

## QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2008 SKQB 179

Date: 2008 04 23  
Docket: Q.B.G. No. 363 of 2008  
Judicial Centre: Saskatoon

---

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

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE  
CREDITORS OF STOMP PORK FARM LTD.

**Counsel:**

M. K. Anderson & S. M. Sinclair  
J. M. Lee & L.A. Widdup  
J. A. Hesje, Q.C. & R. W. Rooke, Q.C.  
E. M. S. Kleisinger  
G. A. T. Meschishnick

for the Stomp Pork Farms Ltd.  
for the National Bank of Canada  
for Farm Credit Canada  
for Cargill Limited  
for the Monitor, Meyers  
Norris Penny Limited

---

FIAT  
April 23, 2008

ROTHERY J.

---

[1] In my fiat of April 7, 2008, cited at 2008 SKQB 152, I directed the Monitor to file a report with the court "to provide its recommendations on the fair and equitable allocation of any future DIP financing," as stated in paragraph 16 of that fiat. National Bank of Canada ("NBC") had brought a motion for me to vary the debtor-in-possession ("DIP") financing charge, and takes the position that the DIP financing provided by Farm Credit Canada ("FCC") may retroactively be allocated in accordance with the Monitor's recommendations.

[2] With respect to FCC's DIP facility, which expired April 22, 2008, my conclusion remains the same as it was when I initially granted the order for FCC's DIP facility. That is, as stated in para. 15 of the April 7, 2008, fiat, "the initial order placed the risk with the security that immediately benefitted from it, that is, the current assets." My conclusions on the risk allocation for that first DIP facility have not been changed by the Monitor's report. Oppositely, the Monitor's report supports my assessment that most of the FCC DIP facility was used to ensure that the pigs continued to be fed and that they were prepared for market. This short term DIP facility was equitably allocated among the creditors to the CCAA application. Any application to vary my original order pertaining to the FCC DIP facility is hereby dismissed.

[3] The issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique. Indeed, it was the focus of much argument by counsel at the initial order proceeding. Any DIP financing proposed was on the basis of a specific allocation between current and fixed assets. The court was required to decide prior to the initial order being made. The factual background is outlined in my April 7, 2008, fiat.

[4] The stay of proceedings has been extended to May 12, 2008. No application for future DIP financing is presently before the court. However, now that the Monitor has provided its report with respect to future DIP financing, counsel for Stomp Pork Farm Ltd. ("Stomp") submits that a ruling on cost allocation of any DIP financing between current and fixed assets is imperative. Counsel requests that the court decide that issue now.

[5] I must agree. The two secured creditors are at "loggerheads". Progress in these proceedings seems to be impeded by this issue. The only detriment to making a ruling at this stage is that it requires a certain amount of conjecture on the court's part. That will naturally

create some measure of imprecision in the answer. Even assessing cost allocation after a failed CCAA proceeding allows for a degree of imprecision. It is the essence of these proceedings. As stated by C. Campbell J. in *Re Hunjan International Inc.* (2006) 21 C.B.R. (5<sup>th</sup>) 276, 2006 CarswellOnt 2718 (Ont. S.C.J.) (affirmed at 26 C.B.R. (5<sup>th</sup>) 258, 2006 CarswellOnt 8189 (Ont. C.A.), at para. 4-5:

¶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. et al. v. Deeder Electric Ltd.* (1976), 9 O.R. (2d) 84 (C.A.) at 89; *Ontario Securities Commission v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (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* 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 Monitor's second report, dated April 21, 2008, recommends that the cost of DIP financing be allocated equally between Stomp's current and fixed assets. However, it concedes at page 17 of the report that there is no prescribed formula and "any means of calculating the allocation of a DIP lending charge will be arbitrary."

[7] The Monitor estimates costs attributable to current assets to be about 93.6%, and the costs attributable to fixed assets to be about 6.4%. The Monitor calculates that the total liquidation values of current assets and fixed assets to be equal, that is, about \$13 million

each. This is the basis upon which the Monitor recommends equal sharing of the DIP facility between current and fixed assets. But, counsel for FCC argues that the Monitor failed to take an important factor into consideration in its assessment and recommendations. That is, the Monitor ought to not only have estimated liquidation values, but ought to have addressed the shortfall position of both FCC and NBC as a result of the liquidation values. For example, (in round figures) if the liquidation value on current assets is \$13 million and NBC is owed \$15.5 million, its shortfall is \$2.5 million. If \$13 million is realized on the fixed assets, FCC recoups 85% or \$11.05 million and NBC recoups \$1.95 million. Stomp's outstanding debt to FCC is \$28.5 million. FCC's shortfall would be \$16.95 million. Oppositely, NBC's shortfall on its current and fixed assets would be approximately \$5.25 million.

[8] The Monitor's second report was prepared on short notice and under difficult time constraints. As well, the Monitor was required to provide a prospective analysis of the outcome of this CCAA stay of proceedings within the constraints of a dynamic Canadian, and North American, hog market. In spite of these constraints, the monitor's summary of Stomp's financial situation and its recommendations have been most beneficial to the court.

[9] However, I cannot ignore the inequity that would be created by an equal allocation of costs between the current and fixed assets. FCC's dramatically greater shortfall position must be a factor in the exercise of the court's discretion. Equity calls for a cost allocation that not only recognizes which creditor may benefit more directly from the stay of proceedings, but ensures that all creditors contribute to the restructuring process. It is neither an equal sharing of costs between current and fixed assets, nor is it simply an allocation based on percentage of costs between current and fixed assets.

[10] Both FCC and NBC will benefit from a successful restructuring. FCC may not have to commence foreclosure proceedings on numerous hog barns (with little present value)

if Stomp can resolve its current problems and continue as a going concern. Therefore, I find that a cost allocation of 75% to current assets and 25% to fixed assets best reflects an equitable allocation between the creditors. Any future DIP financing will be on the basis that the DIP lender is granted a superiority charge in this ratio.

  
A. R. ROTHERY