**);

d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;

e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the **"MPCo Noteholder Charge"**) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;

f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the "**ULC Reserve Charge**"); and

g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

[14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension

4 See Monitor's 19th Report dated October 27, 2009.

from Investissement Quebec **("IQ")** to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

[15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN$173.9 million.

THE ULC DIP FACILITY

[16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN$282.3 million.

[17] This amount may be used for a limited number of purposes (the "**Permitted Investments**") that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

[18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN$230 million from the ULC Reserve as a Permitted Investment.

[19] According to the Monitor[5], the significant terms of the ULC DIP Term Sheet are as follows:

i) **Manner of Borrowing** – Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN$50 million in increments of up to CDN$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN$50 million shall become available upon further order of the Court.

ii) **Interest Payments** – No interest will be payable on the ULC DIP Facility;

iii) **Fees** –No fees are payable in respect of the ULC DIP Facility;

iv) **Expenses** – The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;

v) **Reporting** – Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

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5 See Monitor's 19th Report dated October 27, 2009.

vi) **Use of Proceeds** – The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the "**Budget**");

vii) **Events of Default** – The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the *CCAA* Stay of Proceedings;

(c) Failure to file a *CCAA* Plan with the Court by September 30, 2010; and

(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) **Rights of Alcoa** – Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) **Rights of Senior Secured Noteholders** – The Senior Secured Noteholders' rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;

(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;

(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;

(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and

(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) **Security –** Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

[20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN$167 million.

THE QUESTIONS AT ISSUE

[21] In light of this background, the Court must answer the following questions:

1) Should the ULC DIP Facility of CDN$230 million be approved?

2) Should the proposed distribution of CDN$200 million to the SSNs be authorized?

3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

ANALYSIS AND DISCUSSION

1) THE APPROVAL OF THE DIP FINANCING

[22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

[23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

[24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US$100 million loan to the Abitibi Petitioners by Bank of Montreal (**"BMO"**), guaranteed by IQ.

[25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

[26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

[27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

[28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

[29] On the one hand, as highlighted notably by the Monitor[6], the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

[30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

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[6] See Monitor's 19th Report dated October 27, 2009.

[31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

a) Only about CDN$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN$335 million of liquidity (Monitor's 19th Report at paragraph 68);

b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US$200 million;

c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US$100 million.

[32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

[33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

[34] Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

[35] Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

a) The period during which the company is expected to be subject to *CCAA* proceedings;

b) How the company's business and financial affairs are to be managed during the proceedings;

c) Whether the company's management has the confidence of its major creditors;

d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;

e) The nature and value of the company's property;

f) Whether any creditor would be materially prejudiced as a result of the security or charge; and

g) The Monitor’s report.

[36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

[37] The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

[38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

[39] Second, even if the ULC DIP Facility of CDN$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

[40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN$130 million. Subsequent additional draws up to CDN$50 million will be in maximum increments of CDN$25 million and subject to prior notice. The final CDN$50 million will only be available with the Court's approval.

[41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;

b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and

d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

[42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;

b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;

c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

[43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

[44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

[45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

[46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

[47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

[48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

[49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) THE DISTRIBUTION TO THE SSNs

[50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN$200 million.

[51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

[52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN$27.4 million per year in accruing interest costs on the CDN$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

[53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

[54] The Bondholders oppose the CDN$200 million distribution to the SSNs.

[55] In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

[56] The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor

group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

[57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

[58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

[60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

[61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN$230 million ULC DIP Facility, they still contest the CDN$200 million proposed distribution that is directly linked to the latter.

[62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

[63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

[64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

[65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better

arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

[66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

[67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

[68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

[69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

[70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

[71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada[7].

[72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

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7 See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.,* (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

[73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

[74] In *Windsor Machine & Stamping Ltd. (Re)*[8], Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

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

[75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;

b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;

c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and

d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

[76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

[77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

[78] This benefits a large community of interests that goes beyond the sole SSNs.

[79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

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8 *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

[80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) THE ORDERS SOUGHT

[81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

[82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

[83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

[84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

[85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

[86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

<u>ULC DIP Financing</u>

[87] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova

Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **$230** million.

[88] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

d) a first draw of $130 million to be advanced at closing;

e) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

f) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[89] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[90] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[91] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the

approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[92] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[93] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[94] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[95] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[96] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[97] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[98] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[99] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[100] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

[101] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior

Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[102] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[103] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> "**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate

of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[104] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[105] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[106] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[107] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First

Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[108] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[109] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

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Date of hearing: November 9, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

21. **ABITIBI-CONSOLIDATED INC.**
22. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
23. **3224112 NOVA SCOTIA LIMITED**
24. **MARKETING DONOHUE INC.**
25. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
26. **3834328 CANADA INC.**
27. **6169678 CANADA INC.**
28. **4042140 CANADA INC.**
29. **DONOHUE RECYCLING INC.**
30. **1508756 ONTARIO INC.**
31. **3217925 NOVA SCOTIA COMPANY**
32. **LA TUQUE FOREST PRODUCTS INC.**
33. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
34. **SAGUENAY FOREST PRODUCTS INC.**
35. **TERRA NOVA EXPLORATIONS LTD.**
36. **THE JONQUIERE PULP COMPANY**
37. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
38. **SCRAMBLE MINING LTD.**
39. **9150-3383 QUÉBEC INC.**
40. **ABITIBI-CONSOLIDATED (U.K.) INC.**

SCHEDULE "B"

BOWATER PETITIONERS

20. BOWATER CANADIAN HOLDINGS INC.
21. BOWATER CANADA FINANCE CORPORATION
22. BOWATER CANADIAN LIMITED
23. 3231378 NOVA SCOTIA COMPANY
24. ABITIBIBOWATER CANADA INC.
25. BOWATER CANADA TREASURY CORPORATION
26. BOWATER CANADIAN FOREST PRODUCTS INC.
27. BOWATER SHELBURNE CORPORATION
28. BOWATER LAHAVE CORPORATION
29. ST-MAURICE RIVER DRIVE COMPANY LIMITED
30. BOWATER TREATED WOOD INC.
31. CANEXEL HARDBOARD INC.
32. 9068-9050 QUÉBEC INC.
33. ALLIANCE FOREST PRODUCTS (2001) INC.
34. BOWATER BELLEDUNE SAWMILL INC.
35. BOWATER MARITIMES INC.
36. BOWATER MITIS INC.
37. BOWATER GUÉRETTE INC.
38. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

17. **ABITIBIBOWATER INC.**
18. **ABITIBIBOWATER US HOLDING 1 CORP.**
19. **BOWATER VENTURES INC.**
20. **BOWATER INCORPORATED**
21. **BOWATER NUWAY INC.**
22. **BOWATER NUWAY MID-STATES INC.**
23. **CATAWBA PROPERTY HOLDINGS LLC**
24. **BOWATER FINANCE COMPANY INC.**
25. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
26. **BOWATER AMERICA INC.**
27. **LAKE SUPERIOR FOREST PRODUCTS INC.**
28. **BOWATER NEWSPRINT SOUTH LLC**
29. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
30. **BOWATER FINANCE II, LLC**
31. **BOWATER ALABAMA LLC**
32. **COOSA PINES GOLF CLUB HOLDINGS LLC**