Clerk's Stamp

COURT FILE NUMBER:	1703 12765
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
PLAINTIFF:	SERVUS CREDIT UNION LTD.
DEFENDANTS:	CRELOGIX ACCEPTANCE CORPORATION, CRELOGIX PORTFOLIO SERVICES CORP., CRELOGIX CREDIT GROUP INC., KARL SIGERIST, NICHOLAS CARTER, MIKE MCKAY and MICHAEL MILLS
DOCUMENT:	**BRIEF OF ALVAREZ & MARSAL CANADA INC., IN ITS CAPACITY AS THE COURT APPOINTED RECEIVER AND MANAGER OF CRELOGIX** **NOVEMBER 25, 2020 APPLICATION FOR APPROVAL OF RECEIVER'S ACTIVITIES AND FEES, ALLOCATION OF RECEIVER'S FEES AND DISBURSEMENTS, AND TO SCHEDULE REHEARING OF UNFUNDED MERCHANTS' APPLICATIONS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	PARLEE McLAWS LLP Barristers & Solicitors 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5J 0H3 Attention: Jeremy H. Hockin, Q.C. Telephone: (780) 423-8532 Facsimile: (780) 423-2870 File Number: 73150-2/JHH

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INTRODUCTION

1. By Consent Receivership Order filed July 6, 2017 (the "Receivership Order"), Alvarez & Marsal Canada Inc. (the "Receiver") was appointed as the Receiver and Manager, without security, of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "Property") of Crelogix Acceptance Corporation ("CAC"), Crelogix Portfolio Services Corp. and Crelogix Credit Group Inc. (collectively, "Crelogix"). The Receivership Order empowers and authorizes, but does not obligate, the Receiver to manage, operate and carry on the business of Crelogix.

2. As stated in the Receiver's Sixth Report, the Receiver's activities up to the events described in the Receiver's Fourth Report filed January 31, 2018 have been approved by prior Court Order.

3. Similarly, the Receiver's professional fees and disbursements up to December 31, 2017 have been approved by prior Court Order .

4. On this Application, the Receiver is seeking three main items of relief:

   (a) approval of its activities since the latest of the activities described in the Receiver's Fourth Report,

   (b) approval of its professional fees and disbursements for the period January 1, 2018 to September 30, 2020 and a direction as to their allocation, and

   (c) a procedural Order directing the process to be followed by the parties to implement the decision of the Court of Appeal arising from its Memorandum of Judgment issued on May 29, 2020 [**Tab 1**] and the resulting Judgment filed June 17, 2020 [**Tab 2**].

THE LAW

Approval and Allocation of Receiver's Fees and Disbursements

5. The Court's jurisdiction to deal with a Receiver's renumeration is found in section 99 of the *Alberta Business Corporation Act*, RSA 2000, c. B-9 (as amended) (**"ABCA"**). Stripped of surplus wording section 99 of the ABCA states:

> "On an application by a Receiver or Receiver-Manager,..., the court may make any Order it thinks fit including,... an Order... approving the Receiver's or Receiver-Manager's accounts"

- Section 99 ABCA, **Tab 5**

6. For Receivers appointed under the *Bankruptcy and Insolvency Act* (**"BIA"**) section 243 (6) provides as follows:

> "If a Receiver is appointed under subsection (1), the Court may make any Order respecting the payment of fees and disbursements of the Receiver that it considers proper..."

- Section 243(6) BIA, **Tab 6**

7. In the case at bar, paragraph 17 of the Receivership Order **[Tab 3]**, provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges, and that the Receiver and its counsel are granted a charge (the "**Receiver's Charge**") on the Property as security for such fees and disbursements "which charge forms a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances ... in favour of any Person...". A charge affording identical priority is further provided by paragraph 20 as security for the payment of monies borrowed by the Receiver in the discharge of its powers and duties.

8. The law concerning the manner in which a Receiver's fees and disbursements should be assessed was most recently expounded by Madam Justice Veit in the case of *Servus Credit Union Ltd. v Trimove Inc.,* 2015 ABQB 745. At paragraph 6 of that decision, Justice Veit stated:

> "Receiver's and Receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in *Belyea, Bakemates and Diemer*"

- *Servus Credit Union Ltd. v. Trimove Inc., 2015 ABQB 745,* **Tab 7**

9. Justice Topolniski quoted the following extract from *Belyea* at paragraph 25:

> "The considerations applicable in determining the reasonable remuneration to be paid to a Receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the Receiver's knowledge, experience and skill, the diligence and thouroughness displayed, the responsibilities as assumed, and the results of the Receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner."

- *Winalta Inc. (Re)*, 2011 ABQB 399 [**Tab 8**]

10. The Receiver's Sixth Report outlines the services rendered by the Receiver since the date of its last fee approval. In addition, the Receiver's services have been verified by the Affidavit of Orest Konowalchuk.

11. The Receiver's charges meet the standard set by *Belyea*, and should be approved, along with the fee accounts of its counsel.

12. As summarized in *Royal Bank of Canada v. Atlas Block Co. Limited,*[1] the cases reveal the following principles generally accepted to be relevant in determining a principled allocation of a Receiver's costs and expenses:

(a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a Receiver;[2]

(b) 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

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1 *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531 at para 43 ("***Atlas Block***") [**Tab 9**].
2 *Hunjan International Inc. (Re)*, 2006 CanLII 63716 at para 4 ("***Hunjan***") [**Tab 10**].

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;[3]

(c) Where a Receiver was appointed for the benefit of interested parties to ensure that all creditors were treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs;[4]

(d) Costs should be allocated in a fair, equitable, evenhanded, and objective manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;[5]

(e) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;[6]

(f) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;[7]

(g) Trust funds may be allocated an appropriate share of a Receiver's charges;[8]

(h) 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;[9]

13. In its Sixth Report, the Receiver has presented a number of possible methods for allocating its fees and disbursements as amongst the various asset categories that it still has under

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3 *Ibid.* See also *In Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164 at para 17 (***"Hickman"***) **[Tab 11]**; *JP Morgan Chase Bank N.A. v. Uttc United Tri-Tech Corp.*, 2006 CanLII 25352 at para 42 (***"Tri-Tech"***) **[Tab 12]**. *Hickman* has been followed in Alberta: see *Respec Oilfield Services Ltd. (Re)*, 2010 ABQB 277 at para 23 (***"Respec Oilfield"***) **[Tab 13]**.

4 *Bank of Nova Scotia v. Norpak Manufacturing Inc.*, 2003 CanLII 30124 at para 6 (ONCA) **[Tab 14]**.

5 See e.g. *Hickman* at para 17; *Tri-Tech* at para 42; *Respec Oilfield* at paras 22-23. See also, generally, *Re Hunters Trailer & Marine Ltd.*, 2001 ABQB 1094 (***"Hunters Trailer & Marine"***) **[Tab 15]**.

6 *Atlas Block* at para 43; *Re: Medican Holdings Ltd.*, 2013 ABQB 224 at paras 47-51 (***"Medican"***) **[Tab 16]**; *Hunters Trailer & Marine* at paras 20-23.

7 *Atlas Block* at para 43; *Respec Oilfield.*

8 *PriceWaterhouseCoopers v. Bank of Montreal*, 2017 CanLII 11229 at para 74 (NL SCTD) (***"PwC v. BMO"***) **[Tab 17]**; *Residential Warranty, infra,* **Tab 18**

9 *Atlas Block* at para 43; *Medican* at para 39; *Hunjan* at paras 58 and 73.

administration. Those assets consist almost entirely of consumer loans that it is administering and segregating between various categories. One such category is what has been referred to as the "Disputed Unfunded Loans", which are claimed by a group of Crelogix' former dealers which have been described as the "Unfunded Merchants".

14. The Receiver proposes that, given the amount of its time and effort spent on the Disputed Unfunded Loans, the funds held that are subject to the claims made by the Participating Unfunded Merchants should be allocated a portion of its professional fees and disbursements based on the time it has spent dealing with those funds.

15. The Receiver has provided the Affidavit of Orest Konowalchuk in support of its application for approval of its fees and disbursements, thereby complying with the procedure recommended by the Honourable Madam Justice J.E. Topolniski in the case of *Winalta Inc. (Re)*, 2011 ABQB 399 [**Tab 8**]

16. In this case, entitlement to the funds collected by the Receiver arising from customer payments on the Loan Agreements and Promissory Notes that are subject to the Unfunded Merchants' applications has not yet been determined. It is therefore still an open question as to whether or not these assets are "Property" within the meaning of the Receivership Order [**Tab 3**].

17. Nevertheless, the Receiver submits that, in certain circumstances, such funds are still available for allocation of some part of the Receiver's professional fees and disbursements.

18. In the case of *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 [**Tab 18**], Madam Justice Topolniski addressed the funding of a trustee in bankruptcy from assets under administration when all of the assets in question were subject to a disputed trust claim. Justice Topolniski noted that, in a typical bankruptcy, the trustee is paid from estate assets:

> [41] Ordinarily, a trustee in bankruptcy will not be funded from trust assets unless it shows that its work was necessary to preserve or otherwise benefit the trust assets, or the work was required for resolution of the trust claim or to sort out beneficiaries.
>
> [42] The first exception developed as a result of the court's exercise of inherent jurisdiction in ordinary trust cases, ... The

> court's inherent jurisdiction in this regard has been exercised sparingly and generally in circumstances where the beneficiary would have had to hire someone else to do the work performed by the trustee. The second exception flows from the trustee in bankruptcy's duty under the BIA to approve or disallow of claims.
>
> *Re Residential Warranty* at paras. 41 and 42, [**Tab 18**]

19. After considering the Alberta Court of Appeal decision in *Re Sproule Estate*, Justice Topolniski found as follows:

> [45] The Trustee in the present case was obliged to gather in trust property, which vested in the Trustee, but it cannot distribute the res of the trust to creditors. The Trustee therefore has two capacities, one as trustee in bankruptcy and the other as an ordinary trustee arising by implication of law. If Kingsway prevails at the end of the day, the Trustee is entitled to seek compensation for its work "in and about the trust". In my view, the broad scope of compensable work discussed ... in *Sproule* includes identifying which assets, if any, are subject to a trust and, if doubt exists, placing the necessary information before the court for determination of that issue.
>
> *Re Residential Warranty* at para. 45, [**Tab 18**]

20. Justice Topolniski's decision was upheld by the Court of Appeal.

- *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293 [**Tab 19**]

21. In *PwC v. BMO*, the court stated as follows, beginning at paragraph 71:

> "Notwithstanding a limitation in section 243(6) of the BIA to the scope of the Receiver's charge, the court may, where it is equitable and appropriate to do so, extend a Receiver's charge to funds that are held in trust."

- PwC v. BMO, at paragraph 71, **Tab 17**

22. At paragraph 72 of the same decision, the Court quoted from the Ontario case of *Ontario (Securities Commission) v. Consortium Construction Inc.* as follows:

> "It is, I think, well established that a Court has the inherent power to allow a Receiver and Manager to recover its proper remuneration expenditures and disbursements out of any assets which are subject to the administration of the Court.
>
> If the trust funds form part of the assets which are subject to the administration of the Court, it would seem to me to follow necessarily that the court has the power, in its discretion, to charge those assets with the Receiver and Manager's proper remuneration expenditures and disbursements."

- PwC v. BMO, paragraph 72 **Tab 17**

23. The Receiver is in a position analogous to the trustee in the *Residential Warranty* case, and to the Receiver in the *PwC v. BMO* case. It has identified an issue with respect to the ownership of a certain category of assets, namely the Loan Agreements and Promissory Notes assigned to Crelogix by Unfunded Merchants. It has segregated all such agreements and notes and has held the proceeds collected from them in trust pending a determination as to whether or not the Unfunded Merchants are entitled to them, as against both the receivership estate and the prime secured Creditor of Crelogix. It has analyzed the relevant information and documents from the Crelogix records and has presented the issue to the Court for determination.

24. The Receiver respectfully submits that it is appropriate to allocate the portion of its professional fees and disbursements to the Loan Agreements and Promissory Note proceeds based on its professional time and that of its counsel agent regardless of whether or not they are ultimately found to be the property of the Unfunded Merchants.

Procedural Order

25. The Court has the authority to grant a procedural order pursuant to Rule 1.4 of the *Alberta Rules of Court* **[Tab 4]**.

26. With respect to the scheduling of the rehearing of the Unfunded Merchants' application to determine their entitlement to the Loan Agreements and Promissory Notes, the Receiver submits that the procedure contemplated by Commercial Practice Note No. 1 should be followed.

27. The parties filed extensive materials for the hearing of the applications before Justice Graesser, including supplemental briefs restricted to the topic of the availability of a constructive trust. Justice Graesser's determination that a term or terms should be implied into the governing merchant agreement, although that issue had not been presented to or argued in front of His Lordship, necessitated the appeals brought by the Receiver and by the Plaintiff and resulted in the Court of Appeal directing that the matter be returned to this Honourable Court for re-argument. It is therefore appropriate that an opportunity be provided for the parties to present written material on the issues that were not argued in front of Justice Graesser, as enumerated in the Formal Judgment arising from the Court of Appeal's Reasons.

CONCLUSION AND RELIEF REQUESTED

28. The Receiver respectfully requests that the relief prayed for in its application be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on behalf of the Receiver with the request that its application be allowed.

Dated at the City of Edmonton, in the Province of Alberta, this 18th day of November, 2020.

PARLEE McLAWS LLP

Jeremy H. Hockin, Q.C.
Solicitors for the Receiver

LIST OF AUTHORITIES

TAB

TAB 1

In the Court of Appeal of Alberta

Citation: Servus Credit Union Ltd v Crelogix Acceptance Corporation, 2020 ABCA 220

Date: 20200529
Docket: 1903-0029-AC;
1903-0031-AC
Registry: Edmonton

1903-0029-AC

Between:

Servus Credit Union Ltd.

Respondent
(Applicant)

- and -

Alvarez & Marsal Canada Inc. in its capacity as the receiver and manager of Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp., and Crelogix Credit Group Inc.

Appellants
(Not party to Application)

- and –

Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp., Crelogix Credit Group Inc., Karl Sigerist, Nicholas Carter, Mike McKay and Michael Mills

Not Parties to Appeal
(Defendants)

- and -

1537891 Ontario Inc., carrying on business as Positive Promotions; Elder Enterprises Ltd.; J&B Cycle and Marine Co. Ltd.; North Bay Cycle & Sports (2015) Inc.; Clare's Cycle and Sports Ltd.; 900337 Ontario Inc., carrying on business as Gaston's Sports & Marine; Andrews Sports, a partnership between John Geoffrey Andrews, Jane Andrews, Jason William Andrews, Joshua Robinson Andrews and James Richard Andrews; Recreational Parts and Accessories Limited; Renovation & Construction Gauthier et Peloguin; Blackfoot

Motorcycle Ltd.; Airdrie Trailer Sales Ltd.; Badiuk Equipment Ltd.; Broadview Power Sports Ltd.; Broker's Marine & Sport Ltd.; Elk Island Sales Inc.; Fraser Pacific Equipment Corp.; GRM Sales Ltd., carrying on business as Bar T5 Trailers Sask; Happy Camper R/V Alberta Ltd.; Jake's Speed Shop Inc., carrying on business as J&J Sports; Northstar Recreation Ltd. carrying on business as Ken's Marine; 1784302 Alberta Ltd., carrying on business as M&P Trailer Sales; Mountain Toys Polaris Ltd.; Proline Motorsports & Marine Ltd.; 1455300 Alberta Ltd., carrying on business as Raven Truck Accessories; Recreational Power Sports Inc.; Red Line Power Craft Ltd.; Rick's Marine (1999) Ltd.; 1431209 Alberta Inc. carrying on business as Riderz; Traction Motorcycles Ltd., carrying on business as Daytona Motorsports; Trailer Country Ltd.; Whitecap Recreation, a partnership between Northshore Automotive Ltd. and Southshore Automotive Ltd.; Dynasty Spas Inc., carrying on business as World of Spas Calgary; 1781457 Alberta Ltd., carrying on business as World of Spas Edmonton; Holland Contracting Limited; Adventure Power Products Ltd; Breathe E-Z Homes Ltd.

Respondents
(Not parties to Application)

1903-0031-AC

And Between:

Servus Credit Union Ltd.

Appellant
(Applicant)

- and -

Alvarez & Marsal Canada Inc. in its capacity as the receiver and manager of Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp., and Crelogix Credit Group Inc.

Respondents
(Not party to Application)

- and -

Karl Sigerist, Nicholas Carter, Mike McKay and Michael Mills

Not Parties to Appeal
(Defendants)

- and -

1537891 Ontario Inc.; Elder Enterprises Ltd.; J&B Cycle and Marine Co. Ltd.; North Bay Cycle & Sports (2015) Inc.; Clare's Cycle and Sports Ltd.; 900337 Ontario Inc.; Andrews Sports, a partnership among, Jason William Andrews, Joshua Robinson Andrews, James Richard Andrews and John Geoffrey Andrews; Recreational Parts and Accessories Limited; Renovation & Construction Gauthier et Peloguin; Blackfoot Motorcycle Ltd.; Airdrie Trailer Sales Ltd.; Badiuk Equipment Ltd.; Broadview Power Sports Ltd.; Broker's Marine & Sport Ltd.; Elk Island Sales Inc.; Fraser Pacific Equipment Corp.; GRM Sales Ltd.; Happy Camper R/V Alberta Ltd.; Jake's Speed Shop Inc.; Northstar Recreation Ltd; 1784302 Alberta Ltd.; Mountain Toys Polaris Ltd.; Proline Motorsports & Marine Ltd.; 1455300 Alberta Ltd.; Recreational Power Sports Inc.; Red Line Power Craft Ltd.; Rick's Marine (1999) Ltd.; 1431209 Alberta Inc.; Traction Motorcycles Ltd.; Trailer Country Ltd.; Whitecap Recreation, a partnership between Northshore Automotive Ltd. and Southshore Automotive Ltd.; Dynasty Spas Inc.; 1781457 Alberta Ltd.; Holland Contracting Limited; Adventure Power Products Ltd; Breathe E-Z Homes Ltd.

Respondents
(Not parties to Application)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Sheila Greckol
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice R.A. Graesser
Dated the 21st day of January, 2019
(2019 ABQB 48, Docket: 1703 12765)

Memorandum of Judgment

The Court:

I. Introduction

[1] Crelogix Acceptance Corporation, Crelogix Credit Group Limited and Crelogix Portfolio Service Corporation (collectively, Crelogix) carried on the business of financing consumer purchases of large chattels where the customer was not able to pay the full purchase price upfront but the merchant did not want to provide finance itself.

[2] The appellant Servus Credit Union (Servus) (appeal no. 1903 0031) is a secured creditor of Crelogix and has security under a security agreement over all of Crelogix's present and after-acquired property

[3] In July 2017, the appellant Alvarez & Marsal Canada Inc. (Alvarez) (appeal 1903 0029) was appointed receiver of Crelogix, following a court application by Servus.

[4] The respondents in the two appeals are merchants in the business of selling chattels such as motorcycles, recreational vehicles and boats (the merchants).

[5] These appeals concern an application to determine who has priority to the proceeds of loans and promissory notes in the Crelogix receivership. The dispute is between Servus and the merchants who contracted to assign loans and promissory notes to Crelogix but were not paid for them. The chambers judge found that the unpaid merchants either (1) retained title to the promissory notes and loans because of an implied term to that effect in the master agreement between them and Crelogix or (2) Crelogix held the promissory notes on constructive trust for the unpaid merchants. Either way, the unpaid merchants' claim to payments made under promissory notes and loans had priority over the Servus security interest. The transaction documents are governed by British Columbia law and the chambers judge decided the application accordingly.

[6] Servus and Alvarez both appeal the chambers judge's decision and each has submitted their factum for consideration in the other appeal.

II. Facts

The Business of Crelogix

[7] Crelogix supplied financing for the purchase of large chattels where the customer was not able to pay the full purchase price upfront but the merchant did not want to provide finance itself.

[8] When a merchant sold a chattel to a customer, the parties would enter into a loan agreement under which the customer agreed to pay the purchase price over a number of years. The merchant assigned the loan agreement to Crelogix which would pay the purchase price to the merchant.

[9] For the merchants' sales to be eligible for Crelogix financing, merchants were required to enter into Merchant Agreement 1 with Crelogix.

[10] Merchant Agreement 1 operated as follows:

- Merchants would invite Crelogix to purchase a loan agreement on the terms set out in the Merchant Agreement by submitting a credit application and the loan agreement to an online platform.
- Crelogix would review the application and provide a credit decision.
- If Crelogix approved the credit application, it would then conditionally offer to purchase the loan agreement by posting a promissory note (expressed to be between the merchant and the customer and Crelogix) and other documents on the online platform.
- If the merchant accepted the offer, the merchant and the customer would execute and deliver the required documentation ("required documents" is not defined but includes, at least, the promissory notes and the loan agreements): clause 2.2.10.
- The merchant was then required to assign the benefit of the loan agreement and promissory note: clause 3.1.1.
- Crelogix was required to pay the merchant within five business days: clause 3.1.2.

[11] On receipt of payment from Crelogix, the merchant would release the purchased goods to the customer.

Receivership over Crelogix

[12] By July 2017, Crelogix was in financial strife. It was heavily indebted to Servus on a secured line of credit, it was in default on its indebtedness to other creditors, and had not paid several merchants for loan agreements and promissory notes apparently assigned to it.

[13] Servus was appointed the receiver of Crelogix under s 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. It took the position that unpaid merchants under Merchant Agreement 1 had assigned the loan agreements and promissory notes to Crelogix (so Crelogix was entitled to their proceeds) and that the merchants were unsecured creditors.

[14] On April 13, 2018, the chambers judge established a procedure for unpaid merchants to file claims to the receiver. A total of 37 unpaid merchants filed claims, altogether amounting to $656,000. Most of those merchants are respondents in this appeal.

[15] After this was done, the chambers judge heard argument about whether Servus or the unpaid merchants had the prior claim to the proceeds of the loan agreements/promissory notes. The chambers judge ultimately decided that this depends on whether the unpaid merchants actually assigned the loan agreements and promissory notes to Crelogix or whether Crelogix holds the benefit of them on trust for the unpaid merchants.

III. Decision Below

[16] The first issue in the chambers judge's reasons was whether the unpaid merchants had assigned the loan agreements and promissory notes to Crelogix.

[17] The chambers judge noted that, according to the express terms of Merchant Agreement 1, the merchants assigned the benefit of the promissory notes "upon delivery of the required documents ... to Crelogix" in accordance with clause 2.2.10 of Merchant Agreement 1: *Servus Credit Union Ltd v Crelogix Acceptance Corporation,* 2019 ABQB 48 [Decision] at para 66. In other words, the merchants assigned, and were required to assign, the notes to Crelogix before Crelogix was obliged to pay them the purchase price for the chattels sold.

[18] However, the chambers judge implied a term into Merchant Agreement 1 that the merchants' assignments of the promissory notes did not take effect until Crelogix paid the merchants. He formulated this term in various ways (Decision at para 105) but the idea is clear. The consequence of the implied term was that none of the unpaid merchants had assigned the benefit of the promissory notes to Crelogix. Since title remained in the unpaid merchants, the promissory notes never became the property of Crelogix and Servus never had a security interest in them: Decision at para 239. The chambers judge thought this resolved the priority dispute.

[19] The chambers judge found that the "officious bystander test" for implication of terms was met. An officious bystander would think it obvious that, under Merchant Agreement 1, Crelogix does not receive an assignment of the promissory notes before Crelogix has paid for them. He reasoned that "there was no business requirement" for Crelogix to take title to the promissory note before it paid the purchase price (Decision at para 101) and wrote that implication of the term "is not inconsistent with the officious bystander [test]": Decision at para 111.

[20] As to the "business efficacy test", the chambers judge did not say that the implied term was necessary to give business efficacy to Merchant Agreement 1. Rather, he said it was not necessary to interpret the agreement as lacking the term: Decision at para 107. At other places, he wrote that implying a term that made the assignment conditional on payment was necessary to avoid

frustrating the "business purpose of the Merchant" (Decision at para 119, emphasis added) and that neither party "needed" there to be an assignment without payment: Decision at paras 119, 126.

[21] The chambers judge gave other reasons for implying the term: Decision at paras 108-109, 113.

[22] In the alternative, if he was wrong to imply the term into Merchant Agreement 1, the chambers judge considered whether Crelogix held the notes on constructive trust for the unpaid merchants.

[23] The chambers judge rejected the argument that a constructive trust over the promissory notes arose to disgorge gains made by the wrongful conduct of Crelogix.

[24] The chambers judge did not impose a constructive trust to reverse unjust enrichment either. He found that if no term is implied into Merchant Agreement 1, Crelogix would be enriched by the assignment of the promissory notes and the merchants would be deprived, but there would be a juristic reason for that – namely the merchant's contractual obligation to assign the notes before payment under clauses 2.2.10 and 3.3.1: Decision at para 195. He also found that if a term is implied into Merchant Agreement 1 that makes the assignment of the notes conditional on payment, it would be unnecessary to impose a constructive trust: Decision at para 162. Since the merchants would not have assigned the notes, the notes are not the property of Crelogix, and Servus never acquired a security interest in them (Decision at paras 163, 239, 241), so there is no priority dispute.

[25] If he was wrong to imply the term into Merchant Agreement 1, the chambers judge imposed a constructive trust over the promissory notes: Decision at para 242. That trust was not an unjust enrichment constructive trust or a wrongful conduct constructive trust: Decision at paras 195-196. The chambers judge imposed it on the ground of good conscience because "the situation is one that calls out for appropriate equitable remedies" (Decision para 242) and "it would be unconscionable to deprive the Merchants of a restitutionary or equitable remedy on the facts of this case": Decision at para 240.

[26] Servus and Alvarez argued that the constructive trust should not give unpaid merchants priority over Servus' claim as secured creditor to the proceeds of the promissory notes, because constructive trusts cannot subvert the scheme of distribution in receiverships established by the *BIA*. The chambers judge rejected that argument, finding himself bound by British Columbia law and, in particular, *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd.*, 2000 BCCA 458, which he interpreted as holding that a constructive trust may alter the statutory scheme of distribution if it is necessary to avoid unconscionable results. He held the constructive trust gave the merchants' claims to the proceeds of the promissory notes priority over Servus' security interest, although he did not explain how the priority worked.

IV. Grounds of Appeal

[27] The grounds of appeal of Servus and the receiver, cumulatively, are that:

1 the implication of a term into Merchant Agreement 1 was procedurally unfair.

2 the chambers judge erred in law by implying a term into Merchant Agreement 1.

3 the chambers judge erred in law by finding that the interest of the merchants in the promissory notes "created by" the implied term had priority over Servus' security interest.

4 the chambers judge erred by imposing a constructive trust over the loan agreements/promissory notes.

V. Analysis

A. The implication of a term into Merchant Agreement 1 was procedurally unfair.

[28] The Appellants argue that the chambers judge's implication of a term into Merchant Agreement 1 was an innovative theory of liability neither pleaded nor argued at chambers. They argue this was a breach of natural justice that requires appellate intervention.

[29] The merchants do not take issue with the principle that the rules of natural justice must be observed at chambers, so that all parties have the right to notice and opportunity to be heard, to correct or contradict relevant statements, and to state their case adequately and answer any contrary arguments.

[30] Essentially, the merchants respond that within their arguments are found the seeds of the chambers judge's findings. For example, the chambers judge found, at para 119 of the Decision, that the merchants' interests would be satisfied entirely if an escrow - like term were imposed; and at para 124, that it was an implied term that the transfer of title to the promissory notes to Crelogix was "conditional" on payment of the amount due to the merchant. The merchants say that these points were argued by counsel at the chambers hearing, including that there was an escrow-like arrangement between the parties, that there was a gap in terms in the Merchant Agreement 1 that needed to be filled, and that the assignment of the purchase contracts remained incomplete.

[31] In arguing that the merchants set the stage for the implied term finding at the chambers hearing, counsel for the merchants relies on paras 37 – 39 of their written submissions at chambers:

> 37 The Merchant Agreements do not specify precisely when assignment is to occur, saying only that "the Merchant will assign and Crelogix will purchase for the Purchase Price [of the Units] all right, title and interest of the Merchant in the payments due under and other benefits due from each [Unfunded Loan Agreement] and the goods, if any, being sold under the Contract ..."
>
> 38 Given that the essence of the bargain between the Merchants and Crelogix was to purchase the Unfunded Loan Agreements for the purchase price so that Crelogix could accept financing payments directly from Customers with, applicable fees and interest, the reasonable expectations of the parties accord with an interpretation whereby assignment is legally effective only upon payment by Crelogix. To hold otherwise would mean that Crelogix would gain "all right, title and interest of the Merchant[s]" without any corresponding benefit to the Merchants.
>
> 39 The wording of the Promissory Notes, drafted by Crelogix, do not assist in the interpretation of the Merchant Agreements. The clauses therein relating to assignment are contradictory and vague. Further, the acknowledgement that a contract has already been "assigned" (rather than "may be" assigned) is made only by the Customer, who has no knowledge of the contractual arrangement between the Merchants and Crelogix.

[32] As to the interpretation of the contract, at the chambers hearing, counsel for the merchants argued that "because there is no actual assignment document, there has to be a reasonable interpretation as to when the assignment is complete, and we say it is complete on the simultaneous giving ... and receiving of the documentation and the payment. The payment completes the circle": transcript, p. 20, l. 6 – 17. And further: "...what is fair and equitable ... is to rescind the unfunded loan agreements as the assignments remain incomplete and allow one of two things, either allow the merchants to collect the monthly payments and take Crelogix and the receiver out of it, or affirm the contracts and Crelogix and the receiver must actually fund to be able to obtain those monthly payments": transcript, p. 24, l. 10 – 16.

