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LAWYERS MEDIATORS

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Your File:

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May 5, 2023

SENT VIA EMAIL: CommercialCoordinator.QBEdmonton@albertacourts.ca

Court of King's Bench of Alberta
Law Courts Building
1A Sir Winston Churchill Square
Edmonton, AB T5J 0R2

Attention: The Honourable Mr. Justice Lema

Dear Sir:

Re: Royal Bank of Canada v. Faissal Mouhamad Professional Corporation et al.
Court of King's Bench of Alberta Action Number: 2203 12557

We represent the parties referred to in the Receiver's Seventh Report as the Jovica Creditors.

Please accept this letter as our written submission on behalf of our client opposing certain relief requested by the Receiver. In its pending Application scheduled to be heard by you at 2 pm on Monday, May 28.

Unless otherwise defined herein, capitalized terms used throughout shall have the meanings ascribed to them in the Receiver's materials.

Primary Rejection

The Jovica Creditors specifically object to the relief sought in paragraphs 1(b), (d), 3(a) and 3(c) of the Receiver's Application.

The Jovica Creditors do not object to a further distribution to the Bank of Nova Scotia from the 52 Wellness proceeds (paragraph 3(b) of the Application document).

Basis for Objection

There is no urgency in respect of this Application, yet it is brought on relatively short notice (less than one week) and the Receiver is seeking, among other things, substantive relief in its favour respecting a blanket approval of its activities since January 1 of this year and approval of a substantial amount of professional fees.

The Receiver also seeks the effective approval of its proposed allocation of all of the professional fees now, before realizations and a full administration of the entire receivership has been concluded, while seeking to obtain its discharge in respect of one of the companies under its administration, 52 Wellness.

Not all of the Defendants in this action are part of the receivership. Only FMPC, DDC, 52 Dental, 52 Wellness, and MDML and 985 are. The Jovica Creditors have primary security (in the form of land mortgages) against each of MDML and 985. They do also have personal property security in the assets of those two debtors.

The appointing creditor, Royal Bank of Canada ("RBC") did not have any security interest in MDML. That entity was placed into receivership because of concerns over certain asset transfers. The Jovica Creditors had nothing to do with those transfers and they did not impinge on the land. The Jovica Creditors mortgage security is considered valid.

The Receivership Order at paragraph 30 (**attached at Tab 1**) maintains alive throughout the receivership the ability of a party to make Application to the Court to address allocation of the Receiver's Charge and the Receiver's Borrowing Charge. Those charges apply across the entirety of the assets of all of the debtors placed into receivership.

If preceded to, the relief sought by the Receiver will:

1. Eliminate the ability of creditors to make fulsome argument on allocations; and

2. More importantly, remove 52 Wellness from further consideration for allocation purposes. This will be the effect if the receivership 52 Wellness is ended prior to the entirety of the receivership being concluded.

This is prejudicial to the creditors with claims in the companies in Receivership particularly in circumstances where the Receiver still has much work to do including evaluation of certain claims, and as sought in this Application, concluding further realizations.

In ***Bank of Montreal v. Dedicated National Pharmacies Inc.*** **2011 Carswell 185 (attached at Tab 2)**, the Court had before it a circumstance where the Receiver was seeking approval of its activities and interim fees prior to the closing of a transaction. The Court declined to grant that relief stating at paragraph 7:

> *"Applications for the approval of the Receiver's actions and fees, as well as the fees of its counsel, should occur at a time it makes sense, having regard to the commercial realities of the receivership. In this case the asset sale was expected to close by the end of January. More appropriate time consider the Receiver's conduct and the payment of fees would, thus, be surely after the closing. If the transaction fails to close at the end of January, new commercial reality will arise. The asset sale process will have to be repeated once again triggering a commercially sensible time to review the actions and pay the Receiver and counsel."* (emphasis added).

The Receiver has sought and obtained approval of its fees at certain stages in this Receivership. We do note that at one point Justice Mah did express reservations about doing so on an interim basis. Regardless, approving fees, discharging the Receiver as Receiver of 52 Wellness, and effectively approving an allocation now when the full administration of the Receivership is not complete is not the appropriate time.

With respect to approval of fees, we note as well, that ***Winalta Inc. (Re)*, 2011 ABQB 399** has not been complied with **(attached at Tab 3)**. The Receiver and its counsel have not provided Affidavits to support their fees.

