



***THE COURT OF APPEAL FOR SASKATCHEWAN***

Citation: 2008 SKCA 73

Date: 20080605

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Between:

National Bank of Canada

Docket: 1627

Appellant

- and -

Stomp Pork Farm Ltd.

Respondent

- and -

Farm Credit Canada, Cargill Limited  
and Meyers Norris Penny Limited, Monitor

Respondents

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Coram:

Sherstobitoff, Lane & Jackson JJ.A.

Counsel:

Jeffrey Lee and Linda Widdup for National Bank of Canada  
Kim Anderson for Stomp Pork Farm Ltd.  
Joel Hesje, Q.C. for Farm Credit Canada  
Ian Sutherland for Cargill Limited  
Gary Meschishnick for Meyers Norris Penny Limited

Appeal:

From: 2008 SKQB 152, 2008 SKQB 179

Heard: May 13, 2008

Disposition: Appeal Decided May 13 and May 22, 2008 (orally)

By: The Honourable Madam Justice Jackson

In Concurrence: The Honourable Mr. Justice Sherstobitoff  
The Honourable Mr. Justice Lane

## **Jackson J.A.**

### **I. Introduction**

[1] The broad issue in this appeal is the extent to which a Chambers judge has the authority to allocate priority among the assets of pre-filing creditors for debtor in possession (“DIP”) financing early in the process of proceedings under the *Companies' Creditors Arrangement Act*<sup>1</sup> (“the CCAA”). In the result, the Court left in place the Chambers judge’s decision with respect to an allocation of priority for DIP financing that had already been advanced, but set aside the allocation of priority with respect to future and, as yet not required, DIP financing, with reasons to follow. These are those reasons.

### **II. Facts and Decisions under Appeal**

[2] The facts are well set out in the two decisions of the Honourable Madam Justice A.R. Rothery under appeal such that I will provide a brief sketch only.

[3] Stomp Pork Farm Ltd. (“Stomp”) is the second largest commercial hog producer in Saskatchewan owning 27,000 breeding sows.<sup>2</sup> Its two principal lenders are National Bank of Canada (“NBC”) and Farm Credit Canada (“FCC”).

[4] As of March 24, 2008, Stomp owed NBC approximately \$20.5 million secured on Stomp’s current assets, which comprise livestock inventory and accounts receivable (the “Current Assets”). NBC has priority over the

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<sup>1</sup> R.S.C. 1985, c. C-36.

<sup>2</sup> Appeal Book, Vol. 2, pp. 180a and 182a, Affidavit of Ivan Stomp sworn March 26, 2008, paras. 4, 5 and 19.

Current Assets to the extent of \$18 million and thereafter shares priority with FCC, with NBC's share, over and above the \$18 million, being 15%.

[5] As of March 27, 2008, Stomp owed FCC approximately \$28.5 million secured on Stomp's land, buildings and improvements (the "Fixed Assets"). NBC also holds a security interest in 15% of the Fixed Assets.

[6] Due to a variety of factors including high feed prices and currency rate challenges, Stomp became insolvent. On March 27, 2008, it applied *ex parte* and received an initial order under the CCAA for a stay of proceedings until April 25, 2008. The *ex parte* initial order was amended on March 28, 2008. This amended order will be called the "Initial Order."<sup>3</sup>

[7] The Initial Order directs FCC to provide a DIP financing facility of \$3 million to Stomp repayable in 30 days to be secured in the following manner: (i) an administration charge to a maximum of \$100,000 to be allocated on a basis of a 50% charge on Current Assets and a 50% charge on Fixed Assets; and (ii) the balance to be secured 100% on the Current Assets including an expected payment of \$1.5 million from the Canadian Agricultural Income Stabilization Program – AgriStability Targeted Payment. Paragraph 34 of the Order reads:

34. This Court Orders that the DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the inventory (including all livestock and breeding livestock) and accounts receivable of the Applicant, and the Canadian Agricultural Income Stabilization Program-AgriStability Targeted Payment (the "Security"), which charge shall not exceed the aggregate amount owed to the DIP Lender under the Commitment Letter, filed.

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<sup>3</sup> Appeal Book, pp. 13a-35a, Amended *Ex Parte* Initial Order issued March 28, 2008.

The DIP Lender's Charge shall have the priority set out in paragraphs 45 and 48 hereof.<sup>4</sup>

[8] On April 2, 2008, NBC applied for an order substituting it as the DIP lender and allocating the DIP financing equally between the Current Assets and Fixed Assets as initially proposed by Stomp on March 27, 2008 and supported by NBC. In the alternative, NBC asked that the DIP lender's charge be allocated against Stomp's assets according to the recommendation of the Monitor in a formal written report to be prepared.