[33] During oral submissions, the chambers judge acknowledged the arguments regarding "fairness, equity, commercial reasonableness" but also that the challenge is the language used in the documents that are actually signed: transcript, p. 24, l. 18 – 26. He also acknowledged that the documents are not set up like a mortgage or escrow or trust arrangement where the transaction is contingent on payment: transcript, p. 24, l. 28 – 41. Concerning implied terms, the chambers judge said (transcript, p. 25, l. 2 – 8):

> A logical reading, I think, of the contract is that there is a period, up to [a] five-day period where the merchant may be at some risk, and it's not that they necessarily understand that they're at risk or thought they were at risk but the paperwork seems

> to put them at risk for this unsecured five-day period. Unless you then start, I suppose inferring or supplementing the contract with additional terms and conditions, you know, *the implied terms and conditions that -- no one is really arguing or has argued that the Court should imply terms and conditions that would amount to a trust provision or an escrow provision.* (emphasis added)

[34] Counsel for Servus argued that equity cannot subvert express contractual language and a statutory insolvency regime: transcript, p. 56, l. 1 – 4. On the question of implied terms, Servus argued:

> ... *[W]hat the applicants are looking to do is really to imply terms into the contract*, either that somehow this assignment was to be held in escrow or that rights didn't vest, some, some language or contractual remedy of rescission, but none of those, that terms are in the contract, and contractual interpretation requires that you look at the terms of the contract and not imply terms simply because a party, really under hindsight, wishes that it had included those contracts: transcript p. 56, l. 23-28 (emphasis added)
>
> ...
>
> I'll take you perhaps to the Holland materials at this time, and this is the affidavit of Mr. Van Zoost that you referred to earlier, My Lord, and what we see in the second contract that was provided by Mr. Van Zoost is what we, or what the receiver has been calling the Contract 2s, and in the Contract 2 situation the receiver reviewed the Contract 2s and said that, much like Mr. Van Zoost says, that these, these contracts had the type of language that the applicants are hoping would be in theirs but specifically wasn't, and this is: (as read) That upon making such payment, Crelogix shall have entered into and accepted the applicable loan agreement. So that is the type of language that would allow the applicants to have a successful argument to say on payment, at that point the transaction vests, some type of reservation ...: transcript, p. 56, l. 30-41
>
> ... language, *but that language cannot be implied into the, into the existing contracts, and certainly none of the applicants have provided you any law or precedent where those types of terms are implied into a, into a contract*: transcript, p. 57, l. 1-3 (emphasis added)

[35] The chambers judge did take the view implied terms had been put to him, but the transcript demonstrates otherwise. He said:

> [O]ne of the most common equitable remedies is the imposition of a constructive trust of some sort, and that is what sort of leapt out at me in terms of, I wonder if

> there is something in terms of trust. *You've covered off implying terms into the contract. I think that's been fairly well dealt with, but as far as the limitations on the imposition of constructive trust ...*: transcript, p. 67, l. 37-41 (emphasis added)

[36] Counsel for the merchants replied:

> ... [W]hat my friends are asking you to do is read into -- *they're saying that we need you to imply a term in there. They need you to imply a term in there that is, that this is the order, the merchant will assign and then after that Crelogix will purchase, but that's not what it says.* It says merchant will assign and Crelogix will purchase, and this is what I'm saying is it's all one piece. *The wills are happening at the same time. The assignment completes when the purchase price is made:* transcript, p. 97, l. 39-41; p. 98, l. 1-3 (emphasis added)
>
> ...
>
> With respect, Sir, to that section that I, that I keep going back to with the will assign and will purchase, *we're not trying to imply terms*. We're trying to say this is how you could read it, is that it is a simultaneous thing that has to take place. This is how you could read it. They're saying, well, no, that's not how you read it. It's assignment first, then a promise to pay the purchase price. So once you have two interpretations of how you read something, I think that makes it ambiguous, Sir, and now you're into the contra proferentem, which we've taken you through in our brief ...:transcript, p. 99, l. 30-36 (emphasis added)

[37] In the Decision, the chambers judge gave a detailed analysis, concluding that a term should be implied into the parties' contract:

> 124 I have thus found that Merchant Agreement 1 is subject to the implied term that the effectiveness of the assignment by the Merchant to Crelogix and the transfer of title to the promissory note to Crelogix (or its subsequent assignee) is conditional on payment by Crelogix of the amount due to the Merchant.
>
> 125 Essentially, the assignment is in escrow until payment is made. If payment is made within the permitted five-day period, the contract is fully performed by both parties. If payment is not made within the permitted five-day period, the Merchant would be free to withdraw its offer and the assignment would be null and void. I suppose the Merchant could elect to sue for damages instead, but the Merchant would have a choice.

[38] It is apparent from a review of the transcripts of argument at chambers that the question of implied term was not formally the subject of legal argument by the merchants, nor was it

substantively addressed by either Alvarez or Servus. Ordinarily, the chambers judge's interpretation of a non-standard form contract is entitled to deference as it is a question of mixed fact and law: *Sattva Capital Corp. v Creston Moly Corp* 2014 SCC 53 at para 50. However, where there has been a breach of the rules of natural justice, the error warrants appellate intervention: *Union Building Corporation of Canada v Markham Woodmills Development Inc.* 2018 ONCA 401 at para 13.

[39] The legal questions in this case arose in the context of receivership proceedings. The receiver, Alvarez, brought an application to determine the priority of claims to the proceeds of the promissory notes as between the merchants and Servus. The parties proceeded by way of affidavit evidence, and few facts were in dispute: Decision at para 2. At the chambers hearing, the parties presented oral and written submissions. As set out above, the issue concerning an implied term in the contract was not joined between the parties nor the subject of jurisprudence and submissions as to legal principle. Nonetheless, the chambers judge decided that the contract between Crelogix and the merchants contained an implied term that the interest in the promissory notes did not transfer to Crelogix until it paid for them under the contract.

[40] In *Malton v Attia*, 2016 ABCA 130, this Court found that the chambers judge made findings not raised or argued before her, breaching the *audi alterem partem* rule that requires decision makers to give parties the opportunity to be heard and to fully hear each party's case before rendering judgement. This Court reiterated the principle that a fair hearing must comply with the rules of natural justice, for all parties: para 35. This Court noted that it is particularly problematic for a theory of liability to be introduced for the first time in the reasons for judgement, as this is "fundamentally unfair, depriving the [parties] of the opportunity to rebut the propositions raised in the judgment": para 39.

[41] Unfortunately, that is what transpired here. It is obvious from the lengthy reasons for judgement that implication of a term in a complex commercial contract is not a simple question. It is equally obvious from the transcripts that the parties neither raised nor argued the principles at play when considering the implication of a term into a complex commercial contract.

B. The chambers judge erred in law by implying a term into Merchant Agreement 1.

[42] All three parties agreed that the question of whether there is an implied term in Merchant Agreement 1 was fully argued before this Court and should be decided afresh on this appeal. Counsel for Servus and Alvarez urged in argument that the implication of a "title retention clause" would disrupt receivership practice in Alberta and lead to unintended consequences.

[43] Whether this is so was not fully canvassed before us, leading to the problem that we are ill-equipped to address it and other issues that appeared in the margins of this appeal. For example, Servus argued that even if the impugned term was properly implied into the contract, it maintains priority by virtue of the *Personal Property Security Act*, RSBC 1996, c 359. The merchants'

response was that this is not a conditional sales contract, amenable to registration for the five-day period within which Crelogix had to make payment to the merchants. These issues too, not thoroughly explicated, are better left to a rehearing before the specialized commercial court.

[44] The merchants argued a constructive trust on the basis that a right to damages would be useless in the receivership of Crelogix. It may be problematic to impose a constructive trust where it may disrupt a statutory priority scheme. Further, it is uncertain whether Canadian law recognizes a good conscience constructive trust. These questions deserve full consideration.

[45] A further impediment to the full and fair hearing of issues before this Court is that the chambers judge determined, on his interpretation of the contract, that absent an implied term, the contract did not contemplate a contemporaneous exchange of the assignment of the documents and payment, as argued by the merchants. The chambers judge found:

> 65 On the face of Merchant Agreement 1 and the assignment documentation, the assignment appears to be effective once it has been sent to Crelogix. There is nothing in the documentation withholding legal assignment until the purchase price is paid. There is also nothing in Merchant Agreement 1 or the assignment documentation that contemplates the Merchants being able to withdraw or rescind the assignment in the event of non-performance or breach by Crelogix.
>
> 66 The wording of the documentation appears clear that the assignment was effective upon delivery of the required documents from the Merchants to Crelogix. That would, but for some of the Merchants' argument, result in the Merchants being unsecured creditors. As such, their remedy would be to bring claims for damages.
>
> 67 More importantly, Merchant Agreement 1 is the "*master*" agreement between the parties. The actual assignment document itself purports to be an absolute assignment, presumably perfected on delivery to the assignee, Crelogix. (emphasis added)

[46] The merchants did not appeal this portion of the chambers judge's decision interpreting the language of the contract. We cannot, therefore, address the arguments made by the merchants' counsel concerning the meaning of the words used by the parties to the contract, in particular clauses 3.1.1 and 3.2.2 of Merchant Agreement 1. Since this interpretation issue is inextricably interrelated with the implied term issue in that the decision on implied term may have influenced the interpretation of the operative terms of the contract, the entire question of the contract interpretation must be considered afresh. To decide this case without considering the arguments regarding the interpretation of the contract as advanced by the merchants would be unfair to them.

[47] In all the circumstances, this case must be returned for a new hearing to address the issues, including (a) the interpretation of the contract, (b) whether a term must be implied into the contract, including the implications, if any, for receivership practice, (c) whether the *Personal Property and Securities Act* applies to Merchant Agreement 1 and (d) if necessary, whether equitable principles apply.

VI. Conclusion

[48] The appeal is allowed on the ground that there has been a breach of natural justice: the case was decided on the basis that a term must be implied into Merchant Agreement 1 between Crelogix and the merchants, though the merchants did not advance that argument and Servus and Alvarez did not have the opportunity to fully and fairly respond to it.

Appeal heard on April 29, 2020

Memorandum filed at Edmonton, Alberta
this 29th day of May, 2020

Authorized to sign for: Costigan J.A.

Greckol J.A.

Feehan J.A.

Appearances:

S.A. Wanke (appearing via WebEx)
for the Respondent/Appellant Servus Credit Union Ltd.

J.H.H. Hockin, Q.C./H.A. Frydenlund (appearing via WebEx)
for the Appellant/Respondent Alvarez & Marsal Canada Inc. in its capacity as the receiver and manager of Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp., and Crelogix Credit Group Inc.

C.J. Mohr/B. Cargill (appearing via WebEx)
for the Respondents 1537891 Ontario Inc. carrying on business as Positive Promotions, Blackfoot Motorcycle Ltd., Airdrie Trailer Sales Ltd., Badiuk Equipment Ltd.; Broadview Power Sports Ltd.; Broker's Marine & Sport Ltd.; Elk Island Sales Inc.; Fraser Pacific Equipment Corp.; GRM Sales Ltd., carrying on business as Bar T5 Trailers Sask; Happy Camper R/V Alberta Ltd.; Jake's Speed Shop Inc., carrying on business as J&J Sports; Northstar Recreation Ltd. carrying on business as Ken's Marine; 1784302 Alberta Ltd., carrying on business as M&P Trailer Sales; Mountain Toys Polaris Ltd.; Proline Motorsports & Marine Ltd.; 1455300 Alberta Ltd., carrying on business as Raven Truck Accessories, Recreational Power Sports Inc.; Red Line Power Craft Ltd.; Rick's Marine (1999) Ltd.; 1431209 Alberta Inc. carrying on business as Riderz; Traction Motorcycles Ltd., carrying on business as Daytona Motorsports; Trailer Country Ltd.; Whitecap Recreation, a partnership between Northshore Automotive Ltd. and Southshore Automotive Ltd.; Dynasty Spas Inc., carrying on business as World of Spas Calgary; 1781457 Alberta Ltd., carrying on business as World of Spas Edmonton; Holland Contracting Limited; Adventure Power Products Ltd; Breathe E-Z Homes Ltd.

F.M. Flaconi (no appearance)
for the Respondents Elder Enterprises Ltd., J&B Cycle and Marine Co. Ltd., North Bay Cycle & Sports (2015) Inc., Clare's Cycle and Sports Ltd., 900337 Ontario Inc. carrying on business as Gaston's Sports & Marine, Andrews Sports, a partnership between John Geoffrey Andrews. Jane Andrews. Jason William Andrews. Joshua Robinson Andrews and James Richard Andrews

J. Brown (no appearance)
for the Respondent Recreational Parts and Accessories Limited

I Fortin-Lemaire/R. LeDoux (no appearance)
for the Respondent Renovation & Constructions Gauthier et Peloguin

TAB 2

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	**1903-0029AC**
TRIAL COURT FILE NUMBER:	1703 12765
REGISTRY OFFICE:	EDMONTON
PLAINTIFF:	SERVUS CREDIT UNION LTD.
STATUS ON APPEAL:	RESPONDENT
APPLICANT:	ALVAREZ & MARSAL CANADA INC., in its capacity as the receiver and manager of CRELOGIX ACCEPTANCE CORPORATION, CRELOGIX PORTFOLIO SERVICES CORP., and CRELOGIX CREDIT GROUP INC.
STATUS ON APPEAL:	APPELLANT
DEFENDANTS:	CRELOGIX ACCEPTANCE CORPORATION, CRELOGIX PORTFOLIO SERVICES CORP., CRELOGIX CREDIT GROUP INC., KARL SIGERIST, NICHOLAS CARTER, MIKE MCKAY and MICHAEL MILLS
STATUS ON APPEAL:	NOT PARTIES TO THE APPEAL
RESPONDENTS:	1537891 ONTARIO INC., carrying on business as POSITIVE PROMOTIONS; ELDER ENTERPRISES LTD.; J&B CYCLE AND MARINE CO. LTD.; NORTH BAY CYCLE & SPORTS (2015) INC.; CLARE'S CYCLE AND SPORTS LTD.; 900337 ONTARIO INC., carrying on business as GASTON'S SPORTS & MARINE; ANDREWS SPORTS, a partnership between JOHN GEOFFREY ANDREWS, JANE ANDREWS, JASON WILLIAM ANDREWS, JOSHUA ROBINSON ANDREWS and JAMES RICHARD ANDREWS; RECREATIONAL PARTS AND ACCESSORIES LIMITED; RENOVATION & CONSTRUCTION GAUTHIER ET PELOGUIN; BLACKFOOT MOTORCYCLE LTD.; AIRDRIE TRAILER SALES LTD.; BADIUK EQUIPMENT LTD.; BROADVIEW POWER SPORTS LTD.; BROKER'S MARINE & SPORT LTD.; ELK

	ISLAND SALES INC.; FRASER PACIFIC EQUIPMENT CORP.; GRM SALES LTD., carrying on business as BAR T5 TRAILERS SASK; HAPPY CAMPER R/V ALBERTA LTD.; JAKE'S SPEED SHOP INC., carrying on business as J&J SPORTS; NORTHSTAR RECREATION LTD. carrying on business as KEN'S MARINE; 1784302 ALBERTA LTD., carrying on business as M&P TRAILER SALES; MOUNTAIN TOYS POLARIS LTD.; PROLINE MOTORSPORTS & MARINE LTD.; 1455300 ALBERTA LTD., carrying on business as RAVEN TRUCK ACCESSORIES; RECREATIONAL POWER SPORTS INC.; RED LINE POWER CRAFT LTD.; RICK'S MARINE (1999) LTD.; 1431209 ALBERTA INC. carrying on business as RIDERZ; TRACTION MOTORCYCLES LTD., carrying on business as DAYTONA MOTORSPORTS; TRAILER COUNTRY LTD.; WHITECAP RECREATION, a partnership between NORTHSHORE AUTOMOTIVE LTD. and SOUTHSHORE AUTOMOTIVE LTD.; DYNASTY SPAS INC., carrying on business as WORLD OF SPAS CALGARY; 1781457 ALBERTA LTD., carrying on business as WORLD OF SPAS EDMONTON; HOLLAND CONTRACTING LIMITED; ADVENTURE POWER PRODUCTS LTD.; BREATHE E-Z HOMES LTD.
STATUS ON APPEAL:	RESPONDENTS
COURT OF APPEAL FILE NUMBER:	**1903-0031AC**
TRIAL COURT FILE NUMBER:	1703 12765
REGISTRY OFFICE:	EDMONTON
APPLICANT:	SERVUS CREDIT UNION LTD.
STATUS ON APPEAL:	APPELLANT
RESPONDENT:	ALVAREZ & MARSAL CANADA INC., in its capacity as the receiver and manager of CRELOGIX ACCEPTANCE CORPORATION, CRELOGIX PORTFOLIO SERVICES CORP., and

	CRELOGIX CREDIT GROUP INC.
STATUS ON APPEAL:	RESPONDENTS
DEFENDANTS:	KARL SIGERIST, NICHOLAS CARTER, MIKE MCKAY and MICHAEL MILLS
STATUS ON APPEAL:	NOT PARTIES TO THE APPEAL
RESPONDENTS:	1537891 ONTARIO INC., carrying on business as POSITIVE PROMOTIONS; ELDER ENTERPRISES LTD.; J&B CYCLE AND MARINE CO. LTD.; NORTH BAY CYCLE & SPORTS (2015) INC.; CLARE'S CYCLE AND SPORTS LTD.; 900337 ONTARIO INC., carrying on business as GASTON'S SPORTS & MARINE; ANDREWS SPORTS, a partnership between JOHN GEOFFREY ANDREWS, JANE ANDREWS, JASON WILLIAM ANDREWS, JOSHUA ROBINSON ANDREWS and JAMES RICHARD ANDREWS; RECREATIONAL PARTS AND ACCESSORIES LIMITED; RENOVATION & CONSTRUCTION GAUTHIER ET PELOGUIN; BLACKFOOT MOTORCYCLE LTD.; AIRDRIE TRAILER SALES LTD.; BADIUK EQUIPMENT LTD.; BROADVIEW POWER SPORTS LTD.; BROKER'S MARINE & SPORT LTD.; ELK ISLAND SALES INC.; FRASER PACIFIC EQUIPMENT CORP.; GRM SALES LTD., carrying on business as BAR T5 TRAILERS SASK; HAPPY CAMPER R/V ALBERTA LTD.; JAKE'S SPEED SHOP INC., carrying on business as J&J SPORTS; NORTHSTAR RECREATION LTD. carrying on business as KEN'S MARINE; 1784302 ALBERTA LTD., carrying on business as M&P TRAILER SALES; MOUNTAIN TOYS POLARIS LTD.; PROLINE MOTORSPORTS & MARINE LTD.; 1455300 ALBERTA LTD., carrying on business as RAVEN TRUCK ACCESSORIES; RECREATIONAL POWER SPORTS INC.; RED LINE POWER CRAFT LTD.; RICK'S MARINE (1999) LTD.; 1431209 ALBERTA INC. carrying on business as RIDERZ; TRACTION MOTORCYCLES LTD., carrying on business as DAYTONA MOTORSPORTS; TRAILER COUNTRY LTD.; WHITECAP RECREATION, a partnership between NORTHSHORE AUTOMOTIVE LTD. and

	SOUTHSHORE AUTOMOTIVE LTD.; DYNASTY SPAS INC., carrying on business as WORLD OF SPAS CALGARY; 1781457 ALBERTA LTD., carrying on business as WORLD OF SPAS EDMONTON; HOLLAND CONTRACTING LIMITED; ADVENTURE POWER PRODUCTS LTD.; BREATHE E-Z HOMES LTD.
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	~~ORDER~~ JUDGMENT
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT:	PARLEE MCLAWS LLP 1700 Enbridge Centre 10180 – 101 Street Edmonton, AB T5J 4K1 Attn: Jeremy H. Hockin, Q.C. Telephone: 780-423-8550 Fax: 780-423-8527 File No.: 73150-2/JHH
CONTACT INFORMATION OF ALL OTHER INTERESTED PARTIES:	MILLER THOMSON LLP Barristers & Solicitors 2700, 10155 – 102 Street Edmonton, AB T5J 4G8 Attn: Stephanie Wanke & Rick Reeson, Q.C. Telephone No. (780) 504-9364/ (780) 429-9719 Fax No. (780) 424-5866 WITTEN LLP 2500 Canadian Western Bank Place 10303 Jasper Avenue Edmonton, AB T5J 3N6 Attn: Coralie J. Mohr Telephone No.: (780) 441 - 3236 Fax No: (780)-429-2559

DATE ON WHICH ORDER WAS PRONOUNCED:	May 29, 2020
LOCATION OF HEARING:	Edmonton, Alberta

NAMES OF JUDGES WHO GRANTED THIS ORDER:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Sheila Grekol
The Honourable Mr. Justice Kevin Feehan

UPON THE HEARING OF THESE CONCURRENT APPEALS ON April 29, 2020, from the Order of the Honourable Mr. Justice R.A. Graesser granted on January 21, 2019; AND UPON REVIEWING all Factums received, being those from Alvarez & Marsal Canada Inc. in its capacity as Receiver and Manager of Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp. and Crelogix Credit Group Inc. ("**Alvarez**"), Servus Credit Union Ltd. ("**Servus**"), and the Respondents represented by Ms. Coralie Mohr of Witten LLP; AND UPON HEARING argument from all parties present at the Appeal, being counsel for Alvarez, counsel for Servus, and Ms. Coralie Mohr as counsel for various of the Respondents:

IT IS ORDERED THAT:

1. The within appeals are allowed.

2. The case is to be returned to a justice of the Commercial Practice Group of the Court of Queen's Bench for a new hearing to address the issues, including:

    a. The interpretation of Merchant Agreement 1;

    b. Whether a term must be implied into Merchant Agreement 1 and any implications that result;

    c. Whether the *Personal Property Security Act*, RSA 2000, c P-7 applies to Merchant Agreement 1; and

    d. If necessary, whether equitable principles apply.

_____
Registrar, Court of Appeal

[CONTINUED ON FOLLOWING PAGE]

APPROVED AS BEING THE ORDER GRANTED:

PARLEE MCLAWS LLP

Jeremy H. Hockin, Q.C
Counsel for Alvarez & Marsal Canada Inc. in its capacity as Receiver and Manager of Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp. and Crelogix Credit Group Inc.

MILLER THOMSON LLP

Stephanie Wanke, as agent for Rick T.G. Reeson, Q.C.
Counsel for Servus Credit Union Ltd.

WITTEN LLP

Coralie J. Mohr, *Counsel for the Respondents: 1537891 Ontario Inc. carrying on business as Positive Promotions, Blackfoot Motorcycle Ltd., Airdrie Trailer Sales Ltd., Badiuk Equipment Ltd., Broadview Power Sports Ltd., Broker's Marine & Sport Ltd., Elk Island Sales Inc., Fraser Pacific Equipment Corp., GRM Sales Ltd. carrying on business as Bar T5 Trailers Sask, Happy Camper R/V Alberta Ltd., Jake's Speed Shop Inc., carrying on business as J&J Sports, Northstar Recreation Ltd., carrying on business as Ken's Marine, 1784302 Alberta Ltd., carrying on business as M&P Trailer Sales, Mountain Toys Polaris Ltd., Proline Motorsports & Marine Ltd., 1455300 Alberta Ltd., carrying on business as Raven Truck Accessories, Recreational Power Sports Inc., Red Line Power Craft Ltd., Rick's Marine (1999) Ltd., 1431209 Alberta Inc., carrying on business as Riderz, Traction Motorcycles Ltd., carrying on business as Daytona Motorsports, Trailer Country Ltd., Whitecap Recreation, a partnership between Northshore Automotive Ltd. and Southshore Automotive Ltd., Dynasty Spas Inc., carrying on business as World of Spas Calgary, 1781457 Alberta Ltd., carrying on business as World of Spas Edmonton, Holland Contracting Limited, Adventure Power Products Ltd., and Breathe E-Z Homes Ltd.*

APPROVED AS BEING THE ORDER GRANTED:

PARLEE MCLAWS LLP

Jeremy H. Hockin, Q.C
Counsel for Alvarez & Marsal Canada Inc. in its capacity as Receiver and Manager of Crelogix Acceptance Corporation, Crelogix Portfolio Services Corp. and Crelogix Credit Group Inc.

MILLER THOMSON LLP

Stephanie Wanke
Counsel for Servus Credit Union Ltd.

WITTEN LLP

Coralie J. Mohr, *Counsel for the Respondents: 1537891 Ontario Inc. carrying on business as Positive Promotions, Blackfoot Motorcycle Ltd., Airdrie Trailer Sales Ltd., Badiuk Equipment Ltd., Broadview Power Sports Ltd., Broker's Marine & Sport Ltd., Elk Island Sales Inc., Fraser Pacific Equipment Corp., GRM Sales Ltd. carrying on business as Bar T5 Trailers Sask, Happy Camper R/V Alberta Ltd., Jake's Speed Shop Inc., carrying on business as J&J Sports, Northstar Recreation Ltd., carrying on business as Ken's Marine, 1784302 Alberta Ltd., carrying on business as M&P Trailer Sales, Mountain Toys Polaris Ltd., Proline Motorsports & Marine Ltd., 1455300 Alberta Ltd., carrying on business as Raven Truck Accessories, Recreational Power Sports Inc., Red Line Power Craft Ltd., Rick's Marine (1999) Ltd., 1431209 Alberta Inc., carrying on business as Riderz, Traction Motorcycles Ltd., carrying on business as Daytona Motorsports, Trailer Country Ltd., Whitecap Recreation, a partnership between Northshore Automotive Ltd. and Southshore Automotive Ltd., Dynasty Spas Inc., carrying on business as World of Spas Calgary, 1781457 Alberta Ltd., carrying on business as World of Spas Edmonton, Holland Contracting Limited, Adventure Power Products Ltd., and Breathe E-Z Homes Ltd.*

TAB 3

I hereby certify this to be a true copy of the original.

for Clerk of the Court

Clerk's stamp: JUL 06 2017

COURT FILE NUMBER: 1703 12765

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF EDMONTON

APPLICANT: SERVUS CREDIT UNION LTD.

RESPONDENT(S): CRELOGIX ACCEPTANCE CORPORATION, CRELOGIX CREDIT GROUP INC., CRELOGIX PORTFOLIO SERVICES CORPORATION, KARL SIGERIST, NICHOLAS CARTER, MIKE MCKAY AND MICHAEL MILLS

DOCUMENT: CONSENT RECEIVERSHIP ORDER

MILLER THOMSON LLP
2700 Commerce Place
10155 – 102 Street
Solicitor: Rick T.G. Reeson, Q.C.
Telephone: 780.429.9767
Facsimile: 780.424.5866
Email: rreeson@millerthomson.com
File Number: 138667.138

DATE ON WHICH ORDER WAS PRONOUNCED: July 6, 2017

NAME OF JUDGE WHO MADE THIS ORDER: K.G. Nielsen

LOCATION OF HEARING: EDMONTON, ALBERTA

UPON the without notice application of SERVUS CREDIT UNION LTD. ("Servus") in respect of CRELOGIX ACCEPTANCE CORPORATION, CRELOGIX CREDIT GROUP INC. and CRELOGIX PORTFOLIO SERVICES CORPORATION (collectively "the "Debtor"); AND UPON having read the Affidavit of Darcy Peelar, filed; AND UPON reading the consent of Alvarez & Marsal Canada Inc. to act as Receiver of the Debtor (the "Receiver"), filed; AND UPON hearing counsel for Servus; AND UPON noting the consent of the Defendants; IT IS HEREBY ORDERED AND DECLARED THAT

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and service thereof is deemed good and sufficient.

APPOINTMENT

2 Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), and sections 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, and 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c.P-7 Alvarez & Marsal Canada Inc. is hereby appointed Receiver, without security, of the Debtor and all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court.

(k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000.00 provided that the aggregate consideration for all such transactions does not exceed $1,000,000.00; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 shall not be required.

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(s) assign the Debtor into bankruptcy; and

(t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECIEVER

4. (i) The Debtor, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental

bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependant on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST RECEIVER

7. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8; and (ii) affect a Regulatory Body's investigation in respect of the Debtor or an action, suit or proceeding that is taken in respect of the Debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "Regulatory Body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

9. All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" (as defined in the BIA), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Debtor, without written consent of the Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an eligible financial contract from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

11. All Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued use of the Debtor' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

13. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("WEPPA").

14. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION OF ENVIRONMENTAL LIABILITIES

15. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

16. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

17. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and 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 section 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

18. The Receivor and its legal counsel shall pass their accounts from time to time.

19. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receivor or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court

FUNDING OF THE RECEIVERSHIP

20. 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 $2,000,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures.

The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's 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 set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

21. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

23. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

ALLOCATION

24. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

25. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

26. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

27. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

28. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

29. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

30. The Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor' estate with such priority and at such time as this Court may determine.

31. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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32. The Receiver shall establish and maintain a website in respect of these proceedings at www.alvarezandmarsal.com/crelogix and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

"K. G. Nielsen"
Justice of the Court of Queen's Bench of Alberta

CONSENTED TO BY:

CRELOGIX ACCEPTANCE CORPORATION

Per: _____
Name: Karl Sigerist
Title: Director

CRELOGIX CREDIT GROUP INC.

Per: _____
Name: Karl Sigerist
Title: Director

CRELOGIX PORTFOLIO SERVICES CORPORATION

Per: _____
Name: Karl Sigerist
Title: Director

_____
WITNESS

_____
KARL SIGERIST

TAB 4

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 194/2020

VOLUME ONE

Published November, 2020

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 *[Purpose and intention of these rules]* the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with any procedural requirement, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

(a) to cure the contravention, non-compliance or irregularity, or

(b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.

(2) An application under this rule must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity.

(3) An application under this rule may not be filed by a party who alleges prejudice as a result of the contravention, non-compliance or irregularity if that party has taken a further step in the action knowing of the prejudice.

(4) The Court must not cure any contravention, non-compliance or irregularity unless

(a) to do so will cause no irreparable harm to any party,

(b) in doing so the Court imposes terms or conditions that will

(i) eliminate or ameliorate any reparable harm, or

(ii) prevent the recurrence of the contravention, non-compliance or irregularity,

(c) in doing so the Court imposes a suitable sanction, if any, for the contravention, non-compliance or irregularity, and

(d) it is in the overall interests of justice to cure the contravention, non-compliance or irregularity.

Part 6:
Resolving Issues and Preserving Rights

Division 1
Applications to the Court

What this Division applies to

6.1 This Division

(a) applies to every application filed in the Court unless a rule or an enactment otherwise provides or the Court otherwise orders or permits;

(b) does not apply to originating applications unless the parties otherwise agree or the Court otherwise orders.

Application to the Court to exercise its authority

6.2 When the Court has authority under these rules, a person may make an application to the Court that the Court exercise its authority.

Subdivision 1
Application Process Generally

Applications generally

6.3(1) Unless these rules or an enactment otherwise provides or the Court otherwise permits, an application may only be filed during an action or after judgment is entered.