With respect to the discharge on 52 Wellness, there is realistically only one receivership. While the Receiver is properly tracking all the asset realizations is and making its best efforts to do the allocation, in the view of Jovica Creditors it is not appropriate at this time to effectively wind up the receivership of only one company when there are further aspects of thew administration of the entire receivership yet to be concluded. That company should remain in the Receivership until the administration of the entire Receivership has been concluded.

Regarding the allocation, the unfortunate circumstance we have before this Court is that several if not all creditors with security are not going to be paid in full. The allocation issue therefore is significant and all these approvals that the Receiver seeks now are going to impact the outcome on allocation.

There are several factors that the Court needs to consider when looking at an allocation apportioning cost that include:

1. Whether the allocation is fair and even handed amongst all creditors on an objective basis;

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 should a recognition that any cost allocation is not limited to the cost realization but does relate to the entirety of the receivership costs whether direct or indirect;

4. Exceptions to a uniform cost allocation are not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver and managing the affairs of the receivership

may have been less intensive or less advantageous with respect to certain group of assets as opposed to other groups of asses and at the extent of this intensity or this advantage may not be immediately or reasonably determinable; and

5. Exceptions to the rule of uniform allocation shall only be made where the requirement for such variation is reasonably articulable **(*Respec Oilfield Services Ltd. (Re*), 2010 ABQB 277 at para. 23, attached at Tab 4)**.

Exactitude in calculation by a receiver is not expected. However, just as application for approval of Receiver's action and fees should occur at a time which makes sense, so too should any application affirming a cost allocation.

It is respectfully submitted that in circumstances of this case, the relief sought by the Receiver which is objected to by the Jovica Creditors should be deferred until the receivership administration is completed in its entirety. Doing so now is prejudicial to the secured creditors. There is also no urgency articulated in the materials.

All of which is respectfully submitted.

Yours truly,

DUNCAN CRAIG LLP
Per:

DARREN R. BIEGANEK, KC
DRB/mq
Enclosures

TAB 1

CERTIFIED E. Wheaton
by the Court Clerk as a true copy of the document digitally filed on Sep 16, 2022

Clerk's stamp:

COURT FILE NUMBER	2203 12557
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**ROYAL BANK OF CANADA**
DEFENDANT	**FAISSAL MOUHAMAD PROFESSIONAL CORPORATION, MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52 DENTAL CORPORATION, DELTA DENTAL CORP., 52 WELLNESS CENTRE INC., PARADISE MCIVOR DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT LTD., FAISSAL MOUHAMAD and FETOUN AHMAD also known as FETOUN AHMED**
DOCUMENT	**RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Susy M. Trace Lawyer's Email: strace@millerthomson.com File No.: 0255685.0004

JUDICIAL CENTRE OF EDMONTON
FILED DIGITALLY
2203 12557
Sep 16, 2022
2:21 PM
CLERK OF THE COURT

DATE ON WHICH ORDER WAS PRONOUNCED:	September 16, 2022
LOCATION WHERE ORDER WAS PRONOUNCED:	Edmonton, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER:	D. Mah

UPON the application of Royal Bank of Canada ("**RBC**") in respect of Faissal Mouhamad Professional Corporation, 52 Dental Corporation, Delta Dental Corp., Michael Dave Management Ltd. and 52 Wellness Centre Inc. (collectively, "the "**Debtors**"); **AND UPON** having read the Application, the Affidavit of Jocelyn Beriault sworn August 19, 2022, the Supplemental Affidavit of Jocelyn Beriault sworn September 9, 2022, the Affidavit of Faissal Mouhamad SWORN August 23, 2022, the Affidavit of Faissal Mouhamad sworn September 8, 2022 and the Supplemental Affidavit of Faissal Mouhamad sworn September 8, 2022, the Brief of Law of RBC, filed, the Brief of Law of Fetoun Ahmad, 52 Dental Corporation, and Delta Dental Corp., filed, the written submissions of Faissal Mouhamad Profession Corporation, filed, the Response Affidavit of Mahmoud Mohamad, sworn September 8, 2022, the first report to the court of MNP Ltd. in its

