Court File Number	1501-02652	Clerk's stamp
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	**BRIEF OF LAW AND ARGUMENT OF PACER CONSTRUCTION HOLDINGS CORPORATION**	
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Hearing Date and Time	**May 7, 2015 at 2:00PM**	
Presiding Justice	**The Honourable Justice B. Nixon**	

I. Introduction

1. All capitalized terms that are not defined herein are to be given the meaning ascribed to them in the First Report of FTI Consulting Canada Inc. ("**FTI**") dated May 1, 2015, in its capacity as the Receiver of Pacer Promec Energy Corporation ("**PPEC**") and Pacer Promec Energy Construction Corporation ("**PPECC**", and together with PPEC, "**PPEC**").

2. This brief is filed in response to Construction Promec Inc.'s application for an order allocating the Receiver's Borrowings Charge to specific assets in the PPEC estate.

II. Background & Facts

3. PPEC's business involves the provision of a wide range of civil, mechanical, and electrical contracting services in the oil sands developments of northern Alberta. The issued and outstanding share capital in PPEC is owned 50% by Pacer Construction Holdings Corporation ("**Pacer**"), and 50% by Construction Promec Inc. ("**Promec**").

Affidavit of Richard Pelletier, sworn March 6, 2015, paras. 12-13 ("Pelletier Affidavit").

4. PPEC's insolvency and entrance into these Receivership Proceedings was precipitated by its inability to repay amounts owing to National Bank under a Credit Agreement dated May 23, 2014. PPEC's obligations to National Bank under the Credit Agreement were secured by a Security Agreement dated May 23, 2014 that applied to all of PPEC's present and after-acquired property. On May 23, 2014, Pacer and Promec also guaranteed PPEC's obligations under the Credit Agreement (the "**Guarantee**"). On February 18, 2015, PPEC defaulted under the Credit Agreement and National Bank called on the Guarantee. Pacer made good on the Guarantee by paying $26,227,046.49 to National Bank and was thereby subrogated to National Bank's rights under the Credit Agreement and Security Agreement.

Pelletier Affidavit, paras. 3, 7, 8, 27, 31, 64, 66.

5. On March 10, 2015, Pacer applied to the Court, on notice to Promec, for the appointment of a receiver over the assets, undertakings and properties of PPEC. This Court appointed FTI as Receiver over PPEC pursuant to the Receivership Order dated March 10, 2015. At the time of the application, PPEC had four remaining construction contracts to complete, each for Canadian Natural Resources Ltd. (the "**CNRL Contracts**"), comprised of

the N5000 Contract, the R-100 Contract (sometimes called N-51 or R-51), the BTU Contract, and the GRU Contract.

> Pelletier Affidavit, paras. 39-42.
> Affidavit of Joel Thompson, sworn May 6, 2015, para. 15 ("Second Thompson Affidavit").

6. The Receiver was appointed pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, s. 13(2) of the *Judicature Act*, and s. 99(a) of the *Business Corporations Act*, as an independent court officer under the supervision of this Court. Promec ignores this important context in its brief. The Receivership Order made pursuant to those statutes empowered FTI to manage, operate, and carry on the business of PPEC; assess the economic value of PPEC's remaining construction contracts and determine the appropriate manner in which to address them in these Receivership Proceedings; and to borrow $10,000,000 by way of Receiver's Certificates for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by the Receivership Order.

> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243(1).
> *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2).
> *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 99(a).
> Receivership Order, ss. 2, 3(c) and (k), 20.

7. The Receivership Order charged the whole of PPEC's property as security for the monies borrowed by the Receiver (the "**Receiver's Borrowings Charge**"), which charge was subordinate only to the security interests of particular equipment lessors, as those parties did not have notice of the initial application for the appointment of the Receiver. At the hearing of that application, Promec contested this allocation of the Receiver's Borrowings Charge, arguing that it should rank in highest priority only with respect to a portion of the PPEC estate, and be subordinated to existing charges with respect to PPEC's other assets. Specifically, Promec submitted that:

> Should the Court authorize the funding of the Receivership, we believe that the Receiver's Borrowing Charge should rank in priority to any existing charges only in respect to the claims related to the CNRL N5000 Contract and be subordinated to the existing charges on any other assets of PPEC.

That request was denied by the Court. Promec did not appeal the Receivership Order and they did not bring a comeback motion with respect to the Receivership Order or any provisions thereof.

Receivership Order, s. 20.
Affidavit of Peter Capkun, sworn March 10, 2015, Exhibit A.
Second Thompson Affidavit, paras. 34-35.

8. For the almost two months since March 10, 2015, Pacer has financed these Receivership Proceedings with $10 million funded by way of Receiver's Certificates, on the basis that those certificates were secured on the whole of PPEC's property. Promec has not contributed to that financing. It is Pacer's position that the initial Receiver's Borrowings Charge of $10 million has been incurred and it is appropriate that it remains allocated amongst all the assets of PPEC.

Second Thompson Affidavit, paras. 6, 33-34.

9. Those costs were incurred by the Receiver for various activities which benefitted Promec and other stakeholders. As seen in the First Report, that $10 million did not go solely towards the completion of the CNRL N5000 Contract: the Receiver

a. Stabilized PPEC's operations for the benefit of all stakeholders;

b. Reviewed the CNRL Contracts and commenced discussions with CNRL in respect of payment of receivables and negotiation of significant change orders previously in dispute;

c. Substantially completed the CNRL GRU and BTU Contracts, and progressed toward the completion of the R-100 Contract, all of which contracts Promec guaranteed;

d. Continued to employ over 300 employees;

e. Sold PPEC real estate for $451,000; and

f. Engaged in meetings with Pacer and Promec regarding the Krupp Claims, and attended a meeting with Krupp in an effort to pursue recovery of the claim.

FTI's First Report, paras. 40-53, 58, 71, 78.

Promec was aware of the work that the Receiver was performing, and the fact that costs were being incurred. It did not seek the Court's assistance to stop the Receiver from incurring such costs at any time in the almost two months that have elapsed since the Date of Appointment.

10. The Receiver has brought an application returnable May 7, 2015, at 2:00 p.m., requesting approval of its Completion Protocol, which includes (amongst other things) an

increase in its borrowing powers via two new borrowing facilities secured by separate charges with different priority structures:

a. The General Facility in the amount of $63 million to complete the CNRL Contracts, implement the lien management and claims processes, and generally administer the estate, secured by the General Facility Charge on all of PPEC's assets besides the Krupp Claims. Any recoveries from this portion of the estate will be applied first to the General Facility Charge, and then the Krupp Facility Charge, and later to the amounts owing by PPEC to Pacer under the Credit Agreement.

b. The Krupp Facility in the amount of $5 million to pursue the Krupp Claims, secured by a Krupp Facility Charge on those claims. Any recoveries on the Krupp Claims will be applied first to the Krupp Facility Charge, then to reduce PPEC's liability under the Credit Agreement, and then to the General Facility Charge.

FTI's First Report, paras. 98-99.

11. No part of the Receiver's application for approval of the Completion Protocol seeks to allocate the initial Receiver's Borrowings Charge to particular property in the PPEC estate, nor subordinate its priority ranking. The allocation and ranking are to remain as they were originally ordered by this Court on March 10, 2015 and acted upon thereafter.

12. In response to the Receiver's application, Promec has filed an application renewing its request for the reallocation of the Receiver's Borrowings Charge to the proceeds of the CNRL N5000 Contract, or the CNRL Contracts generally, pursuant to s. 24 of the Receivership Order.

Construction Promec Inc. Application filed May 4, 2015, para. 1(a).
Affidavit of Paul Lafrenière, sworn April 29, 2015, para. 74.

III. Issue

13. The issue on Promec's application is whether the Receiver's Borrowings Charge should be reallocated to the proceeds of the CNRL Contracts, or the N5000 Contract specifically. The larger issue at stake is whether the Receiver's Completion Protocol should be approved by this Court.

IV. Law and Argument

The Completion Protocol is Fair and Reasonable

14. It is Pacer's position that the Completion Protocol is fair and reasonable: it will benefit multiple stakeholders, specifically lienholders, is recommended by the Receiver, and is being funded entirely by Pacer with no contribution from Promec. This potential $68 million in financing is in addition to the almost $73.5 million Pacer has funded to PPEC since November 2014 without contribution from Promec.

> Second Thompson Affidavit, paras. 17(b), 21, setting out that Pacer contributed $9,375,000 in November 2014, $27,875,000 in February 2015, $26,227,046 in March 2015 towards the National Bank Credit Agreement, and $10,000,000 since the commencement of these Receivership Proceedings.

15. The Completion Protocol also contemplates a mechanism by which the Krupp Claims – the assets Promec sees as containing the most value in these proceedings – can be pursued and monetized. The Protocol "ring-fences" recoveries on the Krupp Claims from contributing toward the completion of the CNRL Contracts. In light of this accommodation offered to Promec, it cannot refuse to contribute financially to these Receivership Proceedings and direct the Receiver's other actions, how they should be funded, and the terms and security of that funding.

There Should be No Reallocation of the Receiver's Borrowings Charge

16. Pacer submits that Promec cannot make an application pursuant to s. 24 of the Receivership Order because they have not pursued this remedy in a timely fashion and they are not a secured creditor as this section envisions.

17. The starting premise is that a court-appointed receiver has the benefit of a first-ranking charge in respect of the work it is being asked to perform. The Alberta Template Receivership Order contemplates in s. 20 that the Receiver's Borrowings Charge will be a charge on the whole of the debtor's property as security for the payment of the monies borrowed in priority to all security interests of any person.

18. Section 24 of the Alberta Template Receivership Order (which is also s. 24 of the Receivership Order in this case) allows an interested party to apply for an order allocating the Receiver's Borrowings Charge differently, amongst the various assets in the estate. As

quoted by Wachowich C.J.Q.B. in *Re Hunters Trailer & Marine Ltd.* however, courts should be cautious in allocating the costs of an insolvency proceeding: "it is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company." The Court also noted that all secured creditors in that case could point to costs that could not be attributed to the assets over which they held security, but considered that the financing granted in the initial sorting-out period was still for the benefit, or potential benefit, of all creditors. As quoted by Bielby J. in *Re Respec Oilfield Services Ltd.*, "exceptions to a uniform application of cost to creditors ought not to be lightly granted."

> *Re Hunters Trailer & Marine Ltd.*, 2001 ABQB 1094, Tab 1 at paras. 10, 23.
> *Re Respec Oilfield Services Ltd.*, 2010 ABQB 277, Tab 2 at para. 23.

19. As recognized by the Court in *Respec Oilfield* in addressing a request by a Monitor in CCAA proceedings to increase the quantum of its charge to deal with increased administration costs,

> 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.

The same chilling effect can be predicted if Promec's application is successful.

> *Respec Oilfield*, Tab 2 at para. 94.

20. If brought at all, such applications ought to be brought in a timely manner. The Receiver has already incurred the costs whose security Promec now seeks to reallocate. Furthermore, those costs were incurred to perform actions that benefitted all stakeholders, including Promec, through the stabilization of PPEC's operations in the initial sorting-out period, the completion or near-completion of several CNRL Contracts, the thorough assessment of the value remaining in the estate, and the initial evaluation of the Krupp Claims. Having now received the benefit of the costs incurred, especially with respect to the R-100, GRU and BTU Contracts which it has guaranteed, Promec now seeks to inappropriately and retroactively reallocate the security for the funds spent by the Receiver. As Bielby J. stated in *Respec Oilfield*, "it would have the effect of offloading costs which benefitted all secured creditors onto the shoulders of only one of those creditors".

> *Respec Oilfield*, Tab 2 at para. 94.

21. Although s. 24 of the Receivership Order says "any interested party may apply" for a reallocation order, the Explanatory Notes to the Alberta Template Receivership Order make clear that it is generally only secured creditors with an interest in the assets whose value may not be improved by the Receiver's incurring of costs who bring such applications. The cases cited by Promec all address the claims of secured creditors in respect of allocation of costs.

> *Alberta Template Receivership Order* (December 2012), Tab 3, s. 24.
> *Alberta Template Receivership Order Explanatory Notes* (December 2012), Tab 4.

22. Promec is not a secured creditor of PPEC and has no interest in any assets whose value may not specifically be increased by the Receiver's activities. At best, Promec is an unsecured creditor of PPEC. In reality, it is Promec who has a potential *obligation* to others in this case, including CNRL under Promec's guarantees of three of the CNRL Contracts, and Pacer as the major secured creditor of PPEC. To ignore the rights of secured creditors in favour of Promec would be to turn the priorities of the PPEC estate on their head.

23. In support of its application for an allocation order, Promec also cites arts. 2359 and 2365 of the Civil Code of Québec, which read as follows:

> **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.
>
> **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.

24. Promec's reference to the Civil Code unreasonably stretches the potential application of these provisions, and the appropriate timing in which the provisions could be triggered. While framed as a basis for seeking reallocation of previously ordered charges, the arguments appear designed more in respect of a future defence to guarantee claims which may be brought against Promec.

25. Article 2359 is not generally used in the insolvency context, in which the court already has oversight over the debtor's (in this case the Receiver's) actions to ensure those

actions do not prejudice others', and particularly creditors', positions. It is entirely unclear whether this provision even applies once formal insolvency proceedings have been commenced, a court officer appointed, and a supervising court is in place. Moreover, the article envisions a situation in which neither the debt, nor the guarantee has been called on, which is not the case here.

26. Article 2365 also does not support Promec's application for an order allocating the Receiver's Borrowings Charge among PPEC's assets pursuant to s. 24 of the Receivership Order. Article 2365 creates an *ex post facto* sanction against the *creditor* who damages the value of the guarantor's rights of subrogation. It is not a right exercisable against the debtor (in this case PPEC), or its estate. Commentary suggests that a guarantor must prove four elements in order to be discharged from their guarantee pursuant to art. 2365: (1) there must be an act of the creditor; (2) the guarantor lost a right to which he was subrogated; (3) the guarantor suffered a real or certain prejudice; and (4) there is a causal link between these three elements. These elements can clearly only be proven after the impugned creditor's action has occurred and the damage has been suffered or is certain to be suffered; procedurally, the correct mechanism would be to plead this article in a statement of defence, or proceed by way of statement of claim for a declaratory judgment, on a complete court record.

