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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
PLAINTIFF:	PACER CONSTRUCTION HOLDINGS CORPORATION
DEFENDANTS:	PACER PROMEC ENERGY CORPORATION AND PACER PROMEC ENERGY CONSTRUCTION CORPORATION
DOCUMENT:	**BENCH BRIEF OF CONSTRUCTION PROMEC INC.**
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INTRODUCTION AND FACTS

1. The following is the Bench Brief of Construction Promec Inc. ("**Promec**") with respect to an Application regarding allocation of the security for the borrowings of the Receiver of Pacer Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation (collectively "**PPEC**"). It is the positon of Promec that the borrowings should all be allocated and secured against the so called "CNRL N5000 Contract" (as defined in the various materials filed in this matter).

2. Except where indicated, the facts below are derived from the Affidavit of Paul Lafreniere sworn April 29, 2015 and filed May 4, 2015 (the "**Lafreniere Affidavit**").

PPEC's financing

3. Promec invested a total of $20,000,000 in PPEC, $2,500,000 in equity and $18,200,000 in the form of payments to PPEC's suppliers and services directly rendered by Promec to support PPEC's operations. Pacer invested similar amounts in PPEC.

4. National Bank of Canada ("**NBC**") granted credit facilities in the aggregate amount of $30,850,000 (the "**NBC Credit Facilities**") pursuant to a Credit Agreement signed on May 23, 2014 (the "**NBC Credit Agreement**"). PPEC's obligations under the NBC Credit Agreement were secured by a General Security Agreement over all assets of PPEC (the "**NBC Security**"). Both Pacer and Promec jointly and severally guaranteed PPEC's obligations under the NBC Credit Agreement (the "**Pacer/Promec Guarantee**").

5. As of February 18, 2015, the amounts owed by PPEC under the NBC Credit Facilities totalled $26,043,421.37.

6. On March 5, 2015 (the day prior to the Receivership Application), Pacer paid the amounts owed to NBC and was legally subrogated in all of NBC's rights under the NBC Credit Agreement, the NBC Security and the Pacer/Promec Guarantee. This legal subrogation was also recorded as an assignment agreement.

PPEC's Operations

7. The core of PPEC's operations consisted in construction contracts with Krupp Canada Inc. ("**Krupp**") for the Kearl Lake Oil Sands Project ("**Kearl Project**") and the Mildred

Lake Mine Replacement Project ("**MLMR Project**") (collectively: the "**Krupp Contracts**") and with Canadian Natural Resources Limited ("**CNRL**") for the Horizon Oil Sands Project. There are a total of four (4) ongoing contracts between PPEC and CNRL, namely the CNRL N5000 Contract, the CNRL N-51 Contract, the CNRL BTU Contract and the CNRL GRU Contract (collectively: the "**CNRL Contracts**") that are described at paragraphs 41 to 43 of the Affidavit of Richard Pelletier sworn March 6, 2015.

Krupp Contracts

8. The Krupp Contracts are all completed. PPEC's only remaining step with regards to the Krupp Contracts is the collection of PPEC's claim against Krupp (the "**Krupp Claim**"). The Krupp Claim consists of pending receivables and holdbacks for an approximate amount of $7,785,400 and a claim for extras resulting from several change orders during the execution of both the Kearl Project and the MLMR Project, for amounts estimated at $41,184,135 and $21,838,072 respectively.

9. In order to secure the payment of the Krupp Claim, PPEC has registered a lien on the Kearl Lake Oil Sands Project and the Mildred Lake Mine Replacement Project.

10. The collection of the Krupp Claim is being negotiated by the Receiver, with the active involvement of Promec, and may eventually have to be collected through judicial proceedings.

CNRL Contracts

11. PPEC has two completed contracts with CNRL (the CNRL BTU Contract and the CNRL GRU Contract), and a third contract (the CNRL R-51 Contract) that is almost completed (in regard to which PPEC still has to collect an amount of $13,000,000).

12. PPEC also has a $40 million contract (the CNRL N-5000 Contract) that is several months from completion and is virtually the sole remaining operational obligation of PPEC.

13. This CNRL N-5000 Contract is at the heart of the issues of this file because (i) a large portion of the Contract was to be performed by TFL Industrial Services Ltd. ("**TFL**"), a

subcontractor related to Pacer, (ii) it is not an economically viable contract for PPEC and (iii) its execution and completion is guaranteed by Pacer and not by Promec.