[9] Rothery J. agreed to adjourn the reconsideration application pending completion of a report by the Monitor analyzing Stomp's situation<sup>5</sup> and providing its recommendations on the fair and equitable allocation of the DIP lender's charge and any future DIP financing.<sup>6</sup> As part of this exercise, the Monitor was directed to consider the proportionate amounts of total aggregate indebtedness of Stomp to each of NBC and FCC and the relative liquidation values and fair market values of Stomp's Current Assets and Fixed Assets.<sup>7</sup>

[10] On April 23, 2008, Rothery J. confirmed her original decision to secure the super-priority for the DIP financing on the Current Assets and directed that any future DIP financing be secured 75% on the Current Assets and 25% on the Fixed Assets (the "April 23 Order").<sup>8</sup> The April 23 Order reads:

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<sup>4</sup> *Ibid.*, p. 27a.

<sup>5</sup> 2008 SKQB 152, para. 15.

<sup>6</sup> *Ibid.* para. 16.

<sup>7</sup> *Ibid.*

<sup>8</sup>2008 SKQB 179, paras. 2 and 10.

1. The application by National Bank for an Order varying the Initial Order so as to modify the allocation of the DIP Lender's Charge provided for in the Initial Order as it pertains to the FCC DIP Facility shall be and is hereby dismissed.
2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 75% to current assets of Stomp Pork Farm Ltd. and 25% to fixed assets of Stomp Pork Farm Ltd.<sup>9</sup>

[11] NBC applied immediately for leave to appeal both decisions relating to the Initial and April 23 Orders and for an order that the application for leave to appeal be expedited and heard by a panel of three judges of the Court, who would go on to hear the appeal proper if leave were granted. Chief Justice Klebuc granted such an order on April 28, 2008 directing that the leave application be expedited and added to the list of appeals to be heard during the regular sittings of the Court on May 13, 2008.

[12] On May 13, 2008, the Court refused the application for leave to appeal the Initial and April 23 Orders insofar as they pertain to the initial DIP financing. The Court granted leave to appeal the April 23 Order as it pertained to an allocation of priority for future DIP financing. Upon announcing these decisions, counsel for NBC indicated that he wished to consult with his client. On May 14, 2008, counsel advised that NBC's position was that the appeal be allowed and the April 23 Order be amended by substituting para. 2 of that order with the following:

2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 50% to current assets of Stomp Pork Farm Ltd. and 50% to fixed assets of Stomp Pork Farm Ltd.<sup>10</sup>

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<sup>9</sup> April 23 Order, Appeal Book, p. 169a.

<sup>10</sup> Letter dated May 14, 2008 to the Registrar, Court of Appeal.

In the alternative, NBC submitted that if the Court were prepared to allow the appeal but were not prepared to grant this form of relief, the appropriate course of action would be that para. 2 of the April 23 Order be vacated in its entirety.

[13] On May 22, 2008, the Court advised the parties that it was allowing the appeal from the April 23 Order, as it pertained to future DIP financing, and vacating para. 2 of the April 23 Order in its entirety with reasons to follow.

### **III. Reasons**

#### **1. Reasons for Refusing Leave Pertaining to the Interim Order**

[14] The Court's jurisdiction to hear this appeal is found in s. 13 of the CCAA:

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.<sup>11</sup>

[15] In a series of cases emanating first from British Columbia<sup>12</sup> and then from Quebec,<sup>13</sup> Alberta<sup>14</sup> and Ontario,<sup>15</sup> there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the CCAA should be granted only where there are serious and arguable

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<sup>11</sup> CCAA, *supra* note 1.

<sup>12</sup> *Pacific National Leases Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

<sup>13</sup> *Steinberg Inc. (Re)*, [1993] Q.J. No. 860 (QL) (Que. C.A.).

<sup>14</sup> *Multitech Warehouse Direct Inc. (Re)*, (1995), 32 Alta L.R. (3d) 62 (C.A.); *Blue Range Resource Corp. (Re)*, 1999 ABCA 255, (1999), 244 A.R. 103; *Canadian Airlines Corp. (Re)*, 2000 ABCA 149, (2000), 80 Alta. L.R. (3d) 213.