> Édith Lambert, ed., *Commentaires sur le Code Civil du Québec: le cautionnement (Art. 2333 à 2366 C.c.Q.)*, (Éditions Yvon Blais, 2011), Tab 5 at pp. 392, 411-12.

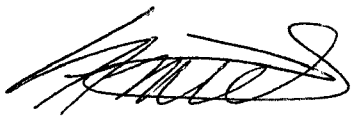
27. Finally, Promec seeks reallocation of the existing and future charges on the PPEC estate on the basis of *allegations* regarding the historical management of the CNRL Contracts and their financing. These allegations, denied by Pacer, are a means of seeking to deflect attention from the fact that Promec has repeatedly failed to provide financial support for PPEC since November 2014, while permitting its 50% shareholder to provide in excess of $73 million to ensure PPEC's ongoing operations. If the historical background which Promec refers to is relevant at all, which Pacer submits it is not, the Court should be provided with a complete record and response relating to this historical period.

V. Conclusion

28. Pacer submits that there should be no reallocation of the Receiver's Borrowings Charge to specific property in the PPEC estate. Promec has belatedly filed this application, is not a secured creditor with an interest in specific assets in the estate, and the costs the Receiver has incurred to date have been to fund activities which were to the clear benefit of all stakeholders. Pacer supports the recommendations of the Receiver as outlined in the First Report and asks the Court to render the relief sought by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Toronto, Province of Ontario, this 7th day of May, 2015.

STIKEMAN ELLIOTT LLP

Per: 

ELIZABETH PILLON

Counsel for Pacer Construction Holdings Corporation

TAB 1

2001 ABQB 1094
Alberta Court of Queen's Bench

Hunters Trailer & Marine Ltd., Re

2001 CarswellAlta 1636, 2001 ABQB 1094, [2001] A.J. No. 1638, [2002] A.W.L.D. 61, 110 A.C.W.S. (3d) 795, 305 A.R. 175, 30 C.B.R. (4th) 206

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of the Hunters Trailer & Marine Ltd.

Wachowich C.J.Q.B.

Heard: November 20, 2001
Judgment: December 14, 2001
Docket: Edmonton 0003-19315

Counsel: *Kentigern A. Rowan*, for Canadian Western Bank
Terrence M. Warner, for CIT Financial Ltd.
Douglas H. Shell, for Deutsche Financial Services
R. Craig Steele, for Bank of America Canada Specialty Group Ltd.
Juliana E. Topolniski, Q.C., for Mr. Blair Bondar
Darcy G. Readman, Darren R. Bieganek, for UMC Financial Management Inc.
Jeremy H. Hockin, Deborah J. Polyn, for Deloitte Touche Inc.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Wachowich C.J.Q.B.*:

Canadian Asbestos Services Ltd. v. Bank of Montreal, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) — considered

Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co. (1991), 5 C.P.C. (3d) 299, (sub nom. *Rieger (Wm. C.) Co. (Receivership), Re)* 126 A.R. 69 (Alta. Q.B.) — referred to

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, *(*sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, *(*sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246 (N.S. C.A.) — considered

Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

APPLICATION by interim receiver to determine allocation of costs between major secured creditors.

***Wachowich C.J.Q.B.*:**

THE APPLICATION TO DETERMINE COST ALLOCATION

1 The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in possession" (DIP) financing and administrative charge provided for in the ***Companies' Creditors Arrangement Act*** proceedings (***CCAA*** costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

2 Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the ***CCAA*** proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The

primary issue of contention is the extent to which UMC Financial Management Inc. (UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the ***CCAA*** costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of ***CCAA*** costs.

THE ARGUMENTS OF THE PARTIES

3 DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all ***CCAA*** costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the ***CCAA*** costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the ***CCAA*** proceedings to one class of creditors.

4 CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the ***CCAA*** costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

5 UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the ***CCAA*** costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

6 The Interim Receiver recommends something of a middle ground. While acknowledging that the ***Bankruptcy and InsolvencyAct*** does not apply to ***CCAA*** proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

7 The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent

of the Monitor's fees and $500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

8 UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE *CCAA* COSTS

9 The ***CCAA*** does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

> 38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

10 The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), at 359:

> 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 (*Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]); *Canadian Asbestos Services Ltd. v. Bank of Montreal, supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

14 All creditors may be affected by a stay imposed in the ***CCAA*** proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the ***CCAA***. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the ***CCAA.*** While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the ***CCAA*** costs. That is not to say that equity calls for an equal allocation of costs.

16 The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in

terms of ***CCAA*** costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

17 Six classes of creditors voted on a reorganization plan in *Keddy Motor Inns Ltd., Re* (1992), 90 D.L.R. (4th) 175 (N.S. C.A.). 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 *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

> It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment - as opposed to equitable treatment - is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

18 Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in ***CCAA*** proceedings.

19 In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

> It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in ***Kowal*** [*Robert F. Kowal Investments Limited v. Deeder Electric Limited* (1975), 9 O.R. (2d) 84 (C.A.)] that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

20 I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from ***CCAA*** proceedings. The ***CCAA*** recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there

is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

21 Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of ***CCAA*** costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitors fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

22 Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

23 Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

24 Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

25 An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered ***CCAA*** costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the ***CCAA*** proceedings there could have been no certainty as to the sale price of the land or UMC's share of the ***CCAA*** costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of ***CCAA*** costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

26 I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

27 UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of ***CCAA*** costs and the principles that should be applied in such a determination. There is no need, as there was in*Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Alta. Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

CONCLUSION

28 UMC is allocated 15 percent of the Monitor's fees, $500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the ***CCAA*** costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

Order accordingly.

TAB 2

2010 ABQB 277
Alberta Court of Queen's Bench

Respec Oilfield Services Ltd., Re

2010 CarswellAlta 830, 2010 ABQB 277, [2010] A.W.L.D. 2826, 17 P.P.S.A.C. (3d) 148, 188 A.C.W.S. (3d) 31, 28 Alta. L.R. (5th) 239, 68 C.B.R. (5th) 189

In the Matter of the Bankruptcy of Respec Oilfield Services Ltd.

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.

Myra B. Bielby J.

Heard: March 25, 2010
Judgment: April 28, 2010
Docket: Edmonton BK03-115337, 0903-06823

Counsel: Richard Reeson, Q.C., Satpal Bhurjee for PricewaterhouseCoopers Inc.
Terrence Warner for National Leasing Group Inc.
Charles Russell, Q.C. for Canadian Western Bank
Kibben Jackson for Business Development Bank
Ryan Zahara, Michael O'Brien for Komatsu International (Canada) Inc.
Sean Collins, Jeffrey Whyte for GE Capital
Stephen Livingstone for Little Red River Cree Nation
Colin Brousson, Eugene Macchi for North Shore Leasing Ltd.
Paul Pidde for Ford Credit Canada
Robert Kennedy for Jim Pattison Leasing
Justice Agyemang for Bank of Nova Scotia
Ed Bresky for Great West Kenworth
Karl Driedger for K & N Contracting
Tara Hamelin for Wells Fargo Equipment Finance Company

Subject: Insolvency

Table of Authorities

Cases considered by *Myra B. Bielby J.*:

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 5 C.B.R. (5th) 56 (N.L. T.D.) — followed

Hunjan International Inc., Re (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — distinguished

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — followed

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — referred to

Western Express Air Lines Inc., Re (2005), 7 P.P.S.A.C. (3d) 229, 2005 BCSC 53, 2005 CarswellBC 72, 10 C.B.R. (5th) 154 (B.C. S.C.) — distinguished

Winnipeg Motor Express Inc., Re (2009), 2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242, 56 C.B.R. (5th) 265, 243 Man. R. (2d) 31 (Man. Q.B.) — distinguished

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

APPLICATION by monitor to have its proposed apportionment of allocated costs approved.

***Myra B. Bielby J.*:**

Decision

1 An attempted reorganization of a debtor company under the *Companies' Creditors Arrangement Act* ("CCAA") failed whereupon the debtor was placed into receivership. A number of pieces of heavy equipment were sold in an auction held before the termination of the CCAA stay. The Monitor applied for approval to apportion its costs, the costs of conducting the auction and Debtor-in-Possession financing costs ("the allocated costs") among all creditors on a *pro rata* basis, to deduct those costs from the auction proceeds payable to creditors who had security on the auctioned equipment, and to distribute the balance of the auction proceeds accordingly.

2 The Court approved an apportionment of costs calculated through a comparison of the net funds received on the sale of each secured asset or the estimated value of unsold secured assets against the value of the debt secured on that asset. Where costs of sale could be traced to a specific asset those costs were deducted from the value received on the sale of that asset. Otherwise the costs of sale were attributed on the same *pro rata* basis as other costs.

3 Approval was granted as sought except in relation to a proposed apportionment of allocated costs to a "true" lessor of equipment. That lessor was not obliged to bear any portion of those costs because it received no benefit from the CCAA proceedings. The lease payments it received during the period of the stay were no more than that to which it was entitled as a continuing supplier pursuant to s. 11.01(a) of the CCAA.

4 The auctioneer had provided a guaranteed price for assets placed in the auction. GE Canada Equipment Financing G.P. ("GE") had first-in-priority security on assets for which that guaranteed price was $1.4 million. It elected to retrieve those assets from the auction rather than allow them to be sold. They remained in GE's possession and unsold as of the date of this application. GE led evidence to show that those assets are worth only $990,000. It was unsuccessful in its application to reduce its *pro rata* share of the allocated costs through using $990,000 rather than $1.4 million as the basis upon which that share should be calculated. It would not be fair and equitable to permit a creditor to avoid the consequences of a poor business decision by foisting them in part on other

creditors. The Monitor was granted judgment against GE for its share of the allocated costs in the amount of $215,688.46, less any portion of the deposit paid by GE which has not been accounted for in the determination of that figure.

5 The charge granted to the Monitor under the initial CCAA order ("the First Day Order") was increased from $200,000 to $240,000 to reflect the estimated actual costs to be incurred by the Monitor to complete the distribution and other work remaining from events which occurred during the operation of the stay. This was notwithstanding the fact that the Monitor otherwise did not have any function in relation to the disposition of remaining assets, which were placed in the control of the Receiver shortly after the conclusion of the equipment auction.

Facts

6 On May 8, 2009 Respec Oilfield Services Ltd. ("Respec") applied for and received a First Day Order granted pursuant to s. 11 of the CCAA imposing a stay of proceedings on any actions by its creditors to collect any debts owing to them and appointing PricewaterhouseCoopers ("PWC") as Monitor. The initial stay was to expire May 23, 2009 but was extended by various Court orders up until November 30, 2009 at which time PWC was appointed Receiver of the undertaking upon the collapse of Respec's efforts to devise a plan of compromise of its debts.

7 Canadian Western Bank ("CWB") is the secured lender which holds a first priority claim and the Business Development Bank ("BDC") is the secured creditor which holds a second priority claim over all Respec's assets except for a significant number of pieces of heavy equipment which were subject to personal property security interests ("PMSI"s) held by various lenders and finance companies. CWB and BDC are together referred to as "the two banks".

8 Pursuant to the provisions of orders granted by me on October 8 and 20, 2009, Respec entered into a contract with Ritchie Bros. Auctioneers ("Ritchie Bros.") which provided that many pieces of the heavy equipment were to be auctioned on November 24 and 25, 2009 in Grande Prairie, Alberta. Under that contract Ritchie Bros. undertook to pay Respec a minimum amount of money in respect of each item auctioned irrespective of the net bid price received at the auction.

9 Pursuant to Court order any lender or lessor who wished to remove equipment subject to its security from the auction, and take it away was permitted to do so upon paying the Monitor a deposit on account of any portion of the allocated costs it was ultimately found liable to pay.

10 Certain lenders paid this deposit and removed their equipment including GE, Wells Fargo Equipment Finance Co. ("Wells Fargo") and Jim Patterson Lease ("JPL"). The balance was sold netting $5,643,858.46, a figure below the guaranteed price offered by Ritchie Bros. of $6,338,000. Ritchie Bros. has paid the Monitor an additional $114,048, being the difference between the guaranteed and actual net auction proceeds.

11 The Monitor incurred certain professional and legal fees during the period of the stay, secured by the granting to it of a $200,000 administration charge in the First Day Order. It anticipates incurring additional fees to a maximum of $35,000 to conclude its involvement in this matter. In its 15th report dated March 12, 2010 the Monitor has recommended that these costs as well as all the other allocated costs including the Debtor-in-Possession financing ("the DIP funds") and the indirect costs incurred to sell assets in the auction be allocated on a *pro rata* basis among the secured creditors based on their actual or estimated recovery (for those assets not yet liquidated). Any direct costs of sale of a particular asset are proposed to be charged against the sum recovered on the sale of that asset.

12 Then, based on that proposed distribution, the Monitor seeks approval for the following:

- to deduct the allocated costs due from each creditor from the sale proceeds of the equipment upon which that creditor had a PMSI charge and to distribute the net balance to that creditor;

- where a creditor removed the equipment upon which it had security from the auction the deposit it paid to the Monitor would be applied to its share of the allocated costs;

- where the deposit is inadequate to cover its share in full the Monitor would be granted a judgment against that creditor for the shortfall; and

- when the Receiver sells the assets upon which the two banks have security their shares of the allocated costs will be recovered from those sale proceeds.

13 In its 15th report the Monitor sets out its suggested calculation of the allocated costs relating to each piece of equipment or other asset, plus the direct costs of sale for that asset, if any, identifies the auction price received for or estimated value of each and proposes the net difference as the payment to be made to each affected creditor. Each of the two banks and a majority of the PMSI creditors support the Monitor's proposed distribution. GE, Caterpillar Financial Services Ltd. (Cat), Komatsu International (Canada) Inc. (Komatsu), Kingland Ford Sales Ltd. (Kingland), Wells Fargo, and JPL do not. I note that the proposed allocation will require the two banks to contribute to the indirect costs of the auction notwithstanding that it is highly unlikely that either will receive any of the auction proceeds given their status as second-in-priority creditors behind the PMSI holders.