Appointment of subcontractor

14. In the execution of the CNRL N-5000 Contract, Pacer directed PPEC to grant a subcontract to TFL, a Pacer subsidiary, for the pipe stool fabrication work on this project. TFL was also designated as subcontractor for the NCRL N-51 contract for the structural steel fabrication work. In order to accomplish its subcontract for the CNRL N-51 Contract, TFL subcontracted the engineering portion to Corbo Engineering ("**Corbo**"), another subsidiary of Pacer.

15. It quickly appeared that TFL did not have the required capacities to successfully execute its obligations as subcontractor. In July 2014, after several requests by Promec, TFL finally agreed to subcontract a large portion of the CNRL N-5000 Contract and the CNRL N-51 Contract to another fabricator.

Economic viability of CNRL Contracts

16. An analysis of the economic viability of the CNRL N5000 Contract made by PPEC indicated that the CNRL N5000 Contract will never generate a profit. On the contrary, should PPEC (or the Receiver) decide to continue the performance of the CNRL N5000 Contract, PPEC will have to assume an important deficit.

17. The following emails confirm Pacer's knowledge of the fact that the CNRL N5000 Contract is not profitable:

    (a) email from Bhaskar Bhowmick, PPEC's Vice President – Finance, dated November 17, 2014, that notably mentions that "*We have only finished 35% of the job but incurred 65% of the cost!*" and "*Not only we are losing money we are cash negative in a big way*";

    (b) email from Bhaskar Bhowmick, PPEC's Vice President – Finance, dated December 19, 2014;

    (c) email from Bhaskar Bhowmick, PPEC's Vice President – Finance, dated February 13, 2015, that notably mentions that "*To sum it up, we need another $ 27 Mil cash injection for N5000*" and "*And right now, the project is not solvent*";

(d) email from Bhaskar Bhowmick, PPEC's Vice President – Finance, dated February 17, 2015, that notably mentions that "*I agree with you that this will cause more loss for PPEC*".

18. On January 30, 2015, Joel Thompson (Pacer's Chief Financial Officer) emailed to Promec's and PPEC's representatives a document entitled *Cash to Complete,* in which Pacer recognized that the CNRL N5000 Contract was to generate a loss for PPEC, as appears from said email and its attachments.

Execution Guarantee of the CNRL N5000 Contract

19. The execution of the CNRL N5000 Contract has only been guaranteed by Pacer (the "**N5000 Guarantee**"). Promec did not sign the N5000 Guarantee, or any other guarantee of the CNRL N5000 Contract.

20. Therefore, Pacer, as sole guarantor, assumed all risks associated with the CNRL N5000 Contract. If PPEC is unable to complete that contract, CNRL will not be prejudiced as Pacer will have the obligation to complete it.

Defaults and governance crisis

21. On November 7, 2014, NBC issued a notice of default to PPEC ("**NBC Notice**"). NBC also requested that Pacer and Promec make further subordinated advances to PPEC in order to support PPEC's operations. In that context, Pacer advanced an aggregate amount of $12,435,726 to PPEC that is secured by a general security agreement over PPEC's assets (the "**Pacer Security**").

22. Promec did not advance any additional amounts to PPEC because, *inter alia,* the CNRL N5000 Contract would not generate a profit or any benefit for PPEC (Pacer's interest to fund that contract was not as a shareholder, but rather as the sole guarantor.

23. Promec consented that the Pacer Security be granted by PPEC, insofar as the Pacer Security be fully subordinated to the NBC Security.

24. On January 8, 2015, Promec learned that PPEC was to collect an amount of $8,000,000 from CNRL and that another amount of $8,000,000 had already been collected from CNRL on December 28, 2014. In conformity with the NBC Credit Agreement and the NBC Notice, the $16,000,000 collected by PPEC should have been applied in reduction of PPEC's debt under the NBC Credit Facilities. However, Pacer instead directed PPEC

to use those funds in order to finance the ongoing work for the NCRL N5000 Contract and the NCRL N51 Contract, despite the fact that Pacer was aware of the fact that the NCRL N5000 Contract was going to generate a loss.

25. An email dated January 23, 2015 confirmed that PPEC and Pacer were fully aware that the use of these funds would generate a margin deficit under the NBC Credit Facilities.

26. Moreover, on January 23, 2015, Pacer directed PPEC to pay $2 million to TFL.

27. On January 23, 2015, Promec advised PPEC that PPEC's funds should be used to :

    (a) reduce PPEC's indebtedness towards the first NBC charge and debt;

    (b) pay unremitted amounts to the Crown for source deductions for an amount of $970,336 (this Crown claim ranking prior to the NBC Claim and for which PPEC's directors (including Promec's representative) had a potential personal liability).