(2) Unless the Court otherwise permits, an application to the Court must

(a) be in the appropriate form set out in Schedule A, Division 1 to these rules,

(b) state briefly the grounds for filing the application,

(c) identify the material or evidence intended to be relied on,

(d) refer to any provision of an enactment or rule relied on,

(e) specify any irregularity complained of or objection relied on,

(f) state the remedy claimed or sought, and

(g) state how the application is proposed to be heard or considered under these rules.

(3) Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application, 5 days or more before the application is scheduled to be heard or considered,

(a) notice of the application, and

(b) any affidavit or other evidence in support of the application.

TAB 5

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Functions of receiver-manager

94 A receiver of a corporation may, if the receiver is also appointed receiver-manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom the receiver is appointed.

1981 cB-15 s90

Directors' powers during receivership

95 If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

1981 cB-15 s91

Court-appointed receiver or receiver-manager

96 A receiver or receiver-manager appointed by the Court shall act in accordance with the directions of the Court.

1981 cB-15 s92

Duty under debt obligation

97 A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of the Court made under section 99.

1981 cB-15 s93

Duty of care

98 A receiver or receiver-manager of a corporation appointed under an instrument shall

(a) act honestly and in good faith, and

(b) deal with any property of the corporation in the receiver's or receiver-manager's possession or control in a commercially reasonable manner.

1981 cB-15 s94

Powers of the Court

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;

(f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95;1987 c15 s9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

(a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

(b) take into the receiver's or receiver-manager's custody and control the property of the corporation in accordance with the Court order or instrument under which the receiver or receiver-manager is appointed,

(c) open and maintain a bank account in the receiver's or receiver-manager's name as receiver or receiver-manager of the corporation for the money of the corporation coming under the receiver's or receiver-manager's control,

(d) keep detailed accounts of all transactions carried out by the receiver or receiver-manager as receiver or receiver-manager,

(e) keep accounts of the receiver's or receiver-manager's administration that must be available during usual business hours for inspection by the directors of the corporation,

TAB 6

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to November 2, 2020

Last amended on November 1, 2019

À jour au 2 novembre 2020

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Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

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

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

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

1992, c. 27, s. 89.

Receiver may apply to court for directions

249 A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

1992, c. 27, s. 89.

Right to apply to court

250 (1) An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

Idem

(2) Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de l'état de comptes visé au paragraphe 246(3), le tribunal peut ordonner au séquestre de lui soumettre cet état de comptes pour examen; le tribunal peut, de la manière et dans la mesure qu'il estime indiquées, ajuster les honoraires et dépenses du séquestre qui y sont consignés.

1992, ch. 27, art. 89.

Instructions du tribunal

249 Le tribunal donne au séquestre qui lui en fait la demande les instructions écrites qu'il estime indiquées sur toute disposition de la présente partie.

1992, ch. 27, art. 89.

Ordonnance d'un autre tribunal

250 (1) Une demande peut être présentée aux termes des articles 248 ou 249 indépendamment de toute ordonnance qu'aurait pu rendre un tribunal au sens du paragraphe 243(1).

TAB 7

Court of Queen's Bench of Alberta

Citation: Servus Credit Union Ltd v Trimove Inc, 2015 ABQB 745

Date: 20151125
Docket: 1503 06388
Registry: Edmonton

Between:

Servus Credit Union Ltd

Applicant

- and -

Trimove Inc. and Geeta Luthra

Respondents

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] The court-appointed receiver asks for approval of its, and its lawyer's, fees.

[2] The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.

[3] The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately $1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The

receiver recovered a total of approximately $1.1 million, of which approximately $863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately $298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately $82,000.00.

[4] The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be $3,000.00.

[5] The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

[6] Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in ***Belyea***, ***Bakemates*** and ***Diemer***.

[7] Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, 'We'll make sure you get nothing", the nature of the assets – rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

[8] While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in ***Bakemates***, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive.":***BT-PR Realty Holdings***. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

[9] If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in ***Bakemates***.

Cases and authority cited:

[10] **By the debtors**: ***Federal Business Development Bank v Belyea*** [1983] N.B.J. No. 41; ***Bank of Nova Scotia v Diemer (c.o.b. Cornacre Cattle Co.)*** 2014 ONCA 851.

[11] **By the court**: ***Bakemates International Inc. (Re)*** [2002] O.J. No. 3569***; BT-PR Realty Holdings Inc. v Coopers & Lybrand*** [1997] O.J. No. 1097***; 911502 Alberta Ltd. v. Elephant Enterprises Inc.***2014 ABCA 437; ***Sidorsky v CFCN Communications Ltd.*** [1995] A.J. No. 174 (Q.B.); ***Trinier v Shurnaik*** 2011 ABCA 314.

1. Background

[12] Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

[13] Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately $1.1 million. As a representative example,

in the $700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

> 1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

[14] Geeta Luthra guaranteed the repayment of those facilities.

[15] Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

> On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed . . . . In response to this statement Karan stated that "We'll make sure you get nothing".

[16] When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

[17] On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had $146,480.00 in outstanding accounts payable and no funds to pay them.

[18] On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

[19] On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

> [the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security. . . .

> Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands. . . . I provided him the following items . . . list of equipment, I recalled from my memory and locations . . .

[20] Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

[21] Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

[22] Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

[23] Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

[24] In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

[25] The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

2. Testing receivers' and lawyers' fees

[26] I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in ***Belyea*** and ***Diemer***.

[27] In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is ***Bakemates***, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

[28] The other case to which I must refer is ***BT-PR Realty Holdings.*** That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as ***Diemer***, but also any contract in relation to legal fees. As Farley J. said:

> I do not particularly quarrel with the list of factors set out in the Bank of Montreal v. Nicar Trading Co. (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):

(a) the nature extent and value of the cases;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the parties;

(d) time spent by the receiver;

(e) the receiver's knowledge, experience and skill;

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and,

(i) the cost of comparable services.

However I would add

(j) other material considerations –

for example in this case:

(i) the April 12 agreement to the fees;

(ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).

I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

In other words, in ***BT-PR Realty Holdings***, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

3. Applying the principles in this case

a) Receiver's fees

[29] Information about the receiver's fees is attached to an affidavit in the manner recommended by ***Bakemates.*** The debtors do not provide any evidence on the issue of fees.

[30] It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed

some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

[31] More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

[32] In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

[33] The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

[34] Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

[35] Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

[36] It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

[37] Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for $3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

[38] In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.

b) Lawyer's fees

[39] The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in ***Bakemates***: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

[40] However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

[41] More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in ***Elephant Enterprises.***

[42] As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in ***Sidorsky***, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

> 5 There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
>
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
>
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

[43] As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in ***Trinier***:

> G. Any Discretion?
>
> 39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.
>
> 40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.
>
> 41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.
>
> 42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: ***BT-Pr Realty Holdings Inc.***

[44] In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

[45] However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

4. Proposal to hire an expert to review the receiver's fees

[46] If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in ***Bakemates*** rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the ***Bakemates*** procedure does not arise.

5. Costs

[47] The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Heard on the 18th day of November, 2015.
Dated at the City of Edmonton, Alberta this 24th day of November, 2015.

J.B. Veit
J.C.Q.B.A.

Appearances:

Kentigern A. Rowan, QC, Ogilive LLP
for the Receiver MNP Ltd.

Thomas Gusa, Miller Thompson LLP
for the Applicant, Servus Credit Union Ltd.

Darren R. Bieganek, QC, Duncan Craig LLP
for AFSC (Agricultural Financial Service Corporation)

Vishal Luthra and Geeta Luthra
own their own behalfs

TAB 8

Court of Queen's Bench of Alberta

Citation: Winalta Inc. (Re), 2011 ABQB 399

Date: 20110624
Docket: 1003 06865
Registry: Edmonton

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.
>
> (Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

[1] Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor

companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

[2] The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

[3] The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

[4] Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

[5] The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

[6] Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

[7] A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

[8] The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

[9] In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

[10] The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

[11] Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

[12] On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

[13] HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

[14] The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs

associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

[15] There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

[16] The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

[17] In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

[18] There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

[19] In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

[20] At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

(i) approval of Canadian and American counsel fees in a cross-border insolvency (***Re Muscletech Research & Development Inc.*** (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.)); or

(ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (***Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.*** (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

[21] In ***Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce,*** 2005 SKQB 24 at para. 10, 8 C.B.R. (5th) 34, Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

[22] On a different application in the same proceeding (2005 SKQB 252), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

[23] In ***Re Triton Tubular Components Corp.*** (2006), 20 C.B.R. (5th) 278 at para. 83 (Ont. S.C.J.), additional reasons at 2006 CarswellOnt 1029 (S.C.J.), Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

[24] Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

[25] One of the cases most often cited is ***Federal Business Development Bank v. Belyea*** (1983), 46 C.B.R. (N.S.) 244 at paras. 3 and 9, 44 N.B.R. (2d) 248 (C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...

> . . .The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

[26] In ***Re Agristar Inc.***, 2005 ABQB 431, 12 C.B.R. (5th) 1, Hart J. applied the factors articulated in ***Belyea*** in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

[27] Referee Funduk in ***Northland Bank v. G.I.C. Industries Ltd.*** (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing ***Prairie Palace Motel Ltd. v. Carlson*** (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and ***Peat, Marwick Ltd. v. Farmstart*** (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

[28] In ***Re Hess*** (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

(a) allowing the trustee a fair compensation for his services;

(b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and

(c) encouraging efficient, conscientious administration of the estate.

[29] Similar to the caution given in ***Northland Bank***, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

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

[31] The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

[32] I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

[33] The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

[34] The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) *Clerical, administrative, and IT staff*

[35] In ***Peat, Marwick Ltd.*** at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

[36] Referee Funduk in ***Northland Bank*** refused to follow that aspect of the ***Peat, Marwick Ltd.*** decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

[37] The Alberta Court of Appeal weighed in on the topic in ***Columbia Trust Company v. Coopers & Lybrand Ltd.*** (1986), 76 A.R. 303, Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should

> be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

[38] In the result, the court in ***Columbia Trust Company*** elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

[39] In ***Bank of Montreal v. Nican Trading Co.***, (1990), 78 C.B.R. (N.S.) 85 at 93, 43 B.C.L.R. (2d) 315, the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that ***Columbia Trust*** qualified but did not overrule ***Northland Bank*** as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

[40] The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the ***Columbia Trust*** requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in ***Northland Bank*** that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

[41] In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

[42] Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

[43] The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

[44] The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) *Professional staff (non-partner)*

[45] The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

[46] Like Hall J. in ***Re Hickman Equipment (1985) Ltd.*** (2002), 34 C.B.R. (4th) 203 at para. 20, 214 Nfld. & P.E.I.R. 126, I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

[47] Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

[48] Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (***Re Hickman Equipment (1985) Ltd.*** at para. 26).

[49] Consideration of the factors articulated in ***Belyea*** supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

[50] There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

[51] I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

[52] The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

[53] HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

[54] It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

[55] Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

[56] The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

[57] The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

[58] The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

[59] The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the

Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

[60] Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

[61] A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

[62] The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

[63] The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

[64] The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

[65] The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

[66] At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

[67] A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

[68] Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236 :

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[69] The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

[70] The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

(1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

[71] Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

[72] The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

[73] Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

   (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

   (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: **Reviewing the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation**

(a) ***The monitor's fiduciary and ethical duties***

[74] Section 25 of the *CCAA* provides that:

> 25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

[75] Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the

> opinion of an informed person to impair, their professional judgment (Rule 44).

[76] In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

[77] A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see ***Siscoe & Savoie v. Royal Bank of Canada*** (1994), 29 C.B.R. (3d) 1 at 8 (N.B.C.A.); ***Re Laidlaw Inc.*** (2002), 34 C.B.R. (4th) 72 at para. 2 (Ont. S.C.J.); ***Re United Used Auto & Truck Parts Ltd.*** (1999), 12 C.B.R. (4th) 144 at para. 20 (B.C.S.C.); and ***Re 843504 Alberta Ltd.***, 2003 ABQB 1015 at para. 19, 351 A.R. 223). The following observations made by Farley J. in ***Re Confederation Treasury Services Ltd.***, (1995), 37 C.B.R. (3d) 237 at 247 (Ont. Ct. (Gen. Div.)) about a bankruptcy trustee's duty of impartiality resonate:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

[78] In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996), 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

> ... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

[79] Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

[80] Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

[81] Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

[82] Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) *The Monitor's legislated and court ordered duties*

[83] One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

[84] Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

[85] The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

[86] HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

[87] Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender. [Emphasis added.]

[88] Clause 30 of the Initial Order states:

> The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

[89] The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) *Principles of interpretation*

[90] The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

[91] In ***Smoky River Coal Ltd.***, 2001 ABCA 209, 299 A.R. 125, the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

[92] The issue in ***Smoky River Coal Ltd.*** was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

[93] The provision at issue in ***Re Afton Food Group Ltd.*** (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the ***Smoky River Coal Ltd.*** considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

(i) assume that the parties carefully drafted the terms of the order;

(ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and

(iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

[94] The different approaches employed by the courts in ***Smoky River Coal Ltd.*** and ***Afton Food Group Ltd.*** are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

[95] In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

[96] I adopt the reasoning in ***Afton Food Group Ltd.*** that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

[97] The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including ***Bell ExpressVu Limited Partnership v. Rex,*** 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) *Interpreting the relevant provisions of the Initial Order and the CCAA*

[98] The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

[99] Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis

contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

[100] Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

[101] If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

[102] I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

[103] This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

[104] Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

[105] Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

[106] The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

[107] Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

[108] However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

[109] The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

[110] The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

[111] Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

[112] The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

[113] Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

[114] In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it

to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

[115] HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

[116] No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, ***Murphy v. Sally Creek Environs Corp. (Trustee of)***, 2010 ONCA 312, 67 C.B.R. (5th) 161 is informative, although distinguishable on its facts.

[117] ***Murphy*** concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

[118] On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

[119] These directives apply equally to a court-appointed *CCAA* monitor.

[120] In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

[121] There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (***Re Nelson*** (2006), 24 C.B.R. (5th) 40 at para. 31 (Ont. S.C.J.)).

[122] Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (***Murphy*** at para. 112; ***Re Nelson*** at para. 31).

[123] Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

[124] Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

[125] The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

[126] The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

[127] In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Heard on the 21st day of March, 2011
Dated at the City of Edmonton, Alberta this 24th day of June, 2011.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Kentigern Rowan
For Deloitte & Touche Inc.

Darren Bieganek
For the Winalta Group

TAB 9

CITATION: Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 1531
COURT FILE NO.: CV-13-10201-00CL
DATE: 20140310

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Royal Bank of Canada, Applicant

AND:

Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

BEFORE: D. M. Brown J.

COUNSEL: S. Babe, for the Applicant, Royal Bank of Canada

R. Fisher, for the Business Development Bank of Canada

S. Friedman, for the Receiver, KPMG Inc.

HEARD: February 13, 2014

REASONS FOR DECISION

I. Receiver's motion to allocate sales proceeds and its costs between two secured creditors

[1] By order made October 4, 2013, KPMG Inc. was appointed receiver of all of the assets and undertakings of Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario Inc. o/a Atlas Block Trucking (the "Debtors"). Pursuant to orders of this Court the Receiver has sold most of the Debtors' assets. The Receiver moved for the approval of the distribution of the net sales proceeds from certain of the Debtors' assets between the two main secured creditors, the Royal Bank of Canada and the Business Development Bank of Canada, as well as the approval of its allocation of fees and costs as between RBC and BDC.

II. Background

[2] The Debtors manufactured a range of brick and concrete building and landscaping products for sale to industrial and commercial construction contractors. The head office of Atlas Block was located in Midland, Ontario, at what was called the Victoria Harbour Plant. Atlas operated manufacturing facilities at (i) the Victoria Harbour Plant, (ii) the Hillsdale Plant, and (iii) the Brockville Plant.

[3] The Hillsdale Plant was the major asset of Atlas Block. Its construction and equipping was financed with $17.5 million in loans from BDC, $4.8 million from the Ontario government, and $2.2 million in equipment financing from RBC.

[4] RBC and BDC provided other financing to Atlas Block.

[5] Production at the Brockville Plant ceased about two weeks prior to the appointment of the Receiver. The Receiver continued production at the Hillsdale and Victoria Habour Plants for a short period of time until the end of November, 2013.

[6] As a result of a sales and marketing process, the Receiver entered into two asset purchase agreements to sell the equipment, inventory and real estate of Atlas Block to Brampton Brick Limited ("BBL"). Those agreements received court approval on December 20, 2013. In my endorsement approving the BBL sale I wrote, in part:

> This motion is not opposed, however BDC reserves its rights with respect to distribution and my order is made subject to that reservation...

[7] The sales to BBL were completed on January 6, 2014, however they did not include the sale of the real property at the Victoria Harbour Plant. On January 14, 2014, BBL informed the Receiver it that it would not be acquiring the real property at Victoria Harbour.

III. The BBL Asset Purchase Agreement

[8] Under the November 29, 2013 Asset Purchase Agreement (the "Atlas Block APA") BBL purchased the following land and equipment:

(i) Hillsdale: (a) the Hillsdale Real Property, (b) certain molds and forklift equipment; (c) manufacturing equipment; and (d) inventory;

(ii) Victoria Harbour: (a) office furniture and equipment; (b) certain manufacturing equipment; and, (c) inventory; and,

(iii) The interest of Atlas Block in RBC Equipment Leases, which included some leased equipment at the Hillsdale Plant, as well as at the Brockville Plant.

[9] Section 2.7 of the Atlas Block stated that the purchase price would be allocated amongst the purchased assets as set forth on Schedule "K" to the APA, in part, as follows:

Asset	Allocated Amount
Hillsdale Real Property	$1,000,000
RBC Equipment Leases	$2,611,539

Hillsdale and Victoria Harbour Equipment	$7,638,458

[10] In the Atlas APA BBL agreed to assume the obligations under the RBC Equipment Leases and the allocated $2.61 million represented the remaining obligations due under those leases.

[11] Under the December 12, 2013 Asset Purchase Agreement (the "Brockville APA"), BBL agreed to purchase from the Receiver (i) the Brockville Real Property, (ii) the Brockville Equipment, (iii) the Brockville office furniture and equipment, and (iv) the Brockville Inventory. The purchase price of $600,000 was allocated pursuant to section 2.6 of the Brockville APA amongst the purchased assets, in part, as follows:

Asset	Allocated Amount
Brockville Real Property	$100,000
Brockville Equipment and office equipment	$100,000
Brockville Inventory	$400,00

IV. The Receiver's proposed distribution of the sales proceeds

A. The Receiver's proposal

[12] In its Third Report dated January 31, 2014 the Receiver stated that under the two APAs BBL had allocated about $8.2 million of the purchase price to assets subject to the security held by BDC. It continued:

> The Receiver has no basis on which to consider the allocation by BBL to be unreasonable and therefore has used the BBL allocation set out in the Purchase and Sale Agreements as the basis for determining the proceeds to be paid to BDC and RBC.

Observing that it had incurred certain costs and fees on behalf of BDC during the Receivership, the Receiver proposed to deduct those costs from the Gross BDC Proceeds to arrive at a net figure payable to BDC. Appendix "O" to the Third Report set out the Receiver's calculations. Based on those calculations, the Receiver proposed to distribute to BDC proceeds of $7.7 million.

[13] The Receiver reported that the majority of the remaining funds in its receivership accounts related to proceeds from RBC's security. The Receiver proposed to make a distribution to RBC of $3.46 million.

[14] RBC supported the distribution proposed by the Receiver.

B. BDC's position

[15] BDC objected to the Receiver's proposed distribution on the grounds set out in the February 5, 2014 affidavit of Lori Matson, Director, BDC Business Restructuring Unit. As of October, 2013, the Debtors owed BDC approximately $17.39 million.

[16] Matson confirmed that BDC had received from the Receiver a draft of the Atlas APA as early as November 7, 2013, some three weeks prior to its execution, and BDC had understood at that time that part of the purchase price involved BBL assuming about $2.6 million in RBC Equipment Leases. According to Matson, BDC did not take issue with the BBL purchase price, but did have concerns about the allocation of the purchase price:

(i) Matson alleged that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price;

(ii) BDC contended that by assuming the remaining obligations under the RBC Equipment Leases, BBL was "factoring in the transaction structure (i.e.: assumption of capital leases), into its allocation rather than the value of the assets being obtained thereunder. The result is a purchase price allocation that is not reflective of the value of the various assets being acquired based upon appraisals...the allocation becomes arbitrary as it does not distinguish the financing aspect from the underlying value of the assets being acquired". BBL allocated the purchase price based on the amount of the debt being assumed which bore no relationship to the value of the underlying assets. Matson described the situation as an "over-allocation relative to the capital leased assets"; and,

(iii) BBL's allocation of the purchase price did not reflect historic appraised values of the purchased assets.

It was Matson's evidence that the Receiver should distribute $10,644,360 to BDC based upon appraised values, not the $7.7 million it proposed based on the purchase price allocation in the APAs.

[17] At my request, the Receiver filed a supplementary document which compared the calculation of its proposed distributions to the distributions proposed by BDC.

V. Analysis: Allocation of sales proceeds

A. Allegation of pre-execution discussions between BBL and RBC

[18] Matson alleged that "negotiations took place between the Purchaser and RBC as part of the Purchaser's due diligence process in advance of the bidding that had the effect of creating an opportunity for the Purchaser to finance part of this purchase and as well creating expectations relative to the allocation of the sale proceeds on the part of RBC".

[19] Matson did not disclose in her affidavit any source or basis for her allegation.

[20] Mark Swanson, a Manager in RBC's Special Loans and Advisory Services Department, deposed, in his February 6, 2014 affidavit, that RBC had no communication with BBL prior to being told by the Receiver that BBL's offer included, amongst its terms, the assumption of the RBC Equipment Leases on an undiscounted basis. Swanson stated that the Receiver had asked RBC whether it would support a motion to approve a transaction under which BBL assumed the leases, rather than paying cash for them, but Swanson deposed that there had been no discussion between RBC and the Receiver of a discount or reduction of payments under the leases.

[21] In the Second Supplement to its Third Report the Receiver responded to Matson's allegations:

> ...BDC suggests that negotiations took place between BBL and RBC prior to the submission of BBL's offer. The Receiver provided all potential purchasers who signed the Receiver's confidentiality agreement with information on Atlas' various leases and fixed assets through the Receiver's online data room so that they could perform their due diligence. BDC was also provided access to the Receiver's data room and was therefore aware of the information available to all purchasers. The Receiver is not aware of any other information supplied to BBL nor any negotiations between RBC and BBL prior to the submission of BBL's offer. The Receiver notes that BDC has not provided any evidence to support their allegations.

[22] Given the failure of BDC to disclose the evidence upon which it based its allegation of the pre-execution negotiations between BBL and RBC and in light of the strong direct evidence to the contrary from the Receiver and RBC, I give no effect whatsoever to BDC's allegation that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price. BDC's allegation was without any evidentiary foundation foundation.

B. The RBC Equipment Leases

[23] There was no dispute that part of the consideration offered by BBL under the Atlas APA was its agreement to assume the obligations of Atlas Block under the RBC Equipment Leases. The amount allocated for that consideration under the Atlas APA was the amount of the remaining obligations under those leases.

[24] I do not accept BDC's submission that such an allocation of consideration was somehow arbitrary or unfair. To the contrary, the consideration allocated for BBL's assumption of that liability corresponded exactly to the monetary amount of the remaining obligations under those leases. There was nothing arbitrary about such an allocation. The crux of BDC's complaint really related to the amount of the purchase price allocated to other assets, in particular the Hillsdale Real Property, so I turn now to that issue.

C. The relationship between allocations of the purchase price to the Hillsdale Real Property and the appraised values of that asset

C.1 The positions of the parties

[25] The crux of BDC's complaint about the proposed distribution of sales proceeds was that in the APAs BBL's allocation of the purchase price did not reflect historic appraised values of some of the purchased assets, in particular the Hillsdale Real Property.

[26] In section 1.1.7 of its Second Report dated December 12, 2013, the Receiver observed that "the construction of the Hillsdale Plant unfortunately coincided with the start of the 2008/2009 economic downturn..." Schedule "K" to the Atlas APA allocated $1 million of the purchase price to the Hillsdale Real Property. BDC submitted that $3 million should have been allocated to that property.

[27] Matson attached to her affidavit extracts from two appraisals of the Hillsdale Real Property performed in 2008 and 2011. The first extracts were from a June, 2008 appraisal that had been prepared by Katchen Appraisals Inc. for BDC. By its terms the Katchen Appraisal was intended to assist for financing purposes only and was "to serve as a benchmark for establishing the projected value of the property *as improved with a completed concrete block manufacturing facility*, in fee simple, assuming a market exposure of twelve months prior to sale under forced sale conditions on June 17, 2008..." Katchen valued the property at $4.5 million.

[28] Matson also attached extracts from a second appraisal, one prepared by Appraisers Canada Inc. with an effective date of December, 2011. The appraisal stated that it was intended only "for an accounting function and for no other use" and that its purpose was "to estimate a current hypothetical market value of the subject property, as if unimproved, as at the effective date". Appraisers estimated that value as in a range between $2.162 to $2.883 million, with a "value tendency" of $2.5 million.

[29] Pointing to the extracts from both appraisals, Matson deposed that BBL's price allocation "seriously undervalues the land and building" and "allocating $1,000,000 to the real property is not reasonable".

[30] In its Second Supplement to the Third Report the Receiver noted that the appraisals relied upon by BDC were prepared at different dates and used different appraisal assumptions:

> The Receiver does not believe that this amalgamation of estimated values is a superior method of allocating the purchase price as compared to the allocation of a third party purchaser of assets.

The Receiver also observed that the Hillsdale Plant was a special purpose asset, remotely located, which was difficult and perhaps cost prohibitive to relocate.

[31] Although RBC did not comment directly on the valuations, Swanson did depose that back in August, 2013, just after RBC had commenced this application, it had been asked by the Debtors' financial advisor to adjourn the application to enable the Debtors to work out a refinancing with BDC. A signed memorandum of understanding between the Debtors and BDC provided to RBC disclosed that BDC's existing loan in excess of $17 million would be replaced by a $5 million loan to a Newco which would acquire the Debtors' assets and business. Newco would issue preferred shares to BDC. In the result, that transaction did not proceed and a receiver was appointed. Swanson deposed:

> The history of this matter therefore shows that the Receiver, who RBC drove to appoint, successfully increased BDC's anticipated recovery by over $3 million and reduced BDC's risk by even more. The Receiver has therefore significantly reduced the shortfall that BDC was otherwise willing to incur.

C.2 Analysis

[32] In *Bank of America Canada v. Willann Investments Ltd.*[1] Farley J. commented that when examining a receiver's proposed sale of assets in light of the principles set out in *Royal Bank of Canada v. Soundair*,[2] a court might well refrain from approving a sale that proposed an allocation of the purchase price which was significantly different from the latest valuation of the assets because such an allocation would not fairly consider the interests of all creditors.[3] From that it follows that the time for objecting to an allocation of the purchase price in a proposed sale is when the sale is brought before the Court for approval. If the Court agrees with the objection, it can decline to approve the sale, which may or may not result in further negotiations with the proposed purchaser, depending upon the significance to it of the purchase price allocation.

[33] Once a court approves a sale agreement, however, as occurred here, it becomes more difficult for a creditor to advance an objection about the fairness of the term of the sales agreement allocating the purchase price because such an objection, in essence, constitutes an objection to a material term of the now-approved sale agreement. Put another way, not having opposed the approval of a sales transaction, thereby securing the benefit of that sale of the

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[1] 1992 CarswellOnt 1743 (Gen. Div.)
[2] (1991), 4 O.R. (3d) 1 (C.A.)
[3] *Bank of America Canada, supra.*, para. 5.

debtor's assets, a creditor faces difficulty in objecting subsequently to a material term of the agreement which it did not oppose.

[34] In the present case BDC did not oppose the approval of the BBL APAs – no doubt because the BBL offers were far, far superior to any other offer obtained by the Receiver – but BDC did put a "reservation of rights" on the record, without filing evidence at the time about the nature of its objections. A receiver's distribution motion should not turn into a debate about the fairness of the term in the approved sale agreement which allocates the purchase price to particular assets. The proper time for such a debate is at the hearing of the approval motion. I will consider the objections made by BDC, but their timing weakens the weight to be given to them.

[35] Turning to the submission of BDC that the allocated purchase price for the Hillsdale Real Property was far below its appraised value, I have five comments. First, any appraisal must be read in its entirety to understand the methodology used and the assumptions employed. On this motion BDC only filed portions of the reports from which it was not possible to ascertain the methodologies and information used by the appraisers to arrive at their estimates. Failing to file the entire reports significantly undermined their evidentiary value. Second, the reports gave opinion values as of June, 2008 and December, 2011. The reports therefore were quite dated, the last expressing a value some two years prior to the appointment of the Receiver. Since the actions of the Receiver must be assessed at the time taken, stale valuation reports are of little assistance in ascertaining how the market perceived the value of the Hillsdale Real Property as of November, 2013, the date of the Atlas APA.

[36] Which leads me to my third point. In the December 12, 2013 Supplement to its Second Report the Receiver stated:

> BDC also has a mortgage on the real property at Hillsdale...Both the Receiver and BDC agreed that an appraisal of the Hillsdale Real Property would not be cost beneficial as the value of the Hillsdale Real Property is intrinsic to the manufacturing plant and could not be separately assessed. It was agreed that an appraisal of the market value of the Hillsdale Real Property on a standalone basis would be theoretical at best, and not provide useful information in assessing offers.

It is difficult to understand how BDC now relies on stale valuation reports to support its submissions on the allocation of net sale proceeds in light of that agreement.

[37] Fourth, the material deficiencies in the evidentiary utility of the two appraisal reports referred to by Matson brings one back, then, to the general principle that where a receiver markets a property, appraisals cease to have much significance in the valuation process[4] – a sale

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[4] *B & M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 56 C.B.R. (5th) 313 (Ont. S.C.J.), **para. 13**; *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Gen. Div.), para. 5.

is always a better indication of value of a particular property than a valuation. In the present case, the Receiver contacted 83 different interested parties, 36 of which signed confidentiality agreements, and 8 of which submitted offers. The BBL offer accepted by the Receiver was far, far superior to any other offer.

[38] Fifth, and finally, in the Second Supplement to its Third Report the Receiver provided the following evidence:

> [T]he Hillsdale building was a sole purpose building, built for the purpose of block production only. Accordingly, it is likely that the building would only have value in a going concern sale. If the assets were liquidated and removed, the building would at best have scrap value and may have been a liability for a purchaser of the real property as it would likely have to be demolished. Therefore, the allocation of the $1.0 million to the real property is likely superior to liquidation value.

