



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Bear Creek Contracting Ltd. v. Canadian Western Bank*, 2026 NLSC 13

Date: February 09, 2026

Docket: 202201G0266

BETWEEN:

BEAR CREEK CONTRACTING LTD.

APPLICANT

AND:

CANADIAN WESTERN BANK

FIRST RESPONDENT

AND:

BANK OF MONTREAL

SECOND RESPONDENT

AND:

**MNP LTD., IN ITS CAPACITY AS
RECEIVER OF UNIVERSAL
HELICOPTERS NEWFOUNDLAND
AND LABRADOR LP, 70703
NEWFOUNDLAND AND LABRADOR
INC., UNIVERSAL HELICOPTERS
HOLDINGS LP, 81924
NEWFOUNDLAND AND LABRADOR
INC., LAKELSE HELICOPTERS
LIMITED PARTNERSHIP, LAKELSE
AIR LTD. AND 1167527 B.C. LTD.**

THIRD RESPONDENT

AND:

**PRICEWATERHOUSECOOPERS LLP,
IN ITS CAPACITY AS TRUSTEE IN
BANKRUPTCY OF UNIVERSAL
HELICOPTERS NEWFOUNDLAND
AND LABRADOR LP, 70703**

**NEWFOUNDLAND AND LABRADOR
INC., UNIVERSAL HELICOPTERS
HOLDINGS LP, AND 81924
NEWFOUNDLAND AND LABRADOR
INC.**

FOURTH RESPONDENT

Before: Justice Garrett A. Handrigan

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

Date of Hearing: January 16, 2026

Summary:

Bear Creek applied to Court for an order directing that surplus funds held by MNP, Receiver of the Universal Group, be marshalled and paid to Bear Creek by subrogation. PwC, the Trustee in Bankruptcy of the Universal Group, opposed Bear Creek's Application, claiming that the Universal Group's unsecured creditors would be materially prejudiced if Bear Creek received the funds.

PwC also claimed that marshalling should not be allowed since the funds were held by MNP, on behalf of the Universal Group, and the Canadian Western Bank was a creditor of Lakelse, not of the Universal Group. Thus, said PwC the conditions were not present for marshalling: while there were two separate creditors, the Bank and Bear Creek, there were also two separate debtors, the Universal Group and Lakelse; and Bear Creek is a creditor of Lakelse, but not of the Universal Group.

The Court found:

1. The Universal Group and Lakelse are the same entity, operating as the Universal Group;
2. The Bank and Bear Creek are separate creditors of the Universal Group;

3. The Universal Group is a single debtor of the Bank and Bear Creek;
4. Bear Creek's claim to the surplus funds, as a secured creditor, is superior to the Universal Group's unsecured creditors' claims;
5. It is fair and equitable to allow Bear Creek to satisfy the debt from the surplus funds that MNP holds for the Universal Group; and
6. Bear Creek is subrogated to the Universal Group for the surplus funds.

Appearances:

Joshua J. Santimaw	Appearing on behalf of the Applicant
No Appearance	On behalf of the First Respondent
No Appearance	On behalf of the Second Respondent
John C. Taylor-Hood	Appearing on behalf of the Third Respondent
Christopher D.J. Isnor	Appearing on behalf of the Fourth Respondent

Authorities Cited:

CASES CONSIDERED: *Bear Creek Contracting Ltd v. Canadian Western Bank*, 2024 NLSC 92; *Wolfe et al v. Taylor et al*, 2020 MBCA 44; *Williamson v. Loonstra* (1973), 34 D.L.R. (3d) 275, 1973 CarswellBC 291(S.C.); *Bread Man Inc., Re*, (1978) 21 O.R. (2d) 59, 89 D.L.R. (3d) 599 (S.C.);

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

TEXTS CONSIDERED: Elizabeth Portman, *Canadian Encyclopedic Digest, Equity* (N.p.: Thomson Reuters, 2024) at section 11

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] On January 19, 2022 Bear Creek Contracting Ltd. (“Bear Creek”) applied to this Court by Originating Application for orders “piercing” the Universal Group’s “corporate veil” so it could proceed against the Universal Group of companies. Bear Creek also asked the Court to “marshal” the assets of the Universal Group to allow Bear Creek to recover from those assets, as a subrogate of the Universal Group. This arose when the Universal Group went bankrupt and the Canadian Western Bank, its major secured creditor, exhausted all of Lakelse’s assets and left nothing from which Bear Creek could recover its debt.