14 The DIP costs represent the amount of monies Respec borrowed to keep its operations afloat during the period of the stay while it was attempting to reorganize. They total $1.368 million. That money just happened to be borrowed from a company related to GE. The DIP costs have now been repaid in their entirety including interest; the remaining issue is which parties should bear ultimate responsibility for that liability and in what proportion.

15 The two banks each advise that CWB is very likely to recover its entire indebtedness from the liquidation of its security. BDC is left in the unenviable position of anticipating a significant shortfall after the liquidation of all remaining secured property including real estate, accounts receivable and some remaining equipment. The relative security positions of the two banks have the effect of ultimately redistributing to BDC any contribution CWB makes to the allocated costs as a result of this application. It is therefore in BDC's particular interest to ensure that the PMSI creditors bear as many of those costs as possible.

16 Accompanying its application to approve payment of the allocated costs and distribution of the balance of the auction proceeds, the Monitor also seeks an order requiring GE to pay it $215,688.46 as the balance remaining from its share of the apportioned costs. Unlike other PMSI creditors which removed equipment from the auction, GE did not pay the Monitor a deposit equivalent to its estimated *pro rata* share of the allocated costs but only $30,000 which apparently represented only its share of the administration costs, which are just a portion of the allocated costs. GE argues that it should not be obliged to pay this additional sum.

17 Wells Fargo objects to the Monitor's proposed distribution because it does not directly apportion the costs of transporting the equipment from Red Earth, Alberta to the auction site, i.e. the cost of transporting each piece of equipment is not charged against that piece. Rather, the entire transportation costs are allocated *pro rata* among the creditors.

18 JPL objects to paying any portion of the allocated costs because it is not a secured creditor but rather a "true lessor" of five pieces of heavy equipment.

19 The Monitor also seeks an order increasing the priority administration charge it has on Respec's assets on account of its professional and legal expenses from the current $200,000 to $240,000.

20 It also seeks direction as on whether funds payable to principals of Respec as wages, conditional upon their providing certain information which has yet to be provided, should be accounted for in the distribution of auction proceeds or from the liquidation of other assets in the subsequent receivership.

21 When this application was argued, BDC sought and was granted an order placing Respec in bankruptcy which gives it a strategic advantage in relation to a claim by Canada Revenue Agency in relation to unpaid Goods and Services Tax ("GST").

Issues

1. Should the proposed distribution of auction proceeds be approved?

a. should GE be required to pay a further $215,688.46 on account of its share of the allocated costs?

b. does fairness require the two banks to bear more than their *pro rata* share of the allocated costs?

c. should the costs allocated to Wells Fargo be reduced rather than, as proposed, attributing the direct costs of disassembling the camps upon which it held security to its share of the auction proceeds given the costs of transporting all the equipment to the Ritchie Bros. auction are attributed on a *pro rata* basis among creditors?

d. should JPL, a "true lessor" of equipment, thus be exempted from contributing to the allocated costs?

2. Should the Monitor's administration charge be increased to $240,000?

3. Should the funds payable to Respec's principals as wages be "held back" from the distribution of the auction proceeds or taken from proceeds realized in the receivership? and,

4. Should Respec be placed into bankruptcy?

Analysis

1. Should the proposed distribution of auction proceeds be approved?

22 Each application to apportion costs incurred in a failed attempt to reorganize under the CCAA must be decided on its own facts. In cases where a pre-existing Court order prescribes the apportionment method to be used, that method will be used. Where, as here, no such order yet exists, the issue will be decided based on the facts in the case. I note that I have no obligation to attempt to allocate those costs on the basis of a cost-benefit analysis as to which creditor benefited to what degree as a result of the activities of the Monitor; see *Hunjan International Inc., Re*, 2006 CarswellOnt 2718 (Ont. S.C.J.). 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 (Man. Q.B.) at para. 41.

23 Hall J. set out the following principles for apportioning costs in *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.) 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 . Noneth eless it must be recogni zed that certain activiti es of the Receiv er in managi ng the affairs of the receive rship may have been less intensi ve or less advant ageous with respect to certain groups of assets as oppose d to other groups of assets and that the extent of this intensit y or disadv antage may not be immed iately or easily determ inable.

To require the Receiv er to calcula te and determ ine an absolut ely fair value for its service s for one group of assets vis-à-vis another would likely not be cost effecti ve, would drive up the overall receive rship cost and would likely be a fool's errand in any event;

(5) exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

24 Allocating costs on a uniform percentage of the sale price received for the asset in question has been interpreted and applied to mean allocating the costs on the basis of a *pro rata* share using the total recovery as a factor in the calculation; see *Winnipeg Motor Express Inc. (Re), supra*, at paras. 46 and 47. That is the approach the Monitor proposes be used here.

25 While none of the creditors challenging the Monitor's proposed cost allocation has described an alternate method of apportionment which they believe to be more equitable, the following challenges have been raised:

a. Should GE Be Required to Pay a Further $215,688.46 on Account of Its Share of DIP and the Administrative Charge?

i. Does the Proposed Allocation and Distribution Fail to Attribute a Proper Portion of the Allocated Costs to the Two General Secured Lenders, CWB and BDC?

26 In addition to seeking approval for apportionment of the allocated costs to the PMSI creditors, the Monitor has apportioned part of those costs to each of the two banks based on estimated liquidation values for the assets subject to their charges. GE originally challenged the Monitor's proposed distribution under the mistaken impression that all allocated costs were proposed to be borne by the PMSI creditors. This point has now been clarified.

27 GE did not press the issue of the proposed apportionment to be borne by the two banks being based on estimated values rather than realized values perhaps because its own share of the allocated costs, however calculated, must also be based on estimated values as the equipment it removed from the auction has yet to be sold by it.

28 GE also challenged the distribution on the basis that it was impossible to calculate the proper *pro rata* share of the allocated costs to be borne by the two banks because the total amount of Respec's indebtedness to them was not known. CWB was quick to advise that it is owed $1,872,000 plus interest to be calculated at prime rate plus 1% from May 21, 2009 to the date of payment. Similarly, BDC advised it was owed $3,430,000 as of March 22, 2010. The Monitor's calculation of their proposed share of allocated costs is based on these figures.

ii. Method of Determination of Pro Rata Share - the Debt Owed to Any PMSI Creditor as Against Respec's Total Indebtedness Versus the Net Sale Proceeds Recovered on the Sale of a Given Piece of Equipment as Against the Total Amount Owed on That Equipment;

29 The Monitor's calculation of each creditor's *pro rata* share of the allocated costs is based on a comparison of the sale proceeds recovered on the sale of each asset or the estimated value of that asset as against the total amount owed by Respec on that asset. GE argued that its share should be calculated based on a comparison of the debt owed to it against the total debt owed by Respec to all its creditors. While each application for apportionment must be considered in the context of its own facts, no case law was produced in which any court has attributed costs on this basis.

30 BDC vigorously opposed this proposal which would have the effect of offloading most of the allocated costs onto it, reducing its recovery accordingly. That is because it and CWB are together owed much more than the PMSI lenders. However, the two banks will recover little, if anything, from the auction proceeds as they are in a position to recover only any surplus earned after applying the sale proceeds produced from the auction of a given piece of equipment from the debt owed to the PMSI lender holding security on it.

31 In other words, if the allocated costs were to be calculated as suggested by GE they would be borne in large measure by the two banks, and ultimately therefore by BDC which will not receive much, if any, benefit from the Monitor's actions in organizing the auction which produced the sale proceeds which are now to be distributed virtually in their entirety to the PMSI creditors.

32 This is not a situation where BDC or the Monitor must prove that GE and the other PMSI creditors would be unjustly enriched at the cost of BDC before I can take this consideration into account. The laws of unjust enrichment do require that certain prerequisites be met which may or may not have been established on the evidence in this application. However, what is important, and is not disputed is that the approach advocated by GE would result in the creditor who will receive the least from the auction proceeds bearing the greatest portion of them, contrary to the

principles in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094 (Alta. Q.B.) at para. 20 where Chief Justice Wachowich concluded that in allocating costs it is unfair to ignore the differences in the type of security held by various creditors and the degree of potential benefit that each creditor may derive from the proceedings.

33 I therefore reject GE's proposal that the allocated costs be allocated among creditors based on proportion of debt owed to each creditor to total debt owed by Respec.

iii. should GE's pro rata share of allocated expenses be calculated on the basis that its secured assets have a value of $990,000 or $1.4 million?

34 In the supplement to the Monitor's 15th report dated March 18, 2010 the Monitor provided evidence that the guaranteed minimum price offered by Ritchie Bros. for the equipment GE removed from the auction was $1,398,200. There was also some additional equipment removed which was not included in the guarantee which the Monitor values at $100,000.

35 There is no evidence as to why GE elected to remove the equipment against which it held PMSI security from the auction. GE's counsel advised the Court that it removed the equipment for business reasons, based on a policy that required GE to be responsible for liquidating its own security. That equipment has not yet been liquidated.

36 On October 27, 2009 GE advised the Monitor's staff that it had received an evaluation of $1.4 million on that equipment from Century Services Inc. However, in support of this application it filed evidence that it had received only an appraisal of $990,000 "on an orderly liquidation" basis dated November 25, 2009 from that firm. The date of that $990,000 evaluation is the same as the date upon which Ritchie Bros. made its offer of the $1.4 million guarantee.

37 GE asks that the $990,000 value be used to calculate its proportionate share of the allocated costs rather than the $1.4 million figure used by the Monitor. The Monitor argues that the other creditors should not be penalized as a result of a poor decision made by GE which could have received a minimum of $1.4 million for its equipment had it been left in the auction. Further, it has not provided evidence to support its earlier advice that it had a higher appraised value for it at the time the decision was made to withdraw it.

38 In furtherance of the principle that costs should be allocated in a fair and equitable manner, it is fair and equitable that one creditor not be permitted to avoid the consequences of a poor business decision by foisting them in part on other creditors. GE should bear the consequences of its decision to walk away from a guaranteed price almost 50% higher that the most recent appraised value for this equipment. GE's share of the allocated costs should be calculated based on those assets being valued at $1.5 million, being the total of the Ritchie Bros. guaranteed price plus the estimated value of the additional equipment at $100,000.

iv. Should GE Be Exempt from Contributing to the DIP Financing Costs Because of Its Relationship to the DIP Lender?

39 GE's counsel argued that had GE known it would have had to bear a portion of the DIP financing costs it would not have permitted its related company to advance the DIP financing. There is no evidence which supports this allegation.

40 GE argues that it took a risk in advancing the DIP loan and urges the Court to exercise its discretion to excuse it from responsibility for its *pro rata* share of that obligation on the basis it would be equitable given that only it, and no other creditor, was prepared to advance these operating funds to the debtor company as it attempted to restructure. I recall, however, that another lender was available and willing to advance DIP financing and that I approved the GE source on the basis that it would charge a lower cost for lending than that lender.

41 GE argues that by advancing the DIP financing it assumed a risk attendant with the potential benefit which might ensue had the restructuring of Respec been successful. Had that restructuring been successful presumably all creditors would have secured a benefit beyond that which they will recover through the liquidation of Respec's assets. GE should therefore be compensated for taking that risk on behalf of all creditors in the form of its not being required to bear its share of the DIP financing costs.

42 GE was repaid the entire DIP loan of $1.138 million within four months of it being borrowed plus an administration fee of $300,000 plus interest which was charged at 9.72% per annum over the bank's acceptance rate. CWB argued that this had the effect of according a return to the DIP lender equivalent to 100% per annum, an arguably criminal rate of interest. If it were to be successful in avoiding payment of its *pro rata* contribution to the DIP costs, its rate of recovery would jump, in effect, to almost 200% per annum.

43 Further, had GE truly anticipated it would not have to bear any portion of these costs it could easily have included that provision in the loan agreement through which it advanced the DIP funding.

44 This situation differs from that addressed by Justice Campbell in *Hunjan International Inc. (Re)*, *supra*, in which he found at para. 52 that the DIP lender would not likely have agreed to loan the DIP financing had it believed that in the event of a collapse of the corporate reorganization and ultimate deficiency it would not have a priority claim for the entire amount of the DIP advanced. I make no such finding here. Rather, the advancing of the DIP financing in this case provided a handsome rate of return in and of itself to the lender and the DIP has been repaid in full, with no issue of deficiency arising.

45 I cannot see that it would be equitable to exempt GE from its obligations to contribute to the overall DIP costs given the rate of return on its investment and the fact it was in a position to make an assessment of business risk at the time it made that loan and no doubt did so.

v. Do the Provisions in the First Day Order Exempt GE from Any Obligation to Contribute to the DIP Financing Costs?

46 GE argued that paras. 27, 29 and 35 of the First Day Order should be interpreted to mean that it is not obliged to now contribute to the DIP financing costs. The order contains no express provision to that effect.

47 Paragraph 27 provides that the Monitor and its counsel will be paid their reasonable fees and disbursements. Paragraph 29 provides that as security for same the Monitor is granted a charge on Respec's property in the maximum amount of $200,000. Paragraph 35 provides that any interested person may apply on notice for an order to allocate this charge amongst various of Respec's assets.

48 GE did not offer an interpretation of any of these three paragraphs which leads to the conclusion that it should not be obliged to pay its share of that portion of the allocated costs which are made up of the DIP financing allocated costs. I cannot see any interpretation which supports that position.

vi. Declaration and Judgment

49 There is no suggestion that GE has an arguable defence to liability for the $215,688.46. I therefore declare that GE is obligated to pay to the Monitor the sum of $215,688.46 on account of its *pro rata* share of the allocated costs in the amount of $215,688.46.

50 GE argues that I am precluded from granting judgment against it for this sum because the Monitor/Receiver should have deducted it from the funds used to repay the DIP. However, timely repayment of the DIP in full avoided ongoing interest costs. In the absence of any express agreement relieving GE from its obligation to share in the DIP costs I conclude that to the extent there was, in effect, an overpayment to GE in an amount of GE's share of the DIP costs, those overpaid funds remain subject to the repayment of those costs.

51 GE also argues that I cannot grant the Monitor judgment in this or any sum against it in the absence of express provisions in the CCAA or other legislation granting that jurisdiction. It argues that the Monitor is obliged to now issue a Statement of Claim against it claiming judgment based on my declaration of liability. If a defence is filed it must then apply for summary judgment or conduct a trial, all pursuant to the provisions of the Alberta Rules of Court.