capacity as interim receiver over the property, assets and undertaking of Faissal Mouhamad Professional Corporation, 52 Dental Corporation, Delta Dental Corp. and the Affidavit of Service Nikki Ebbers, filed; **AND UPON** reading the consent of MNP Ltd., to act as receiver and manager ("**Receiver**") of the Debtors, to be filed; **AND UPON** hearing counsel for RBC; **AND UPON** hearing counsel for the Defendants and any other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**") section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, and section 65 of the *Personal Property Security Act*, R.S.A. 2000, c P-7, MNP Ltd. is hereby appointed Receiver, without security, of all of the Debtors' 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, without limitation including any patient lists, patient files and/or other records (collectively, "**Patient Records**"), and any and all proceeds, receipts and disbursements arising out of or from the Property, provided however, that the Receiver shall not take possession and shall not be deemed to be in possession of any drugs, medications or other controlled substances ("**Controlled Substances**");

    b) to abandon, dispose of, transfer or otherwise release any interest in any of the Debtors' personal or real property, including to transfer the Patient Records to a Custodian (as defined below), in accordance with this Order;

    c) 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;

    d) to engage one or more duly licensed and qualified individuals to take possession of any Controlled Substances of the Debtors or located at the Debtors' premises and to manage, operate and carry on the business of the Debtors, 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 of the business, or cease to perform any contracts of the Debtors;

e) to engage dentists, dental hygienists, dental assistants, dental specialists, technicians, consultants, appraisers, agents, experts, auditors, accountants, IT or forensic consultants, managers, legal 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;

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

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

h) to settle, extend or compromise any indebtedness owing to or by the Debtors;

i) 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 Debtors, for any purpose pursuant to this Order;

j) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtors;

k) 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 Debtors, 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;

l) 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;

m) 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 $50,000, provided that the aggregate consideration for all such transactions does not exceed $100,000;

   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,

provided, however, that any sale of a Patient Record will only be made to a member in good standing of the Alberta Dental Association and College, unless otherwise approved

by this Court, and in the case of any sale notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 or any other similar legislation in any other province or territory shall not be required;

n) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing 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;

o) to conduct examinations, under oath of any person with knowledge of the affairs of the Debtors, if deemed necessary by the Receiver in its sole discretion;

p) to report to, meet with and discuss with such affected Persons (as defined below), including the Plaintiff, 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;

q) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of Alberta, or any other similar government authority, notwithstanding Section 191 of the *Land Titles Act*, RSA 2000, c. L-4, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as Receiver of the Debtors and not in its personal capacity;

r) 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 Debtors;

s) to contact, make necessary inquiries and obtain information pertaining to the Debtors from the Alberta Dental Association and College ("College"), the Alberta Ministry of Health and any of the Debtors past or present insurers;

t) to assign the Debtors or any of them into bankruptcy;

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

v) to retain for the unexpired term, assign, surrender, renegotiate, or terminate any lease or agreement related to the Property;

w) to collect the rents, profits and other receipts arising from the Property or any part thereof;

x) to exercise any shareholder, partnership, joint venture or other rights which any Debtors may have; and

y) 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, including the Debtors, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. (i) The Debtors, (ii) all of their respective current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, including, without limitation, Faissal Mouhamad and Fetoun Ahmad, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order, including the College, the Alberta Ministry of Health, and any past or present insurers of the Debtors (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 dependent on maintaining possession) to the Receiver upon the Receiver's request. Each of Dr. Faissal Mouhamad and Fetoun Ahmad, also known as Fetoun Ahmed, shall, to the fullest extent possible, cooperate with and assist the Receiver in relation to allowing the Receiver access to all Patient Records and, in relation thereto, shall give such consents, access numbers, passwords and PIN numbers as may be required to access any electronic or other information system in which Patient Records are housed or recorded. Further, each of Dr. Faissal Mouhamad or Dr. Ghalib Hadi, are hereby ordered to take steps to secure all Controlled Substances of the Debtors and any Controlled Substances located at the Debtors' premises and remain in possession of same in accordance with applicable law unless or until such time as one or more duly licensed and qualified individuals is engaged in respect of the Debtors in accordance with this Order to secure and take control of the Controlled Substances..

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 Debtors, 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 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.