[2] MacDonald, J. of this Court dealt with Bear Creek’s first request for relief, piercing the corporate veil of the Universal Group. He filed his judgment on June 20, 2024 in *Bear Creek Contracting Ltd v. Canadian Western Bank*, 2024 NLSC 92. At paragraph 45, MacDonald, J. refused Bear Creek leave to sue the Bank: “I will not lift the stay to allow Bear Creek to sue Universal to pierce the corporate veil”. However, at paragraph 67, MacDonald, J. did lift the stay to “allow Bear Creek to seek recovery from Universal of the Surplus Funds [that remained after the Trustee in Bankruptcy of the Universal Group paid all of Universal creditors] based on the principles of subrogation and marshalling”. [emphasis added]

[3] Then, in my turn, I heard the second part of Bear Creek’s Application on January 16, 2026, dealing with the subrogation and marshalling issue and reserved my judgment on it until now.

THE ISSUE

[4] May Bear Creek invoke the principles of marshalling and subrogation to recover its unpaid debt from the Universal Group?

The Law

Statute - *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

[5] Section 69.3 (1) provides:

69.3 (1) Subject to...[section] 69.4..., on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[6] Section 69.4 provides:

69.4 A creditor who is affected by the operation of sections 69 to 69.31...may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

These sections do not relate directly to the issue I am dealing with on this application but they are noteworthy nonetheless, because they undergird the discretion that Bear Creek asks me to exercise on its behalf.

Case Law - *Marshalling*

[7] The Manitoba Court of Appeal discussed “marshalling” in *Wolfe et al v. Taylor et al*, 2020 MBCA 44 and described it in paragraph 31 as “an equitable remedy, intended to protect the recovery of a junior creditor against the arbitrary action of a senior creditor, and to thereby treat all secured creditors equitably”.

[8] The Court of Appeal also acknowledged “[o]ne of the most recognised statements of the doctrine was set out by Lord Eldon in *Aldrich v. Cooper* (1803), 8 Ves. Jr. 382, 32 E.R. 402 (Eng. Ch. Div.) (at p 407):

... a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that, which can be affected by him only; to the intent that the only fund, to which the other has access may remain clear to him” (paragraph 32, *Wolfe et al v. Taylor et al*).

[9] The Court of Appeal elaborated:

[33] To obtain marshalling, certain specific criteria must be met. These criteria include the requirements that: two or more creditors share a *single common debtor*; and the senior creditor has a claim against two of the debtor's funds, while the junior creditor, ranking behind the doubly secured senior creditor, has recourse to only one.

[emphasis in original]

[10] Then the Court also noted that there are “bars to marshalling”:

[38] Jurisprudence recognises bars to marshalling. The first one is that marshalling will not be permitted if it would interfere with the superior right of a secured creditor to pursue its remedy against either of the two funds. The other bar, for our purposes, is that the doctrine is applicable unless it causes prejudice to a third party. Potential prejudice to unsecured creditors is irrelevant....

[11] In *Wolfe*, the Manitoba Court of Appeal cited *Williamson v. Loonstra* (1973), 34 D.L.R. (3d) 275, 1973 CarswellBC 291(S.C.) to support its statement that marshalling is unavailable to “unsecured creditors”. It noted the following at paragraph 12 of *Williamson*, which is pertinent to these presents:

... The doctrine does not extend to all creditors of every degree, it does not apply in favour of an unsecured creditor and it does not apply in favour of a judgment creditor unless he has obtained a charge on the estate that he seeks to have marshalled in his favour....

[12] Kay, J. of the Ontario Superior Court, in Bankruptcy, considered *Williamson in Bread Man Inc., Re*, (1978) 21 O.R. (2d) 59, 89 D.L.R. (3d) 599 (S.C.) and offered this rationale, in paragraph 17 of the judgment, for why unsecured creditors should not be permitted to marshal:

... It is also logical that unsecured creditors of debtors should not be protected, for, in the absence of a statutory provision, they should have no better right to the fund than the debtor himself. ...