I accept that evidence.

[39] Accordingly, I see no reason to interfere with the Receiver's recommendation to distribute the net sales proceeds using a methodology based on the allocation of the purchase price found in the approved Atlas APA and Brockville APA. I therefore grant the relief sought in paragraph (g) of the Receiver's February 3, 2014 notice of motion.

VI. Allocation of the Receiver's costs

[40] The Receiver sought approval of its fees and disbursements of $196,882.73 for the period December 1, 2013 to January 15, 2014, as well as for those of its counsel for the same period in the amount of $147,503.13. Recognizing the competing security interests in the receivership, the Receiver and its counsel had tracked their time and expenses in three separate categories: (i) those directly related to BDC asset realization activities; (ii) those directly related to RBC asset realization activities; and, (iii) those shared between BDC and RBC realization activities.

[41] BDC took no issue with the direct expenses attributed by the Receiver to BDC assets ($67,598). The Receiver tracked shared expenses totaling $510,782. It proposed allocating $357,159 of those expenses to BDC on the basis that BDC recovered 69.92% of the total sales proceeds. RBC supported the Receiver's proposed allocation. BDC objected to the amount of the fees and to their allocation, contending that only 50% of the shared costs should be allocated to it, or the sum of $255,391. BDC complained that "a significant portion of these costs were expended in the collection of accounts receivable and the production and sale of inventory which clearly solely benefitted RBC. In addition, there are significant Receiver and legal fees relative to the trust claims of Holcim and Tackaberry".

[42] This Court approved the Receiver's fees and legal fees for the period up to November 30, 2013 in its December 20, 2013 order. As to the fees incurred after that date, in paragraph 21 of her affidavit Matson "sought clarification" of certain work performed by the Receiver and its counsel. In section 3.1 of the Second Supplement to its Third Report the Receiver provided

detailed clarification. In light of that clarification, I conclude that the fees for which the Receiver sought approval were reasonable in the circumstances.

[43] As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:

(i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;

(ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

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

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

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

(vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.[5]

[44] The Receiver responded to BDC's complaint about the allocation of certain time by reporting that it had only charged time for accounts receivable collections and the Holcim/Tackaberry claims to RBC. That addressed that complaint.

[45] As to the allocation methodology for shared fees, the Receiver reported that as early as October 18, 2013, it had provided BDC with its allocation method for professional fees and expenses incurred in the estate. Its email to RBC of that date stated:

> The shared time will be allocated on realizations of the secured creditor assets so the exact breakdown of those fees will not be known until the assets are realized.

The Receiver provided BDC with requested weekly reports allocating those fees amongst the three time categories. The Receiver responded to periodic inquiries about the fees and their

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[5] See the cases cited by C. Campbell J. in *Re Hunjan International Inc.* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.) and Cameron J. in *JP Morgan Chase Bank N.A. v. UTCC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.).

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

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

[47] The Receiver also stated:

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

[48] The allocation methodology proposed by the Receiver for shared costs based *pro rata* on realizations was *prima facie* reasonable in the circumstances of this case. The Receiver disclosed that methodology to BDC at the start of its administration, and BDC did not object until the 11th hour. BDC has not demonstrated any unfairness in the methodology proposed by the Receiver.

[49] Consequently, I grant the orders sought by the Receiver in paragraphs (h) and (i) of its notice of motion dated February 3, 2014.

VII. Costs

[50] I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office written cost submissions, together with a Bill of Costs, by March 21, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by March 28, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D. M. Brown J.

Date: March 10, 2014

TAB 10

Ontario Superior Court of Justice
Hunjan International Inc. (Re)
Date: 2006-05-03

Docket: 05-CL-5886

Frederick Myers, L. Joseph Latham for KPMG Inc.

Ashley John Taylor, Diana Juricevic for GE Capital Canada Leasing Services Inc., GE Capital Equipment Financing C.P., GE Capital Canada Leasing Trust and GE Capital Leasing Services Company

Paul R. Basso for Canadian Imperical Bank of Commerce

S. Harvey Starkman, Q.C., Kevin W. Fisher for En-Plas Inc.

E. Peter Auvinen, Arthi Sambasivam for CIT Financial Ltd.

Edmond Lamek for Expost Development Canada

Kenneth Dekker for Hunjan Holdings

C. Campbell J.:

[1] The issue before the Court concerns the allocation and apportionment of the costs arising from failed *Companies Creditors' Arrangements Act* ("CCAA") proceedings, which evolved into a receivership sale by auction of assets of the Hunjan Group, held November 30 and December 7, 2005.

[2] At issue is the allocation of actual disbursements incurred to keep the debtor companies operating during the CCAA proceedings, plus the fees, disbursements and expenses incurred during the receivership proceedings to preserve, protect and realize on the debtors' assets.

[3] The recommended allocation of costs by the Receiver as contained in its Tenth Report is challenged by different first-ranking secured creditors on different issues (the "Opposing Creditors.")

[4] Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium*

Construction Inc. (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.

[5] Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that "any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical."

[6] The facts necessary for the determination of the issues that have arisen are largely not in dispute and are set out in the Tenth Report.

[7] Pursuant to the Order of this Honourable Court dated May 4, 2005 (the "Initial Order"), the Hunjan Group and Hunjan Holdings Ltd. (the "CCAA Applicants") obtained protection from their creditors under the CCAA. Under the Initial Order, Deloitte & Touche Inc. was appointed to act as Monitor.

[8] The Initial Order allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce ("CIBC") pursuant to a special loan facility known as "debtor-in-possession" or "DIP" financing. The Initial Order and the May 16 Order contain specific provisions that deal with certain aspects of the Court-approved DIP financing. In the Initial Order, the CCAA Applicants were limited in the amount that they could borrow by way of DIP financing to $1 million in the aggregate. This amount would allow the CCAA Applicants to continue operations for a period of ten days, during which time it was anticipated that they would attempt to secure the necessary financing and other arrangements with their customers to allow them to continue to operate while they attempted to restructure over a longer period of time.

[9] After the Initial Order was granted, the CCAA Applicants began negotiations with CIBC, the CCAA Applicants' principal first-ranking secured lender, and five of their largest customers (the "Participating Customers"). As a result of those negotiations, an accommodation agreement was entered into on or about dated May 13, 2005 (the "Accommodation Agreement.")

[10] The Accommodation Agreement provided, among other things:

(i) that the Participating Customers would continue to order product from the CCAA Applicants (sections 2-6);

(ii) the basis upon which CIBC would provide additional DIP financing to allow the CCAA Applicants to operate during the CCAA Proceedings (the "Amended DIP Facility"), which financing was anticipated to peak at approximately $8.8 million (paragraph 7);

(iii) that the Amended DIP Facility was to be secured by a first ranking charge (subject only to the Administrative Charge contained in the Initial Order) and that all "Post-Filing Receipts" (monies received from operations or production after the Filing Date) would be first used to repay the Amended DIP Facility. This preserved to CIBC's existing secured claims the proceeds of receipts that arose from the operations of the CCAA Applicants prior to May 3, 2005 (the "Pre-Filing Receipts") (section 7); and

(iv) that certain of the Participating Customers' rights of setoff as against pre-CCAA receivables were limited (paragraph 2).

[11] The Receiver understands that, when the Accommodation Agreement and DIP Term Sheet (as herein defined) were negotiated and the May 16 Order was issued, it was anticipated that there would be a shortfall of approximately $4.0 million between the DIP financing advances and the estimated Post-Filing Receipts to be generated by the CCAA Applicants to repay those advances. CIBC and the Participating Customers agreed, as set out in section 9 of the Accommodation Agreement, that the Participating Customers would be responsible for fifty percent (50%) of any Amended DIP Deficiency (the "Customer Contribution"), with such Customer Contribution not to exceed $2.0 million. To secure that obligation, the Participating Customers paid $2.0 million to CIBC to be held in trust pending the outcome of the CCAA proceedings and the quantification of the Amended DIP Deficiency.

[12] The Amended DIP Facility was set out in the Amended DIP Credit Agreement, dated May 13, 2005 (the "DIP Term Sheet")[which provided, among other things, that CIBC was entitled to recover as part of its DIP loan the full amount of the costs it incurred in respect of the Amended DIP Facility.]

[13] The May 16 Order approved the Accommodation Agreement and the DIP Term Sheet, and also ordered that the Amended DIP Facility would be secured by the DIP Charge (as defined in paragraph 32 of the Initial Order). There has been no amendment, variation, or appeal of the May 16 Order.

[14] Furthermore, paragraph 6 of the May 16 Order sets out the means by which the Amended DIP Facility and the Amended DIP Deficiency, if any, was to the repaid. Paragraph 6 of the May 16 Order provides that the Amended DIP Facility is to be repaid:

(i) first from Post-Filing Receipts; and

(ii) to the extent there is a shortfall (that is, if there is an Amended DIP Deficiency), from the proceeds of any unencumbered assets (of which there are none); and

(iii) "the remaining balance, if any, from the net realizations of the collateral which is the subject matter of the security created and issued by the Applicants or any of them to any of their secured lenders prior to the Filing Date and over which such lender or lenders hold a first ranking security interest, charge, mortgage or other encumbrances, pro rata in the proportions that the Applicants or any of them were indebted to each such secured lender as at the Filing Date."

[15] What is not at issue is the rationale for the DIP financing. It has become accepted in restructuring in the automotive manufacturing industry that to determine whether the company can succeed and even if it does not, there needs to be a collaborative effort between the debtor's major financiers and its principal customers.

[16] The reason for this need for co-operation is that those customers (being other automotive parts manufacturers or automotive assembly companies themselves) are part of a highly integrated "just-in-time" supply chain. A shut-down or failure of one manufacturer in the supply chain can cause a chain reaction shutting down the operations of manufacturers further up or down the supply chain. Such shut-downs affect thousands of jobs and cause millions of dollars in losses. Accordingly, customers have incentive to participate in facilitating a debtor's effort to obtain financing to prevent a sudden shut-down of the debtor.

[17] The incentive for the Participating Customers to agree to be responsible for a portion of any Amended DIP Deficiency arose from the fact that they, for a specified maximum cost, were able to secure the timely delivery of necessary inventory during the CCAA Proceedings, and were permitted to have excess inventory banks built to give them an assurance that they would have sufficient time to arrange for alternative suppliers and a smooth transition to such new suppliers if a restructuring failed.

[18] There is an incentive for both Participating Customers and major creditors to cooperate even in a very likely bankruptcy, again to maximize the value of the inventory and return from its sale in the ordinary course.

[19] During the CCAA proceedings, the CCAA Applicants, with the assistance of the Monitor, carried out a marketing and sales process. However, no restructuring or going-concern sale was achieved.

[20] As a result of the failure of the CCAA proceedings, on July 18, 2005, CIBC applied for, and was granted, an Order by the Honourable Justice Stinson terminating the CCAA proceedings and appointing KPMG as the interim receiver and receiver of the Hunjan Group pursuant to Section 47 of the *Bankruptcy and Insolvency Act* (Canada) and Section 101 of the *Courts of Justice Act* (Ontario) (the "Receivership Order.") Pursuant to the terms of paragraph 37 of the Receivership Order, the Amended DIP Facility was terminated going forward but remained available to fund the finalization of certain matters that arose during the CCAA proceedings.

[21] The Hunjan Group had ceased all operating activities before the Receivership Order was granted. As a result, there were no on-going revenues generated with which to fund either the Receiver's fees or the disbursements required to fund the costs to be incurred during the Receiver's mandate, such as rent, maintenance, insurance, utilities, and other costs incurred for the preservation, protection and administration of the assets of the estate.

[22] Furthermore, pursuant to paragraphs 22 to 30 of the Receivership Order, the terms of the May 16 Order regarding the repayment of the Amended DIP Facility (and any Amended DIP Deficiency) were preserved, such that all Post-Filing Receipts are to be first applied to the Amended DIP Deficiency, and not used to fund the receivership proceedings. Pre-Filing Receipts remain pledged to CIBC's pre-existing secured claims.

[23] However, paragraph 22 of the Receivership Order provides that any expenditure or liability that is made or incurred by the Receiver, including the fees and disbursements of its legal counsel, are protected by a court-ordered charge referred to as the "Receiver's Charge".

[24] Furthermore, paragraph 25 of the Receivership Order authorized the Receiver to borrow up to $2.0 million for the purpose of funding the exercise of its powers, which

borrowings were to be protected by a court-ordered charge referred to as the "Receiver's Borrowing Charge".

[25] Both the Receiver's Charge and the Receiver's Borrowing Charge are a charge on all of the assets of the Hunjan Group, except the Pre-Filing Receipts. Both the Receiver's Charge and the Receiver's Borrowing Charge enjoy first-ranking priority over the Amended DIP Deficiency, except in respect of Post-Filing Receipts which, as stated above, are to be applied first to the Amended DIP Facility.

[26] On October 7, 2005, with the permission of the Court, the Receiver assigned each member of the Hunjan Group into bankruptcy.

[27] On November 30, 2005 and December 7, 2005, the Remaining Assets of the Hunjan Group were auctioned by CIA CPCC Inc. pursuant to an auction services agreement approved by Justice Ground on November 7, 2005.

[28] As a result of negotiations on July 18, 2005, paragraph 3A of the Receivership Order granted GE the right to exclude assets over which it had a first-ranking security from the Receiver's auction process. However, over time, the Receiver extended this same option to each secured creditor whose security the Receiver acknowledged was first ranking or was confirmed as first ranking by court order. GE availed itself of this option, as did CIT to a lesser extent.

Allocation of the DIP Financing Costs

[29] As anticipated at the time it was put in place, there is a deficiency associated with the DIP financing estimated by the Receiver to be between $3.4 and $3.9 million, *after* applying a $2.0 million customer contribution described below.

[30] The Opposing Creditors (other than CIBC) take issue with the Receiver's calculation of the Amended DIP Deficiency and the basis of allocating the Receiver's Charge and the Receiver's Borrowing Charge among Opposing Creditors.

[31] The Order of Ground J. dated May 4, 2004 (the "Initial Order") allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce ("CIBC") The calculation of the Amended DIP Deficiency is a product of the Accommodation Agreement (defined herein), which was approved by the May 16 Order, and paragraph 6 of the May 16 Order, which sets out an incomplete waterfall for the repayment of the Amended DIP Deficiency.

[32] Paragraph 6 of the May 16 Order reads as follows:

> THIS COURT ORDERS AND DECLARES that the Amended DIP Facility shall be secured by the DIP Charge (as defined in paragraph 32 of the May 4, 2005 Order herein) and the DIP Charge shall have the relative priority set out in paragraph 65 of such Order, provided however and without in any way limiting the force and effect of the DIP Charge, the DIP Lender shall apply the Post-Filing Receipts first in payment of the Applicants' obligations pursuant to the Amended DIP Facility and in the event any balance remains outstanding thereon following such application (the "Amended DIP Deficiency"), the Amended DIP Deficiency shall be repaid to the DIP Lender, firstly, from any Property (as defined by paragraph 3(a) of the May 4, 2005 Order) which was not subject to any security created and issued by the Applicants on or prior to the Filing Date, and the remaining balance, if any from the net realizations of the collateral which is the subject matter of the security created and issued by the Applicants or any of them to any of their secured lenders prior to the Filing Date and over which such lender or lenders hold a first ranking security interest, charge, mortgage or other encumbrances, pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date.

[33] The Accommodation Agreement is a complicated agreement to which in addition to the Participating Customers, CIBC and Export Development Canada ("EDC") are both party. (For the purpose of this decision it is not necessary to distinguish between the different interests of CIBC and EDC. They will jointly be referred to as "CIBC")

[34] Paragraph 7 of the Accommodation Agreement, entitled Forbearance and Funding by Lenders, sets out in detail the basis on which CIBC was prepared to forbear from exercising its rights and remedies. At the time of execution of the Accommodation Agreement and the DIP Credit Facility, the cash needs of Hunjan were projected to be somewhat in excess of $3.5 million. In fact, they turned out to be the maximum provided for of $8,800,000.

[35] The Opposing Creditors who object to the proposed allocation of the Receiver with respect to the shortfall rely on the wording of Paragraph 9 (b) of the Accommodation Agreement:

> Each Participating Customer will fund its proportionate share of the lesser of (x) 50% of Hunjan's total net funding losses incurred over the period from May 4, 2005 to and including the Termination Date (taking into account any accrued liabilities as at the Termination Date that will be funded by CIBC under the CIBC DIP Credit Facilities), and (y) $2,000,000 (such share, the "Customer Loss Share.") Each Participating Customer's "proportionate share" of such losses shall be as set out on Schedule B. For certainty, the obligation of each Participating Customer under this Section 9 shall continue notwithstanding such Participating Customer may have re-sourced all of its parts production and tooling prior to the expiry or termination of the Funding Period.
>
> CIBC and EDC will each be responsible for their respective shares of the lesser of (x) 50% of Hunjan's total net funding losses over the Funding Period, and (y) $2,000,000. The shares of each of CIBC and EDC shall be as agreed between them.

[36] The complaint of the Opposing Creditors is that in the Receiver's calculation of the DIP Deficiency to be borne by the Opposing Creditors pursuant to paragraph 6 of the May 16 Order, the Receiver applied the full amount of the Participating Customers 50% share ($2,000,000) but failed to omit the contribution that they assert was agreed to by CIBC by Section 9(b) of the Accommodation Agreement.

[37] Both the Accommodation Agreement and the May 16 Order were preceded by the Amended DIP Credit Agreement dated May 13, 2005 (the "DIP Term Sheet") between CIBC and Hunjan, which INSERT para 15 of Receivers

[38] The position of the Opposing Creditors is that Paragraph 9(b) of the Accommodation Agreement calls on CIBC to take into account in determining the obligation to contribute, $2,000,000, which was not advanced but which as between it and the Participating Customers was to be taken into account.

[39] The position of CIBC and the Receiver is that the May 16 Order is compatible with the position that the May 16 Order approved the Accommodation Agreement and the DIP Term Sheet, and also ordered that the Amended DIP Facility would be secured by the DIP Charge (as defined in paragraph 32 of the Initial Order). There has been no amendment, variation, or appeal of the May 16 Order.

[40] The Receiver calculated the Amended DIP Deficiency as set out in Schedule "K" of the Tenth Report on the basis that, as a result of the last paragraph of subsection 9(b) of the Accommodation Agreement, CIBC must bear the second half of the first $4.0 million of the Amended DIP Deficiency, which would reduce the amount to be allocated among secured creditors by $2.0 million. The Opposing Creditors allege that pursuant to that paragraph, CIBC agreed to fund or write-off up to an additional $2.0 million towards any Amended DIP Deficiency that arose.

[41] The Opposing Creditors submit that the obligation of CIBC completely mirrors the obligation of the Participating Customers to fund $2.0 million of any Amended DIP Deficiency. It should be noted that the Opposing Creditors were not parties to the Accommodation Agreement. Among other matters, they complain they were not made aware of it until sometime after July 1, 2005.

[42] The position of CIBC and the Receiver rejects the submission of the Opposing Creditors on the following basis:

[43] First, CIBC knew in advance that it would be providing the full amount of the Amended DIP Facility. Second, it agreed to provide the Amended DIP Facility knowing that there was projected to be a shortfall and negotiated the Customer Contribution to assist in reducing that loss. Third, the language referred to in paragraph 9(b) states, in respect of CIBC, that it will be responsible for its respective share of the Amended DIP Deficiency, and the numbers referred to in that paragraph reflect the Hunjan Group's projections of a $4.0 million deficiency, and not a cap. Finally, CIBC negotiated language for paragraph 6 of the May 16 Order to ensure that the balance of the Amended DIP Deficiency would be shared by the secured creditors should it exceed $4.0 million.

[44] The Receiver reads paragraph 9(b) of the Accommodation Agreement and paragraph 6 of the May 16 Order as working together to first reduce the Amended DIP Deficiency by the Customer Contribution and then allocating the remaining balance, whatever that may be, among the first ranking secured creditors on a percentage of debt basis.

[45] The Opposing Creditors question why Paragraph 9(b) above would refer to the Participating Customers funding 50% of the Funding Losses if CIBC were not agreeing to fund the other 50%.

[46] In support of the argument, the Opposing Creditors urge that at the very least, to the extent that the Court concludes that there is inconsistency between the Accommodation Agreement and the provisions of the May 16 Order, the former should prevail since it was incorporated into the May 16 Order and by implication had the approval of the Court.

[47] In support of its position that the Accommodation Agreement clearly provides for CIBC providing funding of $2,000,000 of $4,000,000, the Opposing Creditors point to two references to the issue in reports provided to the Court by the Receiver. The first reads as follows:

> The total cash burn pursuant to the Accommodation Agreement is shared 50%/50% between the Participating Customers and the [Opposing] Creditors to a maximum of $4 million. Any excess of over $4 million is to be assumed by the [Opposing] Creditors.

[48] The second reference is in Schedule N3 to the Tenth Report as originally filed, and reads as follows:

> Pursuant to the Accommodation Agreement, the DIP deficit is to be shared 50%/50% between the Participating Customers and CIBC to a maximum of $4 million. Any excess of over $4 million is to be allocated between all [Opposing] Creditors.

[49] Schedule N3 was amended at the oral hearing to provide as follows:

> Pursuant to the Accommodation Agreement, the Participating Customers were responsible to contribute 50% of the Amended DIP Deficiency, with their maximum contribution being $2 million.

[50] While I respect the reasons behind the position advanced on behalf of the Opposing Creditors, I am not prepared to accept the references in the Receiver's reports as determinative. The Opposing Creditors were not parties to the Accommodation Agreement. None of the Participating Customers, the Receiver or CIBC support the meaning now being advanced.

[51] I do not find the May 16 Order in any way ambiguous even though it does make reference to the Accommodation Agreement. The closing words of paragraph 6 read, "pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date."

[52] At the time of the Accommodation Agreement, the representation in effect of Hunjan was that the DIP Deficiency would be between $3.5 and $4.0 million. I accept the submission on behalf of the Receiver and CIBC that it is not likely that the latter would have provided the DIP financing if it were aware that in the event the deficiency that it financed exceeded the anticipated amount by 100%, that it would in effect have contributed an additional $2 million.

[53] In this as well as many allocation cases, the effect of a decision can be said to operate disproportionately on one or more creditors to the benefit of others or even only one.

[54] The first principle of priority is to allocate in the manner prescribed by the Order. [See *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132 (Ont. C.A.) at 137.]

[55] Each case is to be considered on its own facts with the exercise of discretion and without the necessity to allocate on a direct "benefit" basis. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd., supra.*

[56] The conclusion at which I have arrived might well have been different had the other Opposing Creditors been parties to the Accommodation Agreement and the surrounding

facts and matrix clearly pointed to an understanding of all parties that CIBC would in effect be responsible for an additional $2 million regardless of the DIP Deficiency. That is not the case on the material before me.

[57] The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) pp 209-212.]

[58] The position advanced by the Opposing Creditors has not met the onus of satisfying me that the allocation prepared by the Receiver is unfair or unreasonable in all the circumstances.

[59] I have considered carefully the submission made on behalf of the opposing creditors. Each has some merit. The assertion by CIT is that given its exposure ($20 million), CIBC had more incentive to invest more money in the DIP financing.

[60] Counsel for En-Plas made much the same point, suggesting that the parties (CIBC) that take the risk should bear the cost on the basis that no one thought the DIP Financing Deficit would exceed $4 million and the DIP Financing did not particularly benefit En-Plas given its particular position. The DIP Financing did permit the opportunity for improvement of their position by all creditors.

[61] The response from counsel for CIBC is simply that it is not equitable for his client to advance $8 million and not have a charge on the DIP Financing simply doesn't make sense.

[62] In my view, the reason the cases referred to emphasize the discretion in the presiding judge is that between competing creditors, there is often competing equitable claims. I accept that if one result would work a manifest unfairness, that fact will likely be determinative where as I found here, that there is no manifest unfairness in permitting the creditor (CIBC) with the largest exposure some recovery from the DIP Financing Deficit.

[63] As I have concluded on the language of the Accommodation Agreement and the May 16 Order, there is no express restriction on recovery by CIBC. I am not persuaded that there is any manifest unfairness to the Opposing Creditors in accepting the position advanced by the Receiver, CIBC.

Allocation of Receiver's Expenses

[64] Not all the issues dealt with in the Receiver's Tenth Report were dealt with on this motion. The one that requires determination at this stage is that submitted on behalf of some creditors, which urge that the general administration expenses should be based on the percentage of pre-filing debt of each of the Opposing Creditors, rather than recovery.

[65] The Receiver reports that in allocating costs, it took into consideration the following factors:

(a) these proceedings evolved from the CCAA Proceedings to the Receivership Proceedings and, as such, proceeds of realizations can be attributed to three different time periods, which may affect the entitlement to the proceeds from such assets and consequent costs allocations:

(i) *Pre-Filing Period* — The period prior to the Filing Date (being the commencement of the CCAA proceedings);

(ii) *Post-Filing Period* — The period between the Filing Date and the commencement of the Receivership Proceedings; and

(iii) *Receivership Period* — The period after the commencement of the Receivership Proceedings;

(b) the May 16 Order already mandates how the Amended DIP Deficiency is to be allocated;

(c) the Receiver's Charge and the Receiver's Borrowing Charge were generally incurred for the benefit of all creditors with assets in the Receivership; and

(d) there were some circumstances in which specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between the cost and the benefit derived therefrom.

[66] Those creditors who urge that the allocation of costs should be on the basis of pre-filing debt do so on the basis that in their view CIBC derived a benefit from a significant amount of recovery pre-filing that should be taken into account and not just the amount that was recovered post-filing.

[67] The total amount of the Receiver's Borrowing and expenses is set out in Schedule W to the Report of the Receiver and totals some $2,087,629.00. On the basis of realization

based on security and the allocation, relative cost to CIBC is at a level of 42.7%, that of GE at 38.3%, EnPlas at 14.3% and CIT at 4.5%.

[68] The response by the Receiver submits that while CIT's gross realizations were $612,663, of that amount it has already received free of any deduction an account of costs the sum of $300,000, leaving only $312,663 against which CIT's total share of the costs must be charged.

[69] There is some evidence of what each of the creditors recognized might be its share of anticipated costs at the time of the May 16, 2005 order, which makes the Receiver's allocation reasonable in relation.

[70] I have considered the submissions of those objecting creditors, as well as those of the Receiver.

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

[72] I am satisfied that the Receiver has to the extent possible attempted to apply costs in a reasonable and fair manner and has taken into account to the extent possible a distinction between those costs that could be said to benefit all creditors with assets in the Receivership and those where it was possible, where specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between cost and benefit derived.

[73] I also accept that where the allocation is *prima facie* fair, the onus should be on an opposing creditor to satisfy the Court that they are unfair or prejudicial. (See *Canadian Imperial Bank of Commerce v. Acchione Construction Co.* (1989), 36 C.L.R. 144 (Ont. S.C.) [Master] 146.

[74] I recognize that there are other bases of allocation and have no issue with the general principles set out by Hall J. in *Hickman Equipment (1985) Ltd., Re,* [2004] N.J. No. 299 (N.L. T.D.)

[75] Having considered the submissions of all creditors, I am not persuaded that the onus has been met. The Receiver's cost allocation is therefore approved.

[76] Counsel may obtain a further appointment to deal with any issues remaining on the motion and the fixing of costs, if required.

Order accordingly.

TAB 11

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. **The Present Application.**

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. **Receiver's Position.**

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

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

(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.

CORRIGENDUM

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

TAB 12

COURT FILE NO.: 06-CL-6326
DATE: 20060725

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JP MORGAN CHASE BANK N.A. v. UTTC UNITED TRI-TECH CORP.

BEFORE: Justice Cameron

COUNSEL: Larry Crozier and Stephanie Fraser, for the Receiver, Ernst & Young Inc.

Brett Harrison, for JP Morgan Chase Bank N.A.

Aubrey Kauffman, for Laurentian Bank of Canada and Business Development Bank of Canada

DATE HEARD: July 12, 2006

ENDORSEMENT

[1] Ernst & Young Inc. ("Receiver"), in its capacity as court appointed Interim Receiver and Receiver and Manager of all the assets, undertaking and property ("Property") of UTTC United Tri-Tech Corporation ("UTTC") moves for an Order:

1. approving the activities of the Receiver as described in the Fifth Report of the Receiver dated July 6, 2006 ("Fifth Report");

2. authorizing the Receiver to distribute certain net proceeds from the sale of the Property to JP Morgan Chase Bank, N.A. ("JPM") and to Laurentian Bank of Canada and Business Development Bank (the "Banks") subject to execution of a mutually satisfactory reimbursement agreement from each of JPM and the Banks;

3. approving the fees and disbursements of the Receiver and its lawyers;

4. providing for the allocation of the Receiver's Charge pursuant to the Appointment Order dated March 10, 2006

    i) in respect of the professional fees and disbursements of the Receiver (including legal fees) ("Fees"), the sum of $182,000 to be allocated to the Banks and the balance of some $1.4 million to be allocated to JPM;

ii) in respect of claims against the Receiver in connection with the receivership, other than those resulting from willful misconduct or gross negligence ("General Claims"), JPM and the Banks shall reimburse the Receiver on a *pro rata* basis relative to their distributions from the proceeds of sale of the Property; and

iii) in respect of claims by a party who had an interest in the Personal Property or the Real Property, or proceeds therefrom, that is established to have priority over the respective interests of JPM or the Banks ("Specific Claims"), as the case may be, each of JPM and the Banks shall be individually responsible to reimburse the Receiver for claims ranking in priority to their respective secured positions.

[2] The parties are agreed on items 1 and 3 above. The respondent says that the Receiver's Charges:

1. should be allocated in accordance with a "fair and equitable" principle, and

2. should not be liable to a reimbursement agreement.

FACTS

[3] On July 8, 2005, the Banks and JPM entered into a priority agreement and a creditors agreement.

[4] Pursuant to the Priority Agreement:

1. the Banks would rank first on the Cornwall property, and

2. JPM would rank first on the personal property, other than certain listed equipment on which the Banks would rank, without regard to any priority granted by any principle of law or statute, including the *Personal Property Security Act*.

[5] They also agreed that any proceeds in respect of collateral would be dealt with according to the provisions of the Priority Agreement.