28. Pacer's decision to direct PPEC to use its funds to (i) pay its subsidiary TFL; and (ii) continue funding the unprofitable CNRL N5000 Contract, caused defaults under the NBC Credit Agreement which led to NBC sending a Demand for payment and Notice to Enforce Security on February 18, 2015.

Receiver's Report

29. The First Report of the Receiver ("**Receiver's Report**") indicates while the CNRL N5000 Contract is probably not economically viable, and would normally be abandoned, that certain groups benefit from completion of the CNRL N5000 Contract, such as lien holders and employees, due to obtaining further income in the completion process.

30. The Receiver's Report further indicates that stakeholders other than lien holders should be indifferent as to the completion or the abandonment of the CNRL Contracts.

31. The Receiver has proposed to "ring fence" recoveries related to the Krupp Claims (but not the Krupp Receivable) such that those proceeds would be applied only against liabilities other than the go forward costs of completing the CNRL Contracts. However, the Receiver did not indicate any similar allocation in respect to the borrowings already incurred in these proceedings. Instead, recoveries relating to all PPEC's assets including the Krupp Claim would be used to pay down such borrowings. Further, the Receiver

proposes to use the Krupp Receivable and other assets to finance the CNRL N5000 Contract.

ISSUES

32. The sole issue in this Application is as to the correct allocation of the cost of the Receiver's borrowings in these proceedings.

LAW AND ARGUMENT

33. The leading case on allocation of Receiver's borrowings and other costs is *Re: Hunters Trailer & Marine Ltd.*, [2001] ABQB 1094 (CanLII).[1] In that case, Chief Justice Wachowich noted, at paragraph 10, remarks made by Chadwick J. in *Canadian Asbestos Services Ltd. v. Bank of Montreal,* to the effect that one class of creditors should not receive a benefit or advantage at the expense of other creditors. He further quoted, with approval, an article entitled "Financing the Debtor in Possession" by H. Alexander Zimmerman as follows:

> It does appear fundamentally unfair, and uncounterintuitive, with 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.

34. Chief Justice Wachowich stated, at paragraph 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.

Chief Justice Wachowich concluded that since one particular secured creditor in that case was in a different position than that of the other major secured creditors, it would not be equitable that it be allocated the same proportion of CCAA costs.

35. In *Re: Respec Oilfield Services Ltd.*, [2010] ABQB 277 (CanLII)[2], the Honourable Justice Bielby quoted the following statement from *Re: Hickman (1985) Ltd.*:

> (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

[1] *Re: Hunters Trailer & Marine Ltd.*, [2001] ABQB 1094 (CanLII) **[Tab 1]**

[2] *Re: Respec Oilfield Services Ltd.*, [2010] ABQB 277 (CanLII) **[Tab 2]**

> intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets…

36. Justice Bielby further adopted the principles set forth in *Hunters Trailer & Marine Ltd., supra*, and held at paragraph 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.

37. In the present case, the bulk of the borrowings has been and will be expended on the CNRL N5000 Contract. The other CNRL Contracts are either completed or will be completed in the next few days.

38. The salient and overriding fact in this matter is Pacer has guaranteed the completion of the CNRL N5000 Contract. Therefore, while some stakeholder groups like lienholders or employees might benefit from the completion of that Contract, that benefit will remain unchanged if the Receiver does not complete the Contract, since Pacer will have to complete it in accordance with its guarantee.

39. It is inequitable for Pacer to foist the result of its poor business decision (guaranteeing an uneconomic CNRL N5000 Contract) on other creditors, in particular, Promec.

40. As detailed above, through Pacer's control, PPEC has been making business decisions in Pacer's interests as the sole guarantor of the execution of the CNRL N5000 Contract.

41. By the same token, Pacer is acting to the detriment of Promec as co-guarantor under the Pacer/Promec Guarantee, since PPEC's assets will not be used to repay the secured debt under the NBC Credit Facilities and, instead, to pay the execution of the CNRL N5000 Contract which Pacer guaranteed.

42. As the proposed lender under the Receiver's Borrowings Charge, Pacer is really advancing amounts to complete a contract that it guaranteed, just like any other guarantor would do when a debtor is insolvent. Therefore, by trying to disguise itself as an interim lender, Pacer is trying to indirectly share the risks of the CNRL N5000 Contract with Promec, despite the fact that Pacer assumed this risk alone.