[emphasis added]

[13] Finally, I note that McDonald, J. of this Court, also discussed “marshalling” at paragraphs 50 and 51 of the judgment he filed on June 24, 2024 in the related matter to the current Application:

[50] The doctrine of marshalling is described in *Ernst Bros. Co. v. Canada Permanent Mortgage Corp.* (1920), 48 O.L.R. 407, 57 D.L.R. 500 (C.A.).

[51] The court says, “It is a settled principle of law that where there are two funds to which, or to either of which, as he may elect, a creditor may resort, and there is another creditor who is entitled to resort to only one of the funds, the latter has the right to require the former creditor first to exhaust the fund on which the latter has no claim”.

Online Digest – Subrogation

[14] The *Canadian Encyclopedic Digest*, under the heading, *CED Equity § 11, Subrogation*, describes “subrogation” thus:

Subrogation means the substitution of one person in the place of another for a legal claim, so that the person substituted succeeds to the rights of the other in relation to the claim. The principle of subrogation is an equitable one merely, and will be carried out in the exercise of a proper discretion with due regard to the legal and equitable rights of others. It was invented as a means of avoiding injustice by conferring on a person not previously entitled to sue in law or equity a status to assert against a person or property a claim recognized as fair and just but which is not maintainable in contract or tort.

[15] This is the law I will apply to the issue I stated above. I turn now to analyze that issue, starting with the background to it.

ANALYSIS

Background

[16] On December 3, 2024, Bear Creek filed an Interlocutory Application in these proceedings asking for an “order pursuant to the principles of marshalling and subrogation to require PriceWaterHouseCoopers LLP (“PwC”) to pay the surplus proceeds [that remained after the Trustee in Bankruptcy of the Universal Group paid all of Universal Group’s creditors] to Bear Creek and costs”. Ian Munson who lives in Terrace, BC is a businessman and the President and sole Director of Bear Creek.

[17] Bear Creek set out the “Material Facts” in paragraph 2 of its Application, supported by Mr. Munson’s affidavit, saying that “... [he had] personal knowledge of the facts contained therein and they are true to the best of my knowledge, information and belief”. Bear Creek’s Application runs to five pages and some 40 paragraphs. I summarize, in bullet form, the facts that are needed to understand my decision, as they appear in Bear Creek’s Application:

- “Universal Helicopters” is comprised of two partnerships, #70703 (formed from Universal Helicopters LP and 70703 NL Inc) and #81924 (formed from Universal Holdings LP and 81924 NL Inc) and is known by that name;
- “Lakelse Partnership” is comprised of Lakelse LP, 1167537 B.C. Ltd. and Lakelse Air and is known as “Lakelse”;
- Universal Helicopters and Lakelse together are known as “Universal Group”;
- Universal Group is fully integrated and additionally, Lakelse LP is wholly owned by Universal Helicopters LP, which, in turn, is wholly owned by Universal Holdings LP;

- The ultimate owners of all of the entities named in the previous bullets are also the same, being two Trusts and a Fund;
- All entities that form the Universal Group have the same directors, and Shane Cyr is President and CEO of all of them, and is also the acknowledged “directing mind” of the Group;
- The Group’s financial statements were consolidated and all banking decisions were made by the officers of the Universal Group;
- In 2017 Universal Helicopters borrowed \$8.5 million from the Canadian Western Bank (the “Bank”) to refinance existing debt and the Bank secured the debt with a first charge on Universal Helicopters’ fleet of helicopters and other assets;
- In 2018 Universal Helicopters formed Lakelse Partnership to acquire 12 aircraft and two helicopter base properties from Lakelse Air, whose shares were owned by Bear Creek;
- Bear Creek concluded the Lakelse Acquisition with a Purchase Agreement on August 31, 2018, in which Universal Helicopters agreed to pay Bear Creek \$14.25 million for the Lakelse Assets, Shares and Business;
- The Bank provided financing totalling \$11 million, to the Universal Group for the Lakelse Acquisition;
- The Bank took security over all of Lakelse’s present and after-acquired property and all entities of the Universal Group fully guaranteed the financing and signed cross-default agreements;
- The President and CEO of the Universal Group signed off on all commitment letters and loan documents on behalf of the Universal Group;
- The Lakelse Acquisition was partly financed by a \$2.5 million promissory note that Lakelse LP issued to Bear Creek and the Universal Group gave Bear Creek a security interest in the Lakelse Assets to support the promissory note;