[6] On the same date the parties entered into a Creditors Agreement which provided, in part:

> 2. The Bank **[JPM]** or any of its officers, employees and agents and its representatives and invitees, including any receiver, receiver manager, interim receiver or other similarly appointed official, (each, a "**Representative**") may, provided it gives reasonable notice ("**Access Notice**") to the Creditor **[the Banks]**, have access to the Immovable, the Listed Equipment and the Excluded Assets at anytime for the purpose of, amongst others, performing an inspection or removing any of the Bank's Property, holding an auction sale, a private sale or submit bids thereat, the whole without any obstruction or opposition on part of the

Creditor, and subject to the priority of the Creditor's rights in respect of the Listed Equipment and the Excluded Assets pursuant to the Priority Agreement.

3. The Creditor hereby agrees that the Bank Property may be stored and/or utilized at the Immovable and shall not be deemed a fixture or part of the Immovable, but shall at all times be considered personal property. Without limiting the generality of the provisions contained herein, and subject to the provisions of Section 4 hereof, the Bank will have the same rights as of the Borrower, following the giving of an Access Notice in writing to the Creditor, to use the Immovable, the Listed Equipment and/or the Excluded Assets without interference from Creditor, including to handle inventory, process inventory, complete raw materials and work-in-process handle and ship finished goods and sell inventory and equipment (including, without limitation, by public auction or private sale (and the Lender or any of its Representatives may advertise and conduct such auction or sale at the Immovable and shall use reasonable efforts to notify the Creditor of its intention to hold any such auction or sale) and to take any action to foreclose or realize upon or enforce any of the Bank's Security, and will have the right to perform any operation relating to the Bank's Property, including to dispose of, to sell, to remove, to store temporarily, etc. the Bank's Property, as it may deem useful or necessary, subject to the priority of the Creditor's rights in respect of the Listed Equipment and Excluded Assets, and for a period of time deemed reasonably necessary by the Bank, but in any case not exceeding 120 days (the "**Period**") and provided that during the Period, the Bank shall keep safe and in good order and repair, subject to normal wear and tear, the Immovable, the Listed Equipment and Excluded Assets. If any injunction or stay is issued (including an automatic stay due to a bankruptcy proceeding) that prohibits the Bank and the Creditor from exercising any rights under this Agreement, commencement of the Period shall be deferred until such injunction or stay is lifted or removed. At any time after the Creditor takes action to foreclose or realize upon the Immovable, the Listed Equipment and the Excluded Assets in accordance with the terms of this Agreement and the Priority Agreement, the Creditor may deliver a notice to the Bank requiring that the Period commence on the date of the receipt by the Bank of such notice.

4. During the Period (for greater certainty, regardless of whether the notice commencing the Period was given by the Creditor, the Bank or a Representative), the Bank shall pay to the Creditor, on a *per diem* basis for the period of actual occupancy of the Immovable by the Bank:

(a) Any portion of current interest due and payable under the Creditor's Loans at a rate not in excess of the rate of interest payable as of the date hereof in connection with the aforesaid Loans, with the exception of any amount due and payable on account of arrears of the Borrower or as a result of a default of the Borrower under the terms of the aforesaid loans;

(b) All current utilities, municipal property taxes and similar expenses related solely to the occupation of the Immovable, in amounts consistent with past amounts payable by the Borrower in connection with the Immovable and which, for greater certainty, shall not include any amount due and payable on account of arrears of the Borrower; and

(c) Insurance costs in order to maintain in full force and effect insurance policies relating to the Immovable, the Listed Equipment and the Excluded Assets, as the case may be.

...

7. Subject to the Creditor's obligations during the Period under this Agreement and provided that it does not interfere with the Bank's rights during the Period under this Agreement, (1) nothing in this Agreement shall be construed as to prevent the Creditor from having reasonable access to the Immovable during the Period to inspect and evaluate the Listed Equipment and Excluded Assets or from commencing any action to foreclose or realize upon or enforce any of its rights as a secured party with respect to the Immovable, the Listed Equipment and Excluded Assets and (2) the Creditor shall be entitled to have access to the Immovable to inspect and evaluation the Listed Equipment and Excluded Assets at the commencement of the Period. Creditor may sell the Immovable and the Listed Equipment during the Period, provided that the purchasers of the Immovable and the Listed Equipment shall have expressly agreed in writing to be bound by the obligations of Creditor under this Agreement with respect to the purchased Immovable and the Listed Equipment until the expiration of Period and the items purchased shall remain in place and shall remain subject to the rights of use and occupancy the Bank and any of its Representatives, in accordance with this Agreement. (Underlining and descriptions added).

[7] Thus, under the Creditor's Agreement, JPM could occupy the Cornwall Property for the purpose of carrying on the business of UTTC and selling JPM's collateral. Such occupation would be at JPM's expense and could not exceed 120 days. The Banks could sell the Cornwall Property during this period, as long as the purchaser agreed to respect the 120 day occupation period.

[8] As security for its loans JPM held a first charge over substantially all the personal property of UTTC and a second charge over the real property of UTTC.

[9] The Banks held a first charge against the real property, consisting of land in Cornwall, Ontario containing a manufacturing facility used by UTTC.

The Receivership Motion

[10] On March 7, 2006, counsel to JPM served a Notice of Application and supporting affidavit seeking the appointment of a Receiver over the assets and undertaking of UTTC upon the solicitors for the Banks. The application was returnable on March 10, 2006. Goodman and Carr LLP ("G&C") was retained as counsel on behalf of the Banks.

[11] JPM filed an affidavit of William H. Canney Jr., of JPM in support of the receivership application.

[12] At paragraph 34 Mr. Canney deposes:

> JP Morgan believes that JP Morgan's collateral position is declining. Recent borrowing base certificates submitted to JP Morgan by UTTC show a steady decline in the value of JP Morgan's collateral. It is not clear whether this is a result of the discovery of additional errors or misstatements made by UTTC prior to January 31, 2006, a deterioration in the value of the collateral, or both. The borrowing base certificate submitted to JP Morgan on March 3, 2006 indicated that the borrowing base had declined resulting in the Revolving Facility exposure exceeding the borrowing base by approximately US$6,218,308.36; however, the certificate reflected a calculation error which if corrected, would have indicated an exposure of CDN$5,793,308.36. JP Morgan is concerned that, unless an interim receiver is appointed immediately, the value of UTTC's business and operations may decline further as suppliers and customers become aware of UTTC's instability. (*Underlining added*)

[13] At the time of the Receivership Appointment order, UTTC was indebted to JPM in a principal amount exceeding $12 million (U.S.) and to the Banks in an aggregate amount of $2.2 million (Can.).

[14] In proceeding by way of court appointed receivership, JPM was deviating from the terms of the Creditors Agreement. For example, the stay of proceedings prohibited the Banks from selling the Cornwall Property in accordance with paragraph 7 of the Creditors Agreement.

[15] On March 9, 2006 G&C sent the following e-mail to Brett Harrison of McMillan Binch Mendelsohn ("MBM"):

> Thank you for sending the material.
>
> With respect to the charges in the order, it is my view that my client's collateral should not be subject to the Receiver's Charge or the Receiver's Borrowing Charge. My client's security is on real property and related fixtures. My client does not need a receiver to realize on its collateral. Similarly my client does not require that the business carry on and incur the costs to be financed by the receiver's borrowings. Thus I would ask for a provision carving out Laurentian's collateral from the Charges.

> Aside from the above issues, my client supports the receivership. (*Underlining Added*)

PROVISIONS OF THE APPOINTMENT ORDER

[16] The Appointment Order contains numerous protections for the court appointed Receiver including:

> (i) a prohibition against proceedings against the Receiver without consent or leave of the Court (para. 7);
>
> (ii) protection against liability for employee related claims (para. 13); and
>
> (iii) limitation on environmental liabilities (para. 15).

[17] In addition, the Appointment Order contains a general limitation on the Receiver's liability at paragraph 17 as follows:

> THIS COURT ORDERS that the Receiver and its officers, directors, employees, agents and other representatives acting on behalf of the Receiver in its administration of the receivership shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

[18] RECEIVER'S ACCOUNTS

> 18. THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").

[19] It is clear that paragraph 18, read in context and as a whole, makes reference to expenditures and liabilities, including, fees, properly incurred in the administration of the estate which would be allowed in a passing of accounts. There is no general indemnity of the Receiver with respect to General Claims or Specific Claims arising from the Receiver's conduct or actions.

[20] The Appointment Order does not contain an indemnity in favour of the Receiver, secured by assets of UTTC with respect to General Claims or Specific Claims (as those terms are defined in the Receiver's Factum), as claimed in paragraph 23 of the Receiver's Factum.

[21] The terms of paragraph 24A of the Receivership Agreement were negotiated to maintain the provisions of the Creditors Agreement:

> 24A. THIS COURT ORDERS that notwithstanding any other provisions herein, but subject to further order of the Court, the Receiver's Borrowing Charge shall be subordinate to the charges held by Business Development Bank of Canada and Laurentian Bank of Canada with respect to the collateral defined as the "Immovable" and "Excluded Assets" as defined in the creditor agreement made as of July 8, 2005 amongst Business Development Bank of Canada, and Laurentian Bank of Canada and JP Morgan (the "Creditor's Agreement"). The allocation of the said charges to "Listed Equipment", as defined in the Creditors Agreement and the allocation of the Receiver's Charge with respect to the Immovable and Excluded Assets is to be undertaken by the Receiver, subject to further order of the Court. The Receiver shall pay an amount equal to the current interest due and payable under the Creditor's Loans (as defined in the Creditors Agreement) together with all current utilities, municipal property taxes and similar expenses related solely to the occupation of the Immovable and insurance costs in order to maintain in full force and effect insurance policies relating to the Immovable, and the Excluded Assets, all as defined in the Creditors Agreement.

[22] Essentially, paragraph 24A:

(i) recognizes the priority of the Bank's real property security over borrowings of the receiver for the purpose of operating the business of UTTC;

(ii) recognizes the requirement to allocate the Receiver's Charge by the Receiver subject to further order of the Court; and

(iii) reflects JPM's obligation to make the payments referred to in paragraph 4 of the Creditor's Agreement.

Receivership Proceedings

[23] On April 18, 2006 an Order was granted by the Court approving the "going concern" sale by the Receiver to a single purchaser or its affiliates of substantially all the Real Property and all the Personal Property.

[24] The Receiver operated the UTTC business for an extended period, prepared a comprehensive confidential information memorandum with respect to the business, dealt with numerous potential purchasers with respect to the business, attended on various motions and, ultimately, succeeded in selling the business as going concern on May 1, 2006. The Receiver received net proceeds of approximately $7.1 million for the Personal Property and $2.2 million (Can.) from the sale of Real Property.

[25] Most of the work done by the Receiver and its counsel would not have been necessary in order to sell the Cornwall Property alone.

[26] The Banks have no complaint with respect to the purchase price secured by the Receiver for the Cornwall Property. The gross sale proceeds slightly exceed the indebtedness owed to the Banks.

[27] However, the largest beneficiary of the sale of the real property is JPM as the sale of the Cornwall Property allowed for the sale of the UTTC business as a going concern. It is the understanding of the Banks that if the operating assets of UTTC (i.e. inventory, receivables and equipment) were sold on a liquidation basis, JPM would have recovered less.

[28] The Banks were free to sell the Cornwall Property after 120 days independent of JPM's realization on its security. It is a moot point whether they would have received more or less on a separate sale.

[29] At present the Receiver is not aware of any General Claims. The Receiver intends, upon further motion to this Court, to seek direction with respect to a claims bar procedure for the purpose of identifying, contesting and resolving any General Claims or Specific Claims. However, pending the outcome of that process, the Receiver is concerned that its rights to indemnification pursuant to the Receiver's Charge from the proceeds be maintained notwithstanding any distribution that may be made to JPM or the Banks. Absent a reimbursement agreement, the only recourse of the Receiver is to the proceeds of sale in accordance with the Appointment Order and the Approval and Vesting Orders made by this Court.

NATURE OF DISPUTE

[30] The Appointment Order provided that the allocation of the Receivers Charges would be subject to further order of the Court. The parties agree that the Receivers Charge ranks in priority to their respective interests in the Sale Proceeds.

[31] The Receivers Charge proposed by the Receiver and agreed to by JPM but not by the Banks, is:

> i) In respect of the professional fees and disbursements by the Receiver (including legal fees), $175,000 (CAD) plus GST plus an additional $7,000 (CAD) plus GST in respect of Excluded Equipment should be paid by the Banks and the balance allocated to JPM;
>
> ii) In respect of General Claims against the Receiver, JPM and the Banks should reimburse the Receiver on a *pro rata* basis relative to their respective distributions from the proceeds of sale; and
>
> (iii) In respect of Specific Claims, each of JPM and the Banks should be individually liable to reimburse the Receiver.

For these purposes:

a) a "General Claim" is a claim made against the Receiver in connection with the receivership (other than one resulting from its willful misconduct or gross negligence); and

b) a "Specific Claim" is a claim by a party who had an interest in the Personal Property, the Real Property, or proceeds that is established to have a priority over the respective interests of JPM or the Banks.

[32] The Banks say that their liability for Receivers Charges should be limited to $100,000 plus GST and that they should not be liable to reimburse for anything as all claims for real estate priorities were settled prior to the closing.

[33] In addition, it would allow JPM to do an "end run" around the priorities agreed to in the Priority Agreement and Creditors Agreement.

[34] JPM appointed Ernst & Young the Receiver and any indemnity with respect to the operating assets should flow from JPM. However, the Banks agreed to the Receivership subject to priority for the Receiver's Charge.

DISCUSSION

[35] The Receiver's allocation of Fees to the Banks is based upon a reasonable calculation of that portion of the fees of the Receiver and its advisors that can be attributed to the sale of the Real Property and the administration of the receivership up to the completion of the sale. The warehouse operation of UTTC carried on from the Real Property were closely integrated into the business operations of UTTC. The Real Property and Personal Property were jointly marketed by the Receiver and sold in linked transactions which closed simultaneously. Therefore, while it is impossible to segregate and calculate with precision the professional fees attributable solely to the administration of the receivership in relation to Real Property, the Receiver is satisfied that the amount of $175,000 is reasonable in the circumstances.

[36] It is well-settled that at common law, a court-appointed receiver is personally liable for its acts as a receiver but has a correlative right to indemnification on a priority basis out of any assets under its administration. See Kerr & Hunt on *Receivers and Administrators*, 18th ed. (Sweet & Maxwell: London, 2005).

[37] This principle is reflected in the Receiver's Charge as defined in paragraph 18 of the Appointment Order.

[38] The Receiver submits that pursuant to the Receiver's Charge indemnification from the assets of UTTC (in this case the Sale Proceeds) is permitted for three categories of claims. These are as follows:

(a) The Fees;

(b) General Claims; and

(c) Specific Claims.

[39] It is submitted that, as the Receiver was authorized to realize on the assets of UTTC for the benefit of JPM and the Banks pursuant to a consensual sales process, that the Fees, General Claims and Specific Claims are subject to the Receiver's Charge and properly allocated to these creditors for satisfaction from the Sale Proceeds: *Robert F. Kowal Investments Ltd.* v. *Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492 (Ont. C.A.) at pp. 3-5.

[40] In *Kowal Investments*, the Ontario Court of Appeal considered whether a Receiver has priority over a mortgagee with respect to its expenses. In its decision, the Court relied upon a passage from *Clark on Receivers*, which began as follows:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of the lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for approving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

[41] The excerpt from *Clark on Receivers* relied upon by the Court of Appeal in the *Kowal Investments* decision goes on to highlight three exceptions to this general rule, which may be summarized as follows:

(a) Where the Receiver has been appointed at the request of or with the consent of the Mortgagee, the Receiver will be given priority over the security holder;

(b) If the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including the mortgagee; and

(c) If the Receiver has expended money for the necessary preservation or improvement of the property.

[42] The obligation on a Receiver in allocating costs from an insolvency proceeding is to exercise its discretion in an equitable manner that does not readjust the priorities between creditors. The allocation:

(a) should be fair and equitable; and

(b) not ignore the benefit or detriment to any creditor.

There is however no requirement that the Receiver be obliged to conduct a strict accounting on a cost-benefit basis as between the creditor classes: *Hunjan International Inc. (Re)* (2006), Carswell Ont. 2718 (Ont. S.C.) at p. 2 and p. 8.

[43] The Receiver submits that the Proposed Allocation is reasonable and in accordance with general principles established by Canadian insolvency courts.

[44] The Receiver submits that the allocation of the Fees is reasonable in the circumstances. Moreover, it has been held that "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: *Hickman Equipment (1985) Ltd.*, [2004] N.J. No. 299 at p. 6.

[45] Where as in this case, the Receiver was appointed for the benefit of interested parties to ensure that all creditors were treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs: *Bank of Nova Scotia* v. *Norpak Manufacturing Inc.*, [2003] O.J. No. 4818 (Ont. C.A.) at p. 2.

[46] Although every case is different, the case most directly on point is *Re Hunters Trailer & Marine Ltd.*, [2001] A.J. No. 1638 where UMC held mortgages on property and claimed it was a passive creditor. While the risk of loss was greater for the other secured creditors, UMC benefited from the proceedings in that it continued to receive interest and received principle on the sale. However 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 the proceedings.

[47] In this case, the receivers fees were $1.67 million. Of the sale proceeds, $175,000 and $7,000 were allocated to the Mortgages for their $2.2 million recovery including $28,000 for personalty. Approximately $1.5 million was allocated to the personal property creditor, JPM, for its $7M recovery. Most of the effort was devoted to running the business and arranging for sale, some indefinable part of which was for the benefit of the Banks.

[48] The court appointed Receiver's Order cancelled the prior Credit and Priority Agreements. The need for a receivership on short notice resulted from a rapidly depreciating value of the business.

[49] The Banks agreed to be responsible for a portion of the receivership costs applicable to the realization on the real property, failing agreement by court determination.

[50] The complexity of the receivership was due not to the real property but the sale on a going concern basis of the manufacturing business.

[51] There were significant issues relating to employees, suppliers, and customers which devolve on the personalty rather than the real estate.

[52] On the other hand, the sale of the real estate was dependent on the sale of personalty, and vice-versa. If either had fallen through, JPM and the Banks would be left to their own devices. There is no guarantee the real estate would have realized its value.

[53] The Receiver paid to the Banks interest on the loans and other realty costs in accordance with s. 24A of the Receivership Order pending sale.

[54] The Banks did not have to bear the risks of a private sale, including real estate commission.

CONCLUSION

[55] In these circumstances, after weighing all the circumstances, I cannot say that $183,000 out of $1,670,000 was an unfair or inequitable burden for the Banks to bear.

[56] Nor can I say that the allocation as between General and Specific Claims is unfair or inequitable. Each will be liable for its respective Specific Claims and will share *pro rata* in General Claims in accord with the amount received. There should be little, if any, General Claims to devolve on the Banks. Operating expenses will be for the account of JPM unless they can be said to rank ahead of the mortgages of the Banks.

ORDER

[57] I grant the motion of the Receiver approving the activities in the Fifth Report, authorizing distribution of the Sale Proceeds subject to a mutually satisfactory reimbursement agreement, approving the fees and disbursements of the Receiver and its lawyer and providing for the allocation of the Receiver's Charge as proposed.

COSTS

[58] If the parties cannot agree, costs may be addressed in writing. The Receiver's submissions shall be made within 15 days of the release of this order. The Banks shall respond within 10 days thereafter.

CAMERON J.

DATE: July 25, 2006

TAB 13

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.

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

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

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

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

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

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

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

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

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

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

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

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

vi. declaration and judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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
Miller Thomson LLP
for PricewaterhouseCoopers Inc.

Terrence Warner
Miller Thomson LLP
for National Leasing Group Inc.

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

Kibben Jackson
Fasken Martineau DuMoulin LLP
for Business Development Bank

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

Sean Collins & Jeffrey Whyte
McCarthy Tetrault LLP
for GE Capital

Stephen Livingstone
McLennan Ross LLP
for Little Red River Cree Nation

Colin Brousson, Gowling LaFleur
Eugene Macchi, Barrister & Solicitor
for North Shore Leasing Ltd.

Paul Pidde
Walsh Wilkins Creighton LLP
for Ford Credit Canada

Robert Kennedy
Fraser Milner Casgrain LLP
for Jim Pattison Leasing
Justice Agyemang
Asset Recovery/Asset Inc.
for Bank of Nova Scotia

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

TAB 14

DATE: 20031210
DOCKET: C39737

COURT OF APPEAL FOR ONTARIO

RE:	THE BANK OF NOVA SCOTIA (Plaintiff/Respondent in Appeal) –and– NORPAK MANUFACTURING INC. (Defendant)
BEFORE:	LABROSSE, SHARPE and ARMSTRONG JJ.A.
COUNSEL:	Harvey G. Chaiton for the appellant Business Development Bank of Canada
	William J. Burden for the respondent Bank of Nova Scotia
HEARD:	December 8, 2003
RELEASED ORALLY:	December 8, 2003

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated March 7, 2003.

ENDORSEMENT

[1] This is a dispute between the Bank of Nova Scotia ("BNS") and the Business Development Bank of Canada ("BDC"), two secured lenders to Norpak Manufacturing Inc. ("Norpak"), as to what proportion of the receiver's costs each should bear.

[2] The order of Farley J. is closely related to the earlier order of Himel J. which appointed the receiver over all assets of Norpak. BDC originally appealed that order, but subsequently abandoned the appeal.

[3] To some extent, BDC is challenging the orders of Himel J. by questioning the appropriateness of the receivership (which it originally supported). It is inappropriate for BDC to challenge that decision now. Given the disastrous situation found by the monitor, without the receiver's report, BDC would not have been in a position to properly assess Norpak's financial status and the prospects for obtaining payment of its debt.

[4] BDC originally agreed with BNS that a receiver should be appointed but changed its position and opposed the appointment of the receiver after it entered into a side deal to

sell the security to Web Pack International Inc. ("Web Pack"), a company controlled by Norpak's principals. As found by both Himel J. and Farley J., this was not a situation where a secured creditor could just pull out its security. That agreement had the effect of preferring BDC over other creditors and creating a situation of unfairness. Himel J. specifically rejected BDC's position that the agreement was the best way to deal with the security and also that a receiver should not be appointed over all assets of Norpak.

[5] Web Pack's revised bid was ultimately selected and the receiver believed that the sale was in the best interests of all creditors, including BDC. The process undertaken by the receiver was fair and took into account the interests of all creditors. The receiver always acted on the direction of the court.

[6] There is no valid reason for BDC to avoid paying its fair share of the receivership costs. The receiver was clearly appointed for the benefit of all interested parties to ensure that all creditors were treated fairly and to ensure a fair process to deal with the assets.

[7] Given that the indebtedness of BDC and BNS was approximately equal, it was appropriate for Farley J., in the exercise of his discretion, to equally allocate the receiver's costs and to make BDC pay a portion of the legal costs associated with the appointment of the receiver.

[8] Accordingly, the appeal is dismissed with costs payable to the respondent and fixed at $10,000.00, all inclusive.

Signed: "J.-M. Labrosse J.A."
"Robert J. Sharpe J.A."
"Robert P. Armstrong J.A."

TAB 15

Re Hunters Trailer & Marine Ltd., 2001 ABQB 1094

Date: 20011214
Action No. 0003 19315

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

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

- and -

IN THE MATTER OF HUNTERS TRAILER & MARINE LTD.

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

APPEARANCES:

Kentigern A. Rowan
Ogilvie LLP
for Canadian Western Bank

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

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

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

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

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

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

THE APPLICATION TO DETERMINE COST ALLOCATION

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

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

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

THE ARGUMENTS OF THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

J.C.Q.B.A.

TAB 16

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

TAB 17

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *PriceWaterhouseCoopers v. Bank of Montreal*, 2017 NLTD(G) 43
Date: March 6, 2017
Docket: 201601G1645

IN THE MATTER OF the
Receivership of 50549 Newfoundland
and Labrador Inc.

BETWEEN:

PRICEWATERHOUSECOOPERS

APPLICANT

AND:

BANK OF MONTREAL

FIRST RESPONDENT

AND:

ACCESSEASYFUNDS LIMITED

SECOND RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR ASSOCIATION OF REALTORS

THIRD RESPONDENT

Before: Justice Robert P. Stack

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

Date of Hearing: November 15, 2016
January 30, 2017

Summary:

The Court set forth the basis for distribution of trust and other monies in the receivership of a real estate broker. Trust claims were recognized on behalf of vendors and purchasers, real estate agents and Canada Revenue Agency. Trust claims were not recognized for third party brokers or a commission factoring company.

Appearances:

D. Bruce Clarke, Q.C. and Leon Tovey	Appearing on behalf of the Applicant
Geoff Spencer	Appearing on behalf of the First Respondent
Neil Jacobs	Appearing on behalf of the Second Respondent
Paul Burgess	Appearing on behalf of the Third Respondent

Authorities Cited:

CASES CONSIDERED: Sheehan-Brothers v. Barrett, 2015 NLTD(G) 89; **Tang v. Zhang**, 2013 BCCA 52; **Ontario (Director, Real Estate & Business Brokers Act) v. NRS Mississauga Inc.**, [2003] 64 O.R. (3d) 97, 226 D.L.R. (4th) 361 (C.A.); **Law Society of Upper Canada v. Toronto Dominion Bank**, [1998] 42 O.R. (3d) 257, 169 D.L.R. (4th) 353 (C.A.); **Midland Pacific Properties Corp. v. Chang**, [1999] 69 B.C.L.R. (3d) 187, 90 A.C.W.S. (3d) 680 (S.C.); **PIPSC v. Canada (Attorney General)**, 2012 SCC 71; **Sun Squeeze**, [1994] 28 C.B.R. (3d) 201, 51 A.C.W.S. (3d) 208 (Ont. C.A.); **Ontario (Securities Commission) v. Consortium Construction Inc.**, [1992] 34 A.C.W.S. (3d) 1231, 93 D.L.R. (4th) 321 (Ont. C.A.).

STATUTES CONSIDERED: *Real Estate Trading Act*, RSNL 1990, c R-2; *Real Estate and Business Brokers Act*, RSO 1990, c R.4; *Income Tax Act*, RSC 1985, c. 1 (5th Supp.); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Excise Tax Act*, RSC 1985, c. E-15.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 25.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] On February 5, 2016, PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") was privately appointed receiver of the Respondent, 50549 Newfoundland and Labrador Inc. ("50549"), by the Bank of Montreal ("BMO") pursuant to a security instrument. Prior to the appointment of PWC as receiver, 50549 operated as a real estate brokerage firm under the business name Exit Realty on the Rock.

[2] On March 17, 2016, by order of this Court (the "Receivership Order"), PWC was named court-appointed receiver of all the assets, undertaking, and property of 50549. I will now set out how the funds in the possession of the Receiver are to be distributed among the various claimants.

[3] On April 27, 2016, I issued a Claims Process Order setting out the procedure for making claims in the receivership and directing and empowering PWC to administer the claims process. The Receiver has now come to the Court seeking directions on how to distribute the proceeds it has realized on the receivership. The funds available for distribution are as follows:

1) $124,000, being the balance in the 50549 deposit account at the date of receivership (the "Deposit Account");
2) Amounts representing commissions received after February 5, 2016; and
3) Amounts collected from Agents for sums they owed to 50549.

[4] PWC proposes paying claims in the receivership as follows (listed approximately in order of rank):

1) The Receiver's Charges;
2) an express trust in favour of vendors and purchasers over the contents of the Deposit Account;
3) an implied or constructive trust over post-receivership commissions in favour of Agents, Brokers (including the commission assigned by Peter Goulding in respect of Deal 22245 to AccessEasyFunds Limited) and Exit Realty International;
4) a statutory trust in favour of Canada Revenue Agency over funds otherwise payable to 50549 for amounts representing unremitted payroll deductions for income tax; and
5) secured creditors.

ANALYSIS

[5] In coming to its proposed distribution of receivership funds, PWC has identified and accepted or rejected a number of claims from parties who have made claims as beneficiaries of trusts or as creditors of the estate. I will individually address each claim that was brought to my attention.

Claims By Hopkins, Clift And Squires

[6] Each of Wilfred and Marian Hopkins, Tom Clift and Anne Squires had claims disallowed by the Receiver. Although they each filed a Notice of Dispute

with the Receiver, none of them filed anything with the Court or appeared at the hearing despite having been provided notice of the Court date. The Receiver's disallowance of their respective claims is therefore upheld.

Deposit Account Claimants

[7] The Deposit Account is the trust account in which 50549 was to hold in trust funds received from purchasers as deposits on pending sales. It had been totally depleted prior to February 1, 2016. As a result, no deposits received prior to that date are traceable to specific real estate transactions.

[8] Between February 1, 2016, and February 5, 2016, 16 deposits were made to the Deposit Account totalling $124,000. Of these funds, $12,000 can be traced to specific transactions (the "Traceable Funds") and the remaining $112,000 was deposited into the account as a lump sum (the "Lump Sum").

Traceable Funds

[9] PWC submits that the Traceable Funds are subject to an express trust in favour of the individual vendors and purchasers to whom the funds can be traced. I am satisfied that these funds possess the three certainties of a trust, as set out in **Sheehan-Brothers v. Barrett**, 2015 NLTD(G) 89 at paragraph 50:

1. Certainty of intention to create the trust;
2. Certainty of the subject matter of the trust, such that it is ascertained; and,
3. Certainty of the objects, or beneficiaries, of the trust, such that the trust obligations can be performed properly.

[10] It is instructive to review how 50549 typically dealt with deposit funds. In the normal course of sales transactions, 50549 collected deposits from purchasers.

If a vendor failed to complete a transaction, or the transaction was frustrated by circumstances beyond the control of either party, then the deposit would be returned to the purchaser. If the purchaser failed to complete the transaction, the vendor would get the deposit. If the transaction closed, then the deposit would be credited to the vendor as part of the purchase price. For another example of this process see **Tang v. Zhang**, 2013 BCCA 52.

[11] Typically, therefore, if a transaction closed, the deposit would be applied against the commission due to the sales agent who worked under the Exit Realty on the Rock banner (the "Agent") and negotiated the sale. That is, once a transaction closed, 50549 had a contractual right to convert funds from the Deposit Account into a payment on the commission due from the vendor to the Agent on that transaction. This contractual right is the only deduction that could be made, and represents the only funds from the Deposit Account that could be disbursed to someone other than a vendor or purchaser.

[12] The three certainties of trust are made out with regard to the Traceable Funds:

1) There was an intention to create a trust: the Traceable Funds were paid to 50549 on the basis that they would be held for the benefit of the vendor or purchaser;
2) The subject matter of the trust is certain: the amount of the deposit in respect of a given transaction;
3) The vendors and purchasers that are the beneficiaries of the trust are certain: trust interests in the Traceable Funds are limited to the vendors and purchasers on each transaction.