7. In respect of Patient Records, the Receiver shall: (i) take all steps reasonably necessary to maintain the integrity of confidential information; (ii) if necessary, appoint one or more dentists licensed and qualified to practice in the Province of Alberta to act as a custodian ("**Custodian**", as defined in the Alberta *Health Information Act*) for the Patient Records; (iii) not allow anyone other than the Receiver, the Custodian or the individual whose information is the subject of the Patient Record to have access to the Patient Records; and (iv) allow the Debtors supervised access to the Patient Records for any purposes required pursuant to the Alberta *Health Professions Act* or other governing provincial or federal legislation, for the Debtors to adhere to applicable legal obligations.

8. Without the prior written consent of the Receiver, the Debtors are restrained from entering any of the Debtors' premises or in any way dealing with the Property, and from soliciting or contacting existing patients of the Debtors' dental practices, except as is required to comply with their duties as a licensed dentist and the requirements of this Order.

9. Without limitation, to the extent that Faisal Mouhamad or Fetoun Ahmad or any of them, have any Records in their personal possession, such Records shall not be destroyed, altered, deleted, or modified in any manner whatsoever by any Person and shall be preserved by the person in possession or control of such Records. Each of the aforementioned persons shall immediately deliver up any and all Records in each of their possession or control upon the request of the Receiver.

NO PROCEEDINGS AGAINST THE RECEIVER

10. 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. To the extent the Receiver is in possession or control of Patient Records, the Receiver will establish a process for the Receiver and the Custodian to respond to patient requests for copies of Patient Records, in accordance with the provisions of the Alberta *Health Information Act*.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

11. No Proceeding against or in respect of any 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 any 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 10; and (ii) affect a Regulatory Body's investigation in respect of any Debtor or an action, suit or proceeding that is taken in respect of any 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 OR REMEDIES

12. All rights and remedies of any Person, whether judicial or extra judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtors or the Receiver, or affecting the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued 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 that nothing in this Order shall:

    a) empower the Debtors to carry on any business that the Debtors are not lawfully entitled to carry on;

    b) prevent the filing of any registration to preserve or perfect a security interest;

    c) prevent the registration of a claim for lien; or

    d) exempt the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment.

13. Nothing in this Order shall prevent any party from taking an action against the Debtors where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Receiver at the first available opportunity.

NO INTERFERENCE WITH THE RECEIVER

14. No Person shall accelerate, suspend, 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 Debtors, except with the written consent of the Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an eligible financial contract (as defined in the BIA) from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

15. All persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with any Debtor, 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, suspending or terminating the supply of such goods or services as may be required by the Receiver or exercising any other remedy provided under such agreements or arrangements. The Receiver shall be entitled to the continued use of the Debtors' respective current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that

the usual prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with the payment practices of the Debtors, 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

16. 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

17. Subject to employees' rights to terminate their employment, all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on any 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**").

18. 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 Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

***HEALTH INFORMATION ACT* (ALBERTA)**

19. In accordance with the *Health Information Act*, RSA 2000 c H-5 ("**HIA**"), the Receiver shall only disclose personal health information to the Custodian and prospective bidders or purchasers who are potential successors to one or more dental practices of the Debtors (each a "**Practice**") as Custodians for the purposes of allowing potential successors to assess and evaluate the operations of the Practices. Each potential successor to whom such personal health information is disclosed will be required in advance to review and sign an acknowledgment of this Order indicating that Person agrees to keep the personal health information confidential and secure and not retain of the information longer than is necessary for the purposes of assessment or evaluation, and if such

potential successor does not complete a Sale, that Person will return all such information to the Receiver or destroy such information. The within acknowledgement shall be deemed to be an agreement between the Receiver and any potential successor to do all things required of such potential successor pursuant to the HIA and regulations thereunder.

LIMITATION ON ENVIRONMENTAL LIABILITIES

20. (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

21. 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

22. 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 the benefits of and are hereby granted a charge (the "**Receiver's Charge**") on the Property as security for their professional fees and disbursements incurred at the normal rates and charges of the Receiver and such counsel, 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, deemed 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) of the BIA.

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

24. 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

25. The Receiver is 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 $150,000 (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, deemed 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) of the BIA.

26. 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.

27. 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.

28. 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.

29. The Receiver shall be allowed to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

30. 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

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

32. 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. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

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

34. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction 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, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

35. The Receiver is 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.

36. The Plaintiff shall have its costs of this application, 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, including legal costs on a solicitor client full

indemnity basis, to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

37. 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.