- Bear Creek, the Bank and Lakelse entered into an Intercreditor Agreement in September 2018 by which Bear Creek subordinated both its Promissory Note and its security in the assets to the loans that the Bank extended to Bear Creek for the Purchase;
- The Intercreditor Agreement also provided that the first \$10 million recovered under the Bank's General Security Agreements would go to the Bank and the next \$2.5 million would go to Bear Creek;
- In June 2019, the Bank, without informing Bear Creek, issued a further "loan facility" to Lakelse, for which the Universal Group confirmed that all of the security the Universal Group extended to the Bank for the initial loan would apply to the new facility;
- In May 2020 the Universal Group defaulted on both loans with the Bank and the Bank appointed MNP as receiver of the assets of Universal Helicopters and Lakelse;
- MNP took possession of the Universal Group's assets and, with Court approval, sold the assets off by March 2021, realizing \$18.88 million from the sale of the aircraft alone;
- Lakelse Partnership made an assignment in bankruptcy in January 2022, declaring total debt of \$7.3 million dollars, of which it owed \$2.5 million to Bear Creek and \$1.3 million to the Bank;
- On March 5, 2024, Bear Creek filed an affidavit dated December 13, 2021, from Wayne Horachek, Associate VP of Credit Risk Management at the Bank in which he declared at paragraph 10 "...the receivership of the Universal Group has resulted in an anticipated shortfall...owing by the Lakelse Entities to CWM [the Bank] of approximately \$790,407.03, and anticipated surplus...[on] the obligations owing by the Universal Entities to CWB of between approximately \$1,564,000 and \$2,303,000. After allocating certain surplus realization proceeds from the Universal Entities to compensate for the shortfall of realization proceeds from the Lakelse Entities, I anticipate that the remaining total net surplus of realization proceeds from the Universal Entities will be between approximately \$775,592.97 and \$1,512,592.97";

- In the result, because of the Lakelse Purchase Loans for \$11 million dollars and the 2019 Loan for \$1.7 million that the Bank had extended to the Universal Group, Bear Creek could not recover any of the debt that Lakelse owed to it from the proceeds of the Lakelse receivership;
- There was, however, a surplus from the sale of the Universal Helicopter's assets after the amount owing by Universal Helicopters was paid to the Bank and Bear Creek is looking for that surplus;
- MNP holds the surplus funds; and
- PwC, which represents Universal Group's unsecured creditors opposes Bear Creek's Application and says that marshalling will prejudice the unsecured creditors if Bear Creek is allowed to collect its debt before them.

[18] This is the background to the Application. I turn now to discuss the issue stated earlier.

DISCUSSION

[19] In *Wolfe*, the Manitoba Court of Appeal stated the criteria that a creditor claiming the benefit of marshalling must establish. While I set out the quotation earlier in these reasons, I repeat it here for ease of reference:

[33] To obtain marshalling, certain specific criteria must be met. These criteria include the requirements that: two or more creditors share a *single common debtor*; and the senior creditor has a claim against two of the debtor's funds, while the junior creditor, ranking behind the doubly secured senior creditor, has recourse to only one.

[emphasis in original]

Two Creditors?

[20] It is self-evident that there are two creditors here: Bear Creek and the Canadian Western Bank. The Bank loaned the Universal Group \$8.5 million in November 2017 to refinance some of its existing debt and Universal Group gave the Bank a first charge on its fleet of helicopters and other assets to secure that loan.

[21] The Bank provided further financing of \$11 million to the Universal Group for the Lakelse Acquisition in August 2018. The Bank took security over all of Lakelse's present and after-acquired property, and all members of the Universal Group guaranteed the financing fully and signed cross-default agreements.

[22] Then in June 2019, the Bank extended a third loan to the Universal Group for which the Universal Group confirmed that all of the security the Universal Group gave to the Bank for the initial loan would apply to the new facility. All three loans were still outstanding when the Bank appointed MNP as receiver of the Universal Group's assets in May 2020.