<sup>15</sup> *Algoma Steel Inc.*, (2001), 25 C.B.R. (4th) 194 (Ont.C.A.).

grounds that are of real significance and interest to the parties and to the practice in general.<sup>16</sup> The test is often expressed as a four-part one:

1. whether the issue on appeal is of significance to the practice;
2. whether the issue raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
4. whether the appeal will unduly hinder the progress of the action.<sup>17</sup>

[16] There can be no question that the issues raised in this appeal are of significance to the practice. The general question of the allocation of priority between the DIP financier, which is a pre-filing creditor, and the other existing creditors has been little explored by the existing jurisprudence. The particular questions of whether the restructuring judge can allocate priority before the outcome of the restructuring is known, and whether he or she may do so with respect to certain assets and not others, appear to be matters of first instance.

[17] Nor can it be questioned that the appeal is of significance to the action. By the decision pertaining to interim financing, NBC has had its priority position significantly affected. Beyond the impact on NBC, however, given the large amount of funding involved, whichever decision the Court were to make on this appeal would be significant to the restructuring. Given the procedure that has been followed, it also cannot be seriously contested that the appeal would unduly hinder the action.

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<sup>16</sup> See, for example, *Multitech*, *supra* note 14 at para. 3, summarizing *Steinberg*, *supra* note 13.

<sup>17</sup> *Blue Range*, *supra* note 14 at para. 4; *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (C.A.) at para. 13; *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, (2008), 422 A.R. 4 at para. 12.

[18] It is the third factor, however, that is determinative in deciding whether leave to appeal should be granted in relation to the initial DIP financing.

[19] Notwithstanding the fact that the leave application and the appeal proper were heard together, the parties were advised at the commencement of the appeal that the Court would consider the question of leave independently from the merits of the appeal. Admittedly, in a case such as this one, where leave to appeal and the appeal proper are heard together, the line between when a judge grants leave and when a court decides the appeal blurs as the court turns more quickly to questioning counsel on the merits of the appeal and the impact on the restructuring than might otherwise occur in Chambers. There can be no question, however, but that the procedure followed in this case provided a rapid result for the parties.

[20] With respect to the initial financing, these factors became controlling for the Court. Rothery J. had before her an application made by the debtor requesting a \$3 million facility to be provided by NBC to be secured as a super-priority charge allocated 50% against Current Assets and 50% against Fixed Assets. NBC made its position clear that it was prepared to advance the funds if a priority allocation were made in this manner only. FCC opposed this motion. All parties before the Court, however, agreed that it was imperative funds be advanced within hours if arrangements were to be made for Cargill Ltd. to supplement dwindling food stocks to permit the animals to be fed. It appeared to Rothery J. that the only other possible DIP financier before the Court was FCC. Rothery J. ordered FCC to make a \$3 million

facility available by the next morning, which facility was to be secured primarily on the Current Assets, but in the event that FCC refused to provide that facility, NBC would be permitted to become the DIP financier, in accordance with its proposal, with a 50/50 allocation against Current and Fixed Assets. In sum, Rothery J. was required to make an order, on extremely short notice, with submissions from all parties including NBC, that immediate financing was required.

[21] That brings us to the proceedings adjourned to April 23, 2008 wherein Rothery J. agreed to reconsider the allocation following receipt of full argument and the Monitor's Report. Rothery J. reconsidered her decision and confirmed it. On this occasion, she wrote:

[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.<sup>18</sup>

[22] We accept these reasons. At this stage of the proceedings, we might add or emphasize these factors: (i) the only DIP lenders available to the Court were pre-existing filing creditors; (ii) no pre-existing filing creditor was prepared to step forward to provide financing secured on all of the assets of the debtor without a priority allocation being made and incurring the risk that such a decision would entail; (iii) all parties appeared to agree that financing was crucial to ensure the aims of the CCAA; and (iv) some \$2.2 million of the \$3 million facility were ultimately required and had already been expended by the time the appeal was heard. On this last point, we accept the argument of FCC that to change the priorities with respect to funds already expended this early in the process plants an unwelcome seed of uncertainty in the process contemplated by the CCAA.

[23] In sum, the Court refused leave with respect to the initial DIP financing as the Court would be highly unlikely to intervene and intervention would upset a significant arrangement that was already in place.