Quebec Law on Guarantor Rights

43. The Pacer/Promec Guarantee is governed by the laws of the Province of Quebec.

44. The *Civil Code of Quebec* ("**CCQ**") notably includes a provision that provides recourses of a guarantor (or *surety* in the CCQ) against the debtor if the debtor is insolvent :

> **2359.** A surety who has bound himself with the consent of the debtor may take action against him, even before paying, if he is sued for payment or the debtor is insolvent, or if the debtor has bound himself to effect his acquittance within a certain time.
>
> The same rule applies where the debt becomes payable by the expiry of its term, disregarding any extension granted to the debtor by the creditor without the consent of the surety, or where, by reason of losses incurred by the debtor or of any fault committed by the debtor, the surety is at appreciably higher risk than at the time he bound himself.

45. The Court has the discretion under 2359 CCQ to make any orders that is relevant to protect the interests of a guarantor. A guarantor can request that certain measures be put in place to insure that the assets of the debtor are used in a way that will not prejudice the guarantor, including by ensuring that certain amounts of money be applied in reduction of the debt guaranteed by the guarantor.

46. As mentioned before, Pacer is proposing that the Receiver's Borrowings Charge ranks in priority over all assets of PPEC, including the Krupp Receivable, even if the Receiver's funding is to be provided by Pacer and is required to complete the CNRL N5000 Contract. This causes prejudice to Promec who is entitled under the CCQ to request that the assets of PPEC be used according to the rights of the existing secured creditor.

47. Also, the CCQ also provides that a guarantor is discharged of its obligations towards the creditor when he suffers a prejudice as a result of the act of the creditor :

> **2365.** Where, as a result of the act of the creditor, the surety can no longer be usefully subrogated to his rights, the surety is discharged to the extent of the injury he suffers thereby.

48. 2365 CCQ is also relevant in the circumstances described above because the Promec suffers a prejudice from the actions and decisions of Pacer that notably acts as secured creditor of PPEC after the subrogation in the rights of NBC.

CONCLUSION

49. Promec requests that the Receiver's Borrowings Charge ranks in priority only over the assets for which the funding is required (PPEC's rights under the CNRL N5000

Contract), andut be subordinated to existing security interests over any other assets, including both the Krupp Receivables and the Krupp Claim.

50. The net result of this request depends on whether or not the CNRL N5000 Contract will generate a profit:

(a) If, as Promec believes, the CNRL N5000 Contract does not generate a profit, Pacer will have solely assumed the loss, which is consistent with the liability Pacer assumed as sole guarantor of the CNRL N5000 Contract;

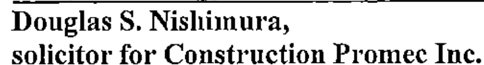
(b) If the CNRL N5000 Contract does generate a profit, the proceeds will be sufficient to cover the funding of the Receiver and the amounts advanced by Pacer will be repaid in full in accordance with the Receiver's Borrowings Charge ranking in priority over PPEC's rights under the CNRL N5000 Contract.

51. One way or another, the result of such an allocation of the Receiver's Borrowings Charge is consistent with the rights and liabilities of the parties and does not prejudice Pacer. Or any other creditor.

52. The alternative suggested by Pacer is to have the funding of the receivership be secured by assets for which said funding is not necessary. This is not consistent with the rights of and liabilities of the parties and causes a prejudice to Promec as it forces Promec to share the risks associated with the CNRL N5000 Contract with Pacer despite the fact that Pacer accepted to assume that risk on its own.

Submitted this 6th day of May, 2015.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
FIELD LLP



Per: ______________________
Douglas S. Nishimura,
solicitor for Construction Promec Inc.

TABLE OF AUTHORITIES

TAB

1. *Hunters Trailer & Marine Ltd.*, [2001] ABQB 1094 (CanLII)

2. *Respec Oilfield Services Ltd.*, [2010] ABQB 277 (CanLII)

TAB 1

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

2001 ABQB 1094 (CanLII)

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.

2001 ABQB 1094 (CanLII)

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.

2001 ABQB 1094 (CanLII)

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.

2001 ABQB 1094 (CanLII)

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

2001 ABQB 1094 (CanLII)

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).

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[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

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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.

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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 2

Court of Queen's Bench of Alberta

Citation: Respec Oilfield Services Ltd. (Re), 2010 ABQB 277

2010 ABQB 277 (CanLII)

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.

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[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

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- 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.

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[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").

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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.

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[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?

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[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.

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[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.

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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.

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[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?*

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[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.

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[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.

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[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

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> 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.

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[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

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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

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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.

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