[23] At that time, as indicated in paragraph 34 of Bear Creek's Interlocutory Application, these were the amounts that the Universal Group owed:

Creditor	The Debt	Amount Owing
The Bank	2017 Loan	\$7,600,000
The Bank	2018 Loan	\$10,450,000
Bear Creek	2018 Promissory Note	\$2,500,000
The Bank	2019 Loan	\$1,700,000
Total:		\$22,250,000

[24] Bear Creek noted that the 2018 loan should be apportioned between Universal Group and Lakelse in amounts of \$3.8 million and \$6.65 million respectively. It also noted in paragraph 39 of its Application that MNP “[a]s of March 19, 2021...had received proceeds of about \$18.88 million from the sale of Universal Group aircraft alone. The Applicant [Bear Creek] believes that MNP had also received substantial additional proceeds from sales of other Universal Group assets”.

2. One Debtor?

[25] While it is, as I noted above, self-evident that there are two creditors, it is not so obvious that there is a “single common debtor”. Nonetheless, I am satisfied that for marshalling in this proceeding, there is a single debtor, whose distinct status emerges organically from the relationship between the Universal Group and the Lakelse; as will appear below.

[26] There are several aspects to that relationship which require closer scrutiny and they are: the emergence of the Universal Group; the Universal Group’s acquisition of the Bear Creek assets; and the disposition of the Universal Group’s assets.

[27] I use the designation “Universal Group” deliberately here, referring to the constellation of entities that form part of it:

- Universal Helicopters Newfoundland and Labrador LP; 70703 Newfoundland and Labrador Inc, which is the general partner of Universal Helicopters LP;
- Universal Holdings LP;
- 81924 Newfoundland and Labrador Inc., which is the general partner of Universal Holdings LP;
- Lakelse Helicopters Limited Partnership; 1167537 B.C. Ltd., which is the general partner of Lakelse LP; and

- Lakelse Air Ltd, the shares of which are owned by the Lakelse Partnership.

[28] I noted earlier in these reasons, that the 81924 and 70703 Partnerships were generally referred to as “Universal Helicopters”; that the Lakelse Partnership and Lakelse Air were referred to as Lakelse; and that Universal Helicopters and Lakelse were referred to, together as the “Universal Group”.

- All of these companies shared common management and ownership control;
- Universal Helicopters LP wholly owned Lakelse LP and Universal Holdings LP;
- Labrador Inuit Capital Strategy Trust and the Tasiujatsoak Trust and the CAPE Fund LP owned Universal Holdings LP, Universal Helicopters LP and Lakelse LP.
- The directors of each of the corporate entities in the Universal Group were the same;
- All executive decisions that each of the corporate entities in the Universal Group took, issued from its head office in Goose Bay, NL or its corporate office in St. John’s, NL;
- Shane Cyr was the President and CEO of all of the corporate entities in the Universal Group, as well as their directing mind. Mr. Cyr made all major decisions related to the day-to-day management and overall operations of the corporate entities, including taking on debt; and negotiating credit facilities and loans. Mr. Cyr treated all corporate entities as one group and he presented himself as the CEO of the Universal Group to everyone who interacted with the Group and its entities;
- The financial statements of the Universal Group were prepared on a consolidated basis; and
- All decisions regarding the transfer of funds to and from operating bank accounts within the Universal Group were made by officers of the Universal Group.

[29] I drew the preceding information from paragraphs 6-13 of the Originating Application that Bear Creek filed on January 19, 2025. As to that information, it is replicated and verified in an affidavit that Ted Howell, who was the Chief Financial Officer of Universal Helicopters Newfoundland and Labrador LP from June 2017 to March 2019, filed to support the Originating Application.

[30] Further, I refer again to an affidavit that I quoted from earlier in these reasons from Wayne Horachek, the Associate Vice-President-Credit Risk Management of Canadian Western Bank. Mr. Horachek presented as "...the senior member of CWB [the Bank] for managing CWB's recovery and realization efforts in respect of various loans advanced by CWB to Lakelse Helicopters Limited Partnership, 1167537 B.C. Ltd., Lakelse Air Ltd. (collectively, the "**Lakelse Entities**"), and Universal Helicopters Newfoundland and Labrador LP, 70703 Newfoundland and Labrador Inc., and 81924 Newfoundland and Labrador Inc. (collectively, the "**Universal Entities**"), and together with the Lakelse Entities, the "**Universal Group**")".