52 The Monitor urges me to find jurisdiction to grant a direct judgment based on my wide and broad discretion to deal with various matters that are not expressly addressed in the CCAA; see *Skeena Cellulose Inc., Re*, 2003 CarswellBC 1399 (B.C. C.A.).

53 It also argues that the ability to grant a judgment flows from the provisions of my October 8 and 20, 2009 orders in which I:

> (a) directed a sale of the equipment of Respec under the supervision of the Monitor;
>
> (b) directed that the PMSI creditors could either let the equipment on which they had security be sold in that auction or remove it from the sale;
>
> (c) ordered that where equipment was removed the creditor removing it must post a deposit with the Monitor as against any eventual finding that it was liable for the payment of a portion of the allocated costs; and
>
> (d) directed that such a deposit was to be paid to legal counsel for the Monitor to be held in trust until further Court order which could be made after taking into account the portion of the allocated costs for which each such creditor was found to be liable.

54 Of course, the fact this order was granted cannot confer any jurisdiction to grant it which does not otherwise exist but these provisions evidence that there was a plan in place to liquidate certain assets and account for the costs incurred to that point. I find that the creation and implementation of such a plan was within my jurisdiction as a part of the overall scheme of the CCAA. A Court in a CCAA proceeding has the ability to deal with assets, debt and costs incurred in that proceeding. I conclude this includes the right to grant judgment against a party which it determines liable to contribute to those costs.

55 I therefore grant the Monitor judgment against it in that amount.

56 If the $30,000 deposit was not accounted for in the determination of that figure it should now be applied to reduce the judgment accordingly.

b. Does Fairness Require the Two Banks to Bear More Than Their Pro Rata Share of the Allocated Costs?

57 While the majority of the PMSI creditors support the Monitor's proposed allocation of costs, certain of the PMSI creditors, Cat, Kingland Ford and Komatsu, argues that the principles in *Hunters Trailer & Marine Ltd. (Re)*, *supra*, require the two banks to bear more than their *pro rata* share of the allocated costs.

58 First, these PMSI creditors suggest that a cost allocation which requires the PMSI creditors to pay a *pro rata* portion of the Monitor's costs means that CWB will not make any contribution to those costs. The proposed allocation does impose a *pro rata* contribution on CWB based on the estimated value of the assets upon which it holds security. However, it will ultimately be indemnified for that contribution because its security gives it a first charge for such recovery. In the result, BDC will bear the ultimate cost of that indemnity by way of an accordingly reduced recovery from those assets upon which it holds a second-in-line security position after CWB. Therefore the fact CWB is indemnified in full and the PMSI creditors are not is that CWB had enough security to protect it for its entire exposure whereas the PMSI creditors did not.

59 Second, these PMSI creditors argue that the costs incurred by the Monitor to the date of the termination of the stay should be paid for through the collection of the receivables generated by Respec during that period or by application of the $275,000 in cash in Respec's bank account on the day the stay was terminated. The value of the receivables on the day the stay was granted was not significantly different than their value on the day the stay was terminated. Of course the identity of the individual receivables changed during the stay as old ones were paid and new ones created.

60 Both the receivables and cash on deposit are subject to the first ranking security interest of CWB and the second ranking security interest of BDC. The Monitor allocated $30,982.58 of the funds in the bank account to be applied to the DIP loan as CWB's proportionate share of that aspect of the allocated costs. These PMSI creditors argue the entire amount of $275,000 should have been applied to the DIP costs as well as $513,559.27 of the receivables.

61 The main thrust of this argument is that the receivables and cash were generated during the stay using equipment for which these PMSI creditors were not paid. They were thus prejudiced through the resulting depreciation of their equipment although no evidence was lead to this effect.

62 The result of this argument, if accepted, is that those receivables and the cash against which the two banks had first charge would be entirely used to fund costs incurred on behalf of the PMSI creditors as well as the two banks. In comparison, the proposed allocation would attribute costs in proportion to the recovery made by each creditor.

63 These PMSI creditors argue that they have suffered undue prejudice but in the absence of evidence to show the equipment upon which they held security depreciated more than the assets upon which the two banks held security through the position of the stay, I cannot reach that conclusion.

64 Third, these PMSI creditors argue that it is inequitable for their recovery to be based on the actual sale proceeds of their secured equipment because in May 2009 the Monitor obtained estimates of higher values for that equipment than were received at auction. That assertion is largely factually incorrect.

65 The earlier estimates were obtained prior to moving and placing the equipment for auction. They were contained in a valuation estimate, not an appraisal, obtained at the direction of the Court. Those figures did not reflect the costs of sale which were, naturally, unknown at that time. When comparing the gross auction sale proceeds against the estimated values the Monitor has calculated that those gross sale proceeds were 14.92% higher than the estimate for the Cat secured goods, 18.06% higher than the estimate for the Kingland Ford secured goods and 9.04% less than the estimate for the Komatsu secured goods.

66 Therefore, fairness does not compel an order that the two banks bear more than their *pro rata* share of the allocated costs.

c. should the costs allocated to Wells Fargo be reduced rather than, as proposed, attributing the direct costs of disassembling the camps upon which it held security to its share of the auction proceeds given the costs of transporting all the equipment to the Ritchie Bros. auction are attributed on a pro rata basis among creditors?

67 While the Monitor requested a detailed cost breakdown from the party transporting the equipment to be auctioned to the Ritchie Bros. site in Grande Prairie, such a breakdown was not received. It is not possible, therefore, for it to account for transportation costs as part of the direct costs attributed to each item sold. Rather, the Monitor has apportioned them as part of the indirect costs which make up a portion of the allocated costs. Therefore, each PMSI creditor, including Wells Fargo, will not have the gross sale proceeds received in relation to each piece of equipment reduced by the actual cost of transporting that item to auction but by another amount, a *pro rata* share of all transportation costs.

68 Other costs, which were accounted for in relation to individual pieces of equipment, i.e. direct costs of sale, were offset against the sale proceeds from that piece of equipment. That includes the cost of disassembling various camp equipment subject to a PMSI charge held by Wells Fargo.

69 Wells Fargo complains that this approach requires it to bear the entire actual costs of disassembling these assets but allocates transportation costs on a *pro rata* basis. Somewhat ironically, that includes the costs of transportation to market that Wells Fargo bears in relation to other equipment upon which it had PMSI security. Of course it cannot be determined whether any PMSI creditor, including Wells Fargo, will bear a greater or lesser cost as a result of this *pro rata* attribution than it would had actual costs been recorded as against each item transported.

70 Wells Fargo submits that it has not been treated fairly as a result of having to bear the actual costs of dismantling the camps while other creditors (including itself in relation to other assets) bear only *pro rata* costs of transportation. It asks that those other creditors each be required to bear a *pro rata* share of the disassembly costs as well or that its obligation to contribute to the DIP costs be reduced to account for its proportionately higher costs in the realization of its security. It argues

that under the principles outlined in *Hunters Trailer & Marine Ltd. (Re), supra.* I should exercise my discretion to modify the proposed distribution to achieve one of these two possible results on the basis this is necessary to effect equity in relation to the apportionment of costs among creditors.

71 Any finding of inequity would have to be based on a finding that Wells Fargo bore a disportionately higher portion of the costs than did other creditors. However, the Monitor proposes that each PMSI creditor bear any actual costs related to the sale of the equipment it charged. The reason Wells Fargo is the only creditor charged camp dismantling costs is because it is the only creditor which had a charge on any of the camp assets which were disassembled.

72 I cannot therefore discern any inequity which requires Wells Fargo to bear the direct costs relating to its charged assets simply because one of those costs is of a type unique to a certain kind of asset. The same approach is followed in relation to all other kinds of asset where the PMSI creditor is asked to bear the direct costs incurred in placing that asset for sale. To find otherwise would be to violate the *Hunters Trailer & Marine Ltd. (Re)* principles and accord Wells Fargo a disproportionate benefit.

d. Should JPL, a "True Lessor" of Equipment, Thus Be Exempted from Contributing to the Allocated Costs?

73 JPL was the lessor of five pieces of equipment leased to Respec. Upon paying the Monitor a deposit of $20,900 it removed that equipment from the Ritchie Bros. auction. It now seeks recovery of that deposit on the basis that its leases were true leases, it was not therefore a secured creditor of Respec and that it received no benefit from the efforts of the Monitor or the DIP financing other than lease payments which it was entitled to receive pursuant to the provisions of s. 11.01(a) of the CCAA. If successful it will bear no portion of the allocated costs.

74 The Monitor acknowledges that these five leases were true leases in the sense that the parties always intended the leased equipment would be returned to JPL at the end of the lease term. In other words, the leases were not disguised forms of purchase financing.

75 After the granting of the First Day Order, Respec retained and continued to use the leased equipment, paying the monthly lease costs for the May 1, 2009 through October 31, 2009 period in the total sum of $20,712.36. During that period Respec maintained insurance coverage for these vehicles as well as performing any required maintenance or repairs, as required by the terms of the leases. The Monitor, in its proposed distribution of allocated costs, has attributed $20,900 to JPL.

76 Section 11 and 11.02 give the Court jurisdiction to order a stay of all proceedings against the debtor company such as was granted here in the May 8, 2009 First Day Order.

77 This stay is subject to the operation of s. 11.01 of the CCAA which provides:

No order made under section 11 or 11.02 has the effect of

> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made;

78 While it did receive lease payments during the period of the stay, including the benefits of insurance and vehicle maintenance, JPL argues that those payments were made because Respec was obligated to make them pursuant to s. 11.01(a) of the CCAA. It otherwise, arguably, received no benefit from the efforts to reorganize Respec and thus should not be obliged to contribute to the allocated costs.

79 The Monitor responds that had the reorganization been successful JPL would have secured the benefit of an uninterrupted stream of lease payments. It is in essentially the same position as other creditors in that had the reorganization been successful it would have benefitted. The fact that its lease payments were required and not caught by the stay is arguably no reason to exempt JPL from contributing its fair share of the allocated costs.

80 While I required JPL to post a deposit with the Monitor as a condition of the recovery of its leased equipment, my order did not have the effect of determining ultimate responsibility for any portion of the allocated funds. The deposit was simply a deposit, to be applied in the event that JPL was ultimately found liable for a contribution to same.

81 In *Western Express Air Lines Inc., Re*, [2005] B.C.J. No. 72 (B.C. S.C.), Chief Justice Brenner held that an equipment lessor under a "true lease" was not required to contribute to CCAA costs. While the PPSA in British Columbia allowed registration of such leases, the Chief Justice held that mere registration did not make the lessors secured creditors. Registration existed merely to allow the legislation's provisions in relation to conflicts, perfection and priority to apply with respect to the leased goods. Unlike the situation where a lease is a vehicle used to finance the purchase of goods, registration of a "true lease" does not permit a secured creditor who took a security interest in leased goods to declare a priority over the lessor. As such, the Chief Justice held that the lessors did not become secured creditors of the debtor which was subject to the CCAA reorganization attempt.

82 He stated at paras. 20-21:

> 20. If costs are to be allocated on the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. ...They continue to own the aircraft. That will not change whether the restructuring succeeds or fails.

> 21. Post filing they have continued to receive payments for aircraft leases that Westex has chosen not to disclaim. However under the First Day Order they were obligated to continue leasing these aircraft to Westex. They were prevented from relying on the outstanding unpaid pre-filing lease payments and repossessing the aircraft.

83 He went on to conclude that under the general equitable principles of the CCAA there was no basis for requiring the aircraft lessors to bear a part of the restructuring costs.

84 As stated, in *Hunters Trailer & Marine Ltd. (Re)*, Chief Justice Wachowich held only that it was equitable for each major *secured* creditor to be liable for a portion of the CCAA costs.

85 The Monitor urges me to extend this principle to lessors notwithstanding that they are not secured creditors as was done in *Winnipeg Motor Express Inc. (Re)* at paras. 63-65 where Suche J. held that the true lessor of equipment there would nonetheless be required to bear a portion of the allocated costs. She distinguished *Western Express Air Lines Inc. (Re)* by observing that Chief Justice Brenner there concluded that the lessor received no benefit from the restructuring whereas she found the true lessor in the case before her to have received a real and meaningful benefit from the successful restructuring of the debtor company. The lease was assigned to the new purchaser "without interruption" which presumably means the lease payments continued to be made without interruption. She ordered the true lessor thus to contribute to the allocated costs without finding it to be a secured creditor and notwithstanding its status under s. 11.01(a) of the CCAA.

86 In comparison, in *Western Express Air Lines Inc. (Re)* the ongoing payment of lease costs was not found by Chief Justice Brenner to create a sufficient benefit to the lessor to require it, in equity, to contribute to the allocated costs even though at the time of the making of his judgment it was still possible for that restructuring to succeed.

87 As we now know that the Respec structuring did not succeed and JPL did not receive an uninterrupted flow of lease payments, JPL received less benefit from the unsuccessful efforts to restructure Respec than that which accrued to the lessors in *Western Express Air Lines Inc. (Re)*. Just as Chief Justice Brenner found no basis under the general equitable principles of the CCAA for requiring the lessors to contribute to the allocated costs, that must also be the result on this more egregious set of facts.

88 The Monitor is thus required to return the deposit of $20,712.36 to JPL in its entirely. JPL has no obligation to contribute to the allocated costs.

2. Should the Monitor's administration charge be increased to $240,000?

89 Paragraph 27 of the First Day Order provides that the Monitor and its counsel shall be paid their reasonable fees and disbursements. Paragraph 29 provides that as security for same the Monitor is granted a charge on Respec's property in the maximum amount of $200,000.

90 I find that the Monitor has provided evidence establishing that it has incurred fees to this point of $196,189.52. Notwithstanding the appointment of the Receiver on November 30, 2009, the Monitor has continued to function to bring to a conclusion those matters arising during the stay. That includes making this application to address distribution of the proceeds of the auction pursuant to an order I granted on December 9, 2009. The Monitor advises that it expects to incur a further $35,000 in professional fees to conclude its obligations, over and above any fees incurred in the operation of the receivership. It applies to increase the charge to a maximum of $240,000 as a result.