[13] As a result, subject only to the contractual right of 50549 to withhold commissions from deposits credited to vendors, the Traceable Funds are subject to an express trust in favour of the vendors and purchasers, and must be disbursed to vendors and purchasers as required by each transaction.

The Lump Sum

[14] The Lump Sum, on the other hand, is not traceable to specific transactions. As mentioned, the Deposit Account was depleted as of February 1, 2016. A number of transactions were still pending at that time, and were dependent on trust funds that PWC advises had been removed from the Deposit Account.

[15] PWC submits that the Lump Sum deposit was intended to replace trust funds that had been removed from the Deposit Account. I agree. When funds are deposited into a trust account with the intention of replacing misappropriated trust funds, the new funds are impressed with the same trust character that would have applied to the misappropriated funds: **Ontario (Director, Real Estate & Business Brokers Act) v. NRS Mississauga Inc.**, [2003] 64 O.R. (3d) 97, 226 D.L.R. (4th) 361 (C.A.) at paragraph 49.

[16] Where tracing is not possible, but it is otherwise clear that a given fund is composed of trust monies, each of the trust claimants will have a *pro rata* claim to whatever money is in the fund, with the total calculated as of the date of the last injection of money into the fund or when the account is frozen (see **Law Society of Upper Canada v. Toronto Dominion Bank**, [1998] 42 O.R. (3d) 257, 169 D.L.R. (4th) 353 (C.A.)).

[17] Therefore, I conclude that vendors and purchasers with proven but untraceable claims are entitled to benefit from a constructive trust over the Lump Sum and to have the Lump Sum divided among them *pro rata*.

Post-Receivership Commissions

[18] PWC has explained that 50549 collected commissions from real estate transactions on behalf of two different sets of realtors. First, there were 50549 Agents. Second, there were external brokerage firms, who collaborated with 50549 Agents to negotiate sale agreements ("Brokers"). These two groups of claimants

will be addressed individually. Any amount otherwise due to an Agent or Broker will be reduced by any set-off rights that 5049 has against that person, so that the net amount will be paid as a distribution to the claimant, and the set-off amount will be available to 50549 to pay other claims.

Agents

[19] The Receiver proposes that post-receivership commission claims of Agents be honoured by tracing to the commissions from those completed transactions. Pre-receivership commission claims of Agents cannot be paid because any property to which those claims might have attached was dissipated prior to the receivership. Pre-receivership commissions therefore rank as unsecured claims in the receivership.

[20] Post-receivership commissions, whether withheld from deposits or otherwise, legally became the property of 50549 prior to distribution to Agents and Brokers. However, the beneficial owners of the commissions were, at all times, the Agents.

[21] In **Midland Pacific Properties Corp. v. Chang**, [1999] 69 B.C.L.R. (3d) 187, 90 A.C.W.S. (3d) 680 (S.C.), Cohen, J. considered an application by various salespeople in the bankruptcy of a real estate brokerage firm. The salespeople argued that their commissions were property held in trust for them by the brokerage firm rather than property of the brokerage firm in bankruptcy.

[22] At paragraph 9 of **Midland**, Cohen, J. set out the process by which salespeople were paid, which I find is comparable to the process at 50549:

> 9 Like all real estate agents, Midland was required by Section 16 of the Real Estate Act to maintain a trust account into which all money received from clients were to be paid. Section 17 of the Real Estate Act strictly limits withdrawals from the trust account. The practice of Midland was that upon completion of a sale, any amount of deposit in excess of the commission

> payable would be paid out of trust to the credit of the purchaser who made the deposit. Thereafter the balance of the money in trust was paid into Midland's general account on which was then drawn cheques payable to the salesperson involved in the transaction and to the other agency, if any, whose salesperson was entitled to share in the commission.

[23] Provisions similar to the ones from British Columbia referred to above are found at section 29 of the *Real Estate Trading Act*, RSNL 1990, c R-2 (the "RETA") which provides as follows:

> 29. (1) An agent shall maintain at least 1 interest-bearing trust account of a type approved by the superintendent in a financial institution that is authorized to receive money on deposit.
>
> (2) An agent shall deposit in a trust account money received by the agent in trust for other persons in connection with real estate transactions and shall make deposits within 2 banking days of their receipt by the agent.
>
> (3) An agent shall not disburse money from a trust account unless
> (a) the offer of purchase has not been accepted by the vendor;
> (b) the sale has been completed;
> (c) written notice from the vendor and purchaser has been received by the agent authorizing the return of the deposit to the purchaser;
> (d) a court has given a direction as to the disbursement of the proceeds; or
> (e) the money has been deposited into the trust account in error.
>
> (4) Interest earned on money deposited in a trust account referred to in subsection (1) shall be the property of the agent.

[24] In **Midland**, Cohen, J. held that there was an implied trust on the commissions in favour of the salespeople. He wrote at paragraphs 43 to 44:

> 43 When I consider the relationship between Midland and the appellants, as agreed to by the parties in the Independent Contractor Agreements, the nature of the "100% House" business arrangement in general and the

> conduct of the parties, it is clear, I think, that the parties fully intended that while Midland would hold legal title to the appellants' commissions in order to comply with the Real Estate Act, beneficial ownership in the commissions would at all times rest with the appellants.
>
> 44 The business of Midland was to provide services, for a fee, to the appellants. The appellants served the clients. Midland was not only aware that the commissions from transactions belonged to the appellants, they agreed to this arrangement. Midland could not use the appellants' commissions as it saw fit, and the Trustee, who can be in no better position than Midland, is bound by the parties' intention.

[25] The evidence shows that 50549 operated on a similar model to Midland, with similar independent contractor agreements (called "Sales Representative Agreements"). Given the similarity between the facts in **Midland** and the present circumstances, I find an implied trust in favour of the Agents owed commissions by 50549.

Brokers

[26] A similar analysis cannot be applied to the Brokers. Their claims are contractual, rather than based in trust. Although the Sales Representative Agreements between 50549 and the Agents created an implied trust, I am not aware of any arrangement whereby the Brokers would similarly become the beneficiaries of a trust in respect of which 50549 would be the trustee. I was not provided with any documentation upon which I can make such a finding. In particular, I was not provided with the form of contract by which a Broker becomes entitled to a portion of a commission otherwise payable by 50549 to an Agent. Absent proof to the contrary, I am unable to find a trust claim on behalf of the Brokers.

[27] PWC submits that the Broker commissions should be subject to a remedial constructive trust. In **PIPSC v. Canada (Attorney General)**, 2012 SCC 71, Rothstein, J. discussed the circumstances in which a court may find a constructive trust:

144 Since this Court's decision in Soulos v. Korkontzilas, [1997] 2 S.C.R. 217 (S.C.C.), there have been two grounds on which a court can impose a constructive trust: (1) breach of an equitable obligation, and (2) unjust enrichment. The appellants have argued both in this appeal.

145 In Soulos, McLachlin J. (as she then was) held that a constructive trust "may be imposed where good conscience so requires" (para. 34). In her view, good conscience might require the imposition of such a trust in two situations: (1) where property is obtained wrongfully by the defendant (such as by breach of fiduciary duty or breach of loyalty), or (2) where the defendant has been unjustly enriched.

[28] The first variety of constructive trust was described in **PIPSC** as follows:

146 Regarding the first category, McLachlin J. identified four conditions which are generally required before a constructive trust for wrongful conduct may be imposed:

The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [Soulos, at para. 45]

[29] Rothstein, J. also discussed the requirements for a constructive trust resulting from a claim in unjust enrichment:

149 In order to prove a claim in unjust enrichment, the plaintiff must establish: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (Pacific

> National Investments Ltd. v. Victoria (City), 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) ("Pacific National"), at para. 14). Where these elements are satisfied, the remedy of constructive trust may be available, if (1) "monetary damages are inadequate", and (2) "there is a link between the contribution that founds the action and the property in which the constructive trust is claimed" (Peter v. Beblow, [1993] 1 S.C.R. 980 (S.C.C.), at p. 988).
>
> 150 As Binnie J. explained in Pacific National, at para. 15, "[a]n enrichment may 'connot[e] a tangible benefit' ..., or it can be relief from a 'negative', such as saving the defendant from an expense he or she would otherwise have been required to make" (emphasis in original).

[30] The Brokers' commissions meet neither test. With regard to the first variety outlined by Rothstein, J., it was not proven that 50549 had an equitable obligation, whether as a fiduciary or as a failed trustee, to remit a portion of commissions to the Brokers; that is, there has been proven neither the type of relationship that would give rise to a trust nor any wrongful conduct in relation to the collection of the post-receivership commissions.

[31] Although we have seen that the commissions are imbued with a trust in favour of the Agents, it is they who appear to have an obligation to pay the Brokers. That, as a matter of expedience, 50549 may have disbursed a commission in part each to an applicable Agent and the corresponding Broker, does not amount to a failure of an express or implied trust in respect of monies that were meant to be held on behalf of the Brokers. Nor does the absence of a proprietary remedy mean that the Brokers would rank as unsecured creditors of 50549; it appears that their claims are against the responsible Agents and it is to them that they should look for payment of their share of the commissions. Consequently, a constructive trust is not created in the circumstances.

[32] I acknowledge that courts have previously found that the equities in this type of scenario favour of agents over secured creditors. The Brokers are one step removed, however. That is, Doherty, J.A. for the Ontario Court of Appeal in **NRS** was clear such an equitable preference would only arise where there is a clear connection between misconduct by the trustee and the assets over which the trust is

claimed. No such connection is shown between 50549 or the Receiver, who collected the post-receivership commissions, and the commissions themselves.

[33] Furthermore, nothing has been presented to establish that the Brokers are without a remedy in these circumstances. I have already found that the entirety of the post-receivership commissions is held on an implied trust in favour of the respective Agents; the Brokers' claims appear to be contractual claims against those Agents.

[34] With regard to the second test, it is likely true that the Brokers expended significant time and effort to make sales. It is also true that the only money ever intended to flow to 50549 was its fees; the primary work and the primary reward were intended to be in the hands of the Agents and Brokers. It is accepted that 50549 has no property right to monies held in trust beyond its fees. But because 50549 has no interest in the commissions beyond its fees, there is no enrichment of 50549 at the expense of the Brokers who facilitated the production of commissions upon contractual arrangements with the Agents.

[35] Simply put, therefore, although the Brokers cannot claim a trust interest in the post-receivership commissions, the trust interest of the Agents includes amounts that would be payable to the Brokers. Based upon their contracts with the Agents, therefore, individual Brokers may be able to claim their share of the commissions from the respective Agent. Those commissions may, in fact, be imbued with a trust in favour of the Brokers, but with the Agents as trustees. Although PWC may be in a position to facilitate such payments to the Brokers it is not a trustee in respect of same.

Exit Realty Corp. International

[36] No one appeared on behalf of Exit Realty Corp. International ("Exit International"). Its position was put forward by counsel for the Receiver. He explained that as part of its franchise agreement, 50549 periodically paid monies to Exit International that amounted, in effect, to franchise fees under various labels. These included a "company development fee", a "formal franchise fee", and a

"regional development fee". Each of these fees was tied in some way to the sales of 50549's agents. Each form of fee was calculated periodically and paid from funds in 50549's operating account out of amounts otherwise belonging to 50549. None of these franchise fees were paid contemporaneously with the closing of particular transactions.

[37] The Exit International Proof of Claim was originally in the amount of $143,039.05. The Notice of Dispute is now limited to $35,850.05. Schedule I to the First Receiver's Report contains PWC's calculation of the amount payable to Exit International. From transactions that closed post-receivership, it has determined the amount to be $33,883.21.

[38] These fees are particularized in more detail in the document called "*The EXIT Formula*", which is attached to Exit International's proof of claim. According to PWC, they are payable by 50549 as franchisee to Exit International, pursuant to clauses 6(f), 7(f), and 8(a) of *The EXIT Formula*. None of those provisions would give rise to a trust claim. If they are to be paid it would be based upon them being expenses incurred by the Receiver in the course of conducting the receivership.

[39] I note that the Notice of Dispute filed by Exit International appears to categorize the $35,850.05 as a trust claim in the nature of "sponsoring bonuses" to be paid to Agents. Unfortunately, in the absence of anyone appearing on behalf of Exit International, and because the Receiver has not recognized such a trust claim, I am unable to find one.

[40] Based upon the material and representations before me, I find as follows. The Receiver did not carry on the business of 50549 after it was appointed. That is, no new commissions were generated although commissions on concluded pre-existing sales were collected. The claim of Exit International is in respect of commissions received on behalf of 50549 post-receivership in connection with those concluded transactions. But no evidence was led to establish what, if any, actual services were rendered by Exit International after the receivership. That is, it was not proven that these are expenses of the Receiver incurred in the ordinary

course of conducting the receivership. They are categorized by the Receiver as contractual obligations that were incurred prior to the receivership but were not payable until afterwards. The Exit International claim therefore ranks as an unsecured claim.

AccessEasyFunds Limited

[41] AccessEasyFunds Limited ("AEFL") makes claim to all of the money in the receivership up to $526,470, the total amount of its indebtedness; furthermore, the claim is that the funds held in the Deposit Account are imbued with a trust in its favour.

Background of AEFL'S Claims

[42] For the purposes of this application, on various dates AEFL entered into Commission Purchase Agreements ("CPAs") with certain Agents of 50549, namely Anne Squires, Peter Goulding, and Bruce Mullett. According to each CPA, the Agent borrowed money from AEFL against the commission payable him or her on a transaction scheduled to close at a later date and, in turn, gave an absolute assignment of that commission to AEFL. Each CPA, therefore, was in the nature of a factoring arrangement.

[43] In summary, AEFL submits as follows:

1) any amounts collected by 50549 as commissions on behalf of agents that contracted with AEFL are impressed with a trust in favour of AEFL;

2) 50549 had a duty to pay these amounts over to AEFL; and

3) 50549 participated in a fraud against AEFL, which entitled AEFL to a constructive trust to the extent of its indebtedness less any traceable funds.

[44] There are CPAs representing forty-five commissions in issue. Each of Mullett and Goulding is a party to one CPA. Squires is a party to forty-three of the subject CPAs.

[45] PWC acknowledges that AEFL is an assignee of certain rights of Anne Squires, Peter Goulding, and Bruce Mullett pursuant to the CPA's. As PWC notes, however, AEFL, as an assignee, cannot have rights greater than the various assignors – i.e., Ms. Squires, Mr. Goulding and Mr. Mullett.

[46] I am satisfied that the CPAs did not create any requirement by 50549 to pay AEFL independently of the debts between an individual agent and AEFL (save for subsequent commissions payable to the same agent). Each CPA used identical language and identified 50549 as the "Broker" and the individual Agent as the "Sales Representative". Clause 6 of the standard CPA provides as follows:

> The Broker hereby acknowledges the Sales Representative's entitlement to the Sales Commission and acknowledges receipt of the foregoing irrevocable authorization and direction and hereby undertakes to pay the Payment Obligations to AccessEasy out of the Sales Commission immediately following receipt of the commission and finalization of the related commission reconciliations and agrees that after the Closing Date all amounts it may hold on account of the Sales Commission will be held in trust for the benefit of AccessEasy until disbursed by it to AccessEasy in accordance with this Agreement. **Notwithstanding the foregoing, in the event that the sale of the Property fails to Close, the Broker is not responsible to pay the Payment Obligations to AccessEasy. Furthermore, in the event that the Sales Commission received on or following the Closing Date is less than the Payment Obligations, the Broker is not responsible to pay this shortfall to AccessEasy.** The Broker agrees that in the event that there is a failure to pay the - [sic] Payment Obligations in full as a result of sale of the Property failing to close or a shortfall in the Sales Commission, the Broker will comply with the irrevocable direction to pay future commissions to AccessEasy in accordance with Section 4. In that regard the Sales Representative hereby authorizes the Broker to provide AccessEasy with printouts and details of all the Sales Representatives [sic] other pending deals. The Broker further hereby acknowledges the representations, warranties and covenants made by the Sales Representative in this Agreement and, for greater certainty, nothing contained herein shall alter the Sales Representative's obligations for collecting and remitting GST, HST or other taxes.

[Emphasis added.]

[47] This clause makes it clear that although 50549 was directed to pay to AEFL any amounts it would have otherwise paid to the Agent entering into the CPA, the agreement did not contemplate independent liability on the part of 50549. It follows, therefore, that where 50549 (or PWC in its stead) does not itself receive closing funds in relation to a transaction, 50549 has no obligation to pay funds to AEFL.

[48] In this context, it is clear that AEFL is an absolute assignee with no additional rights. As previously noted, it cannot have a better claim to any funds than the Agents who assigned them.

Express Trust

[49] As mentioned, AEFL's claim relates to 45 individual transactions. With regard to what PWC identifies as Deal 22245, the evidence shows that PWC has sufficient documentation to establish a commission payable to Mr. Goulding, and an assignment of that commission to AEFL. Mr. Goulding's claim would be held in trust in the manner of all Agents' claims as discussed above. To the extent that 50549 agreed to hold that commission in trust for AEFL, rather than for Mr. Goulding, then any amount payable to Mr. Goulding in respect of that transaction is held in trust for and should be paid to AEFL.

[50] With regard to the remainder of its claim, AEFL shall be treated as an unsecured creditor. As previously noted, the evidence establishes that PWC does not possess funds from pre-receivership transactions available for AEFL. Thirteen of the 45 transactions for which AEFL claims commissions closed prior to February 1, 2016, with four more closing between that date and the appointment of the Receiver.

[51] AEFL claims the commissions held by PWC relating to Deals 22194, 22298, and 22300 on the basis that they were carried out by Anne Squires as agent. PWC

submits, however, that these transactions were actually carried out by agents Chris Dunn (22194) and Holly Walker (22298 and 22300), neither of whom has a CPA with AEFL. Therefore, I am satisfied that these amounts were not assigned to AEFL and are not payable to it. AEFL has not adduced any evidence to prove that the commissions in these instances are not payable to the Agents identified by the Receiver and not to Anne Squires. Therefore, AEFL cannot claim a trust interest in those specific commissions.

[52] The evidence before me establishes that other than the four transactions noted above, PWC received no closing funds in relation to any of these 45 transactions. Therefore, those claims are not traceable (and, in fact, may not represent actual closed transactions). Since PWC does not possess traceable funds in relation to any of the 45 transactions claimed by AEFL, other than in respect of Deal 22245, there are no additional funds in PWC's possession that can be imbued with an express trust in favour of AEFL.

Other Trust Claims by AEFL

[53] AEFL claims that "all funds" in the receivership are held in trust for it. It bases its trust claims on two premises: a statutory trust over the commissions pursuant to section 29(1) of the RETA, and a constructive trust as a remedy for an alleged fraud by 50549 against AEFL. As we saw above, the creation of a trust requires certainty of intention to create the trust; certainty of subject matter of the trust; and certainty of the objects or beneficiaries of the trust (**Sheehan-Brothers** at paragraph 50).

Statutory Trust

[54] Section 29 of the RETA does not have the effect of creating such a statutory trust in favor of AEFL. In **NRS**, the Ontario Court of Appeal considered sections 19(2) and 20(1) of the Ontario *Real Estate and Business Brokers Act*, RSO 1990, c R.4, which are worded similarly to section 29(1) of the RETA. Doherty, J.A.

rejected the argument that the Ontario legislation created a trust like the one argued by AEFL. He wrote at paragraph 22:

> 22 Neither section creates a trust. Instead, both assume the existence of a trust and require that the broker maintain appropriate books and records and a separate account designated as a trust account. Nor can I agree with counsel for the Director's submission that *REBBA* reveals a legislative intent that trust claimants should rank in priority to any other claimant should the broker become insolvent. Nothing in the *Act* gives the trust claimants any remedies or special status over other creditors in the event of the broker's default: see *Ontario (Director, Business Practices Division, Ministry of Consumer & Commercial Relations) v. Safeguard Real Estate Ltd.* (1994), 114 D.L.R. (4th) 546 (Ont. Gen. Div. [Commercial List]), at 548.

[55] Likewise, section 29(1) of the RETA cannot be said to create an independent trust interest. It is merely a requirement to designate an account as a trust account and to keep proper books. Even if 50549 failed to keep proper accounts, this failure does not give AEFL any trust interest in funds that it would not otherwise have at common law.

Constructive Trust

[56] AEFL alternatively claims a constructive trust on the basis that 50549 committed a fraud against it, either by misusing funds it received in trust or by making representations concerning allegedly fictitious transactions. PWC has not accepted this claim. Although fraud was alluded to at the hearing of this matter, and may well have occurred, I was not presented with any actual proof of fraud. Furthermore, as discussed above, there are a large number of entirely innocent and meritorious vendors, purchasers and Agents with trust claims to most of the assets in the receivership. Even if AEFL is able to substantiate its fraud claim, the equities favour vendors, purchasers and Agents with traceable post-receivership claims ahead of a creditor with untraceable claims, even one who may itself have been a victim of pre-receivership fraud.

[57] AEFL claims on pages 6 and 7 of the Addendum to its Notice of Dispute that the other creditors of 50549 were aware, or ought to have been aware, of the fraud. AEFL has not adduced any evidence to substantiate these assertions.

[58] AEFL's trust claims fail to meet the tests for the creation of a constructive trust. With regard to the first variety:

1) Any trust obligation owed by 50549 to AEFL is limited to amounts received in relation to commissions on transactions subject to a CPA or otherwise payable to an agent who had entered into a CPA in respect of which the commission was not paid to AEFL;

2) AEFL has failed to show that any assets in the receivership resulted from a breach of an equitable obligation by 50549 to AEFL, with the sole exception of the amount received in relation to Deal 22245; and

3) AEFL has failed to show a reason for the grant of a proprietary remedy where the imposition of a constructive trust in favour of AEFL would unfairly prejudice innocent and more meritorious claimants, such as vendors, purchasers and Agents.

[59] With regard to the unjust enrichment analysis, AEFL has failed to show an unjust enrichment of 50549 that would put it in priority to vendors, purchasers and Agent. No link between a contribution by AEFL and any of the assets in the receivership has been established.

[60] I understand that $5900 will remain in the Deposit Account after payment to vendors and purchasers. That amount may therefore be available to 50549 if it is not the subject of a trust claim or a security interest. There may also be an argument that these funds are held on a constructive trust for sales commissions that arose prior to the receivership or the claim of AEFL. The amount is small, however - if it were paid *pro rata* to the trust claimants each amount would be negligible in the scheme of things (even if AEFL were to receive it in its entirety it would comprise just over one percent of its claim). In addition, I am advised by PWC that the cost of assessing and administering the individual amounts to be paid

would likely exceed the remaining fund itself. Consequently, I order that the $5900 be applied towards the Receiver's Charge, thus lessening, in a small way, the *pro rata* effect on the body of claimants.

Canada Revenue Agency

[61] Between September 1, 2015, and February 5, 2016, 50549 withheld approximately $28,000 as payroll deductions in favour of the Canada Revenue Agency ("CRA") for income tax pursuant to section 153 of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.). These withholdings were not remitted to CRA.

[62] Subsections 227(4) and (4.1) of the *Income Tax Act* provide for a statutory trust in favour of the Crown (as represented by CRA) over any amounts withheld as payroll deductions, which operates notwithstanding any other enactment (except sections 81.1 and 81.2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, neither of which are relevant here) and takes priority over secured creditors.

[63] The Receiver is obligated to remit these amounts to CRA pursuant to subsections 227(5) and (5.1)(c) of the *Income Tax Act*. Therefore, this amount is properly payable to CRA from the funds that are otherwise payable to 50549 in priority to any secured creditor.

[64] CRA also has a claim for unpaid amounts collected by 50549 and its agents as Harmonized Sales Tax (HST) under the *Excise Tax Act*, RSC 1985, c. E-15. These amounts are subject to a trust under section 222 of the *Excise Tax Act*. The Receiver advises that this amount is unknown and would be subject to a CRA audit, assessment and appeal process. However, unlike the trust over payroll deductions for income tax, pursuant to subsection 222(1.1) of the *Excise Tax Act* this trust would be vacated upon a bankruptcy of 50549 and CRA would rank as an unsecured creditor in relation thereto.

[65] The Receiver proposed that it be empowered to place 50549 into bankruptcy, with the result that the amounts claimed by CRA for HST would become unsecured claims. I am advised that resolving the quantum of that trust, and determining which claimants should bear the burden of it, would likely prevent any distribution from the receivership for quite some time.

[66] I am satisfied that bankruptcy would bring certainty to this issue, and allow an early resolution and distribution of the receivership (see **Sun Squeeze**, [1994] 28 C.B.R. (3d) 201, 51 A.C.W.S. (3d) 208 (Ont. C.A.)). I am further satisfied that the professional fees associated with a basic bankruptcy (likely in the range of $10,000) will be a cost of administration of the 50549 estate, to be borne *pro rata* by all claimants (other than CRA). Any creditor who wishes to use the bankruptcy administration for additional purposes, such as investigations, reviews of related party transactions, and so on, would need to fund the trustee in relation to those particular matters. I have therefore ordered that PWC be empowered to file an assignment in bankruptcy for 50549 and that it is authorized to act as the trustee in bankruptcy in addition to acting as receiver.

Receiver's Charge

[67] PWC was appointed as receiver pursuant to section 243 of the *Bankruptcy and Insolvency Act* and Rule 25 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

[68] Paragraph 20 of the Receivership Order states:

> 20. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge to a maximum of $100,000.00 (the "Administrative 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 the Administrative Charge shall form a first charge on the Property in

to the one before this court involving investors' money awaiting investment, it was stated at pp. 50-51 [Ch. D.]:

> The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. *It is a discretion which will be sparingly exercised*; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *In re Marine Mansions Co.*, L.R. 4 Eq. 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v. Nesbitt*, 14 Ves. Jun. 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Phipps v. Boardman*, [1964] 1 W.L.R. 993). In my judgment this is a case in which the jurisdiction can properly be exercised.
>
> [Emphasis added.] Similar orders imposing receiver's costs against trust funds are found in:
>
> *Re Eastern Capital Futures Ltd. (In Liquidation)*, [1989] B.C.L.C. 371 (Ch. D.);
>
> *Re Exchange Securities & Commodities Ltd. (No. 2)*, [1985] B.C.L.C. 932 (Ch. D.);
>
> *Re G.B. Nathan & Co. Pty. (In Liquidation)* (1991), 24 N.S.W.L.R. 674, 5 A.C.S.R. 673, 9 A.C.L.C. 1,291 (S.C.);
>
> *Laudan v. ABC Travel System, Inc.*, 165 A. 2d 568 (N.J. Ch. D., 1960).

10. I am satisfied that these authorities amply ground an authority to make an order imposing upon trust assets in receiverships, although the discretion should be sparingly exercised. ...

> priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person, but subject to subsections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

[69] In turn, paragraph 2 of the Receivership Order defines the "Property" as "all of the assets, undertakings, and property of [50549] acquired for, or used in relation to a business carried on by [50549], including all proceeds thereof." Paragraphs 23 and 24 of the Receivership Order create a second charge subordinate in priority to the Administrative Charge called the Receiver's Indemnity Charge. Paragraph 25 of the Receivership Order also provides for the distribution of PWC's expenses among different groups of assets.

[70] The very broad language in the Receivership Order is consistent with the wide latitude given to the courts to create schemes of remuneration for a receiver. Subsection 243(6) of the *Bankruptcy and Insolvency Act* provides:

> 243 (6)If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

[71] Notwithstanding the limitations in section 243(6) of the *Bankruptcy and Insolvency Act* to the scope of a receiver's charge, the Court may, where it is equitable and appropriate to do so, extend a receiver's charge to funds that are held in trust. As Carthy, J.A. wrote in **Ontario (Securities Commission) v. Consortium Construction Inc.**, [1992] 34 A.C.W.S. (3d) 1231, 93 D.L.R. (4th) 321 (Ont. C.A.) at paragraph 9:

> 9. In the case of *Re Berkeley Applegate (Investment) Consultants Ltd.; Harris v. Conway*, [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71, the High Court of England, in a case similar

[72] In a concurring judgment, Galligan, J.A. stated (at paragraphs 33 and 35) a similar principle:

> 33 It is, I think, well established that a court has the inherent power to allow a receiver and manager to recover its proper remuneration expenditures and disbursements out of any assets which are subject to the administration of the court.
>
> [...]
>
> 35 If the trust funds form part of the assets which are subject to the administration of the court, it would seem to me to follow necessarily that the court has the power, in its discretion, to charge those assets with the receiver and manager's proper remuneration expenditures and disbursements. [...]

[73] Here, the receivership is a complex one with numerous competing claims to the funds and assets of 50549. PWC has expended considerable time and effort to determine the nature of the various claims and the equities among the parties. Most of the funds held by PWC are imbued with a trust of one type or another. It is also clear, given the complex web of rights at play, that no individual claimant would have been able to receive any distribution from the assets of 50549 without the services of a receiver or someone fulfilling a similar role. Furthermore, as required by subsection 243(6) of the *Bankruptcy and Insolvency Act*, the present receivership process ensures that all of the claimants had notice and ample opportunity to make representations on this issue.

[74] In this context, where there are a large number of trust claimants, it would be inequitable for one class of claimant to bear the full cost of PWC's expenses and to give other claimants a windfall. This, therefore, is one of those rare cases where the receiver's fees and disbursements should be paid by trust claimants as well as creditors. Each should bear its *pro rata* share of the costs incurred in realizing upon the estate and sorting through the facts and issues.

[75] PWC submits that the only exception proposed to the *pro rata* allocation of the Receiver's Charge is that the CRA statutory deemed trust for unremitted payroll deductions would not be subject to the *pro rata* deduction. This, says

PWC, is largely a matter of efficacy; it is more efficient to pay CRA the relatively small employee remittance claim in full, rather than create confusion for the employees and a possibly lengthy debate between PWC and CRA.

[76] As such, the Receiver's Charge shall first be paid from any unallocated balance in the Deposit Account and then be allocated *pro rata* among all accepted claims, except as noted for CRA employee deductions, including trust and other equitable claims to the Deposit Account and to the Post-Receivership Commissions, and shall rank in priority to all of them.

Other Creditors

[77] The secured creditors of 50549 will have claims to any funds otherwise distributable to 50549 (i.e., not impressed with a trust) after the payment of any prior statutory claims and PWC's charges.

[78] There is no distribution expected to any unsecured creditors.