[31] Mr. Horachek, like Mr. Howell replicates and verifies the information provided in the Originating Application. Mr. Horachek also stated how the aggregate collectivity of the Universal Group dictated the Bank's posture towards the Universal Group as a borrower:

8. Because the Universal Group acted as a single economic unit, CWB [the Bank] required, among other things, that all obligations of Universal Entities and Lakelse Entities be cross-guaranteed, and that each entity comprising the Universal Group grant security over all present and after-acquired personal property for the payment of all obligations to CWB under the Purchase Loans and the subsequent 2019 Loan. I confirm that, in the course of CWB's [the Bank's] credit evaluation and approval process in deciding to advance the Purchase Loans, 2019 Loan, and any other credit facilities to the Universal Group entities, CWB treated the Universal Group as a single, consolidated economic entity.

[emphasis added]

[32] Ian Munson, the President and sole Director of Bear Creek also reflected on the Universal Group's status in the affidavit that he filed in support of Bear Creek's

Interlocutory Application. This, from paragraphs 6 and 7 of that affidavit on the “Ownership and Management of the Universal Group”, is relevant:

6. As far as I was concerned, as a businessperson, “Universal” was a helicopter company based in Goose Bay, Newfoundland and Labrador. It has one set of directors and officers, with Shane Cyr at the top. I did not concern myself, particularly, with the intricacies of the corporate structure of the Universal Group. As far as I was concerned, I was dealing with “Universal”.

7. As far as I was concerned, Universal was purchasing the Lakelse Assets to add them to, and operate them as part of, the Universal Group.

[33] I find on this evidence and, for the purposes of this Application, that the Universal Group and all of its corporate entities are a single debtor to the two creditors, the Canadian Western Bank and Bear Creek Contracting Ltd. I find further, on the same evidence, that the Bank and Bear Creek are “senior” and “junior” creditors respectively of the Universal Group.

[34] I need also inquire if there any “bars to marshalling” as the Manitoba Court of Appeal contemplated in *Wolfe*, when it suggested two potential bars to consider: 1. Would it interfere with the rights of the senior creditor; or 2. Would it cause prejudice to a third party.

1. Interfering with Senior Creditor

[35] If I marshal Universal Group’s assets to apply surplus proceeds that MNP holds for the Universal Group to Bear Creek’s debt that will not interfere with the Bank as senior creditor. Quite simply, the Bank has already recovered all of the money that the Universal Group owed to it and is no longer involved in the Universal receivership.

2. Prejudice to Third Party

[36] This potential bar is more contentious and requires closer consideration.

[37] PwC was appointed Trustee in Bankruptcy of the Universal Group on June 15, 2021. MNP was appointed Receiver of the Universal Group on May 27, 2020 and sold the assets of the Universal Group, with Court approval on October 30, 2020. Both events happened before PwC was appointed Trustee.

[38] PwC filed a written submission opposing Bear Creek's Interlocutory Application for marshalling and subrogation. It noted that MNP still holds the surplus funds from the sale of the Universal Group's assets but it says that I should deny Bear Creek the relief that it is seeking.

[39] These are the bases that PwC relies on for its opposition:

- i. Bear Creek did not seek marshalling when MNP sold the assets;
- ii. Universal Group and Lakelse are separate and distinct entities and the creditors of one are not creditors of the other, so that Bear Creek is not a creditor of Universal Group; and
- iii. To allow Bear Creek marshalling will materially prejudice Lakelse's unsecured creditors and Bear Creek can only succeed if it proves that its prejudice will exceed any prejudice to the unsecured creditors.

[40] I will examine each of these submissions in its turn.

i. Bear Creek Failed to Seek Marshalling

[41] I do not know if Bear Creek sought marshalling previously. In paragraph 19(a) of its written submission, PwC submits that "Bear Creek had ample opportunity to make this Application and it failed to do so until after the assets were sold". That may be true, although PwC has offered no evidence to support its submission and it was not engaged in the process when MNP sold off the Universal Group's assets.

