2010 Update on Insolvency Law in Alberta

Prepared by
Patricia Quinton-Campbell
with assistance from Craig O. Alcock, Student–at-law

Sixth Annual Pan-Canadian Insolvency and Restructuring Law Conference
9/13/2010
Westin Montreal
Montreal, Quebec

BURNET, DUCKWORTH & PALMER LLP
CALGARY, ALBERTA

Introduction

The September 2009 amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"), and *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. C-36 ("**CCAA**") have yet to receive significant consideration by the courts in Alberta. Notwithstanding the limited jurisprudence on the newly enacted provisions of September 2009, the temperature of the economic climate of the past two years has turned up the heat on debtors and put a number of cases before the courts.

Included for your consideration are eight Alberta cases. The first three cases deal with personal bankruptcy. The first, *Re Mutter,* is noteworthy for the results-based approach taken by the court. The second, *Re Nielsen*, is an interesting historical and inter-jurisdictional analysis of the current "seize or sue" provisions of the Alberta *Law of Property Act,* and provides an illustration of the flexibility available to a secured creditor under the present statutory regime. In the third case, *Decker Estate v. Canada (Superintendant of Bankruptcy)* the Alberta Court of Appeal overturns a 2008 decision that stood for the principle that provincial limitations periods begin to run anew when the trustee in bankruptcy is discharged and the bankrupt is not. In the Fourth case, the court decided on public policy grounds to continue the interim receivership of a private healthcare facility in *Alberta Health Services v. Networc Health Inc.* In the fifth case, *Re BA Energy Inc*, the Alberta Court of Queen's Bench considered the entitlement of a party to file a late amended claim which changed the characterization of the claim from fully secured, to a large portion of its claim being unsecured. The seventh case addresses the issue of the payment of the levy pursuant to s. 147 of the BIA on certain payments made by a Trustee also acting as an Agent for a secured creditor. In *Re JED Oil Inc* the Court reviewed whether the dividend claims of preferred shareholders were debt so as be to included in the class of Unsecured Creditors and receive a distribution under a Plan, or whether they were equity so as to be excluded. Lastly, in *Re Respec Oilfield Services* the court addresses the allocation of costs among the various creditors in a failed CCAA.

I. *Re Mutter*, 2009 ABQB 28, aff'd by 2010 ABQB 312

This case is notable for its results-based approach at each level of court. Both the Registrar and the Justice on appeal go to great lengths to support the conclusion that public policy ought to carry the day for the debtor.

A. Decision of the Registrar (January 16, 2009)

The house of an un-discharged debtor was sold pursuant to court order. An application was brought by the trustee for direction with respect to the distribution of the proceeds of sale. The Minister of National Revenue ("**MNR**") had sought to recover post-bankruptcy tax debts owed by the Debtor under the *Income*

Tax Act, R.S.C., 1985, c. 1 (5th Supp.) ("**ITA**") and *Excise Tax Act,* R.S.C. 1985, c. E-15 ("**ETA**"), totalling $52,344.20 (the "**Tax Debts**"). In an effort to collect on the outstanding Tax Debts, the MNR issued Requirements To Pay ("**RTP**") under the garnishment provisions found at s. 224(1) of the ITA and s. 317(3) of the ETA. These RTPs were issued to both the Trust Company and the trustee in his personal capacity. The RTPs were issued based on the MNR's characterization of the potential transfer of sale proceeds as a "payment" within the meaning of the ITA and ETA. The provisions relied upon are set out as follows:

> ITA 224.(1) Garnishment
>
> Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections (1.1) and (3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.
>
> ETA 317.(3) Garnishment
>
> Despite any other provision of this Part, any other enactment of Canada other than the Bankruptcy and Insolvency Act, any enactment of a province or any law, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment.
>
> (a) to a tax debtor, or.
>
> (b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor.
>
> the Minister may, by notice in writing, require the particular person to pay without delay, if the moneys are payable immediately, and in any other case as and when the moneys become payable, the moneys

> otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under this Part, and on receipt of that notice by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, despite any security interest in those moneys, become the property of Her Majesty in right of Canada to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

The MNR adopted the position that the RTPs should attach to the sale proceeds despite the $40,000.00 principle residence exemption in place under the Alberta *Civil Enforcement Act*, R.S.A. 2000, c. C-15 ("**CEA**"). The justification for this stand was that the principle of paramountcy applied to allow the Crown to circumvent the principle residence exemption in the CEA. The MNR also took the position that the Federal Court Rules allowed the enforcement of a tax debt by way of garnishment if a certificate was first filed in the federal court pursuant to the ITA.