91 Presumably it is making this application to permit it to, essentially, withhold $35,000 of the auction proceeds which would otherwise be distributed as a result of my order because there is not likely to be any further funds coming into the hands of the Monitor which it could use to pay these future costs. An increase in the charge created by para. 29 of the First Day Order is not a prerequisite to its entitlement to be paid its actual further professional fees but rather would ensure the continuation of a pool of funds from which they may be paid.

92 GE opposes this application, seeking to have any additional professional fees paid as a cost in the receivership. I note this would result in BDC bearing those costs in their entirety given its position of second-in-line general secured creditor which has as its sole source of recovery of its debt the net funds generated in the receivership.

93 There is nothing in the First Day Order or any subsequent order which expressly limits any subsequent increase in the administration charge. Indeed, para. 42 of the First Day Order expressly permits any interested party "including ... the Monitor" to apply to the Court to vary or amend the order.

94 Refusing the Monitor's application could well have a chilling effect on future CCAA applications as insolvency professionals which might otherwise be willing to take on the role of Monitor could feel disinclined to so act, being unable perhaps to adequately predict their entire future costs and so leaving themselves exposed to the risk of being inadequately secured. Further, it would have the effect of offloading costs which benefitted all secured creditors onto the shoulders of only one of those creditors, BDC, which is not within the equitable principles of overall fair, reasonable cost allocation discussed in *Hunters Trailer & Marine Ltd. (Re)*; see also *Triton Tubular Components Corp., Re* [2006 CarswellOnt 2120 (Ont. S.C.J. [Commercial List])], Ontario Superior Court of Justice, Court File No. 04-CL-5672.

95 GE complains that the Monitor has not led evidence to show what further fees it will actually incur or to show that they are necessary or reasonable. However, that is not a reason to deny this application. The Monitor will have to bring on a future application approving any additional fees or disbursements it wishes to have paid out of the administration costs. At that time GE can challenge the payment if it believes the facts support doing so.

96 The application to increase the administration charge to $240,000 is hereby granted.

3. Should the funds payable to Respec's principals as wages be "held back" from the distribution of the auction proceeds or taken from proceeds realized in the receivership?

97 The Monitor acknowledges that certain principals of and parties related to Respec are owed approximately $22,000 for wages in respect to work done for the company while it was subject to the CCAA stay. It has agreed to pay those costs upon receipt of certain information which it requires to justify certain travel expenses charged to Respec and to prove that certain equipment removed from the auction site was not the property of Respec. That information has been promised but not yet been provided.

98 The Monitor seeks direction as to whether funds should be withheld from the distribution of auction proceeds to other creditors on account of these claims or whether the claims should be left to be paid from the further liquidation of assets, now by it in its capacity as Receiver of Respec. BDC objects to the latter proposal noting that it would result in BDC in effect paying that entire sum by way of reduced recovery from liquidation of its secured assets, the only remaining source of funds once CWB is paid in full.

99 As the debt was incurred prior to the granting of the receivership order and on account of work done while the Monitor was in place pursuant to the CCAA orders, I direct that the funds be withheld from that distribution and paid once the required information is provided.

4. Should Respec be placed into bankruptcy?

100 Alterinvest II Fund L.P., an entity related to BDC, applied to place Respec into bankruptcy, a move designed to give it priority over a claim by the Canada Revenue Agency for money owed by Respec on account of GST. In its application it stated that Respec is indebted to it in the sum of $3,434,888 plus interest from March 11, 2010 at a rate of 12.5% per annum and legal costs. BDC holds security for the payment of that indebtedness but its counsel advised that as its security ranks behind the security held by CWB and the PMSI holders, it expects its security to have a maximum value of $1 million at this time.

101 There is no issue that within the six months prior to the date of the filing of the application on March 16, 2010 Respec committed acts of bankruptcy including ceasing to meet its liabilities

generally as they became due and by advising its creditors that it is insolvent thus giving rise to acts of bankruptcy which support the granting of this application.

102 Originally brought on March 19, 2010, the application was adjourned to March 25, 2010 so that BDC could give notice to CRA. That having occurred, with CRA not appearing or otherwise objecting to the making of this order and none of the other parties objecting to same, I thereupon adjudged Respec bankrupt and made a bankruptcy order in respect of its property.

Conclusion

103 The Monitor's application to approve its proposed apportionment of the allocated costs and the resulting distribution of sale proceeds to the creditors of Respec is approved as adjusted to reflect my decision that JPL is not required to contribute to those costs. The Monitor is directed to return the deposit of $20,712.36 to JPL in its entirety. The Monitor is granted judgment against GE in the sum of $215,688.46 or that amount less $30,000 if the deposit has not been accounted for in its calculation.

104 The Monitor's charge for its professional fees and disbursements is increased from the $200,000 figure set out in the First Day Order to $240,000.

105 A $22,000 debt owed to parties related to Respec shall be paid from funds realized while it was operating under the First Day Order rather than those realized in the subsequent receivership.

106 Respec has been adjudicated to be bankrupt.

Application granted.

TAB 3

Last Revised: December 2012

Clerk's stamp:

COURT FILE NUMBER: **[Number]**

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF ●

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY OF [THE DEBTOR]

APPLICANT:

RESPONDENT(S):

DOCUMENT: **ALBERTA TEMPLATE RECEIVERSHIP ORDER**

[LAW FIRM NAME]
[Address]
[Address]
Solicitor: ●
Telephone: ●
Facsimile: ●
Email: ●
File Number: ●

DATE ON WHICH ORDER WAS PRONOUNCED: ●

NAME OF JUDGE WHO MADE THIS ORDER: ●

LOCATION OF HEARING: ●

[*NOTE: DO NOT USE THIS ORDER AS A PRECEDENT WITHOUT REVIEWING THE ACCOMPANYING EXPLANATORY NOTES.]

UPON the application of **[NAME]** in respect of **[THE DEBTOR]**; **AND UPON** having read the Application, the Affidavit of *; and the Affidavit of Service of * **[if applicable]**, filed; **AND UPON** reading the consent of * to act as interim receiver and receiver and manager ("Receiver") of the Debtor, filed; **AND UPON** noting the consent endorsed hereon of * **[if applicable]**; **AND UPON** hearing counsel for *; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

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

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), and sections 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, 99(a) of the *Business Corporations Act*, R.S.A. 2000, c.B-9, and 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c.P-7 (choose applicable statute(s)) [RECEIVER'S NAME] is hereby appointed Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependant on maintaining possession) to the Receiver upon the Receiver's request.

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

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons

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

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

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

powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

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

NO INTERFERENCE WITH THE RECEIVER

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

CONTINUATION OF SERVICES

11. All Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued

use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

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

EMPLOYEES

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

14. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their

advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

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

(i) before the Receiver's appointment; or

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

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

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

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the

appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

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

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

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

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

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

LIMITATION ON THE RECEIVER'S LIABILITY

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

RECEIVER'S ACCOUNTS

17. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) **[and 88]** of the BIA. **[See Explanatory Notes.]**

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

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

FUNDING OF THE RECEIVERSHIP

20. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $_____ (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority

to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) **[and 88]** of the BIA.

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

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

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

ALLOCATION

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

GENERAL

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

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

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

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

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

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

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

FILING

32. This Order is issued and shall be filed in Court of Queen’s Bench Action No. *****, and Court of Queen’s Bench in Bankruptcy Action No. *****, which actions are not consolidated. All further proceedings shall be taken in both actions unless otherwise ordered. **[See Explanatory Notes, footnote 1.]**

33. The Receiver shall establish and maintain a website in respect of these proceedings at **[insert website address]** and shall post there as soon as practicable:

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

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

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the interim receiver and receiver and manager (the "Receiver") of all of the assets, undertakings and properties of [DEBTOR'S NAME] appointed by Order of the Court of Queen's Bench of Alberta and Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (collectively, the "Court") dated the _____ day of _____, _____ (the "Order") made in action numbers _____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at ●.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

[RECEIVER'S NAME], solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____
Name:
Title:

TAB 4

Last Revised: December 2012

ALBERTA TEMPLATE RECEIVERSHIP ORDER
EXPLANATORY NOTES

Alberta Template Order Committee,
Calgary/Edmonton, Alberta

INTRODUCTION

In February of 2006, the Alberta Template Orders Committee (the "Alberta Committee") finalized a template receivership order for Alberta and explanatory notes to be read in conjunction therewith.

The Alberta Template Receivership Order used the model receivership order (the "Ontario Order") and explanatory notes ("Ontario Explanatory Notes") developed by the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "Ontario Committee") as a starting point for developing the Alberta Template Receivership Order ("Receivership Order"), focusing on those areas where the Alberta practice or legislation diverged from that in Ontario. In this fashion, the Alberta Committee hoped that the form of template Order would be as similar as practicable to the Ontario Order, while appropriately addressing Alberta-specific concerns.

The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") has undergone a substantial amendment process which concluded on September 18, 2009 when the proposed amendments were proclaimed in force. Although some of the amendments represent a significant departure from current practices in bankruptcy and insolvency proceedings, others represent a codification of powers that courts have previously invoked inherent jurisdiction to assume. In light of these amendments, the Receivership Order required certain amendments to comply with the new provisions of the BIA.

The Receivership Order presented by the Alberta Committee is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, consistent with the philosophy adopted by the Ontario Committee, the Receivership Order is meant to serve as a starting point from which any additions, amendments or deletions can be highlighted and brought to the attention of the Justice from whom the Order is sought.

The assistance of members of the judiciary to the Alberta Committee, notably the Honourable Justice K. M. Horner and the Honourable Justice J. Topliniski, does not mean that there is any "arrangement" with the Court that a Receivership Order will be granted in all instances where the proposed Order approximates the Receivership Order, or at all. The input of the judiciary is appreciated, but in each application the discretion of the presiding Justice will be completely unfettered by the use or non use of the Receivership Order.

RECEIVER

The Receivership Order appoints the court officer as a Receiver under s. 243(1) of the BIA and as Receiver and Manager pursuant to s. 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2 (the "JA") and s. 99(a) of the *Business Corporations Act*, R.S.A. 2000, c. B-9 (the "ABCA"). In those cases, where the applying creditor holds a security agreement charging the debtor

company's personal property, the Order could also reference an appointment under s. 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 (the "PPSA").

The Receivership Order assumes the applying creditor maintains security over all of the debtor company's property, business and undertaking, and it is not the recommended form to be used in land foreclosure actions, where appointments are made pursuant to s. 49 of the *Law of Property Act*, R.S.A. 2000, c. L-7.

The dual appointment of a Receiver pursuant to s. 243(1) of the BIA and a Receiver and Manager pursuant to one or more of s. 13(2) of the JA and s. 99(a) of the ABCA has both benefits and burdens that the applying party should consider in determining what to include and what, if anything, to exclude. **In this regard, it should be noted that dual appointments raise distinct procedural and other issues with varying consequences which counsel must be cognizant of, including, for example, differing appeal periods between Queen's Bench civil and bankruptcy actions.**

Since the Receivership Order meets the definition of "Receiver" as set out in s. 243(2) of the BIA, and also constitutes an appointment under s. 13(2) of JA and s. 99(a) of the ABCA, the Alberta Committee is of the view that:

1. The applying creditor must serve the mandatory ss. 244(1) BIA Notice prior to the appointment;

2. The Receiver is subject to the statutory rights of suppliers under s. 81.1 of the BIA in respect of 30 day goods; and

3. The required reporting to the office of the Superintendent in Bankruptcy must be maintained.

Similar to the views of the Ontario Committee regarding the Ontario Order, the Alberta Committee considers the Receivership Order to be neutral and inclusive in respect of the interests of all stakeholders.

CLAUSE BY CLAUSE REVIEW

PARTIES, RECITALS AND SERVICE

The Receivership Order is to be sought on motion in an action to be commenced either by Statement of Claim, by Originating Notice (in the event s. 70 of the PPSA applies), or as may be directed by the Court in Part 3, Division 2, Subdivision 1 of the *Alberta Rules of Court* (since no statutory procedure is set out in s. 243(1) of the BIA, s. 13(2) of the JA, or s. 99(a) of the ABCA).[1]

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[1] The Receivership Order is drafted with a dual style of cause, reflecting a Court of Queen's Bench of Alberta civil action and an associated bankruptcy action to reflect the commonly sought dual appointment under the BIA and the JA. In that scenario, materials would be filed in both actions. Paragraph 32 of the Order references the issuing and filing of the Order in both actions, indicating they are not consolidated but will be heard together unless otherwise ordered.

The parties consist of the applying creditor and the debtor company, respectively named as either the Plaintiff and the Defendant (in the event the action is commenced by way of Statement of Claim), or as Applicant and Respondent (in the event the action is commenced by Originating Application or by Order granted under Part 3, Division 2, Subdivision 1of the *Alberta Rules of Court*).

In urgent situations (imminent risk of asset dissipation, or immediate need to appoint the Receiver to preserve and maintain the value, including the going concern value of the debtor company's assets in the best interest of all stakeholders) the application could be made *ex-parte* supported by affidavit evidence of the urgency. The Receivership Order contemplates, however, that it would be granted either with the consent of or on notice to the debtor company, and on notice to other potential interested persons that may be affected by the granting of the Order (for example, other secured creditors, statutory or otherwise). Since Rule 6.4 permits *ex parte* applications in circumstances where no notice is necessary or where the delay caused by proceeding by notice of motion might entail serious mischief, if an *ex parte* order is granted, the preamble should be amended to delete reference to service and to establish why it is appropriate to proceed *ex parte*. Also, in the event of an *ex parte* order paragraph 1 should be deleted.

If the appointing creditor proceeds by application under Part 3, Division 2, Subdivision 1 of the *Alberta Rules of Court*, the appointing creditor must follow the service directed by the Court. To address concerns of asset dissipation or preservation and maintenance of the going concern value of the debtor's assets, the applying creditor may apply to the Court on short notice and seek an abridgement of time for the debtor's response to the originating document as authorized pursuant to Rule 13.5 of the *Alberta Rules of Court*.

In those cases where there are facts in dispute between the appointing creditor and the debtor company, but the Court finds it just and convenient to appoint a Receiver to preserve and maintain the status quo while outstanding issues are determined, a number of the powers and authorities of the Receiver granted under the Receivership Order may not be appropriate and may have to be modified, depending upon the applicable facts and the interests of the parties and other affected creditors.