DISPOSITION

[79] I order that the funds in the hands of PWC be paid as follows:

1) The Receiver's Charge;
2) Canada Revenue Agency for unremitted payroll deductions for income tax in the approximate amount of $28,000;
3) an express trust in favour of vendors and purchasers over the balance of the Deposit Account in the amount of $118,100;
4) an implied or constructive trust over post-receivership commissions in favour of Agents (including the commission assigned by Peter Goulding to AEFL in respect of Deal 22245);
5) secured creditors in their order of priority.

[80] The claims pursuant to items 3 to 5 above shall be subject to their *pro rata* share of the Receiver's Charge.

[81] There shall be no order as to costs.

ROBERT P. STACK
Justice

TAB 18

Court of Queen's Bench of Alberta

Citation: Re Residential Warranty Company of Canada Inc. (Bankrupt), 2006 ABQB 236

Date: 20060327
Docket: 24 112232 and 24 112233
Registry: Edmonton

In the Matter of the Bankruptcy of Residential Warranty Company of Canada Inc.
Estate No. 24 112232

and
In the matter of the Bankruptcy of Residential Warranty Insurance Services Ltd.
Estate No. 24 112233

Corrected judgment: A corrigendum was issued on April 26, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

I. Nature of the Application

[1] This Decision concerns retrospective and prospective funding of a trustee in bankruptcy from assets under administration when all of the assets are subject to a disputed trust claim that is far from being resolved.

[2] Residential Warranty Company of Canada Inc. (RWC) and Residential Warranty Insurance Services Ltd. (RWI) (collectively the Bankrupts) are Alberta companies that operated a home warranty business. They were in the process of winding up when, in late 2004, Deloitte & Touche LLP was appointed their interim receiver (IR) in the context of a minority shareholder's oppression action. On the companies' deemed bankruptcy in May 2005 (Bankruptcies), Deloitte & Touche LLP became their trustee in bankruptcy (Trustee).

[3] The Applicant, Kingsway General Insurance Company (Kingsway), was an insurance underwriter of home warranty policies brokered or administered by the Bankrupts in Alberta and British Columbia. Kingsway filed proofs of claim in the estates pursuant to s. 81 of the

Bankruptcy and Insolvency Act (*BIA*)[1] claiming approximately $11,200,000.00 pursuant to contractual, statutory and common law trusts. The Trustee gave notice under s. 81(2) that the trust claim was disputed. It maintains that all or substantially all of the insurance premiums collected by the Bankrupts for insurance policies on which Kingsway is liable have been paid to Kingsway and that the balance of the estate of the Bankrupts is income derived from the operation of their home warranty business. Kingsway has appealed the Trustee's decision (Appeal).

[4] Kingsway's trust claim arises from a series of transactions that are detailed in a broadly drafted Amended Statement of Claim (BC Action) which it filed in the British Columbia Supreme Court in June 2004, prior to the Bankruptcies. The Amended Statement of Claim is comprised of 125 paragraphs over 42 pages and contains allegations of breach of contract, fraud, conversion, breach of trust, breach of fiduciary duty. The Bankrupts, along with certain of their directors, officers, and employees, are named as defendants in the lawsuit.

[5] Kingsway now applies for an order:

1. declaring that the Trustee is not entitled to use the realizations of any assets and property of the Bankrupts for the purpose of paying its fees and expenses, both past and future, pending the hearing of the Appeal and the disposition of the BC Action;

2. directing that the Trustee return all fees paid after notice of its trust claim, subject to deduction for reasonable fees directly attributable to preservation of the alleged trust property;

3. appointing the Trustee as Interim Receiver of the Bankrupts' assets under s. 47.1 of the *BIA* (*BIA* IR) for preservation purposes pending determination of the Appeal and the BC Action; and

4. requiring the Trustee to post security for costs in respect of its defence of the Appeal and the BC Action;

[6] The Trustee's position is that resolution of the Appeal to finally determine the validity of Kingsway's claim is central to administration of the Bankruptcies. The Trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to the Appeal for lack of funding.

[7] In response to Kingsway's application, the Trustee asks for a retrospective and prospective charge on all of the estate assets under its administration in order to pay its fees and

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[1] R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27

disbursements, including legal fees and disbursements. The Canada Revenue Agency (CRA), an unsecured creditor, and a builder, Nucon Developments, support the Trustee's request.

[8] The parties on this application focussed squarely on the issue of Trustee funding. Kingsway did not pursue its request for security for costs and, while mention was made of its request for the appointment of the Trustee as a *BIA* IR in Kingsway's written submissions, no evidence or argument was offered to support the relief requested. In supplemental written submissions, Kingsway argued that 'super-priority' funding for a *BIA* IR under s. 47.2 of the *BIA* is not applicable in a "straight bankruptcy" like this. I took this submission to mean that it had abandoned this arm of its application.

[9] Kingsway has applied for an order transferring the Appeal to the British Columbia Supreme Court (In Bankruptcy) and for an order granting it leave to continue the BC Action "to be heard at the same time as the Appeal, subject to the direction of the Judge of the British Columbia Supreme Court hearing the BC Action". The applications and the Appeal were adjourned at the parties' suggestion. The applications are now set to be heard in mid May. Kingsway wants to await the outcome of its applications before scheduling the Appeal.

[10] As Kingsway's application to have the Court in British Columbia deal with the Appeal has not been decided, my Ruling on the present application presumes that the Appeal will proceed in the ordinary course of events in this Court.

II. Background

A. The Bankrupts, the Builders and Kingsway

[11] The Bankrupts brokered and administered residential warranty policies sold in Alberta and British Columbia to builders which were underwritten by Kingsway as the insurer of record. The builders paid for membership in the programs. Each of them also paid money by way of cash deposit or letters of credit as security for repairs covered by the warranty policies. The Bankrupts held the cash deposits in a segregated account. Provided a builder did not owe any money on expiry of the warranty period, the deposit would be repaid to the builder. Letters of credit were treated in a similar fashion.

[12] Relations between Kingsway and the Bankrupts soured to the point where Kingsway terminated its contracts with them in August 2003, alleging that the Bankrupts had sold unauthorized products and had failed to remit certain premiums. The Bankrupts denied the allegations and the fight was on.

[13] In the spring of 2004, Kingsway complained to the British Columbia Financial Institutions Commission (FICOM), British Columbia's insurance regulatory authority, about the Bankrupts' conduct. FICOM investigated the companies and RWI responded by surrendering its

broker's license for three weeks. The Insurance Council of British Columbia subsequently allowed reinstatement of its license on conditions, one of which was that RWI hold approximately $3,100,000.00 in trust with its lawyers for premiums allegedly owed to Kingsway.

[14] Kingsway commenced the BC Action in June 2004, claiming a minimum of $2,108,576.35 plus additional unascertained damages. It started a similar lawsuit in Alberta, but did not prosecute it. About three weeks after the BC Action was commenced, RWC paid $3,092,612.50 to Kingsway, unconditionally.

[15] By the date of the Bankruptcies in May 2005, the defendants to the BC Action had defended and counter-claimed (alleging outstanding commissions, expenses, third party costs, lost income, lost opportunity, and loss of reputation) and Kingsway had demanded document production. Kingsway's forensic accountant apparently calculated the amount that remained owing to Kingsway from the Bankrupts as at June 7, 2005 to be $3,786,606.00. In late June 2005, after receiving certain financial information from the Trustee, Kingsway's forensic accountant determined that $11,292,224.00 (over and above the monies already paid by RWC), plus additional amounts for unliquidated damages, was still owing from the Bankrupts.

[16] Kingsway filed proofs of claim in the Bankruptcies on September 2, 2005 and put the Trustee on notice of its claim and of the position that it was taking with respect to the Trustee's fees and expenses on October 4, 2005.

[17] In late 2005, the police charged the Bankrupts, one of their former directors, and a former employee with fraud, theft, uttering a forged document and drawing a document without authority. An Information was sworn and warrants were held until December 15, 2005. I was not provided with any additional information on this application as to the current status of the criminal proceedings.

B. The Interim Receiver, The Trustee and Stakeholders

[18] The order appointing the IR granted the IR a 'super-priority' charge over the companies' assets, giving it priority over all security, charges and encumbrances affecting the assets.

[19] The IR, which is also the Bankrupts' Trustee, complied with the Court's directions to investigate the Bankrupts' affairs, dispose of certain assets and report on numerous concerns, including the BC Action and the builders' deposits. It prepared three reports for the Court. Kingsway contends that the IR's mention of the BC Action in its first report, dated December 21, 2004, constitutes evidence of notice to Deloitte & Touche LLP of Kingsway's trust claim, and that funding for the Trustee from alleged trust assets, which comprise the entire estate of both Bankrupts, should not be allowed after that date. It asserts that funding should not extend beyond October 4, 2005 at the very latest, when its counsel particularized its trust claim and formally put the Trustee on notice of the position which it now advances.

[20] The assets under the Trustee's administration include bank accounts and claims against various parties, but the vagaries of the Bankrupts' business and their relationships with others have somewhat complicated the Trustee's work. Apart from the typical issues arising in any bankruptcy (financial analysis, securing assets, reviewing proofs of claim, reporting to and meeting with creditors and inspectors, and acting as the point person coordinating court matters), the Trustee has instructed litigation and dealt with winding up business operations. It has also addressed enquiries from policyholders and builder claimants about warranties and the refund of deposits relating to 550 properties.

[21] Kingsway has referred some policyholders to the Trustee on denying coverage under various policies and it has jointly instructed some litigation with the Trustee. The Trustee has provided it with financial analyses and other information, including information concerning the Trustee's findings on premium payments.

[22] The Trustee predicts that its future work will entail continued realization of assets through litigation efforts, including intended litigation against Kingsway to recover $1,500,000.00 in allegedly overdue profit sharing, and resolution of creditor and proprietary claims. In due course, it will wind up the estates, return property rightfully belonging to others, and distribute residual property to the creditors.

[23] There are 627 persons interested in the builders' deposit fund and letters of credit (Builder Claimants). The builders' deposit fund is worth approximately $1,000,000.00 while the letters of credit are valued at approximately $5,000,000.00. The Trustee concedes that some of the Builder Claimants have trust claims against the cash builders' deposits. The method by which builders' claims are to be proved in the bankruptcy and a claims bar date were set by Order in December 2005. Kingsway has agreed to that process.

[24] Kingsway has participated in case management meetings and applications relating to the claims of the Builder Claimants. It has requested that it be given notice of claims that the Trustee disallows. It also wants to participate in the Trustee's application for directions as to whether the letters of credit are impressed with a trust and appeals of the disallowance by the Trustee of some builders' claims. Kingsway maintains that it is entitled to all of the value of the letters of credit, although it has not indicated how these can be considered traceable trust assets. It also claims approximately $300,000.00 of the builders' cash deposit fund as a result of alleged setoffs owed to it by builders for the cost of repairs. Kingsway takes the position that once the claims of the Builder Claimants who are seeking access to the cash fund have been resolved in these bankruptcy proceedings, the Builder Claimants must "duke it out" with Kingsway in the ordinary courts to determine who is entitled to the funds.

III. Analysis

A. Fairness, Practicality and Neutrality

[25] A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

[26] The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers.[2] Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.[3]

[27] Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard.[4] What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. As astutely noted by Mr. Justice Farley in ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.***[5]:

> While the *BIA* is generally a very fleshed-out piece of legislation when one compares it to the *CCAA*, it should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating

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[2] s. 183(1)

[3] ***Re Tlustie*** (1923), 3 C.B.R. 654, 23 O.W.N. 622 (S.C.); ***Re Cheerio Toys & Games Ltd.*** [1971] 3 O.R. 721, 15 C.B.R. (N.S.) 77 (H.C.J.); varied [1972] 2 O.R. 845 (C.A.)

[4] ***A. Marquette & Fils Inc. v. Mercure*** , [1977] 1 S.C.R. 547 at 556 (S.C.C.)

[5] (1994), 114 D.L.R. (4th) 176 at 185, 27 C.B.R. (3d) 148 (Ont. Ct. (Gen. Div.))

under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

[28] Neutrality is the necessary mantra of trustees in bankruptcy. They are neither an agent of the creditors nor of the debtor, but rather are administrative officials and officers of the court charged with the responsibility of looking after all parties' interests. Trustees are obliged to comply with the procedures and rules of conduct set out in the *BIA*, the code of ethics in the *BIA General Rules*[6] and with professional codes of conduct, and cannot enter the fray between competing stakeholders.[7] They must present the facts in a dispassionate, non-adversarial manner in matters before the court.[8] Their job is to act as an independent voice of reason and to provide discipline in the oft-chaotic circumstances created on bankruptcy.

B. Trust Property

[29] Unless otherwise provided by legislation, trustees in bankruptcy have no greater interest in the property they are responsible for administering than the bankrupt does.

[30] The property held by a bankrupt in trust for another is not divisible among the creditors of the bankrupt.[9] However, this does not mean that the res of the trust is not subject to administration by the trustee in bankruptcy. On the contrary, property held by the bankrupt in trust for a third party becomes part of the bankrupt's estate in the possession of the trustee in bankruptcy, who is obliged to administer the property and to deal with it in accordance with the law.[10]

[31] Section 81(2) of the *BIA* governs the actions of a trustee in bankruptcy when presented with a trust claim. Within 15 days of presentation, the trustee in bankruptcy is either to admit the claim or to give notice disputing it, together with the reasons for doing so. There is no intermediate position which may be taken.

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[6] Rules 34-53

[7] ***Re Rassell*** (1999), 177 D.L.R. (4th) 396, 237 A.R. 136, 12 C.B.R. (4th) 316 (C.A.); ***Re Nagy***, [1997] 10 W.W.R. 348, 199 A.R. 146, 45 C.B.R. (3d) 160 (Q.B.); reversed on other grounds [1999] 11 W.W.R. 48, 232 A.R. 399, 13 C.B.R. (4th) 1 (C.A); ***Engles v. Richard Killen & Associates Ltd.*** (2002), 60 O.R. (3rd) 572 at para. 150, 35 C.B.R. (4th) 77(Sup. Ct. Just.)

[8] ***Re Beetown Honey Products Inc.*** (2003), 67 O.R. (3d) 511, 46 C.B.R. (4th) 195 (Ont. Sup. Ct. Just.); affirmed (2004), 3 C.B.R. (5th) 204 (Ont. C.A.)

[9] s. 67(1)(a)

[10] ***Ramgotra (Trustee of) v. North American Life Assurance Co.***, [1996] 1 S.C.R. 325, 37 C.B.R. (3d) 141 at para. 61

[32] Section 81(2) reads:

> 81(2) The trustee with whom a proof of claim is filed under subsection (1) shall within fifteen days thereafter or within fifteen days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or give notice in writing to the claimant that the claim is disputed with his reasons therefor, and, unless the claimant appeals therefrom to the court within fifteen days after the mailing of the notice of dispute, he shall be deemed to have abandoned or relinquished all his right to or interest in the property to the trustee who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant.

[33] The Trustee in the present case has performed a quasi-judicial function in assessing and disallowing Kingsway's claim. There is no suggestion that it acted unfairly in doing so or that it has somehow entered into the fray between competing stakeholders. The Trustee has simply done its job.

[34] The Trustee agrees that the Bankrupts had trust obligations to Kingsway for unremitted premiums, but disagrees with Kingsway's assessment that all of the money collected by the Bankrupts from their customers represented premiums. It also questions the merit of Kingsway's constructive trust claim arising from alleged "secret commissions" and breach of fiduciary duty. Tracing will be an issue concerning Kingsway's claim to entitlement to the letters of credit and possibly other aspects of its claim.

[35] The Act is silent about the trustee's responsibilities on an appeal from its rejection of a claim. However, s. 41(4) of the *BIA* provides that an estate is deemed to have been fully administered only when "a trustee's accounts have been approved by the inspectors and taxed by the court and all objections, applications, oppositions, motions and appeals have been settled or disposed of and all dividends have been paid".

[36] In my view, the Trustee is a necessary party to the Appeal, which it is to participate in as an officer of the court, presenting the relevant facts in a dispassionate, non-adversarial manner, leaving the court to decide the matter. The Trustee's responsibility is to ensure that only valid claims to the assets under administration are recognized.

[37] Kingsway has asserted a significant trust claim that might prevail at the end of the day, but at present that claim is merely an assertion - a fact that weighs heavily on this application.

[38] The onus of establishing a trust at the date of bankruptcy will rest with Kingsway and the ordinary law of trust applies in that regard.[11] Kingsway has not yet proved its claim of a valid trust. It has procured an accounting expert's opinion that it relies on, but that opinion is untested. The BC Action was in the early stages when stayed by the Bankruptcies. Other proceedings dealing with the same series of transactions are seemingly over or similarly not far advanced. FICOM's investigation resulted in a three-week licence suspension, but no further action was taken, and the criminal proceeding is in its early stages.

C. Trustee Funding

[39] In a typical bankruptcy, the trustee is paid from estate assets. Like all insolvency professionals, trustees in bankruptcy are or should be alive to securing payment of their fees, particularly for work in the initial stages of a bankruptcy until the asset base from which they can be paid is assessed. Trustees often look to the petitioning creditor for an indemnity for their fees. Here, the Bankruptcies occurred when proposal deadlines were not met and there is no petitioning creditor. However, other interested parties include the CRA, an unsecured creditor and the Builder Claimants.

[40] Section 39(1) of the *BIA* provides that: "The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors." However, if remuneration has not been fixed under 39(1), the trustee is entitled under s. 39(2) to insert in his final statement and retain as remuneration, subject to increase or decrease on application to the court, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

[41] Ordinarily, a trustee in bankruptcy will not be funded from trust assets unless it shows that its work was necessary to preserve or otherwise benefit the trust assets,[12] or the work was required for resolution of the trust claim or to sort out beneficiaries.

[42] The first exception developed as a result of the court's exercise of inherent jurisdiction in ordinary trust cases, a topic reviewed in some depth by Sigurdson J. in ***Re Gill*** and Tysoe J. in ***Re***

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[11] s. 81(3); ***Re Kenny*** (1997), 149 D.L.R. (4th) 508, 37 C.B.R. (4th) 291, 1997 CarswellOnt 6031, 34 O.T.C. 321 (Ont. Ct. (Gen. Div.))

[12] ***Re Gill***, (2002) 37 C.B.R. (4th) 257, 2002 BCSC 1401 at para. 23; ***Grant v. Ste. Marie Estate***, (2005) 39 Alta. L.R. (4th) 71, 8 C.B.R. (5th) 81 at paras. 30 and 31, 2005 ABQB 35; ***Re Westar Mining Ltd.*** (1999), 13 C.B.R. (4th) 289, 1999 CarswellBC 2149 (S.C.); ***Re Broome***, (1986) 61 C.B.R. (N.S.) 233 (Ont. S.C.); ***Re CJ Wilkinson Ford Mercury Sales Ltd.*** (1986), 60 C.B.R. (N.S.) 289 (Ont. H.C.J.); ***Re Shirt Man Inc.*** (1987), 65 C.B.R. (N.S.) 309, 19 C.C.E.L. 148 (Ont. S.C.); ***Re Genometrics Corp.***, 2005 CarswellSask 790, 2005 SKQB 488; ***Re Frederick McLeod*** (1949), CarswellOnt 88, 29 C.B.R. 163 (S.C.(H.C.J.))

Eron Mortgage Corp.[13] The court's inherent jurisdiction in this regard has been exercised sparingly and generally in circumstances where the beneficiary would have had to hire someone else to do the work performed by the trustee.[14] The second exception flows from the trustee in bankruptcy's duty under the *BIA* to approve or disallow of claims.[15]

[43] There is also statutory authority in Alberta which allows for the funding of ordinary trustees. The *Trustee Act*[16] authorizes the court to order compensation for "the trustee's care, pains and trouble and the trustee's time expended in and about the trust estate". This compensation is available regardless of whether the trusteeship arises by construction, implication of law, or express trust.[17] Trustees in bankruptcy can avail themselves of this legislation to the extent that it is not in conflict with the *BIA*.[18]

[44] The Alberta Court of Appeal in ***Re Sproule Estate***[19] considered the intent and scope of s. 44 funding (then s. 39). Mr. Justice Haddad commented that:[20]

> My concept of the term care and management is consistent with the expressions to which I have referred. It connotes to me not only the responsibility of reasonable supervision and vigilance over the preservation or disposition of assets but also

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[13] (1998), 53 B.C.L.R. (3d) 24, 2 C.B.R. (4th) 184 (S.C.)

[14] ***Re Eron Mortgage Corp.***, footnote 14; ***Harris v. Conway***, [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71 (Eng. H.C.); ***Ontario (Securities Commission) v. Consortium Construction Inc.*** (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6 (C.A.); ***Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.*** (1993), 106 D.L.R. (4th) 132 (Ont. C.A.)

[15] ***Re Ridout Real Estate Ltd.*** (1957), 36 C.B.R. 111 (Ont. H.C.J.); ***Re NRS Rosewood Real Estate Ltd.***, (1992) 9 C.B.R. (3rd) 163 (Ont. Ct. (Gen. Div.)); ***Re Nakashidze (No. 2)***, [1948] O.R. 254, 29 C.B.R. 35 (H.C.J.); ***Re Walter Davidson Ltd.*** (1957), 10 D.L.R. (2d) 77, 36 C.B.R. 65 (Ont. H.C.J.)

[16] R.S.A. 2000, c. T-8, s. 44. The Act expressly permits charging of trust assets for the fees of judicial trustees, but otherwise is silent.

[17] *Trustee Act*, footnote 16, s. 1(b)

[18] *BIA*, footnote 1, s. 72(1); see also the discussion concerning operational conflict in ***Multiple Access Ltd. v. McCutcheon***, [1982] 2 S.C.R. 161 at 190: "[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament." In my view, the overarching principle to be derived from ***Multiple Access Ltd.*** and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means. Impossibility of dual compliance is sufficient but not the only test for inconsistency.

[19] (1979) 95 D.L.R. (3d) 458, 13 A.R. 420 (C.A.)

[20] ***Re Sproule Estate***, footnote 20, para. 11

> the responsibility of judgment and decision making in the affairs of an estate to resolve problems from time to time arising over and above the usual and regular procedures attendant upon administration.

[45] The Trustee in the present case was obliged to gather in trust property, which vested in the Trustee, but it cannot distribute the res of the trust to creditors. The Trustee therefore has two capacities, one as trustee in bankruptcy and the other as an ordinary trustee arising by implication of law. If Kingsway prevails at the end of the day, the Trustee is entitled to seek compensation for its work "in and about the trust". In my view, the broad scope of compensable work discussed by Mr. Justice Haddad in ***Sproule*** includes identifying which assets, if any, are subject to a trust and, if doubt exists, placing the necessary information before the court for determination of that issue.

[46] There are several notable cases in which trustees in bankruptcy have been denied or given only limited funding from trust assets. ***Re Broome***, ***Re Shirt Man Inc.*** and ***Re Genometrics Corp.*** involved assets impressed with undisputed statutory trusts for employee withholdings. In ***Broome***, as here, the trust claims were to the entirety of the funds gathering in by the trustee.

[47] ***Broome*** concerned employee tax withholdings. Master Bowne described his ruling as:[21]

> ...A signal to trustees that where there are trust claims, before undertaking work with a view to realization of assets to benefit trust fund recipients, the trustee would be advised to make arrangements that remunerations would be paid by the administrator of the trust or otherwise.

[48] Master Browne said in *obiter dicta* that even if the funds in the estate exceeded the amount of the trust claims, the expenses and fees which the trustee would be entitled to claim from the estate assets under s. 107 (now s. 136) of the *BIA* would not include indemnity for any work done which did not result in a benefit to the creditors. This aspect of the decision was qualified in ***Re Pugsley***,[22] an appeal of a registrar's taxing order which disallowed legal fees incurred by the trustee in obtaining an opinion on the validity of a trust claim asserted by Revenue Canada under s. 59 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (now s. 81 of the *BIA*). Mr. Justice O'Driscoll in that case held that the comment of Master Browne in ***Broome*** should not be extended or expanded to include the assessed costs of legal counsel retained by the trustee to provide such legal services. He did not consider it logical that a trustee would be entitled to pay counsel for the opinion if in the end the proof of claim was adjudged invalid, but not if the claim was upheld, even though technically there was no benefit to the creditors in obtaining the opinion.

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[21] ***Re Broome***, footnote 12, pp. 236 tp 237

[22] (1988), 63 O.R. (2d) 635, 67 C.B.R. (N.S.) 98 (S.C.)

[49] The debtor in ***Re CJ Wilkinson Ford Mercury Sales Ltd.***[23] sought a charge over statutory trust assets, again employee withholdings, to fund his legal counsel. The court denied the application, commenting that it would not allow money owned by one person to be paid over to another person so that he could pay it to yet another person.

[50] ***Grant v. Ste. Marie Estate***[24] involved a summary trial in the ordinary courts, a bankrupt rogue, a finding of a valid express trust and competing claimants. The plaintiff was granted leave to proceed with his lawsuit against the bankrupt. The issue was whether the plaintiff, a victim of the bankrupt defendant's fraud, could trace funds that he had paid to the bankrupt into the hands of the trustee in bankruptcy.

[51] Mr. Justice Slatter found that the bankrupt had used words of trust to reassure the plaintiff. He ruled that the trustee's investigative work was instrumental in precluding improper payouts to others and thereby benefited the plaintiff. Likening the trustee to a *bona fide* purchaser for value without notice, he allowed encroachment on the trust property to pay certain expenses to the extent they related to the trustee's dealings with the traced funds, but only to the date the trustee received notice of the trust claim.

[52] Slatter J. noted that the trustee's fees and expenses relating to general administration of the estate were a legitimate expense of the estate. Where trust funds are used to discharge a debt owed to the recipient of the funds, there is a giving of value and no tracing to the recipient is permitted.[25] Therefore, he reasoned that the trustee's payment of legal expenses and even its own fees prior to receiving notice of the trust precluded the trust claimant from tracing those funds and defeated the beneficiary's interest to that extent. He commented[26] that:

> ... the Trustee is an officer of the Court, and a necessary part of the bankruptcy regime, and the discharge of the estate's obligation to pay the Trustee should also be considered as the giving of value. Before receiving notice of the Plaintiff's claim the Trustee was a bona fide purchaser for value without notice, and the Plaintiff cannot recover the portion of funds used to discharge the legitimate expenses of the estate.

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[23] footnote 12

[24] footnote 12

[25] D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315 at 321

[26] footnote 12 at para. 31

[53] ***Re Westar Mining Ltd.***[27] addressed the issue from the opposite perspective. A group of trust claimants sought funding from estate assets to pay legal fees for their application to exclude certain assets from distribution to the creditors. The court held that the legal work did not benefit the bankrupt's estate nor was it necessary for the management and preservation of estate assets. The court was unmoved by the claimants' plea that it would be unfair to them to have to retain counsel when counsel for the trustee, who was paid for by the estate, represented the other creditors.

[54] The court in ***Re Ridout Real Estate Ltd.***[28] charged trust funds that ultimately were held to belong to realty vendors and purchasers, brokers and salespersons with payment of the fees of a trustee in bankruptcy. The only mention of the trustee's work in connection to the trust assets was that he received a deposit and brought an application for directions concerning distribution of the assets. Presumably, this was sufficient to warrant compensation. The case report refers only to trust funds in the trustee's hands. There is no mention made as to whether there were any residual assets in the bankrupt's estate.

[55] In ***Re NRS Rosewood Real Estate Ltd.***,[29]the court awarded the trustee in bankruptcy $25,000.00 in compensation from trust monies as it was satisfied that issues between the stakeholders had to be resolved by the court and it was the trustee's initiative which had caused that to happen. Apparently, there were some residual assets in that case.

[56] Mr. Justice Urquhart in ***Re Nakashidze (No. 2)***[30] allowed the trustee compensation from securities that were not property of the bankrupt, noting that the trustee had undertaken a vast amount of work in sorting out and assembling the securities and claims. However, he reached a contrary conclusion in ***Re Frederick McLeod***,[31] finding that the trustee in bankruptcy was not entitled to compensation from proprietary assets because the proprietary claimant rather than the trustee had "salvaged" the asset. Nevertheless, he did indicate that any work undertaken by the trustee could be taken into account when the estate was wound up in fixing his general compensation.

[57] ***Re Walter Davidson Ltd.***[32] involved a dispute between a secured creditor claiming under a general assignment of book debts, mechanics' lien claimants and unsecured creditors. The court ultimately ruled in favour of the statutory lien claimants, but held that it was the trustee in

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[27] footnote 12

[28] footnote 15

[29] footnote 15

[30] footnote 15

[31] footnote 12

[32] footnote 15

bankruptcy's efforts which had made the money available to the lien claimants and therefore charged the trust assets with payment of the trustee's fees.

[58] Like Kingsway, the miners' lien claimants in ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.***[33] protested funding of the insolvency professional. Funding in that case was pursuant to a 'super priority' charge granted under s. 47.2 of the *BIA*. In refusing the claimants' application, Mr. Justice Farley described the interim receiver's work as "providing discipline to the proceedings" and noted that the interim receiver had to be capable of exercising its own independent judgment. He commented as follows on the status of the applicants' claims in ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.***:[34]

> ...Secondly, it would seem to me that one should not presume what one is hopeful of establishing (i.e. the MLA claimants have not yet proved the validity and priority of their liens). Thirdly, while it should be recognized that the IR may be funded, there is no assurance that it will "win"; it may "lose" in whole or in part. However, at least there will be the testing of the Royalty Claim for the benefit of all creditors who have a valid claim against ***Curragh***...
>
> ... Simply put, it comes down to a question of cutting through the Gordian Knot: one does not know at this stage whether these opposing MLA claimants have a valid and prior claim. It seems to me that the amount of funding is reasonable in the circumstances and would be modest investment in the process.

[59] The trustee is an integral part of the bankruptcy system. The claims review process is designed to ensure that only proper claimants are entitled to share in the bankrupt's property. The Trustee, at least in this case, is a necessary party to the Appeal. Kingsway should succeed only if it has a legitimate claim and not simply by default. To rule otherwise would be to open the door for possible abuse of the system by rogue claimants filing spurious proprietary claims.

[60] If a charge is granted, Kingsway ultimately may be prejudiced if it proves its claim to the extent asserted, but that prospect remains an "if". The sheer magnitude of its claim is no reason to hold the Trustee and the bankruptcy system at bay pending determination of its validity. Mr. Justice Farley's words in ***Curragh*** resonate ... "one should not presume what one is hopeful of establishing".[35]

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[33] [1994] O.J. No. 1917 (Ont. Ct. (Gen. Div.)) (QL)

[34] 1994 CarswellOnt 3853 at paras. 8 and 9 (Ont. Ct. (Gen. Div.))