The first issue was whether the bankrupt was entitled to the $40,000.00 exemption amount, or whether the amount was payable to the MNR pursuant to the garnishment provisions of the ITA and ETA.

Registrar Alberstat canvassed the authorities to determine the purpose of debtor's exemptions and found support for the proposition that the debtor's exemption is an "important component of the ... purpose of the bankruptcy system, that is, allowing the Debtor to remain a viable economic unit" (para. 15). As part of the policy behind debtor's exemptions, Registrar Alberstat noted a number of authorities. Taking these together, he found that it is in the interest of society that the maintenance of the debtor not fall on society. This would result in a net asset transfer from the public purse to creditors. Recovery should be assisted, in that the debtor should be protected from economic and social destruction.

It is clear that Registrar Alberstat was primarily concerned with the public policy rationale behind insolvency law, and to a lesser extent the interpretation of insolvency statutes. Having found a public policy justification for the principle residence exemption under the CEA, Registrar Albertstat then needed to find legislative support to allow the exemption to stand despite the operation of the provisions of the ITA and ETA. The wording of s. 4.1 of the BIA makes it clear that the BIA is binding on the MNR. The BIA also prohibits the distribution of a debtor's property that is exempt from execution under provincial law (in this case the CEA allows an exemption of $40,000.00 for the debtor's principal residence). Based on this, Registrar Alberstat concluded that the MNR should respect the $40,000.00 exemption and not

interfere with the debtor's entitlement to the principle residence exemption. This conclusion was bolstered by the finding that the MNR falls under the definition of creditor at s. 2 of the BIA, therefore the Tax Debts also falls within the scope of s. 121(3) of the BIA, thereby preventing the MNR as creditor from taking any action against the debtor.

The second issue was whether the Trustee's intent of remitting the $40,000 exemption to the Debtor is a "payment" as contemplated by the ITA, s. 224(1), and the ETA, s. 317(3).

Registrar Alberstat declined to find that a payment would occur on these facts. He reasoned that since the bankrupt had lost the ability to deal with his finances by virtue of the fact that he had assigned himself into bankruptcy, and that all his property had automatically vested in the trustee, the debtor still owned the property even though it was in the hands of the trustee. As the BIA directs that exemption amounts are not to be distributed to creditors, it follows that the debtor is able to once again deal with the exempt amount as property once the exemptions are severed from the amounts payable to creditors.

In the result, the debtor was entitled to the $40,000.00. The Registrar stated at para 37:

> I find that the above analysis which addresses the Debtor's situation as an un-discharged bankrupt and the limitations this situation has on the Minister's ability to garnish the $40,000 exemption amount is sufficient to dispose of the matter. However, I find the Minister's suggestion that the Debtor's exemption can be circumvented by using garnishment provisions of the ITA and the ETA troubling. This would enable the Minister to take all the Debtor's possession, leaving him destitute and falling on the care of the state.

Thus, the debtor was entitled to the $40,000.00 for public policy reasons.

B. Appeal to a Justice of the Court of Queen's Bench **(May 6, 2010)**

This case was affirmed on appeal by the Honourable Mr. Justice S. LoVecchio in March, 2010. There were two issues on appeal. First, how should the funds derived from the sale of the principal residence of the bankrupt be viewed? The second issue was a matter of statutory interpretation.

On the first issue, the court agreed with Registrar Alberstat that the transfer of the $40,000 exemption from the proceeds of sale was not a payment within the meaning of s.224(1) of the ITA or s.317(3) of the ETA:

> 16 The Registrar concluded that the obligation of the Trustee to deliver the proceeds from the sale to Mr. Mutter should not be seen as a "payment" as contemplated by the federal tax provisions at issue. In particular, the Registrar found that although Mr. Mutter had lost his ability to deal with his property, the property still remained his, even when in the hands of the Trustee. As the exemption amount was always the property of Mr. Mutter, once this amount was severed from those amounts payable to Mr. Mutter's creditors, Mr. Mutter regained the ability to deal with this property. Therefore, although the Trustee must transfer the funds to give complete control over the property back to Mr. Mutter, this was not the type of "payment" contemplated by the federal tax provisions. As such, there was no legal foundation for the RTP.

On the second issue, the court examined the proper interpretation of the ITA and ETA sections at the centre of the dispute.