WEBSITE

38. The Receiver shall establish and maintain a website in respect of these proceedings, as determined by the receiver (the "**Receiver's Website**") 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.

39. Subject to paragraph 41 of this Order, service of this Order shall be deemed good and sufficient by:

    a) serving the same on:

        i. the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

        ii. any other person served with notice of the application for this Order;

        iii. any other parties attending or represented at the application for this Order; and

    b) posting a copy of this Order on the Receiver's Website

    and service on any other person is hereby dispensed with.

40. Subject to paragraph 41 of this Order, service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

41. Upon any representative(s) of the Receiver attending at any premises of any of the Debtor, a representative of the Receiver shall provide to any senior management employee or representative of the Debtor (as determined in the discretion of the Receiver) a true unfiled copy of this Receivership Order endorsed by the Justice of the Court granting this Order, and service in this manner shall be deemed to be good and sufficient service of the Receivership Order on the Debtor.

42. Upon service of this Order as provided for in this Order, the Debtors shall grant to the Receiver, and any of its employee, agents, or representatives full unrestricted, unobstructed, and unfettered access to the property, the Business and the Records in accordance with this Order, and none of the Debtors, nor any of their shareholders, current or previous directors, officers, employees, or

anyone else acting on behalf of any of the Debtor shall interfere with, obstruct, deny access to, or otherwise impede the Receiver or its employees, agents or representatives, from lawfully carrying out any provision of this Order.

Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT _____

1. THIS IS TO CERTIFY that MNP Ltd., receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of Faissal Mouhamad Professional Corporation, 52 Dental Corporation, Delta Dental Corp., 985842 Alberta Ltd., Michael Dave Management Ltd., and 52 Wellness Centre Inc., 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 September, 2022 (the "**Order**") made in action number 2203 12557, 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 $150,000 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__.

MNP Ltd. solely in its capacity as Receiver of the Debtors (as defined in the Order), and not in its personal capacity

Per:_____
Name:
Title:

TAB 2

2011 ONSC 346, 2011 CarswellOnt 185, 73 C.B.R. (5th) 13

2011 ONSC 346
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Dedicated National Pharmacies Inc.

2011 CarswellOnt 185, 2011 ONSC 346, 73 C.B.R. (5th) 13

BANK OF MONTREAL (Applicant) and DEDICATED NATIONAL PHARMACIES INC., METHADRUG CLINIC LIMITED AND UNION MEDICAL PHARMACY INC. (Respondents) AND GRANT THORNTON LIMITED, IN ITS CAPACITY AS RECEIVER AND MANAGER OF DEDICATED NATIONAL PHARMACIES INC., METHADRUG CLINIC LIMITED AND UNION MEDICAL PHARMACY INC.

Marrocco J.

Heard: January 11, 2011
Judgment: January 17, 2011
Docket: CV-10-8852-00CL

Counsel: Jeff Carhart, Arthi Sambasivan for **Receiver**, Grant Thornton Limited
Orestes Pasparakis, V. Sinha for Public Access Defibrillation Inc.
Heath Whiteley for Bank of Montreal
David Chernos for 2141546 Ontario Limited
John Russo for Tolim Management Inc.
S. Brotman for Centric Health Corporation
M. Adilman for Rachel Diena, Joel Diena

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII **Receivers**
VII.6 Conduct and liability of **receiver**
VII.6.a General conduct of **receiver**
Debtors and creditors
VII **Receivers**
VII.8 Remuneration of **receiver**
VII.8.b Remuneration
VII.8.b.i General principles

Headnote

Debtors and creditors --- **Receivers** — Conduct and liability of **receiver** — General conduct of **receiver**
Credit facilities were made available to debtor company — M Ltd. and U Inc. were guarantors of debt — As result of application by bank to enforce its security, monitor was appointed to monitor all assets of debtor and guarantors — Monitor reported to court efforts by debtor to sell its assets; as result, monitor was appointed **receiver** of those companies — **Receiver** provided second report to court and moved for order **approving** its activities, interim statement of receipts and disbursements, and its counsel's **fees** and disbursements — **Receiver's** asset sale was **approved** and order was made sealing various confidential appendices that had been filed with court until asset sale was completed — Secured creditor of debtor and guarantors brought motion asking court to defer **approving** **receiver's** activities and accounts on basis that such

approval was premature — Motion granted — There should be short delay in deciding whether to **approve** activities of **receiver** and interim **fees** — Applications for **approval** of **receiver's** actions and **fees** should occur at **time** that makes sense, having regard to commercial realities of receivership — More appropriate **time** to consider **receiver's** conduct and payment of **fees** would be shortly after closing — This was not situation where closing was foregone conclusion; there were at least two contingencies which affected closing.