[42] In any event, the relief that Bear Creek is asking for is equitable in nature and it is fairer to decide the question on the equities in play, than if Bear Creek simply passed on its chance at marshalling at a more opportune time. I expect that the Universal receivership was a dynamic process and that it ushered in an unsettling time for all involved, whereupon it may have been difficult for Bear Creek to focus on the nuances of marshalling and subrogation and assert them then, as it does now.

ii. Universal Group and Lakelse as Separate Entities

[43] I dealt with this argument earlier in these reasons and need not repeat that discussion here. I regard the Universal Group as a tightly cohesive unit, whose operations were so inextricably entwined that even the Bank, its biggest creditor, regarded it as one entity.

iii. Material Prejudice to Unsecured Creditors

[44] I will not deal with this concern by simply saying, as the Manitoba Court of Appeal did in *Wolfe* that “[p]otential prejudice to unsecured creditors is irrelevant”. Indeed, I note as my colleague, MacDonald, J. did in paragraph 64 of *Bear Creek*, the companion piece to this matter, that “Bear Creek will have to satisfy a court that:...(d)...it is materially prejudiced more than other creditors, including Universal’s unsecured ones...”?

[45] Counsel for PwC advised me when I heard Bear Creek’s Application that \$2,595,886 is owed to the unsecured creditors of the Universal Group, while \$2,500,000 is owed to Bear Creek; or put another way for the Bear Creek debt, the Universal Group still owes the full amount of the Promissory Note that Bear Creek took back from the Universal Group to finalize the transaction between them. Doubtlessly, the unsecured creditors of the Universal Group will suffer material prejudice from Universal Group’s bankruptcy. But Bear Creek will suffer greater prejudice. In either event, the surplus funds that MNP holds was estimated for me at the hearing as between \$350,000-\$400,000.

[46] Ian Munson, President and sole Director of Bear Creek, to whom I referred earlier in these reasons, filed an affidavit to support Bear Creek's Interlocutory Application. At paragraph 16, he agreed that Bear Creek "...did receive interest payments [on the Promissory Note] of about \$244,000 between September 2018 and March 2020", but "[t]he balance of the purchase price (\$2,500,000) has never been paid". In the same affidavit, Mr. Munson also reflected on the impact that the Universal Group's default had on Bear Creek's business:

28 As a result of the non-payment of the \$2.5 million in principal owing and secured by the Promissory Note, together with accumulated interest, Bear Creek has been unable to refinance at favourable rates and has been unable to pay down other existing debts, which has caused ongoing and significant expense to Bear Creek".

[47] When Bear Creek took back the Promissory Note for \$2.5 million from the Universal Group, it became as one of the Universal Group's "secured creditors", as section 8 of the Promissory Note, dated September 6, 2018 shows:

7. Security

As general and continuing security for the due performance and payment of any and all of its obligations to the Holder [Bear Creek] of this Note, the Maker [Lakelse Helicopters LP] has granted a security interest in the Aircraft pursuant to a security agreement dated as of the date hereof".

[emphasis added]

[48] There were, in fact, two security agreements which Bear Creek was a party to with the Universal Group, the first a "General Security Agreement" ("GSA") and the other an "Aircraft Security Agreement" ("ASA"), both dated September 8, 2018, and each concurrent with and in support of the Promissory Note. The GSA gave Bear Creek security over "...all of the Debtor's present and after acquired property" and the ASA gave Bear Creek security over "...the aircraft described in Schedule "A"", of which the list included twelve helicopters and one "Rotable (spare SD2 engine)". The GSA appears as Exhibit "C" to Ian Munson's affidavit and the ASA as Exhibit "D".

[49] The Bank required that Bear Creek and Lakelse Helicopters LP subordinate their claims to the Bank's interest in the assets listed in Schedule "A", which it took to secure the money that the Universal Group owed to it. To that end, the Bank insisted that Bear Creek, and Lakelse Helicopters LP enter into an "Intercreditor Agreement" dated September 6, 2018 with it. The Bank designated Bear Creek in the Agreement as "Subordinate Lender" (reminiscent of my finding that Bear Creek was a "junior" creditor to the Bank) and referred to the two Lakelse entities as "Borrower" and "Indemnitor".

[50] Clause G of the Intercreditor Agreement states the status of the Borrower and Indemnitor to the Bank's security:

G. It is a condition, among others, of the Bank's willingness to extend the Credit Facilities to the Borrower that the Subordinate Lender [the Bank], the Indemnitor and Borrower [the Lakelse entities] execute and deliver this Intercreditor Agreement pursuant to which the Subordinate Security [held by Bear Creek] will at all times be postponed and subordinate to the Bank Security.