Section 224(1) of the ITA is silent about being subject to the BIA, but s. 317(3) of the ETA is specifically subject to the BIA. Regarding s. 317(3) of the ETA, Justice LoVecchio held that since s. 317(3) of the ETA is expressly subject to the BIA, it is also subject to the exemptions under s.67(1)(b) of the BIA. Thus the RTPs issued under the ETA are not supported by law.

The more problematic aspect of Justice LoVecchio's decision is the analysis of s. 224(1) of the ITA. The BIA is not mentioned in the subject provision of the ITA:

> 31 The more difficult issue in the present case relates to s. 224(1) of the *ITA*. As Parliament has not referred to the *BIA* in s. 224(1) of the *ITA*, this provision is not consistent with other provisions of the *ITA* and *ETA* where Parliament has explicitly done so.
>
> 32 For example, s. 224(1.2) of the *ITA* states that it operates "[n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* ...". Conversely, s. 317(3) of the *ETA* discussed above states that it operates "[d]espite any other provision of this Part, any other enactment of Canada other than the *Bankruptcy and Insolvency Act* ...". These are two examples of federal provisions where Parliament's

> intention on making one provision "subject to" or operate "notwithstanding" another federal provision is clear.
>
> 33 Section 224(1) of the *ITA* has neither set of words.

Justice LoVecchio recognised that the MNR should be zealous in collecting tax debts, but decided that the policy of leaving a small financial stake with a bankrupt should prevail. To make the policy work he held, at paragraph 40:

> Reading "subject to the *BIA*" into s. 224(1) of the *ITA* makes this provision more consistent with other exemption provisions and the policy behind the exemption itself and in my view is what Parliament intended.

The public policy justification to allowing the $40,000.00 exemption was bolstered by Justice LoVecchio's decision on the proper method of statutory interpretation to apply to the ITA. The Registrar's decision was confirmed and the Trustee was directed to remit the $40,000.00 to the debtor.

It remains to be seen whether this case will stand up to further scrutiny. A notice of appeal was filed the week after the release of Justice LoVecchio's decision.

II. ***Re Nielson,* 2010 ABQB 464 (July 7, 2010)**

An application described as "an issue not considered in Alberta in many years," was brought before Registrar J.B. Hanebury. The relevant facts were as follows:

> 4 On September 10, 2007, Randy Nielsen entered into a Sales Finance Contract with Gateway Toyota, to purchase a vehicle. Gateway Toyota assigned the contract to the Toronto Dominion Bank on the same day. Notice of the agreement was provided to the Canadian Securities Registration System a week later for registration and the Bank perfected its purchase money security interest.
>
> 5 On July 8, 2009, The Bank commenced an action in the Court of Queen's Bench against Nielsen to recover the amount owing under the agreement and obtained default judgment for $27,509.37 plus interest.

> 6 In November, 2009, Mr. Nielsen assigned himself into bankruptcy. The Bank claimed an interest in the vehicle as a secured creditor and the trustee, Meyers Norris Penny, disallowed the claim. The Bank appealed that disallowance.

At issue was the effect of the seize or sue provisions of the *Law of Property Act* R.S.A. 2000 c. L-7 ("**LPA**"), on the ability of a secured creditor to maintain its security. More specifically, did the Bank's security interest in the vehicle remain after it commenced an action and obtained a judgment for the amount outstanding?

The start point in determining whether the Bank had a secured interest that could be recognised under the BIA is in the LPA. Subsections 53(1) to (3) of the LPA state:

> (1) A secured party may enforce the secured party's right to recover the purchase price owing to the secured party under a purchase-money security agreement or related agreement either
>
> > (a) by proceeding as provided in subsection (4), or
> >
> > (b) by action for a judgment against the debtor.
>
> (2) If the secured party elects to enforce the secured party's purchase-money security interest and the goods are seized, no action is maintainable for the purchase price of the goods or any part of it, notwithstanding anything to the contrary in any Act or in any agreement between the secured party and the debtor.
>
> (3) If the secured party elects to bring an action against the debtor and recovers a judgment for the money owing, then if the goods in respect of which that money is owing are seized under a writ of enforcement issued pursuant to that judgment,
>
> > (a) the secured party's rights are restricted to the amount realized from the sale of those goods, and

(b) the judgment, to the extent that it is based on the purchase price of those goods, and the taxed costs, is deemed to be fully paid and satisfied.

(4) When goods that are collateral under a purchase-money security agreement

....