It is more likely that the debtor company or other interested persons would have greater success in a future application to vary or amend the Receivership Order under the "comeback" clause in paragraph 31, if the debtor company or any such interested person was not served with notice of the application to obtain the Order. The debtor company and other potentially affected persons should therefore be served with notice of the application where circumstances permit. Further, the preamble should identify all of those served, and note the appearance or non-appearance of the parties and persons served.

As stated in the Ontario Explanatory Notes:

> Many rights are affected by service and appearance at a motion. Appeal rights, effective vesting and even the effectiveness of the receivership order itself may depend upon proof of service and appearance. Recitation of these jurisdictional facts in the order itself should not be ignored.

Unless the Order is being consented to by the debtor company, it is recommended that the application be made before a Justice in Chambers, rather that before a Master in Chambers. It is unlikely, unless the Order is consented to by the debtor company, that a Master has the jurisdiction to grant the injunctive relief contained within the Receivership Order.

PARAGRAPH 3—THE RECEIVER'S POWERS

The Alberta Committee considers the recitation of powers to be given to a Receiver in the Ontario Order to be appropriate for the Receivership Order, and adopts the Ontario Committee's rationale expressed in the Ontario Explanatory Notes, paraphrased as follows:

1. While it is tempting to give the Receiver a broadly worded simple power to take all reasonable steps to conduct the Receivership, it is very helpful and often essential for the Receiver to be able to point to a specifically enumerated power in the Order to enforce compliance or support the Receiver's entitlement to act. Therefore, the most essential and least controversial powers regarding presentation and realization have been identified and included. It is open to counsel to seek to reduce or enlarge upon the listed powers by highlighting the change and bringing it to the Court's attention;

2. Among the powers specifically enumerated are the standard powers to take possession of and protect and preserve the debtor's property, particularly liquid assets;

3. It is assumed the Receiver will manage the business, hire consultants as required, enter into transactions and compromise claims owing to the debtor;

4. Normal powers to litigate are included;

5. It is assumed the Receiver will market and sell assets with no specific approval of the marketing process required. However, a Receiver is well advised in a significant case to seek prior approval to avoid subsequent questioning of the efficacy of the process itself. There is a materiality level established for assets sold beyond which prior approval of the Court should be sought;

6. Paragraph 3(n) empowers the Receiver to report to, meet and discuss with affected persons. It is expected that as an officer of the Court, the Receiver will engage in meaningful communications with stakeholders. This process can cause extra costs and therefore requires the Receiver to exercise reasonable discretion. The case law is clear that use of the Court-appointed Receiver is not the private preserve of the senior creditors and must have some degree of transparency and accountability to stakeholders. Expensive appearances and last minute challenges may be avoided by timely communications among the appropriate parties;

7. The concluding words of paragraph 3 are designed to clarify that the Receiver is exclusively in control of the debtor's activities. Absent specific authority, the

debtor's board of directors may not engage in litigation or take any other steps on behalf of the debtor following the Receiver's appointment; and

8. There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material, substantive and final act that, if a Receiver is empowered to bankrupt the debtor, it should be expressly brought to the Court's attention.

The Alberta Committee has added a phrase to paragraph 3(j) of the Receivership Order that makes it clear that, despite the Receiver being empowered to defend all actions involving the debtor, the Receiver does not have that authority with respect to the very action in which the Receiver is appointed. This follows *Toronto-Dominion Bank v. Fortin et al* (1978), 26 C.B.R. (N.S.) 168 (B.C.S.C.).

PARAGRAPHS 4 TO 6 – INJUNCTIONS, POSSESSION AND ACCESS TO PROPERTY

Paragraph 4 of the Receivership Order requires the debtor (including the debtor's management, advisors, and shareholders), those affiliated with the debtor and everyone with notice of the Order, to advise the Receiver of the existence of any of the debtor's property in their possession or control and to deliver to the Receiver such of the debtor's property as the Receiver requires.

The limitation of delivery of property to that which the Receiver requires is designed to save costs for third parties and protect the estate from being forced to incur costs to move or store property that might be more efficiently left in the possession of third parties temporarily or permanently.

Paragraph 4 also qualifies the obligation to protect the interests of third parties who may require continuing possession of the debtor's property in order to maintain certain lien rights.

Paragraph 5 mandates the Receiver's entitlement to records in the possession or control of any person that relate to the business or affairs of the debtor. The Receiver's entitlement to review such records is subject to exceptions for statutory provisions prohibiting such disclosure or privilege attaching to records which are the subject of a solicitor and client communication or are prepared in contemplation of litigation.

PARAGRAPHS 7 TO 11 – THE STAY

The combined effect of these paragraphs is to restrain the commencement, continuation or exercise of any rights or remedies against the Receiver, the debtor, or the property of the debtor under the Receiver's administration.

There has been minimal, if any controversy over the Court's ability to protect its officer, the Court-appointed Receiver, from suit without leave, and it has always been a logical extension of

that protection to include the assets of the debtor. The underlying philosophy that has routinely been accepted by the Courts is the need to protect its officer in the performance of the duties it has been authorized to perform, to permit it the opportunity to gather in all assets of the debtor free from interference by creditors attacking individual assets, and to facilitate administration of the entire estate for the benefit of all stakeholders with less expense. Some Alberta authority has cast doubt, however, on the Court's ability to issue what is essentially an injunction restraining suits against debtors in Receivership (see, for example, *Toronto-Dominion Bank v. W-32 Corporation Limited* (1983), 50 C.B.R. (N.S) 78 (Alta. Q.B)).

The jurisdiction to issue a stay of proceedings is contained in ss. 17 and 18 of the JA. Frank Bennett, Bennett on *Receiverships*, 2nd ed (Scarborough: Carswell, 1999) argues persuasively for the existence of an inherent jurisdiction to grant relief to give effect to a Receivership Order, including staying actions against the debtor (at pages 200 — 222):

> If creditors are able to take proceedings against the debtor without Court approval, the debtor is in most cases without funds to defend. If priority is claimed, the Court-appointed Receiver will be involved in as many actions as are commenced by creditors against the debtor. If no priority is claimed, the effect of a Judgment is unenforceable until the Receiver is discharged. The Court must be able to control its own judicial process and allow the Receiver sufficient opportunity to perform the powers and duties. Such a condition is not contained in any legislation, but rather it is a condition rooted in the inherent jurisdiction of the Court to control its own process and protect its officers.

Of particular concern to the Alberta Committee was the possibility that a party having a claim against a debtor in Receivership might face the possibility of a limitation period expiring before that party could apply to set aside the stay of proceedings to permit its claim to be advanced. The Alberta Committee is therefore recommending that the general stay be subject to a proviso that any party facing the expiry of a limitation period would be entitled to commence whatever proceedings are necessary to preserve that party's rights, without further Order.

The Alberta Committee has now included a provision in paragraph 8 which allows regulatory bodies to continue investigations or proceedings against a debtor so long as the investigation or proceeding is not for the enforcement of a payment order. This provision is consistent with s. 69.6(2) of the BIA which provides regulatory bodies an exemption from the automatic stay of procedings that arises where a Notice of Intention to File a Proposal has been filed.

Section 65.1(1) of the BIA provides that where a Proposal or Notice of Intention to File a Proposal is filed, an automatic general stay applies to prevent termination of agreements based on the debtor's insolvency. Similarly, where an initial Order is made under s. 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), the Order may contain a general stay enjoining termination of contracts with the debtor. Section 65.1(7) of the BIA excepts from the statutory stay, any right a counterparty has to terminate an eligible financial contract ("EFC"). Sections 34 of the CCAA and 22.1 of the *Winding Up and Restructuring Act*, R.S.C. 1985, c. W-11 contain analogous provisions excluding the stay from applying to prevent termination of EFCs. However, in many receiverships there are no applicable statutory provision to except an EFC from the application of a general stay Order.

In *Re Enron Canada Corp.* (2001), 31 C.B.R. (4th) 15, Hart J. considered an application by Enron Canada Corp. for a general stay in arrangement proceedings it brought under the *Canada Business Corporations Act*., R.S.C. 1985, c. C-44. Although that Act contained no express statutory exception for EFCs, Hart J. found that just as there is good reason for statutory exceptions for EFCs in insolvency legislation, there is equally good reason to honour the underlying public policy considerations in cases involving solvent applications. Accordingly, Hart J. declined to grant the general stay applied for against termination of EFCs.

Although there do not appear to be any cases dealing with the propriety of an exception for EFCs from the general stay provisions of a Receivership Order, the Courts may generally support an exception for EFCs from the general stay. Although an exception for EFCs has been added to the stays contained in paragraphs 9 and 10 of the Receivership Order, the Alberta Committee notes that the court will decide whether or not to make EFCs an exception to the general stay.

As stated in the Ontario Explanatory Notes:

> There have also been many attempts to deal with circumstances where the suppliers to the debtor seek to secure or obtain preferential payment of pre-insolvency claims by using post-proceeding pricing practices. Suppliers have been known to seek security deposits or to enforce price increases to seek to disguise their efforts to re-coup pre-proceeding claims.

At law, a Court-appointed Receiver is a separate person from that of the debtor company, and as such is entitled to enter into new supply contracts with any supplier. In particular, a Court-appointed Receiver is entitled to obtain the supply of water, gas and electricity without the payment of any outstanding arrears, pursuant to ss. 22, 23 and 25 of the *Water, Gas and Electric Companies Act*, R.S.A. 2000 c.W-4 ("WGECA") and *Canadian Commercial Bank v. Universal Tank Ltd and Universal Industries Ltd.* (1983), 49 C.B.R. (N.S.) 226 (Alta. Q.B.).

The Alberta Committee is also mindful of the competing decisions of *Alberta Treasury Branches v. Invictus Financial Corp.* (1985), 55 C.B.R. (N.S.) 176 (Alta. Q.B.) and *BC Credit Union v. Metro Co-Operative* (1982), 43 C.B.R. (N.S.) 97 (B.C.C.A.). These decisions reached opposite conclusions to a certain extent on whether a supplier of a telephone service can compel payment of arrears before a Court-appointed Receiver is entitled to utilize a debtor's telephone number, or at the very least, before a Court-appointed Receiver is entitled to transfer the right to use the telephone number to a purchaser of the debtor company's business.

The Receiver has the right under the WGECA to acquire the supply of water, gas and electricity without the necessity of paying the outstanding arrears payable in respect to such utilities by the debtor. The Receiver, under its power as a separate entity to enter into new contracts for the supply of services, is otherwise left to negotiate new arrangements with suppliers of essential services to the debtor, and hopefully to do so in a manner which does not give any preference for the recovery of unsecured claims against the debtor that arose prior to the Receivership.

The "continuation of services" paragraph included in the Ontario Order is also included in paragraph 11 of the Receivership Order. The Alberta Committee concluded that in order to preserve the business and undertaking of the debtor in the best interests of all stakeholders, it would be preferable at the outset to enjoin the discontinuance, alteration, interference or

termination of the supply of goods and services to the debtor company (including computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services). In return, the Receiver is obliged to pay the "normal prices or charges for all such goods and services received as and from the date of the Order ... in accordance with normal payment practice of the debtor, or such other practices as may be agreed upon by the supplier or the service provider and the Receiver, or as may be ordered by the Court".

In each case, if the Receiver and any particular key supplier cannot agree on the reasonable prices or charges for the supply of any particular goods or services, the matter of the Receiver's obligation to pay a fair price for these can be determined by the Court on application by the Receiver or the supplier.

Furthermore, if any supplier believes that it has been unduly affected by paragraph 11 of the Receivership Order, the supplier can also re-apply pursuant to the "comeback clause" in paragraph 31 to vary this provision of the Order.

PARAGRAPH 13 – EMPLOYMENT

Among the most controversial aspects of receivership orders in Ontario has been the paragraph dealing with employment of employees by the Receiver.

Some insolvency professionals are of the view that in order to protect the Receiver from personal liability for termination and severance pay obligations, the Order ought to terminate the employment of all of the debtor' s employees and thereby crystallize termination obligations as claims against the estate. The Receiver is then free to re-hire employees as it wishes, free of pre-existing obligations, as provided under s. 14.06(1.2) of the BIA. They rely on the limited mandate of the Receiver and the fact that there has been no "sale" of the debtor's assets to argue that the Receiver will not be a successor employer in these circumstances.

Other counsel believe that if the Receiver actually hires employees in its own name, the Receiver stands a greater risk of being bound by pre-existing obligations. These counsel prefer to adopt the historical characterization of the Receiver as a third party simply monitoring the affairs of the debtor's business and therefore not interfering at all in the debtor's employment of its own employees. These counsel are of the view that the Receiver will have less risk of being held to be a successor employer because, notionally at least, the debtor's corporate personality survives during the Receivership with its employment contracts intact. This characterization is at odds with the reality of the Receiver's role in most cases.

This remains a live topic in Ontario with several cases having been brought on issues of relevance. While reasonable counsel can differ on the degree of protection available under differing receivership structures, the Ontario Order was drafted by the Ontario Committee to minimize the disruption to the existing legal relationship, while providing as much protection as they were able to give, having regard to the TCT decision described below, and leaving it open to counsel to seek a wider order in a particular case.

The decision of the Ontario Court of Appeal in TCT has effectively prohibited, at least in Ontario, the previous practice of routinely deeming a Receiver not to be a successor employer in Receivership Orders. The background is that Receivers who continue to operate businesses in Receivership can be held to be successor employers under labour legislation, and become responsible for termination, wage, pension and other obligations.

Section 46(1) of the *Alberta Labour Relations Code*, R.S.A. 2000, c. L-1 (the "ALRC") provides that:

> …when a business or undertaking or part of it is sold, leased, transferred or merged with another business or undertaking or part of it, or otherwise disposed of so that the control, management or supervision of it passes to the purchaser, lessee, transferee or person acquiring it…, and:
>
> > (a) if a trade union is certified, the certification remains in effect and applies to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and
> >
> > (b) if a collective agreement is in force, the collective agreement binds the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it as if the collective agreement had been signed by that person.

Similarly, s. 5 of the *Employment Standards Code*, R.S.A. 2000, c. E-9 provides that for the purposes of that Act, ". . .the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged or if it continues to operate under a Receiver or Receiver-Manager."