[35] footnote 34 at para. 8

D. Charge on the Assets

[61] Kingsway contends that an asserted trust claim valued at more than potential realizations, regardless of its facial merit, forces the trustee in bankruptcy to seek funding for an appeal of its disallowance of the claim from sources other than the assets under administration. It contends that responsibility to fund the Trustee falls on the shoulders of other creditors or claimants, whether by means of direct funding or an assignment under s. 38 of the *BIA*. Given the nature of the claims in these Bankruptcies, I disagree. The validity and priority of the trust claims must be determined. The Trustee is assisting the Court and all of the claimants in coordinating these matters and in providing the necessary information to resolve these issues.

[62] The Trustee is not asking for a retrospective charge over undisputed statutory employee withholdings, as were the (unsuccessful applicant) trustees in bankruptcy in ***Broome***, ***Shirt Man*** and ***Genometrics***. Nor is the Trustee seeking a prospective charge over undisputed statutory employee withholdings like the bankrupt in ***C.J. Wilkinson Ford Mercury Sales***.

[63] Mr. Justice Slatter held in ***Grant*** that the trustee in that case could not use the trust funds after receiving notice of the proprietary plaintiff's claim. It is unclear what position the trustee in that case took concerning the trust claim (offering financial and documentary information to the court does not equate to disputing the claim), what work, if any, it undertook after notice of the trust claim, and whether there were residual assets from which it could be funded. This is not surprising given that the case was not about trustee compensation or the charging of trust assets.

[64] The role of the Trustee here is more akin to that of the trustees described in ***Ridout Real Estate***, ***NRS Rosewood***, ***Nakashidze (No.2)***, ***Walter Davidson Ltd.***, and ***Frederick McLeod***, each of whom was successful in obtaining a retroactive charge over established trust assets for their work in gathering and preserving trust assets or in sorting out the trust claims.

[65] In ***Pugsley***, Mr. Justice O'Driscoll commented that a trustee should be able to pay counsel for their opinion and services in regard to a proof of claim whether the claim eventually is adjudged invalid or not. He reasoned that if the trustee cannot hire and remunerate counsel to process the claims, counsel to a trustee might refuse to do so because of the potential for non-remuneration. In his view, that would put the trustee in a "no win" situation with regard to legal advice and legal services regarding proofs of claim.

[66] ***Sproule*** is also responsive to the "no win" situation identified by Mr. Justice O'Driscoll in ***Pugsley***.

[67] Common sense dictates that trustees in bankruptcy should receive reasonable compensation when they are called on to exercise their judgment and to be real problem solvers in a situation such as the present one. If it were otherwise, trustees would be inclined to shy away from problems and the list of persons willing to take on the role of trustee would dwindle, particularly in situations where there was no personal connection between the potential trustee and the beneficiary or the assets under administration.

1. Retrospective Charge

[68] Kingsway's application is denied. The Trustee is entitled to a charge on the assets under administration for its fees and expenses in undertaking work on the estate to date. Presuming success for Kingsway in the end, a significant part of the Trustee's work will have benefited Kingsway, given that its claim is to all of the assets under administration. Furthermore, the Trustee is entitled to compensation for all of its work to date in sorting out Kingsway's claim. The Trustee has offered its assistance to Kingsway in related proceedings concerning proposals made by various directors and officers of the Bankrupts, it has formulated a plan that Kingsway has joined in for resolving claims by Builder Claimants, it has coordinated and attended case management meetings, and it has argued a preliminary arm of Kingsway's jurisdictional application.

[69] I have taken Kingsway's choices regarding process into consideration in determining whether it is appropriate to grant the Trustee a retrospective charge on the contested assets for its fees and disbursements. Kingsway has chosen to make a preliminary application to move the Appeal to British Columbia. It wants to continue the BC Action. While it is entitled to bring these applications, it cannot ignore the logical consequences of doing so. These applications, and others which it has brought in parallel proceedings relating to the proposals made by various officers and directors of the Bankrupts, have and will continue to delay the ultimate decision about the validity of Kingsway's trust claim. Kingsway wants to take advantage of the bankruptcy proceedings to have this Court determine the validity of the claims of the Builder Claimants and whether the letters of credit are impressed by a trust, but to force builders with trust claims against which it alleges a right of setoff to "duke it out" in the ordinary courts. Finally, I observe that Kingsway did not seek an expedited hearing for this or its other applications.

[70] Kingsway's application to stop the Trustee from using assets under its administration to pay its fees and expenses is denied and the Trustee is granted a retrospective charge over the assets under its administration for all of its reasonable fees and disbursements, including legal expenses, concerning the gathering in and preserving of assets in the estate and the general administration of the Bankruptcies, such as investigating Kingsway's trust claim. The charge is granted no matter what the outcome is of the Appeal.

[71] If an appeal court decides that the retrospective charge should be restricted to fees and expenses relating to work undertaken before the Trustee had notice of Kingsway's claim, as in ***Grant***, I offer my finding that reasonable notice did not occur until November 25, 2005. The reasons for my finding in this regard are:

1. The Trustee's work in its capacity as IR was at the Court's behest. Like the insolvency professional in ***Ontario (Registrar of Mortgage Brokers) v.***

Matrix Financial Corp.,[36] it is entitled to payment from trust assets for all work done prior to the Bankruptcies.

2. The Trustee, as IR, indicated in its reports to the Court between December 2004 and May 2005 that:

   (i) the BC Action existed;

   (ii) it had a concern about Kingsway's calculation of premiums owing;

   (iii) it was premature to opine on the merits of the BC Action, but once that could be done, a decision would be taken to settle, vigorously defend or purse damages by counter-claim.

3. The allegation of breach of trust in the BC Action is just one of many claims in a broadly cast pleading. The filing of pleadings in a civil action does not mean that the plaintiff will pursue its claim in a bankruptcy.

4. It was not until October 4, 2005 that Kingsway's counsel particularized its trust claim and formally put the Trustee on notice of the position which it now asserts.

5. Kingsway's Notice of Motion was filed November 25, 2005. That is the date on which the clock should run.

2. Prospective Charge

[72] ***Gill*** is the only reported bankruptcy case that specifically addresses prospective charges over trust assets. As might be expected, the decision there turned on the unique facts of the case. There were allegations that the bankrupt had been involved in a scheme to hide his interest in certain properties by having them registered in the names of others. The trustee filed 350 caveats to preserve the interests of creditors and potential proprietary claimants. Information about the extent of the trust property and the claimants was uncertain at the date of the application. The trustee sought a retrospective and prospective charge over the yet unascertained trust assets.

[73] Mr. Justice Sigurdson found that the application for a prospective charge was premature, but granted leave to the trustee to reapply on evidence of creditor prejudice. He noted that the trustee's request would ripen when valid trust claims were established and sale proceeds were ready for distribution. He was concerned that affected parties should have notice of the

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[36] footnote 14

application, an impossibility at the time of the application given that the trustee did not know who they were.

[74] The facts in ***Gill*** are distinguishable from those in the present case. Unlike the situation in ***Gill***, the Trustee's application here is not wholly premature. It is clear that Kingsway and the Builder Claimants advance trust claims. The value of Kingsway's claim is established. Values of the assets under administration are known, subject to some further collection efforts and potential litigation recoveries from actions against Kingsway. The trust claims have not been substantiated at present. That alone is not sufficient reason to defer the Trustee's application.

[75] ***Eron Mortgage*** was followed in ***Gill*** and therefore merits brief discussion, although the facts in that case also are distinguishable. ***Eron Mortgage*** involved the judicial trusteeship of an insolvent company. A court sanctioned lenders' committee sought a charge over (what appear to be undisputed) trust assets to secure past and future payment of expenses and remuneration. Mr. Justice Tysoe concluded that he could exercise inherent jurisdiction to order the charge, but declined to do so, although he gave leave to the committee to reapply. His rationale for declining the charge was that the evidence was unclear about certain committee functions. He considered that it was premature to say what future efforts, if any, would benefit the trust assets.

[76] In my view, it is clear in the present case that resolution of Kingsway's claim will benefit the trust claimant if it succeeds. Similarly, the creditors are entitled to have Kingsway's claim tested, presuming the Inspectors agree to the Trustee's involvement in the Appeal.

[77] The Trustee's request, however, is not just for a charge over potential trust assets in relation to the Appeal, but for a charge in relation to furthering the general administration of the Bankruptcies, including the Appeal. I understand that the Trustee intends to seek a charge over the assets at issue in the Builder Claimants' matter. However, even excluding that work, the proposed charge encompasses more than the case law presently authorizes for sorting out claims and preserving trust assets. It is a request for a general "super priority" funding order like that available to *BIA* interim receivers under s. 47.2, to judicial receivers, and to debtors in *Companies' Creditors Arrangement Act*[37] proceedings for financing a restructuring (DIP or priming liens).

[78] Except in the context of commercial restructuring cases under the *BIA*,[38] caution must be exercised when considering developments concerning inherent jurisdiction emanating from the *CCAA*. The *BIA* and *CCAA* are very different in degree of specificity and the policy considerations involved. For example, courts in *CCAA* proceedings routinely rationalize financing for commercial restructuring that compromises creditors' traditional interests in the

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[37] R.S.C. 1985, c. C-36

[38] ***Fiber Connections Inc. v. SVCM Capital Ltd.*** (2005), 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271, 2005 CarswellOnt 1963 (Sup. Ct. Just.), leave to appeal to Ont. C.A. granted (2005) 10 C.B.R. (5th) 201.

name of the greater good. There is an overarching policy concern favouring the possibility of a going concern solution and the potential of a long-term upside value for a broad constituency of stakeholders.[39] Arguably, in some cases, super-priority financing and priming charges must be available if restructuring is to be a possibility.

[79] Here, the policy consideration is not to facilitate a potential business survival, but rather to maintain the integrity of the bankruptcy system and to be fair, while recognizing established trusts law.

[80] According to the court in ***Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd***,[40] "super priority" funding for judicial receivers ordinarily is limited to circumstances where either:

1. The receiver's appointment is at the request of or with the consent or approval of the holders of security.

2. The receiver's appointment is to preserve and realize assets for the benefit of all interested parties, including secured creditors.

3. The receiver has expended money for the necessary preservation or improvement of the property.

[81] In my view, a prospective charge can be fashioned which will respect these limitations. Since the assets under administration are bank accounts and chose in action, the Trustee's work for general estate administration can be restricted to matters of some urgency. If the Appeal is dealt with in a timely fashion, significant hardship to the creditors can be avoided and Kingsway can be offered some assurance deductions from the assets over which it is claiming a trust will be minimized. I appreciate, however, that some litigation may be time sensitive. Therefore, the Trustee is granted leave to revisit this restriction on evidence of prejudice to the creditors by delaying litigation.

[82] A prospective charge will be granted on the Trustee filing a report with the Court confirming that the Inspectors in these Bankruptcies have approved the actions which the Trustee proposes to take, including its involvement in the Appeal and all of the preliminary applications filed by Kingsway that may be heard prior to the Appeal. On the filing of that report, the prospective charge will cover the preliminary applications, the Appeal *per se*, and all steps to readying the Appeal for hearing, whether it is a "paper Appeal" or a directed trial of an issue.

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[39] ***Re Royal Oak Mines Inc.*** (1999), 6 C.B.R. (4th) 314 (Ont. Ct. (Gen. Div.)); David B. Light, "Involuntary Subordination of Security Interests to Charges for DIP Financing under the *Companies' Creditors Arrangement Act*," (2005) 30 C.B.R. (4th) 245.

[40] (1975), 21 C.B.R. (N.S.) 201 at 205-206 (Ont. C.A.)

Conservative measures for asset maintenance and preservation also are covered by this prospective charge. However, the Trustee may not pursue new asset realization without leave of the Court or Kingsway's consent.

[83] The Appeal will proceed on an expedited basis after the hearing of Kingsway's preliminary jurisdictional applications. Any application to have the Appeal dealt with by way of a trial of an issue is to be filed within 14 days of these Reasons and made returnable on May 12, 2006. If there is no such application, a case management meeting will be held May 12, 2006 for the purpose of setting deadlines for the exchange of affidavits, cross-examinations on affidavit and the filing of written submissions.

[84] If, as a result of the Appeal, Kingsway establishes a recoverable trust of the magnitude claimed, it will have suffered a loss by virtue of the charge. Nevertheless, that loss will have been incurred, broadly speaking, to benefit the trust in realizing assets and to determine entitlements. If it is held that all of the assets under administration are not impressed with the trust claimed by Kingsway, a hearing is to be held in order to determine out of which funds (i.e. any trust monies owing to Kingsway, any trust monies owing to the Builder Claimants or other parties with a proven trust claim, and the monies to be distributed to creditors), and in what proportion the Trustees' fees and expenses (once approved) are to be taken.

3. Builder Claimants

[85] The retrospective and prospective charges which I have granted have the potential to affect the Builder Claimants if they are successful at the end of the day in establishing entitlement to some of the assets under administration. There is no evidence that the Builder Claimants have been given notice of this application. Accordingly, I direct that the Trustee serve the Builder Claimants with notice of my decision. The charges which I am granting will not take effect on any monies claimed by the Builder Claimants until 14 days after the Trustee has filed proof with the Court of service of these Reasons on all of the Builder Claimants. Prior to that time, the Builder Claimants may challenge the charges which I am granting the Trustee over that portion of the assets to which they claim an interest.

4. Costs

[86] Costs of this application will be determined following the Appeal. If the Appeal does not proceed for some reason, the parties may return on notice to settle the issue of costs.

Dated at the City of Edmonton, Alberta this 24th day of March, 2006.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Brian Rhodes
Dolden Wallace Folick

John I. McLean
Davis and Company
for Kingsway General Insurance Company

Kent Rowan
Ogilvie LLP
for Deloitte & Touche Inc.

Corrigendum of the Memorandum of Decision
of
The Honourable Madam Justice J.E. Topolniski

The third sentence in paragraph 23 was changed from: "Both Kingsway and the Trustee concede that many of the Builder Claimants have trust claims against the cash builders' deposits." to read: "The trustee concedes that some of the Builder Claimants have trust claims against the cash builders' deposits."

The date May 12, 2005 in lines 3 and 4 in paragraph 83 have been changed to May 12, 2006.

TAB 19

In the Court of Appeal of Alberta

Citation: Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc. (Trustee of), 2006 ABCA 293

Date: 20061010
Docket: 0603-0093-AC
Registry: Edmonton

Between:

Kingsway General Insurance Company

Appellant
(Applicant)

- and -

Deloitte & Touche Inc., Trustee In Bankruptcy of Residential Warranty Company of Canada Inc. and Residential Warranty Insurance Services Ltd.

Respondent

Corrected judgment: A corrigendum was issued on October 18, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Doreen Sulyma

Reasons for Judgment Reserved of The Honourable Madam Justice Paperny
Concurred in by The Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Sulyma

Appeal from the Decision of
The Honourable Madam Justice J. E. Topolniski
Dated the 24th day of March, 2006
(24 112232; 24 112233)

Reasons for Judgment of
The Honourable Madam Justice Paperny

Introduction

[1] This is an appeal from a case management judge, sitting in bankruptcy, granting a charge for trustee's fees against property subject to conflicting, undetermined trust claims.

Background

[2] The bankruptcy judge reviewed the facts in her reasons: (2006), 21 C.B.R. (5th) 57, 2006 ABQB 236. The following is a summary.

[3] Residential Warranty Company of Canada ("RWC") and Residential Warranty Insurance Services ("RWI") operated a home warranty business in Alberta and British Columbia. The appellant Kingsway General Insurance ("Kingsway") underwrote warranty policies sold by RWI and RWC.

[4] RWI collected insurance premiums on behalf of Kingsway pursuant to a broker agreement. RWC and RWI also received funds from home builders by way of fees for membership in the warranty programs and by way of cash deposits or letters of credit as security for repairs covered by the warranty policies.

[5] RWC and RWI became bankrupt on May 31, 2005. The respondent, Deloitte & Touche, is the trustee in bankruptcy of their estates.

[6] Kingsway filed proofs of claim pursuant to s. 81 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*") asserting that all property in the bankrupt estates is subject to a trust in Kingsway's favour. Unsecured creditors, Canada Revenue Agency and other competing trust claimants (home builders) also claim interests in the property.

[7] Kingsway claims that the entirety of the bankrupts' estates is comprised of premiums which the bankrupts collected on its behalf and therefore is impressed with a trust under the *Insurance Act*, R.S.A. 2000, c. I-3 and corresponding legislation in British Columbia. Section 504 (formerly 124) of the Alberta statute provides that an insurance agent who acts for an insurer in negotiating, renewing or continuing a contract of insurance and who receives insurance premiums from an insured, is deemed to hold the premiums in trust for the insurer. Kingsway submits that these premiums cannot be subject to the charge granted because as trust funds they do not form part of the bankrupts' estates. Kingsway also asserts an express trust by virtue of the broker agreement and a constructive or resulting trust. The broker agreement between Kingsway and RWI provides that "[a]ll money received by the Broker [RWI] on behalf of the Company [Kingsway] less the Broker commission shall be the property of the Company and shall be held...as Trust Funds...".

[8] The trustee disallowed Kingsway's trust claim and notified Kingsway pursuant to s. 81(2) of the *BIA*. The trustee's review of the records indicated to it that all premiums owing had been paid

to Kingsway and that the funds in the estate represent other income from the operation of the business.

[9] Kingsway appealed the trustee's decision to the Court of Queen's Bench, a summary proceeding under s. 81(2) of the *BIA*. That appeal is pending.

[10] Kingsway applied to the bankruptcy judge seeking that Deloitte & Touche be prohibited from accessing any property in the estates for any purpose, including paying its past and future fees and expenses for appearing on the appeal and otherwise, pending the determination of Kingsway's trust claim.

[11] The trustee opposed Kingsway's application and sought a retrospective and prospective charge against all assets under its administration.

[12] The trustee has been administering the estates of RWC and RWI in accordance with the *BIA*, including: conducting financial analysis; securing and retaining possession of property of RWC and RWI; communicating with Kingsway and builders who are also advancing trust claims; establishing and executing a process to deal with builder claims to cash security deposits held by RWC and RWI; communicating with home owners claiming insurance coverage pursuant to policies issued by Kingsway; and administering insurance claims on a limited basis.

[13] The trustee anticipates future costs arising from dealing with the validity and priority of the trust claims of Kingsway and various builders.

[14] The trustee asserts that because Kingsway's trust claims encompass the entirety of the property under the trustee's administration, the ultimate determination of Kingsway's claim is critical to the administration of these bankruptcies. The trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to Kingsway's appeal of the disallowance due to lack of funding.

Decision Below

[15] The case management judge denied Kingsway's application and granted the trustee's application for a retrospective charge. She also granted the trustee's application for a prospective charge, subject to the trustee filing an interim report with the court confirming the inspectors approved the actions proposed by the trustee, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her. She further ordered the trustee to minimize general estate administration, not to pursue further asset realization without Kingsway's consent or the court's approval, and that Kingsway's appeal from the trustee's disallowance proceed on an expedited basis.

Issues on Appeal

[16] This appeal raises the following issues:

> 1. Does a bankruptcy judge have jurisdiction to order that a trustee's fees be paid from property that is subject to undetermined trust

claims?

2. If so, does that jurisdiction include the trustee's fees associated with determination of a trust claim?

3. If jurisdiction exists, what factors should a court consider in exercising its discretion to make such orders?

4. If jurisdiction exists, did the case management judge properly exercise the discretion?

Standard of Review

[17] The first three issues raise a question of law, subject to the standard of correctness: ***Murphy Oil Co. v. Predator Corp.*** (2005), 384 A.R. 251, 2006 ABCA 69. The fourth issue involves the exercise of discretion of a case management justice and cannot be interfered with in the absence of a palpable or overriding error: ***Northstone Power Corp. v. R.J.K. Power Systems Ltd.*** (2002), 36 C.B.R. (4th) 272, 2002 ABCA 201.

Discussion

1. Jurisdiction to order trustee's fees be paid from property subject to undetermined trust claims

[18] The *BIA* does not address the ability of a trustee to obtain a charge for its fees on property that is subject to undetermined trust claims. The trustee submits that the jurisdiction to do so is found in the inherent jurisdiction of the bankruptcy court.

[19] Section 183(1) of the *BIA* preserves the inherent jurisdiction of the Court of Queen's Bench of Alberta sitting in bankruptcy, stating in part:

> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
> ...
>
> (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;...

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

Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

[21] Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: ***Re Tlustie*** (1923), 3 C.B.R. 654; ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*** (1994), 27 C.B.R. (3d) 148 (Ont. S.C.). It has also been used where there is no other alternative available: ***Re Olympia & York Developments Ltd.*** (1997), 18 C.B.R. (4th) 243 (Ont. Gen.Div.); ***Re City Construction Company Ltd.*** (1961), 2 C.B.R. (N.S.) 245 (B.C.C.A.) and to accomplish what justice and practicality require: ***Canada v. Curragh***.

[22] Kingsway asserts that s. 67(1) of the *BIA* prohibits such a charge. That section states:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
> (a) property held by the bankrupt in trust for any other person...

[23] Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.

[24] The Supreme Court of Canada addressed this issue in ***Ramgotra (Trustee of) v. North American Life Assurance Co.***, [1996] 1 S.C.R. 325 at para. 61:

> Unlike provisions of the [BIA] such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property...the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). *While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.*
> (Emphasis added)

[25] In any event, Kingsway's argument in regard to s. 67 rests on the premise that the property is in fact trust property, a proposition that remains undetermined.

[26] Kingsway also asserts that there is no jurisdiction to order that a trustee's fees be paid from property subject to a statutory trust, citing ***P.A.T. Local 1590 v. Broome*** (1986), 61 C.B.R. (N.S.) 233 (Ont. Master) and ***Re C.J. Wilkinson Ford Mercury Sales Ltd.*** (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).

[27] In both of those cases, however, the validity of the trusts in question was clear and accepted by the trustee. Further, the question of fees for sorting out their validity was not squarely in issue in either decision. Here, a statutory trust as well as several other trust claims have been asserted but not accepted by the trustee and all remain to be determined by the Court of Queen's Bench.

[28] Kingsway also relies on ***Re Gill*** (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 at paras. 29-32 in support of its statutory trust argument. In that case, however, Sigurdson J. recognized the jurisdiction to grant a charge for trustee fees over assets subject to trust claims. He determined on the distinct facts before him not to grant the charge requested.

[29] I therefore accept that inherent jurisdiction exists to grant a charge on property subject to undetermined trust claims.

2. Permitting trustee costs involved in determining the validity of the trust to be paid out of trust property

[30] Kingsway objects to the trustee being paid to "defeat" its claim out of what it alleges to be its property. Kingsway's opinion on the merits of its trust claim differs from the trustee's. However, Kingsway does not suggest that the trustee has acted improperly or unfairly in its disallowance of its claim.

[31] I do not characterize the actions of the trustee as an attempt to "defeat" Kingsway's claims. Upon receiving a proof of claim claiming property in possession of the bankrupt, the trustee must respond in one of two ways according to s. 81(2) of the *BIA*. The trustee can either admit the claim and deliver possession of the property to the claimant, or give notice in writing to the claimant that the claim is disputed, indicating the reasons for the dispute. The section provides for an appeal to the Court of Queen's Bench if the trustee disputes the claim. The trustee is not to function as an adversary. Rather, it functions to advise the court of the relevant facts as its officer in a dispassionate manner, in furtherance of its role to administer the estates to completion, leaving the court to decide the matter: see ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.), aff'd (2004), 3 C.B.R. (5th) 204 (Ont. C.A.) and *BIA*, s. 41(4). The trustee's conduct to date has been in accordance with requirements of the Act and its participation in the appeal is necessary in this case. Kingsway's claims purport to cover the entire estates of both bankrupts, against which there are competing property claims and unsecured claims.

[32] There is precedent for allowing a trustee to be remunerated from trust property for efforts in sorting out trust claims and distributing the trust *res* to beneficiaries: see for example, ***Re***

Nakashidze (1948), 29 C.B.R. 35 (Ont. S.C.); ***Re Rideout Real Estate Ltd.*** (1957), 36 C.B.R. 111 (Ont. S.C.); ***Re Kern Agencies, Ltd.*** (No. 3) (1932), 13 C.B.R. 333 (Sask. K.B.); ***Re NRS Rosewood Real Estate Ltd.*** (1992), 9 C.B.R. (3d) 163 (Ont. S.C.). In ***NRS Rosewood***, for example, Austin J. faced the same argument made by Kingsway in this case that the trustee had no entitlement to share in assets which were not the property of the bankrupt. Austin J. concluded that "[a]s the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue".

[33] I do not suggest that a trustee will in every case be entitled to be paid from trust property. On the contrary, such an order, based on inherent jurisdiction, must be granted sparingly. The situation before us is unique in many respects:

1. Kingsway asserts a trust on various grounds, none of which are obvious. Kingsway has delayed determination of its claim, resulting in additional work by the trustee;

2. Kingsway's claim encompasses the entirety of the estate;

3. There are other trust claimants making claims to the same funds;

4. There are significant sums in dispute;

5. This bankruptcy occurred as a result of a failed proposal. Deloitte & Touche went from interim receiver to trustee and the typical guarantee of the trustee's fees is not in place;

6. There is no other reasonable and more expeditious alternative but to have the trustee participate in the appeal process as part of its administration of these bankruptcies. Most of the other creditors are owed small amounts, aside from a government claim;

7. There is no suggestion that the trustee is acting improperly in disputing the claims; and

8. Kingsway seeks to link the appeal from the trustee's disallowance with the trial of other unrelated issues.

These circumstances and the centrality of the trust claims to the bankruptcies underscore the necessity of the trustee's involvement and the payment of its fees from the property subject to the disputed trusts.

[34] Even if Kingsway is ultimately successful in its appeal of the trustee's disallowance, the trustee has been administering the property and a significant part of its work will likely have benefited Kingsway. The trustee has expended and will continue to expend considerable effort in

sorting out other claims on the property, including the formulation of a plan that Kingsway has joined in for resolving builder claims. It has offered assistance to Kingsway in related proceedings

concerning proposals made by directors and officers of the bankrupts. It has also formulated, coordinated and attended case management meetings throughout the course of its administration.

[35] Kingsway suggests its claim will not go unchallenged if the trustee is not funded to defend the litigation on behalf of the estates; it asserts that one or more of the creditors can pursue the litigation at their own cost pursuant to s. 38 of the *BIA*. However, the litigation is central to these bankruptcies and not merely an action that interests select creditors. The validity and priority of Kingsway's trust claims must be determined and follows from the claims review process mandated by the *BIA*. That process is designed to ensure that only proper claimants share in the bankrupt's property and in these circumstances, the trustee plays an integral part.

[36] Kingsway also submits that the appeal to the Queen's Bench from the trustee's disallowance will be complex, as it intends to bring other solvent parties into the action. Accordingly, Kingsway argues, the *res* of the estates could be frittered away with fees. However, the appeal to the Queen's Bench is intended to be a summary and efficient process to determine the issue relevant to the bankruptcy. To the extent that Kingsway chooses to increase the scope and complexity of the appeal, it must similarly accept the increased costs of the trustee in dealing with that action.

3. Factors in exercise of discretion

[37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:

> 1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in ***C.J. Wilkinson***, where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;
>
> 2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
>
> 3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the forefront. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see ***GMAC*** at para. 50. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic

or potentially unrewarding litigation;

4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;

5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise, the court should assess what part of the estate would ideally bear the burden of costs. It is important to consider whether the determination would proceed by default if the trustee were not fully funded;

6. The anticipated time and costs involved. The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process;

7. The limits that can be placed on the fees or charge; and

8. The role that the trustee will take in the determination process.

4. Exercise of discretion by the case management judge

[38] The case management judge considered the relevant factors and the applicable law. She carefully constructed a limited charge that she viewed as suitable in the circumstances. The order for a prospective charge is subject to the trustee filing a report confirming the bankruptcy inspectors had approved the steps the trustee proposed to take. She delayed the operation of her order to give builder claimants an opportunity to challenge it. She held that if all the property was not ultimately found to be impressed with a trust in Kingsway's favour, that a further hearing be held in order to prorate the trustee's fees between estate and trust assets. Further, she directed that the trustee only address urgent matters of general administration, and that Kingsway's claim be addressed as quickly and efficiently as possible. I see no basis to disturb her exercise of discretion.

[39] One of the fundamental purposes of the *BIA* is to ensure equitable distribution of a bankrupt debtor's assets among the estate's creditors: ***Ramgotra*** at para. 15, citing ***Husky Oil Operations Ltd. v. Minister of National Revenue***, [1995] 3 S.C.R. 453. Determination of the validity of Kingsway's trust claims is central to these bankruptcies. This trustee's participation in that process furthers

appropriate distribution of the assets, whether that be to unsecured creditors in the event all or part of Kingsway's trust claim is rejected by the Court of Queen's Bench, or whether the estate stays out of reach of other creditors as trust property.

[40] The ultimate purpose of the administrative powers granted a trustee under the *BIA* is to manage the estate in order to provide equitable satisfaction of the creditors' claims: ***Ramgotra*** at para. 45. The trustee will be assisting the court and all of the claimants in the bankruptcies in coordinating Kingsway's claims, as well as dealing with the validity and priority of the other trust claims and in providing the necessary information to the Court of Queen's Bench to resolve these issues. For these reasons, it is also just and practical that inherent jurisdiction be used to grant the charge for the trustee's fees.

Conclusion

[41] There is inherent jurisdiction to permit trustee's fees to be paid from property that is subject to undetermined trust claims in appropriate circumstances. The case management judge recognized the power must be used sparingly and did not err in exercising jurisdiction in this case. The appeal is therefore dismissed.

Application heard on September 05, 2006

Reasons filed at Edmonton, Alberta
this 10th day of October, 2006

"Paperny J.A."

Paperny J.A.

I concur: "Côté J.A."

Côté J.A.

I concur: "Paperny J.A."

Authorized to sign for: Sulyma J.

Appearances:

E.A. Dolden
B.D. Rhodes
for the Appellant

K.A. Rowan
for the Respondent

Corrigendum of the Reasons for Judgment of
The Honourable Madam Justice Marina Paperny

On page 6, [33] & [34] have been joined and now read:"....contrary, such an order, ..."