(c) are seized pursuant to the purchase-money security agreement or Part of the Personal Property Security Act and are disposed of, or

(d) are retained by a secured party in accordance with section 62 of the Personal Property Security Act,

the indebtedness of the debtor under the purchase-money security agreement, to the extent that it relates to all or part of the purchase price of some or all of the goods, is extinguished, and any money subsequently paid in respect of the purchase price is recoverable by action against the secured party.

[emphasis added]

The Registrar found assistance in *Butler v. Traders Finance Corp.,* (1964) 47 D.L.R. (2d) 260 (Alta. S.C.), a case that interpreted the effect of similar provisions of the *Conditional Sales Act* R.S.A. 1955 c. 54, which "provided that a creditor under a conditional sales agreement could seize the goods or "elect to bring an action against the purchaser for the purchase price ...". Subsections 19(1), (2) and (3) of the old *Conditional Sales Act* provided:

(1) When any goods or chattels are hereafter sold and after the delivery the vendor has a lien on them for all or part of the purchase price, the vendor's right to recover the unpaid purchase money, if he seizes or causes the said goods or chattels or a portion thereof to be seized under a conditional sale agreement, is restricted to his lien on the goods or chattels and his right to repossession and sale thereof, in which case no action is

> maintainable for the purchase price or any part thereof notwithstanding anything to the contrary in any other Act or in an agreement or contract between the vendor and the purchaser.
>
> (2) Instead of seizing or causing to be seized the goods or chattels or any of them under the provisions of the conditional sale agreement, the vendor may elect to bring an action against the purchaser for the purchase price or part thereof of any of the goods or chattels so sold.
>
> (3) If the said goods or chattels or any of them are seized under an execution issued pursuant to a judgment obtained in the said action, then the vendor's right to recover under the said judgment in so far as it is based on the purchase price of the goods or chattels is restricted to the amount realized from the sale of the said goods or chattels so seized and the said judgment, to the extent that it is based upon the purchase price of the said goods or chattels and the taxed costs, shall be deemed to be full paid and satisfied.
>
> [emphasis added]

The court in *Butler* held that a creditor's security interest is still valid even if it commences proceedings to recover the amount of the purchase price, and is not lost, nor were remedies restricted until the asset was distrained or seized.

The provisions that the Butler case was decided on were moved to the LPA in 1980. Registrar Hanebury noted at para 36 that "[g]enerally, a legislature is presumed not to depart from prevailing law without expressing its intentions to do so with irresistible clearness". With that premise in mind, she stated:

> 37 The goal and purpose of the provisions in issue is to ensure that debtors don't lose the goods they purchased and have a debt for the outstanding balance. Therefore, creditors, should they choose to seize, cannot recover anything further. That original purpose, found in the early versions of the legislation, does not appear to have changed over the intervening decades....

In the result, Registrar Hanebury found that if the legislature had wanted to extinguish a security interest on judgment being granted, it would have expressly done so, as was done by express language in the statutes of other jurisdictions. For example, in British Columbia an action by the secured party to recover debt extinguishes the security interest. In Manitoba a creditor may enforce an outstanding balance by seizing *or* suing. In the Northwest Territory a lien on goods is extinguished by a judgement, and in Saskatchewan the rights of a creditor are limited to seizure and sale of the goods subject to the lien. Further, s. 55(8) of the Alberta *Personal Property Security Act* specifically provides that the security interest does not merge in the judgment. Consequently, Registrar Hanebury found that the Bank's security interest was not lost by reason of the judgment.

The decision confirmed that the Bank was entitled to claim as a secured creditor on the bankruptcy. This gave the trustee the choice to either pay the Bank's claim and keep the asset, or release the asset to the Bank for disposal. If the bank chose to accept the asset, it would do so in full satisfaction of the debt and have no further claim in the bankruptcy.

III. ***Decker Estate v. Canada (Superintendent of Bankruptcy),*** **2010 ABCA 189 (June 17, 2010)**

The Alberta Court of Appeal dealt with the situation that arises when the trustee in bankruptcy is discharged, but the bankrupt is not. In such a situation an administrative gap develops between the date of the trustee's discharge and re-appointment, or appointment of a successor trustee, to complete the administration of the estate. The debtor remains un-discharged during the administrative gap.

In the *Decker Estate* case the bankrupt made a voluntary assignment into bankruptcy in May 1996. His application for discharge was adjourned *sine die* in February 1997. Various proofs of claim were allowed and a distribution was made to creditors in January 1998. The Trustee was subsequently discharged in October 1998, but the bankrupt was not. One of the creditors took action against the bankrupt after the Trustee's discharge resulting in a garnishment of wages. The bankrupt then sought assistance from the Trustee who was re-appointed after a period of ten years. After reappointment, the Trustee realized additional funds in the bankrupt's estate and a dividend was available for distribution to eligible creditors.