The *Ontario Labour Relations Act*, 1995, SO. 1995, c. 1, Sch. A (the "OLRA") contains a provision (s. 69) very similar to s. 46(1) of the ALRC, and provides that a decision as to whether a purchaser or other party is bound by the certification and collective agreement must be made by the Ontario Labour Relations Board (the "OLRB"). Section 114 of the OLRA also provides that the determination of the OLRB is final and conclusive for the purposes of that Act, and that the OLRB ". . .has exclusive jurisdiction ... to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes The OLRB's decisions and rulings cannot be questioned or reviewed in any Court.

In *TCT* the Receiver, acting under the normal receivership order of the time, purported to effect a sale of the assets of one of TCT's businesses, and to allow the purchaser to hire only certain of the employees of that business, contrary to the terms of a collective agreement. That was challenged by the union representing the employees. Farley J. decided the Receiver could not be deemed a successor as long as it was acting "*qua* realizer" of the assets. On appeal, the Ontario Court of Appeal concluded that Farley J. erred by applying the "realizer versus employer" test to effectively determine whether the Receiver was a successor employer, and that the Court had no jurisdiction to make that determination. It concluded that a bankruptcy Justice did not have jurisdiction to exempt a Receiver from the successor employer provisions of the OLRA, but could restrain labour proceedings on a temporary basis by refusing to give leave under s. 215 of the BIA to a party wishing to proceed with a "successor employer" application under the OLRA.

The Alberta situation would appear to be different from the Ontario situation in one key respect: the ALRC does not seem to remove from the Alberta Courts the ability to decide whether a Receiver would be bound by s. 46(1) of the ALRC. This would appear to allow the Court the ability to decide, on the appropriate facts, that a Receiver was in fact proceeding, as Farley J. held in TCT, *qua* realizer rather than *qua* operator of the business. Accordingly, on proper factual and legal support it appears the Alberta Courts might consider, in appropriate circumstances, taking into account the differences between the ALRC and the OLRA to issue an Order of limited duration during which the Receiver would be deemed to be operating *qua* realizer rather than as a successor in the business for purposes of the ALRC. Clearly, such a provision could not affect the liability of a Receiver under s. 5 of the *Employment Standards Code*, and would not be effective in jurisdictions such as Ontario where the Court does not have the authority to make that determination. The provision could, however, greatly reduce the loss of value in particular cases in Alberta where employees are unionized and continued operations are key to preserving value and jobs.

Since one of the key benefits to appointing a Receiver under s. 243(1) of the BIA is the national reach of the Order, there are obvious benefits to using language familiar to an Ontario audience where a Receivership Order may have effect in Ontario. The Receivership Order therefore uses the same language as the Ontario Order. Counsel in Alberta should, however, be aware that the possibility of "deeming" a Receiver not to be a successor employer in Alberta exists. This should probably be done in specific cases on appropriate supporting evidence, with specific reference to Alberta and for a limited time, rather than as a general matter in each Receivership Order.

The Alberta Committee has revised paragraph 13 of the Receivership Order to address the amendments to the BIA dealing with employee and pension plan laibilities and the implementation of the *Wage Earner Program Protection Act*, S.C. 2005, c. 47 (the "WEPPA"). Paragraph 13 now provides that the Receiver is not liable for any employee-related liabilities including successor employer liabilities as provided for in s. 14.06(1.2) of the BIA. That section provides that a trustee is not liable for any employee liabilities or in respect of any pension plan for the benefit of those employees that exist before the trustee is appointed or are calculated in reference to a period before the appointment.

Paragraph 13 of the Receivership Order has also been amended to reference the Receiver's obligations under ss. 81.4(5) and 81.6(3) of the BIA and under the WEPPA. Section 81.4(1) of the BIA provides that the claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages by a debtor for services rendered in the six months preceding the receivership is secured to the extent of $2,000 on the current assets in the possession or under control of the Receiver. Section 81.4(2) also provides security to the extent of $1,000 for the disbursements of a travelling salesperson incurred in the six months preceding the receivership on the current assets in the possession or under control of the Receiver. Section 81.4(5) of the BIA provides that if the Receiver takes possession or in any way disposes of current assets covered by the security, the Receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the Receiver.

Section 81.6(1) of the BIA provides that if a debtor is an employer who participated or participates in a prescribed pension plan for the benefit of employees, certain enumerated amounts that are unpaid as of the date of the receivership order are secured by security on all of the debtor's assets. Section 81.6(3) provides that if the Receiver disposes of assets covered by the security, the Receiver is liable for the unpaid pension amounts to the extent of the amount realized on the disposition of the assets and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

The WEPPA provides that an employee is entitled to apply to the Ministry of Labour for payment of wages owing for the six months prior to the date of a bankruptcy or receivership. The maximum amount that the employee will receive is $3,000 or the equivalent of four times the maximum weekly insurable earnings under the *Employment Insurance Act*, less any applicable deductions under federal or provincial law. Section 36 of the WEPPA and s. 81.4 of the BIA together provide that the Minister will have a subrogated priority claim for a maximum of $2,000 per employee over the current assets of the debtor employer under receivership.

PARAGRAPH 14 – PIPEDA

The following commentary of the Ontario Committee, paraphrased slightly, explains paragraph 14 of the Receivership Order.

The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA") seems to impact the ability of creditors to realize upon a business. Personal information concerning employees, customers and possibly suppliers could well be very important components of either a Receiver's ability to run the business or to sell it.

PIPEDA contains a reasonableness standard that is one of the overriding principles guiding the use and dissemination of personal information. A Receiver has little time and ability to seek the consent of every employee or every customer before disclosing information needed to keep a plant open or to allow an expeditious realization. The reasonableness of limiting the need to obtain express consent in urgent circumstances in order to keep a business from failing is self-evident. It maintains the jobs and the business to which individuals have provided their information presumably because they either want their jobs or they want to do business with the debtor. PIPEDA also allows for Court Orders limiting the need to obtain express consent in appropriate circumstances.

The Ontario Order and in turn the Receivership Order contain such a limitation drawn from *Re PSINet Limited* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.) CCAA proceeding. In effect, the Receiver will be entitled to disclose personal information to prospective purchasers under the terms of appropriate confidentiality orders and provided that the purchaser, by agreement and Court Order, can make no further use of the debtor's data than was available to the debtor itself.

PARAGRAPH 15 - RECEIVER'S LIABILITY FOR ENVIRONMENTAL MATTERS

The Receiver, as an officer of the Court, should be protected from liability arising out of environmental matters, unless the environmental condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct. Some receivership orders have

gone further and have limited damage awards against a Receiver to the value of the assets of the estate or the amount of the Receiver's fees, even in the event of the gross negligence or wilful misconduct by the Receiver. The Alberta Committee is not aware of any jurisprudence or statutory provision which would support the inclusion of such a provision.

In *Big Sky*, Slatter J. reviewed the proper scope of the terms of an Order appointing a Receiver and concluded (at paragraph 46):

> There is no basis for holding that a receiver in Alberta has any immunity for environmental damage beyond what is found in Section 14.06, or the *E.P.E. Act* itself. As was held in *Lindsay* the court has no general jurisdiction to grant exemptions from statutes.

Slatter J. went on to permit the inclusion of a clause which essentially paralleled the provisions of s. 14.06(2) of the BIA. He acknowledged that such a provision might be redundant in legal terms, but believed it would be helpful to note these provisions in the Order.

Paragraph 15 of the Ontario Order contains a provision that nothing shall require the Receiver to occupy or take control, care, charge or possession of any property of the debtor subject to the Receivership Order. Further, the Receiver shall not, as a result of the Receivership Order, or anything done in pursuance of the Receivership Order, be deemed to be in possession of any of the property, unless the Receiver is in actual possession of the property. Slatter J. in *Big Sky* commented on a similar provision in the proposed Order before him (at paragraph 48):

> The initial problem with the proposed environmental provisions in the Order is that they contradict other provisions of the Order. Paragraph 2 of the Order places all of the assets of the debtor under the power of the Interim Receiver. Paragraph 28 then provides that the Order does not vest in the Interim Receiver care or control of any properly which "may be" environmentally polluted. This latter clause is unacceptable, because at best it creates great uncertainly as to which properties are under the control of the Interim Receiver, and at worst it gives the Interim Receiver some sort of ex post facto right to elect whether it has been in control of the properly or not. Sections 14.06(4)(c) and 14.06(6) contemplate the abandonment of contaminated properly by the Receiver, which is the process that should be followed if this latter becomes necessary.

Section 240(3) of the *Alberta Environmental Protection and Enhancement Act*, R. S.A. 2000, c. E-12 ("EPEA") provides:

> Where an environmental protection order is directed to a person who is acting in the capacity of executor, administrator, Receiver, Receiver/Manager or trustee, that person's liability is limited to the value of the assets that person is administering unless the situation identified in the order resulted from or was aggravated by the gross negligence or wilful misconduct of the executor, administrator, Receiver, Receiver/Manager or trustee.

In addition, EPEA defines a "person responsible" for a substance or thing containing a substance, as someone who has or has had ownership, charge, management or control over a substance, or that person's Receiver. This would clearly override the provisions in paragraph 15 of the Ontario Order, as under the EPEA, a Receiver is a "person responsible" regardless of the Receiver's actual possession of property.

As a result, in the Alberta Committee's view the wording in paragraph 15 of the Receivership Order is consistent with the existing statutory provisions and jurisprudence in the Province of Alberta, and is therefore supportable. If some additional protection is required, then an applicant would be expected to satisfy the Court that it is warranted by the facts and is supported by some judicial authority.

A Receiver should apply for an extension of time in which to comply with environmental orders before the later of (a) the time specified in the environmental order, (b) 10 days after the environmental order (if no time is specified), and (c) within 10 days after the appointment of the Receiver, to avoid risking loss of the protection afforded under s. 14.06(2) of the BIA.

It is not always clear on the date a Receiver is appointed whether any environmental orders exist in respect of the debtor's property. Accordingly, there may be circumstances (where, for example, the debtor's records are unreliable or the debtor has significant or complex holdings of property that could be the subject of an environmental order), where it is appropriate to include a stay pursuant to s. 14.06(5) of the BIA in the initial Order that gives the Receiver a more reasonable period of time to review the circumstances surrounding the debtor's property without fear of losing this protection.

PARAGRAPH 16 – LIMITATION ON THE RECEIVER'S LIABILITY

The Receivership Order provides that except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of the Order, the Receiver shall incur no liability or obligation exceeding the amount for which it may obtain full indemnity from the Property. Paragraph 16 also expressly reserves protections and limitations on liability afforded to the Receiver under any applicable law, including, without limitations, ss. 14.06, 81.4(5) and 81.6(3) of the BIA.

PARAGRAPHS 17 TO 23 – THE FUNDING OF THE RECEIVERSHIP

Pursuant to paragraph 17 of the Receivership Order, the Receiver is granted a Receiver's Charge as a first charge on the Property, as security for the fees and disbursements incurred by the Receiver and its counsel both before and after making the Order in respect of the receivership proceedings. Pursuant to paragraph 20, the Receiver's Borrowing Charge ranks just behind the Receiver's Charge and in priority to all security interests. The priority of the Receiver's Charge and the Receiver's Borrowing Charge is subject to ss. 14.06(7), 81.4(4) and 81.6(2) and potentially, s. 88 of the BIA.

Section 14.06(7) of the BIA provides that any claim of Her Majesty in right of Canada or a province against a debtor in receivership for the costs of remedying any environmental condition or damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or damage and on any other real property or immovable that is contiguous thereto or related to the activity that caused the environmental condition or damage. Such security ranks above any other claim, right, charge or security against the property, despite any other provision in the BIA or anything in any other federal or provincial law.

Sections 81.4(1) and (3) and 81.6(1) of the BIA set out the security for unpaid wages and unpaid pension plan contributions, respectively. Sections 81.4(4) and 81.6(2) provide that the security for such amounts rank above every other claim, right, charge or security against the debtor's current assets – regardless of when that other claim, right, charge or security arose – except rights under ss. 81.1 (rights of unpaid suppliers to repossess goods) and 81.2 (special rights of farmers, fisherman and aquaculturists).

Section 88 of the BIA provides that in relation to a bankruptcy or proposal, no order may be made that would have the effect of subordinating financial collateral. Financial collateral means (i) cash or cash equivalents including negotiable instruments and demand deposits; (ii) securities, a securities account, a securities entitlement or a right to acquire securities or (iii) a futures agreement or a futures account that are subject to an interest. Although there is no similar provision in the BIA in respect of receiverships, the Courts may support the inclusion of s. 88 in list of interests to which the Receiver's Charge and Receiver's Borrowing Charge are subordinate. The Alberta Committee has include s. 88 in paragraphs 17 and 20 of the Receivership Order but notes that the court will decide whether or not to avoid subordination to financial collateral.

The priority afforded to the Receiver's Charge and the Receiver's Borrowing Charge is appropriate where the Receiver has been appointed at the request, or with the consent or approval of the holders of all security interests in the Property (see *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd* (1976), 9 OR. (2d), 84, 88 (CA.)) ("*Kowal*"). The priority is also appropriate where the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, or where the Receiver has expended money for the necessary preservation or improvement of the Property (*Kowal* at pages 89 and 91, respectively).

The Court may not, however, make an Order granting the Receiver's Charge and the Receiver's Borrowing Charge priority unless it is satisfied that the secured creditors who would be materially affected by the Order were given reasonable notice and an opportunity to make representations. As such, if a Receiver has not been appointed at the request or with the consent or approval of the holder of a security interest, and if that security interest holder does not fall within one of the other exceptions (referred to above) in *Kowal*, then paragraphs 17 and 20 should be modified so that they do not provide for priority over such a security interest holder.

There may be cases with multiple secured creditors with differing priorities over the various assets that comprise the Property. The fees and expenses of the Receiver may benefit some assets, but not others. If the Receiver carries on the business of the Debtor, doing so may benefit or potentially benefit some of the assets, but not others. In such circumstances, receivership costs should be appropriately allocated among the various assets comprising the Property. Paragraph 24 contemplates that any interested party may apply for allocation of both the Receiver's Charge (for its fees and expenses) and the Receiver's Borrowing Charge among the various assets comprising the Property.