Debtors and creditors --- **Receivers** — Remuneration of **receiver** — Remuneration — General principles

MOTION by secured creditor to defer **approval** of **receiver's** activities and accounts.

***Marrocco J.*:**

1 On July 21, 2008, credit facilities were made available to Dedicated National Pharmacies Inc. by the Bank of Montreal. Methadrug Clinic Limited and Union Medical Pharmacy Inc. provided guarantees of the indebtedness of Dedicated National Pharmacies Inc. to the bank. The companies operated two traditional non-methadone dispensing pharmacies and twelve methadone-dispensing pharmacies in Ontario.

2 On August 17, 2010, as a result of an application by the bank to enforce its security, Grant Thornton Limited was appointed Monitor of all of the assets of Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc. Grant Thornton Limited retained counsel and, on August 30, 2010, reported to the court concerning efforts by Dedicated National Pharmacies Inc. to sell its assets. As a result of that report, on September 8, 2010, Grant Thornton Limited was appointed **Receiver** of those companies.

3 On December 15, 2010, the **Receiver** provided a second report to the court and moved for an order **approving** its activities, the interim statement of receipts and disbursements, as well as its own, and its counsel's, **fees** and disbursements. **Fees** for the **Receiver** and its counsel exceed $800,000 for the period ending December 12, 2010. The **Receiver** also sought an order **approving** the sale of assets of Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc. to Centric Health Corporation.

4 On January 11, 2011, I made an order **approving** the asset sale as set out in the agreement of purchase and sale between Centric Health Corporation and the **Receiver**, dated November 29, 2010. I also made an order sealing various confidential appendices that had been filed with the court until the asset sale was completed.

5 Public Access Defibrillation Inc., a secured creditor of Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc., as well as a member of the controlling shareholder group of those companies, asks that the court defer **approving** the **Receiver's** activities and accounts on the basis that such **approval** is premature.

6 In my view, there should be a short delay in deciding whether to **approve** the activities of the **Receiver** and the interim **fees** and disbursements of the **Receiver** and its counsel. My decision should not be taken as accepting directly, indirectly, expressly or by implication any of the criticisms of the **Receiver** which were expressed during the argument of this motion.

7 Applications for the **approval** of the **Receiver's** actions and **fees**, as well as the **fees** of its counsel, should occur at a **time** that makes sense, having regard to the commercial realities of the Receivership. In this case, the asset sale is expected to close by the end of January. A more appropriate **time** to consider the **Receiver's** conduct and the payment of **fees** would, thus, be shortly after the closing. If the transaction fails to close at the end of January, a new commercial reality will arise. The asset sale process will have to be repeated once again triggering a commercially sensible **time** to review the **Receiver's** actions and pay the **Receiver** and counsel.

8 This is not a situation where the closing of the asset purchase is a foregone conclusion. There are at least two contingencies which affect the closing.

9 First, there has to be the trial of an issue concerning the existence of a lease on a property located at 1678 Dufferin St.,

Toronto. If there is no long-term lease in existence, there will be an abatement of the purchase price. It is the intention of the **Receiver** that the trial of this issue takes place prior to the asset sale to Centric Health Corporation.

10 Second, Ontario Addiction Treatment Centres represents twenty-three pharmacy locations. The leases of those properties are important. Now that the asset purchase agreement with Centric Health Corporation has been **approved**, negotiation of the assignment agreements can proceed. While it does appear that both Ontario Addiction Treatment Centers and the **Receiver** have an interest in a successful negotiation, it is impossible to conclude that the assignment agreements will be successfully negotiated.