The issue that arises in this situation is whether creditors who have proven their claims at the outset of bankruptcy are able to partake in the distribution of the bankrupt's estate if the relevant provincial limitation period has expired and the creditor has not initiated a civil claim during the intervening period.

In considering this question, the Chambers Judge applied *Re Dyrland*, 2008 ABQB 356, which held that following the discharge of the Trustee the provincial limitation period begins to run against a creditor who

may then lose its eligibility to share in a distribution of the estate if timely action is not taken against the bankrupt during the administrative gap. The Chambers Judge directed that the Trustee only distribute funds to those creditors whose claims had not been barred by the limitation period.

On Appeal the Court of Appeal took the opportunity to examine the reasoning in the *Dryland* case, noting that in *Dyrland* the court decided that discharging the trustee and lifting the stay had the effect of re-starting the limitations clock because discharge removes a claim from bankruptcy and places it back into the provincial debt collection system to which limitation periods apply. The Court of Appeal found that this line of reasoning could not stand as the Trustee's determination of the validity of claims is final and conclusive pursuant to s. 135(4) of the BIA, and the effect of s. 121 of the BIA is to fix the date of bankruptcy as the point at which the validity of a creditors claim is to be determined. As the validity of the claim is determined under a Federal Act, the "Provincial limitations cannot erode rights given to a creditor with a proven claim under the federal Act which constitutes a complete code for the distribution of a bankrupt's estate."

The impact of the incorrect decision in *Dyrland* was summed up as follows:

> 33 In short, the validity of a claim must be assessed as of the date of bankruptcy. Following that, if subsequent circumstances (such as payment being received) affect the amount of claim, then it should be revised. Such a revision is not contrary to the requirement that validation is determined by reference to the date that the bankrupt became bankrupt.
>
> 34 *Dyrland* implicitly substitutes a new date for determining the validity of the claims - the date of the trustee's discharge or trustee's reinstatement. If this is correct, it would require a trustee to go through a second adjudication process to determine which claims are valid following the gap. Presumably, this would involve a further set of Proofs of Claim, and the gathering of information to revalidate a claim formerly proven at the outset of the bankruptcy. Nothing in the *Act* contemplates or provides for such a second validation process, and to imply the need for such a process is inconsistent with section 121, which requires a trustee to look at whether a claim is provable on the date of the bankruptcy.

At the end of the day, the Alberta Court of Appeal held that *Dyrland* was incorrectly decided. The effect of a situation in which the trustee is discharged, but the bankrupt is not, is simply a hiatus in the administration of the estate.

IV. *Alberta Health Services v. Networc Health Inc.,* 2010 ABQB 373 (June 1, 2010)

Alberta Health Services ("**AHS**") applied for, and was granted, the appointment of an interim receiver of Networc Health Inc. ("**Networc**") on May 3, 2010. On May 11, 2010 it sought to continue the receivership. Various parties opposed the applications and brought various counter-applications. The Honourable Madame Justice B. Romaine ultimately continued the interim receivership order.

Networc operated a non-hospital surgical facility under the name Health Resource Centre in Calgary. Networc and AHS were parties to an agreement whereby Networc would provide certain surgical services to the public in Alberta, the costs of which were covered by AHS. Networc also provided surgeries for the Alberta Worker's Compensation Board and some out-of-province health insurers. The agreement between Networc and AHS contained an expiry date of March 31, 2012 and provided for a maximum annual number of procedures to be performed by Networc but did not provide for any guaranteed minimum number of procedures.

The Cambrian Group applied for a bankruptcy order against Networc based on a perceived inability of Networc to satisfy its lease obligations and on an alleged admission of that inability. Since AHS's interest was in maintaining the availability of health services, AHS applied for the appointment of the interim receiver under s.46(1) of the BIA, and a stay of the bankruptcy proceedings. AHS also relied on s.13(2) of the Alberta *Judicature Act,* RSA 2000, c. J-2 which allows for the appointment of a receiver where the Court finds that it is "just and reasonable". AHS submitted that it had standing to bring the application as it was a contingent creditor in that it had filed a statement of claim alleging that Networc had breached the agreement with it. The Cambrian Group opposed the AHS application and sought an adjournment. The Honourable Madame Justice B. Romaine granted a one week adjournment of the application to stay the application for a bankruptcy order, appointed an interim receiver, directed Networc to file an Affidavit in response to the Cambrian Group's bankruptcy application, and put the issue of the continuation of the interim receiver over to May 11, 2010.