## **2. Reasons for Granting Leave to Appeal the Order Pertaining to Future DIP Financing**

[24] When we turned to consider whether leave should be granted with respect to the April 23 Order as it pertains to future financing, however, other considerations came to the fore. As with the orders pertaining to the initial

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<sup>18</sup> 2008 SKQB 179, *supra* note 8.

financing, the issues raised are of significance to the practice and to the action and the appeal would not unduly hinder the progress of the action, but with respect to future financing the Court was satisfied that the appeal was *prima facie* meritorious. Thus, leave was granted with respect to this part of the April 23 Order.

### **3. Reasons for Allowing the Appeal Pertaining to Future DIP Financing**

[25] The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in CCAA matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. As Dr. Sarra has said:

There have been a number of judicial pronouncements on the role of the appellate courts during a CCAA proceeding. The British Columbia Court of Appeal in *Doman Industries Ltd.* held that where an order is made by the judge who is supervising the CCAA proceedings of the insolvent company from the beginning, the court will be very reluctant to grant leave to appeal the order. The appellate court will exercise its power sparingly when asked to intervene with respect to decisions made during the course of a CCAA proceeding, as the CCAA judge is undertaking a careful and delicate balancing of numerous interests; and appellate proceedings may upset that balance and frustrate that process. The appellate courts have held that they will be cautious about intervening in CCAA proceedings at an early stage, particularly where the order contains a come-back clause that allows parties to bring their concerns regarding a decision to the judge supervising the CCAA proceeding.<sup>19</sup> [Emphasis added.]

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<sup>19</sup> Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 89 [footnotes omitted].

In this Court, leave has been refused in recent times based on these principles. See: *CIBC v. Community Pork Ventures*<sup>20</sup> and *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*<sup>21</sup>

[26] Notwithstanding this high level of deference, as Dr. Sarra indicates, appellate courts will intervene in certain cases:

Appellate courts will accord a high degree of deference when asked to interfere with the exercise of discretion of a CCAA court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion or there is a fundamental question of the lower court's jurisdiction. Leave will be refused by the appellate court [if] the appeal is of no general significance to the practice and where granting leave would disrupt the proposed plan that has been approved by the creditors.<sup>22</sup> [Emphasis added]

[27] As Newbury J.A. stated in *New Skeena Forest Products Inc., Re*,<sup>23</sup> discretionary decisions in this area are not immune from review. Quoting from Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*,<sup>24</sup> she wrote:

[20] ... At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:

But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]

(See also *Harelkin v. University of Regina* [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)<sup>25</sup> [Emphasis added]

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<sup>20</sup> 2005 SKCA 78.

<sup>21</sup> 2007 SKCA 72 at para. 49, [2007] 9 W.W.R. 79.

<sup>22</sup> Sarra, *supra* note 19 at 89 [footnotes omitted].

<sup>23</sup> 2005 BCCA 192, [2005] 8 W.W.R. 224.

<sup>24</sup> [1941] 2 All E.R. 245.

<sup>25</sup> *New Skeena*, *supra* note 23.

[28] It is now well established that a superior court supervising the restructuring of an insolvent corporation under the CCAA may confer upon a lender, providing DIP financing to the insolvent corporation, the benefit of a court-ordered “super-priority” charge on the assets of the insolvent corporation and that, in certain circumstances, the DIP lender’s charge may rank in priority to the existing security held by secured creditors of the insolvent corporation. It is sufficient to cite as an example in support of this proposition the most recent decision on point: *Re: Temple City Housing Inc.*<sup>26</sup>

[29] While the above aspect of the law appears settled, few reported decisions consider the question of the appropriate allocation of DIP financing as between major secured creditors of the corporate debtor. Some principles are, however, more clear than others. The leading decision is *Hunters Trailer & Marine Ltd., Re.*<sup>27</sup>

[30] The basic determination that a CCAA judge must make in deciding how to allocate the DIP financing charge amongst the assets of the debtor is what allocation would be most equitable, a task that is left initially to the discretion of the CCAA judge:

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<sup>26</sup> 2007 ABQB 786, affirmed *Temple*, *supra* note 17. The Court also notes that Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007, but it is not in force as the Act it amends, being *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 is not yet in force. When these amendments come into effect, they will confirm an authority that the courts have been exercising for some time.

<sup>27</sup> 2001 ABQB 1094, (2001), 305 A.R. 175.