11 The status of counsel for Public Access Defibrillation Inc. requires a short comment. Counsel for Public Access Defibrillation Inc. cannot continue to act; counsel would have withdrawn before today were it not for the necessity to consider without delay **approval** of the asset purchase. Public Access Defibrillation Inc. is concerned about the decision of the **Receiver** to reject one of the asset purchase offers obtained during the sale process. It wants the opportunity to meet with the rejected Offeror before taking a position on the **Receiver's** motion to **approve** its activities and the payment of **fees**. It cannot meet with the rejected Offeror because all of the offering documents are sealed and because it entered into a confidentiality agreement concerning, amongst other things, those same documents. Once the asset purchase agreement closes, discussions between Public Access Defibrillation Inc. and the rejected Offeror may be possible. A short delay will ensure that Public Access Defibrillation Inc. is not disadvantaged because its counsel cannot continue to act.

12 If Public Access Defibrillation Inc., or any other party, is concerned that the sealing orders or confidentiality agreements will continue after the closing of the asset purchase to prevent a discussion with any rejected Offeror, then an application should be made to the court for relief from the order and the agreement. I decline to make such an order at this **time** because the asset purchase with Centric Health Corporation has not closed. In this regard, I wish to remind all the parties that Centric Health Corporation is a publicly-traded corporation and that the disclosure of any information to any third party should take place in a way which ensures that Centric Health Corporation complies with the applicable disclosure and other securities regulations and that the parties, having such discussions, do not inadvertently disclose information which has not been made available to the market.

13 Counsel for Public Access Defibrillation Inc. expressed concern about the treatment of the non-tangible assets of Methadrug Clinic Limited.

14 Home Street and Union 55 operate pharmacies. As a result of regulatory considerations, Home Street Pharmacy's and Union 55 Pharmacy's Ontario College of Pharmacists accreditations are being held by Dedicated National Pharmacies Inc. The **Receiver** has taken the view that the operating non-intangible assets of Home Street Pharmacy and Union 55, which include leases and accreditations, are the property of the debtor companies.

15 Apparently, the accreditation for Methadrug Clinic Limited is also held by Dedicated National Pharmacies Inc. It was counsel's view that the operating non-tangible assets of Methadrug Clinic Limited should also be regarded as assets of Dedicated National Pharmacies Inc. It was counsel's submission that the same process of allocation be used for Home Street, Union 55 and Methadrug Clinic Limited. It was counsel's view that this would become important upon distribution because certain creditors of Methadrug Clinic Limited are not creditors of Dedicated National Pharmacies Inc. The responsibility for the treatment of the non-tangible assets of Methadrug Clinic Limited at this point rests with the **Receiver**. I have chosen to incorporate counsel's view into my endorsement because counsel for Public Access Defibrillation Inc. will be withdrawing from this matter and the position of Public Access Defibrillation Inc. at the hearing before me was clear on this issue.

Motion granted.

End of Document

TAB 3

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

In the Matter of the Companies' Creditors Arrangement Act R. S. C. 1985, c.C - 36, as amended

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system —

Appropriate remedy was to reduce fees by amount associated with preparation of report.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

Afton Food Group Ltd., Re (2006), 18 B.L.R. (4th) 34, 2006 CarswellOnt 3002, 21 C.B.R. (5th) 102 (Ont. S.C.J.) — followed

Agristar Inc., Re (2005), 2005 ABQB 431, 2005 CarswellAlta 841, 12 C.B.R. (5th) 1 (Alta. Q.B.) — considered

Bank of Montreal v. Nican Trading Co. (1990), 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397, 43 B.C.L.R. (2d) 315 (B.C. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

Columbia Trust Co. v. Coopers & Lybrand Ltd. (1986), 76 A.R. 303, 49 Alta. L.R. (2d) 93, 1986 CarswellAlta 259 (Alta. C.A.) — followed

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 8 C.B.R. (5th) 34, 2005 SKQB 24, 2005 CarswellSask 22 (Sask. Q.B.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 68, 2005 SKQB 252, 2005 CarswellSask 410 (Sask. Q.B.) — referred to

Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd. (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — considered

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — considered

Hess, Re (1977), 23 C.B.R. (N.S.) 215, 1977 CarswellOnt 68 (Ont. S.C.) — followed

Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — considered

Nelson, Re (2006), 2006 CarswellOnt 4198, 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — referred to

Northland Bank v. G.I.C. Industries Ltd. (1986), 1986 CarswellAlta 426, 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, 73 A.R. 372, [1986] 4 W.W.R. 482 (Alta. Master) — considered