[emphasis added]

[51] By this clause the Bank acknowledged unequivocally that Bear Creek held a security interest in the assets it acquired from the Universal Group, subject only, of course, to the Bank's claim.

[52] Earlier in these reasons, I quoted from Kay, J. of the Ontario Superior Court, in Bankruptcy, in *Bread Man*:

...It is also logical that unsecured creditors of debtors should not be protected, for, in the absence of a statutory provision, they should have no better right to the fund than the debtor himself. ...

[53] When I develop that "logic" that Kay, J. speaks of in this quotation, it becomes readily apparent what distinguishes the unsecured creditors of the Universal Group from Bear Creek and explains why Bear Creek has a better right to the surplus funds that MNP holds than the unsecured creditors do: Bear Creek (except as to the Bank)

was a secured creditor of the Universal Group. It worked assiduously to ensure that the Universal Group would repay the \$2.5 million loan it extended by the Promissory Note and took as much security as it could avail of subject only as, I repeat, to the Bank. The Bank is no longer in play in these proceedings, and it is eminently fair and equitable to allow Bear Creek to recover as much of its “secured” debt as is available from the surplus proceeds.

[54] Regrettably, Bear Creek will recover only about 15 percent of what is owed to it ($\$350,000-\$400,000/\$2,500,000$) in roughly the same proportion as the unsecured creditors would have had available to them if they could share the surplus ($\$350,000-\$400,000/\$2,595,886$).

[55] In sum, Bear Creek has a superior claim to the unsecured creditors, for the surplus proceeds and because of Bear Creek’s superior claim it is fair and equitable that the surplus funds be paid to Bear Creek, and I so direct; by employing the mechanism of subrogation.

SUBROGATION

[56] I quoted from the CED earlier in these reasons, and from that excerpt I note that subrogation “means the substitution of one person in the place of another for a legal claim, so that the person substituted succeeds to the rights of the other in relation to the claim”. In this matter, but for the outstanding claims by Bear Creek and the unsecured creditors to the surplus funds that MNP holds for the Universal Group, those funds would belong to the Universal Group. Between Bear Creek and the unsecured creditors, the former has the superior claim to the funds as I have just found and Bear Creek is subrogated to the Universal Group to receive the funds.

[57] In effect, and to paraphrase my earlier quotation from the CED, I substitute Bear Creek for the Universal Group and I direct MNP, the Receiver of the Universal Group, to pay the surplus funds into this Court to be distributed to Bear Creek.

DISPOSITION

[58] Bear Creek applied to Court for an order directing that surplus funds held by MNP, Receiver of the Universal Group, be marshalled and paid to Bear Creek by subrogation. PwC, the Trustee in Bankruptcy of the Universal Group, opposed Bear Creek's Application, claiming that the Universal Group's unsecured creditors would be materially prejudiced if Bear Creek received the funds.

[59] PwC also claimed that marshalling should not be allowed since the funds were held by MNP, on behalf of the Universal Group, and the Canadian Western Bank was a creditor of Lakelse, not of the Universal Group. Thus, said PwC the conditions were not present for marshalling: while there were two separate creditors, the Bank and Bear Creek, there were also two separate debtors, the Universal Group and Lakelse; and Bear Creek is a creditor of Lakelse, but not of the Universal Group.

[60] The Court found:

1. The Universal Group and Lakelse are the same entity, operating as the Universal Group;
2. The Bank and Bear Creek are separate creditors of the Universal Group;
3. The Universal Group is a single debtor of the Bank and Bear Creek;
4. Bear Creek's claim to the surplus funds, as a secured creditor, is superior to the Universal Group's unsecured creditors' claims;
5. It is fair and equitable to allow Bear Creek to satisfy the debt from the surplus funds that MNP holds for the Universal Group; and

6. Bear Creek is subrogated to the Universal Group for the surplus funds.

[61] In the result, I order that:

1. MNP, the Receiver of the Universal Group, pay the surplus funds into this Court to be distributed to Bear Creek; and
2. Bear Creek will have its costs of the Interlocutory Application to be taxed on Column 3 of the Scale of Costs.

GARRETT A. HANDRIGAN
Justice