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 call for an equal allocation of costs.<sup>28</sup>

The equitable allocation of a DIP financing charge will need to balance, among other things, the creditors' various positions, the purpose of the DIP financing in particular and the CCAA regime in general:

... The court, in balancing prejudices, will weigh the possibility of a going-concern solution that potentially creates long-term upside value for numerous stakeholders, with the risk of further depletion of value that may be able to satisfy claims on a short-term basis. This balancing of interest and prejudice is at the heart of most financing judgments. Notwithstanding these potential benefits to all stakeholders, absent careful scrutiny of the terms of the DIP financing agreement, granting access to short-term capital can increase the risk of harm to stakeholders if the terms approved by the court lead to a CCAA plan that prejudices their interests more than a liquidation outcome.<sup>29</sup> [Emphasis added.]

[31] In *Hunters Trailer & Marine Ltd.*, the Court altered the allocation of the charge in relation to DIP financing near the end of the process, noting that the restructuring process was for the benefit, or potential benefit, of all creditors, including the creditor whose only security was in the real property. The Court appeared to allocate the charge on the basis of the extent of the benefit, or potential benefit, to the creditor of the DIP financing in relation to the assets over which it held a security:

[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

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<sup>28</sup> *Ibid.*

<sup>29</sup> Sarra, *supra* note 19 at 96-97 [footnotes omitted].

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.

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[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.<sup>30</sup>

[Emphasis added]

Dr. Sarra makes the following observation about *Hunters Trailer*:

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<sup>30</sup> *Hunters Trailer*, *supra* note 27.

The court's recognition of the need for an equitable allocation is aimed at a mid-ground between one creditor bearing all the costs and all creditors sharing equally. The notion that financing is a potential benefit to all creditors is critical to the equitable allocation of costs.<sup>31</sup>

[32] Turning to the case at hand, only some statements may be made with certainty. There is in place a *pari passu* agreement between the principal lenders NBC and FCC. The nature of this arrangement is discussed fully in the decisions under appeal.

[33] The estimated liquidation value of the Current Assets of Stomp, identified by the Monitor, ranges from a low of \$12,949,616 and a high of \$12,974,232.<sup>32</sup> The estimated liquidation value of the Fixed Assets of Stomp, identified by the Monitor, ranges between a low of \$11,056,000 and a high of \$13,004,000.<sup>33</sup>

[34] The Monitor's Second Report concluded with the following recommendation as to the equitable method of allocating the DIP Lender's Charge:<sup>34</sup>

There is no prescribed formula and any means of calculating the allocation of a DIP Lenders Charge will be arbitrary. Section 9 outlines that 93.6% of DIP financing is projected to apply towards Current Assets. However, it is important to appreciate that the Fixed Assets stand to gain a significant increase in value through a successful CCAA.

All things considered, it is suggested that allocating the cost of the DIP Lenders Charge equally to Fixed Assets and Current Assets is a fair and equitable approach.

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<sup>31</sup> Sarra, *supra*, note 19 at 112.

<sup>32</sup> Appeal Book, Vol. 1, p. 94a, Monitor's Second Report, s. 8.1.2.3.

<sup>33</sup> *Ibid.*, p. 95a, s. 8.2.

<sup>34</sup> *Ibid.*, pp. 99a and 100a, s. 13.0.

Applying the 85/15 split under the *Pari Passu* agreement would result in NBC's share being 57.5% and FCC responsible for 42.5% of the DIP Lenders Charge.

[Emphasis added]

FCC, as might be expected, resists the Monitor's conclusion that it will derive any benefit from the restructuring, on the basis that it is prepared to ride out the current economic cycle, with or without hogs, until such time as the Fixed Assets can be sold. There is, of course, no evidence of this and the Monitor's Report appears at this time to be the best evidence of a contrary position.

[35] When Rothery J. made her initial decision, she was presented with no case law and little evidence beyond that which was necessary to demonstrate that if an order were to be made under s. 11 of the *CCAA*, it had to be accompanied by a DIP financing order. Then, by April 23, indeed by April 7, the DIP funds had been expended in accordance with a priority regime that accorded FCC priority. The same points cannot be made in relation to the future DIP financing.

[36] With respect to future financing, there is no immediate urgency and, with the benefit of case law, evidence and the Monitor's Reports, it can be said that it is premature to make an allocation of the priority between the secured creditors, and indeed such an allocation appears speculative at this time.

[37] None of the parties before this Court, including Stomp and FCC, argued in support of a split of 75% and 25%. With the benefit of full argument, it became apparent to all that the question of how to allocate the priority of the future DIP financing would best be left to further negotiation, and decision if necessary, as the restructuring process unfolds.

[38] NBC and FCC will each bear their own costs. If there is any issue with respect to the costs of the other parties, an application may be transmitted to the panel through the office of the Registrar.