The Receivership Order does not specify how the Receiver's Charge and Receiver's Borrowing Charge should be allocated amongst the various assets. Pursuant to an application under paragraph 24, Receivership costs and borrowings should be allocated among the assets equitably

(not necessarily equally) having regard, *inter alia*, to the relative benefit or potential benefit to the various assets involved. See, for example, *Re Hunters Trailer & Marine Ltd.* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) which involved allocation of DIP financing and the Monitor's charge amongst secured creditors with priority over differing assets in a CCAA proceeding. See also *R. Western Express Airlines Inc.* (2005), 7 P.P.S.A.C. (3d) 229 (B.C.S.C.), where aircraft lessors who received no benefit from a CCAA restructuring were not required to bear any of the costs of the restructuring.

In *New Skeena Forests Products Inc.* (Re) (2005), 9 C.B.R. (5th) 278, the British Columbia Court of Appeal reversed an order of the British Columbia Supreme Court allocating DIP financing and restructuring costs in a CCAA proceeding. The chambers judge had allocated those costs based on relative value of the assets as previously appraised. The Court of Appeal allocated costs on the basis of the actual value at the time the assets were realized but with the proviso that the secured creditor could not be required to pay costs in an amount exceeding the value of the property subject to its security.

PARAGRAPH 26 – REPORTING TO THE COURT

On November 1, 2010, the new *Alberta Rules of Court* were enacted. Rule 6.11 of the *Alberta Rules of Court* set out the evidence that a Court would consider on an application and the enumerated list did not make a provision for the filing of a report by a Receiver. This resulted in some confusion as to whether a Receiver would now be required to file evidence in affidavit form. In light of the practice that has developed of Receiver's filing evidence in report form, the Alberta Committee suggests that the Receivership Order provide that unless otherwise ordered by the Court, Receiver's reports to the Court are not required to be in affidavit form and such reports shall be considered as evidence.

PARAGRAPH 31 – THE COMEBACK CLAUSE

The Alberta Committee, after much discussion about whether the paragraph 31 "comeback clause" should include a deadline for applying to vary the Receivership Order (namely a set number of days (perhaps 20) after the service of the Order), concluded that it was best to leave the comeback clause the same as in the Ontario Order, since:

1. circumstances could change after the expiry of the deadline otherwise detailed in a comeback clause, that could affect an applicable interested party; and

2. the insertion of a deadline in the comeback clause may result in various interested parties filing pro forma applications to vary and then adjourning *sine die* such applications, simply to avoid having their rights affected.

PARAGRAPH 33 - MAINTENANCE OF RECEIVER'S WEBSITE

Over the past several years, Receivers have maintained websites for their various receivership files. This has been a very helpful and easily accessible resource to anyone interested in a receivership proceeding. The principal shortcoming arising from this practice is that the websites do not always include substantially all of the materials filed in the receivership

proceedings. After discussion and consultation with members of the judiciary, the Alberta Committee has included paragraph 33 in the Receivership Order. This paragraph provides that the Receiver will post as soon as practicable materials filed in the receivership proceedings by the Receiver or served upon it, excluding confidential materials that are the subject of a sealing order or pending application for a sealing order. (This is in addition to whatever the Receiver may be required by statute or regulation to make publically available.)

CONCLUDING NOTES

The Alberta Committee hopes that the Receivership Order will be a useful tool to both the Bar and Bench by providing a familiar and well-understood starting point. As counsel and the Court consider an appropriate order for a given case, blacklining to the Receivership Order should enable them to expeditiously address changes needed to appropriately tailor the Order to the circumstances.

The Receivership Order is not intended to apply universally to every Receivership, nor is it intended to raise any sort of onus that will require counsel to meet some legal or evidentiary burden in order to depart from the template. Rather, it is intended as a practical help to the Bench and Bar to ensure both are acquainted with typical terms of an initial Receivership Order, so that departures from such terms can be speedily highlighted for consideration by simply blacklining any changes made to the Receivership Order.

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TAB 5

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ébec (DCQ)

rt. 153 à 255 C.c.Q.)
(2007)

eur (Art. 256 à 297 C.c.Q.)
mp (2008)

cession (Art. 776 à 898 C.c.Q.)
Marième Lacroix (2007)

rt. 1553 à 1636 C.c.Q.)
ossés (2011)

5 à 1841 C.c.Q.)
t (2011)

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s) (Art. 2644 à 2680 C.c.Q.)
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entionnelle (dispositions générales)
rt. 2681 à 2695 C.c.Q.)
t (2009)

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3 C.c.Q.)
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7 C.c.Q.)
t (2009)

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à 2802 C.c.Q.)
t (2010)

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es (Art. 3076 à 3133 C.c.Q.)
in (2011)

COMMENTAIRES SUR LE CODE CIVIL DU QUÉBEC (DCQ)

Le cautionnement

(Art. 2333 à 2366 C.c.Q.)

Extraits de
La référence Droit civil
rédigés par

Édith Lambert

ÉDITIONS YVON BLAIS

2365 565 Conditions d'application

Selon l'article 2365 C.c.Q., lorsque la subrogation aux droits du créancier ne peut plus, par le fait de ce dernier, s'opérer utilement en faveur de la caution, celle-ci est déchargée dans la mesure du préjudice qu'elle en subit.

Alain Parent estime que la libération de la caution en vertu de l'article 2365 C.c.Q. exige la présence des quatre conditions cumulatives suivantes[27] :

- il doit exister un *fait du créancier* [voir le paragraphe 2365 575] ;
- la caution doit avoir perdu un *droit subrogatoire (droit préférentiel)* [voir le paragraphe 2365 580] ;
- la caution doit avoir subi un *préjudice* [voir le paragraphe 2365 585] ; et
- il doit exister un *lien de causalité* entre les trois éléments énumérés ci-dessus (fait du créancier, perte d'un droit préférentiel et préjudice) [voir le paragraphe 2365 590].

Ajoutons que l'exception de subrogation en vertu de l'article 2365 C.c.Q. doit évidemment être invoquée par une caution [à ce sujet, voir le paragraphe 2365 570]. La caution ne doit pas non plus avoir renoncé postérieurement au bénéfice de subrogation [voir le paragraphe 2365 600].

Enfin, soulignons que l'article 2365 C.c.Q. porte sur la subrogation qui ne peut plus s'opérer « utilement » en faveur de la caution. Il n'est donc pas nécessaire qu'elle ne puisse plus du tout s'opérer comme le laissait entendre l'article 1959 C.c.B.C.[28].

27. A. PARENT, *loc. cit.*, note 3, p. 264 et 283 et s. ; A. PARENT, *loc. cit.*, note 4, p. 25 et 79. Pour sa part, Marc Boudreault exige le cumul des trois conditions suivantes : 1) la caution ne peut plus être subrogée aux droits du créancier, 2) la subrogation ne peut plus s'opérer par le fait du créancier, et 3) la caution a subi un préjudice du fait qu'elle ne peut plus être subrogée dans les droits du créancier : M. BOUDREAULT, *loc. cit.*, note 4, n^os^ 925 à 930, p. 264 à 266.

28. Voir les commentaires du ministre de la Justice relatifs à l'art. 2365 C.c.Q., EYB1993CM2366.

2365 570 Bénéficiaires

En vertu de l'article 2365 C
créancier ne peut plus, par
faveur de la caution, celle-ci
qu'elle en subit. Cette institu
d'« exception de subrogatio
libérée en totalité ou en parti
tions sont réunies [à ce sujet

Il existe toutefois plusieurs ty
tion de subrogation est alors
prudence et la doctrine, peuv
sens de l'article 2365 C.c.Q.

- la caution simple légal
  commentaires relatifs
- la caution solidaire[30] [
  C.c.Q., EYB2011DCQ

29. A. PARENT, *loc. cit.*, note
Hervé ROCH et Rodolphe
Montréal, Wilson & Lafleu
c. *Simard*, EYB 1984-1427

30. *Normand* c. *Simard*, EYB 1
Boudreault, précité, note 9
REJB 1999-12826 (C.S.), p.
note 4, p. 48 ; H. ROCH et
Banque de Montréal c. *Simo*
tefois *Soris a Division of*
93094 (C.S.), par. 35 et 36
invoquer l'exception de s
Cependant, elle peut l'invo
l'art. 1531 C.c.Q., lequel prév
Soulignons toutefois que l
l'engagement de la caution
pour les dettes solidaires, *de*
nature du cautionnement »
Alain Parent, « la législatio
liable avec celle de la solida
tion en raison du caractère i
solidaire est donc soumise

2365 590 Lien de causalité

L'article 2365 C.c.Q. prévoit que « [l]orsque la subrogation aux droits du créancier ne peut plus, par le fait de ce dernier, s'opérer utilement en faveur de la caution, celle-ci est déchargée dans la mesure du préjudice qu'elle en subit ». Selon une certaine jurisprudence et doctrine, cette disposition exige implicitement l'existence d'un lien de causalité entre[100] :

- le fait du créancier [voir le paragraphe 2365 575] ;
- la perte d'un droit préférentiel [voir le paragraphe 2365 580] ; et
- le préjudice [voir le paragraphe 2365 585].

Rappelons que la faute doit être imputable au créancier ou à l'un de ses représentants, et non pas au débiteur, à la caution ou à un tiers[101].

2365 595 Procédure

L'exception de subrogation permet à la caution d'être libérée de son engagement dans la mesure du préjudice subi par le fait du créancier qui a empêché que ne s'opère utilement la subrogation dans ses droits [art. 2365 C.c.Q.].

Le tribunal ne soulève pas d'office l'exception de subrogation. Ainsi, la caution doit l'invoquer elle-même[102]. Elle peut le faire[103] :

- dans sa défense (moyen de défense au fond) [art. 172 C.p.c.] ;

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judice qu'elle peut l'exiger. Si le créancier a diminué ses sûretés jusqu'à concurrence de la moitié de la créance, il conservera son recours pour l'autre moitié »].

100. En jurisprudence, voir *Banque Nationale du Canada* c. *Buffone*, précité, note 35, par. 19 [« il faut qu'il y ait une relation de cause à effet entre le préjudice subi et la négligence alléguée »] ; *Ladouceur* c. *9050-4986 Québec inc.*, précité, note 95, par. 15. En doctrine, voir A. PARENT, *loc. cit.*, note 3, p. 297 ; A. PARENT, *loc. cit.*, note 4, p. 98.
101. *Société d'aide au développement de la collectivité (SADC) de Lotbinière* c. *Fortin*, précité, note 38.
102. Dans ce sens, voir A. PARENT, *loc. cit.*, note 3, p. 259, note de bas de page 15 ; A. PARENT, *loc. cit.*, note 4, p. 3, note de bas de page 13.
103. À ce sujet, voir A. PARENT, *loc. cit.*, note 3, p. 259, note de bas de page 15 ; M. BOUDREAULT, *loc. cit.*, note 4, n° 931, p. 266 ; A. PARENT, *loc. cit.*, note 4, p. 3, note de bas de page 13 ; G. LABERGE, *loc. cit.*, note 6, p. 4 et s. et 34.

- en tout état de cause, avant que le jugement soit rendu [voir l'art. 199 C.p.c.] ;
- en appel du jugement de première instance ; ou même
- en demande en vue de faire constater sa décharge[104].

Dans ce dernier cas, des auteurs estiment que la caution peut présenter une requête pour jugement déclaratoire en vertu des articles 453 à 456 C.p.c.[105]. L'article 453 C.p.c. se lit comme suit[106] :

> Celui qui a intérêt à faire déterminer, pour la solution d'une difficulté réelle, soit son état, soit quelque droit, pouvoir ou obligation pouvant lui résulter d'un contrat, d'un testament ou de tout autre écrit instrumentaire, d'une loi, d'un arrêté en conseil, d'un règlement ou d'une résolution d'une municipalité, peut, par requête introductive d'instance, demander un jugement déclaratoire à cet effet.

La requête pour jugement déclaratoire doit contenir un exposé de la question litigieuse. Elle doit aussi être signifiée aux autres parties et à toutes personnes intéressées [art. 454 C.p.c.].

2365 600 Renonciation

Si la subrogation aux droits du créancier ne peut plus, par le fait de ce dernier, s'opérer utilement en faveur de la caution, celle-ci est déchargée dans la mesure du préjudice qu'elle en subit [art. 2365 C.c.Q.]. L'article 2355 C.c.Q. complète l'article 2365 C.c.Q. en prévoyant que la caution ne peut renoncer à l'avance, notamment, au bénéfice de subro-

104. Dans ce sens, voir *Télé-Métropole international inc.* c. *Banque Mercantile du Canada*, précité, note 1, par. 32. En doctrine, voir A. PARENT, *loc. cit.*, note 3, p. 259, note de bas de page 15 ; M. BOUDREAULT, *loc. cit.*, note 4, n° 931, p. 266 ; A. PARENT, *loc. cit.*, note 4, p. 3, note de bas de page 13 ; G. LABERGE, *loc. cit.*, note 6, p. 4 et s.

105. A. PARENT, *loc. cit.*, note 3, p. 259, note de bas de page 15 ; A. PARENT, *loc. cit.*, note 4, p. 3, note de bas de page 13 ; G. LABERGE, *loc. cit.*, note 6, p. 6.

106. Dans *Duquet c. St-Agathe-des-Monts (Ville de)*, [1977] 2 R.C.S. 1132, EYB 1976-186868 (C.S.C.), la Cour suprême du Canada a décidé que la requête pour jugement déclaratoire pouvait être utilisée autant à titre préventif que curatif.

gation. Ces deux disposition
l'art. 9 C.c.Q.].

Soulignons que l'article 23
l'avance. Ainsi, comme l'e
après que lui soient acquises
disposition [l'article 2365 C

Pour en savoir davantage
ticle 2355 C.c.Q., EYB201

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107. *SGF Soquia inc.* c. *Cie*
EYB 2010-174146 (C.A.)
sion inc., précité, note 54,
note 3, p. 281 ; A. PAREN

108. *Banque Nationale du C*
par. 25 (requête en sursis
demande d'autorisation
24 juillet 2008). Cette
SAUCIER, « Comment
Canada c. *Lemay* – Cauti
tion par votre comporten
rence Droit civil, EYB20