Peat Marwick Ltd. v. Farmstart (1983), 1983 CarswellSask 66, [1984] 1 W.W.R. 665, 30 Sask. R. 31, 51 C.B.R. (N.S.) 127 (Sask. Q.B.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1980), 1980 CarswellSask 25, 35 C.B.R. (N.S.) 312 (Sask. Q.B.) — referred to

Sally Creek Environs Corp., Re (2010), (sub nom. *Sally Creek Environs Corp. (Bankrupt), Re)* 261 O.A.C. 199, 2010 CarswellOnt 2634, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) — distinguished

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42 (N.B. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

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

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

843504 Alberta Ltd., Re (2003), 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306, 351 A.R. 222, 2003 CarswellAlta 1786, 2003 ABQB 1015 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 13.5 [en. 1992, c. 27, s. 9(1)] — considered

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

s. 23 — considered

s. 23(1)(h) — considered

s. 23(1)(i) — considered

s. 25 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 34 — considered

R. 35-53 — referred to

R. 39 — considered

R. 44 — considered

Regulations considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Companies' Creditors Arrangement Regulations, SOR/2009-219

s. 7 — referred to

APPLICATION by monitor for approval of fees.

***J.E. Topolniski J.*:**

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

> (i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);
>
> (ii) duplication;
>
> (iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);
>
> (iv) mathematical errors ($47,979.39); and
>
> (v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

> (i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;
>
> (ii) HSBC would be unaffected by the *CCAA* proceedings;
>
> (iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and
>
> (iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...
>
> ...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the

> degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat, Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were

prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

65 The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

66 At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

> (1) the bank appoints a receiver for all companies on September 7, 2010;
>
> (2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

> 1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.
>
> 2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.
>
> 3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:
>
> > (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

(b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

> 25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

> (a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).
>
> (b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).
>
> (c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

> ... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.
>
> [Emphasis added.]

88 Clause 30 of the Initial Order states:

> The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information

> disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

> (i) assume that the parties carefully drafted the terms of the order;
>
> (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
>
> (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd.*

Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be

confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed *CCAA* monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

127 In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

• +

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.

End of Document

TAB 4

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

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses
Debtor was placed into receivership — Number of pieces of equipment were sold in auction, monitor applied for approval to apportion its **costs** among all creditors on pro rata basis — CWB bank was secured lender that held first priority claim and BDC was secured creditor that held second priority claim over much of debtor's assets — Pursuant to court order, any lender or lessor who wished to remove equipment subject to its security from auction was permitted to do so upon paying monitor deposit on account of any portion of **allocated** **costs** it was found liable to pay — Two banks supported proposed

distribution, bank CWB was likely to recover entire indebtedness whereas BDC anticipated shortfall — Monitor brought application for approval to deduct **allocated costs** due from each creditor from sale proceeds of equipment upon which that creditor had charge, where creditor removed equipment deposit paid to monitor would be applied to its share of **allocated costs**, and where deposit was inadequate to cover its share then judgment against that creditor for shortfall — Application granted — Argument that **costs** be **allocated** based on proportion of debt owed to each creditor to total debt owed by debtor was rejected as it would result in creditor who would receive least from auction bearing greatest portion of **costs** — Monitor granted judgment against GE for amounts owed, court in Companies' Creditors Arrangement Act proceeding has ability to deal with assets, debt and **costs** incurred in that proceeding including right to grant judgment against party which it determines liable to contribute to those **costs** — Fairness did not require that two banks bear more than their pro rata share of **allocated costs**, plan did impose pro rata contribution on CWB but it would ultimately be indemnified because its security gave it first charge for such recovery, however, BDC would bear ultimate **cost** because it held second-in-line security — Fact that CWB would be indemnified in full was because it had enough security to protect it for its entire exposure while others did not — JPL, true lessor of equipment, was exempted from contributing to **allocated costs** as there were true leases in sense that parties always intended leased equipment would be returned to JPL — Restructuring attempt did not benefit JPL and JPL did not receive uninterrupted flow of lease payments — Wages payable to debtor's principals were incurred prior to granting of receivership order and on account of work done while monitor was in place, funds ordered to be withheld from distribution of auction proceeds.

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.