During the one week adjournment of the proceedings, AHS became a secured creditor by acquiring CIBC's interest in Networc's secured borrowing facilities.

On the hearing of the application one of the first issues was whether AHS had standing to apply for the appointment of the interim receivership under s. 46 of the BIA or s. 13(2) of the *Judicature Act*. The court held that while an application under either of those sections is usually made by a creditor, there is no requirement in either section that the application must be made by a creditor. Justice Romaine found that it is neither necessary nor advisable to impose a limitation that is not found in the legislation. Consequently, while AHS originally submitted it had status to bring the original application as a contingent creditor such standing is not required and the question of whether or not AHS was a contingent creditor did not determine the issue. The primary interest of AHS was to ensure the maintenance of health services for Albertans. Coupled with the concern that a closure of the Networc facility would disrupt surgical schedules and leave physicians without operating theatres, the court found strong public policy considerations for appointing the interim receiver.

In addressing s. 46 of the BIA Justice Romaine noted that s. 46 has long provided for the appointment of an interim receiver where an application for a bankruptcy order has been filed if the court is satisfied that such appointment is necessary for the protection of the estate of a debtor, and an undertaking with respect to damages is provided by the applicant. The appointment of an interim receiver under s. 46 is for conservatory purposes and is limited specifically by s. 46(2) such that the interim receiver cannot unduly interfere with the debtor except to the extent necessary for such conservatory purposes or to comply with the order of appointment. Justice Romaine noted that s. 13(2) of the *Judicature Act* does not require even the prerequisite of the filing of an application for bankruptcy, nor does it appear to limit the scope of powers of a receiver appointed under this section, requiring only that it must appear to the court to be "just and convenient that the order be made". Justice Romaine went on to note that the requirements set out in the authorities with respect to interim receiverships, both under the BIA and the *Judicature Act*, serve as a curb on the inappropriate or overly-broad use of the remedy.

The focus of the case law interpreting s. 46 of the BIA is on protecting the debtor against unwarranted intrusion from petitioning creditors. The applicant has to establish that:

a) on the balance of probabilities, the creditor petitioning the debtor into bankruptcy (in this case the Cambrian Group), is likely to succeed in obtaining a receiving order in bankruptcy, and

b) there is an immediate need for the protection of the debtor's estate.

In this case AHS provided evidence as to the immediate need for the protection of Networc's estate and submitted that if the bankruptcy occurred, a trustee would face obstacles to the continuance of Networc's

operations arising from the specialized nature of the services being provided and the legislation surrounding those services. The obstacles identified included exposure to liability, problems arising from the agreement between Networc and AHS which was not assignable without the consent of AHS, and the dearth of potential assignees that could be properly be designated and accredited to run the facility.

As AHS had acquired the status of secured creditor during the adjournment the issue of its status under ss. 46 and 13(2) became moot. While it could have substituted its original application for one brought under s.47, or the newly enacted s.243 (formerly s. 47(2)) of the BIA there were concerns with doing so. The primary concern was that if AHS had terminated its existing application and then commenced a new one it would have given rise to a perceived interruption to the stay of proceedings, or possibly even created two estates. Justice Romaine found that forcing a termination and re-commencement under different provisions would have foisted unnecessary costs on the taxpayers and perhaps resulted in interrupted health services. Based on the strong public policy issues related to continued provision of health services at the Networc facility, and the irreparable harm that may arise if the existing application was terminated, the application to continue the receivership was granted.

Justice Romaine then dealt with the Cambrian Group's application for a bankruptcy order against Networc. During the one week adjournment, the Cambrian Group and Networc agreed that the Cambrian Group would withdraw its application for a bankruptcy order on the basis of no costs payable by either party. AHS opposed the Cambrian group's application for leave to withdraw the application for a bankruptcy order. Justice Romaine noted that if there was no bankruptcy application, the ability of the court to grant an interim receiver under s. 46 of the BIA may not exist. She further noted that s. 43(14) of the BIA required leave of the court to withdraw a bankruptcy application and that in order for leave to be granted two conditions must be met. Those two conditions are that the debtor must be shown to be solvent and it must be shown that there will be no prejudice to other creditors as a result of the withdrawal.

Justice Romaine found that the Cambrian Group had not provided evidence that Networc was solvent or that other creditors would not be prejudiced. She found that to allow the withdrawal would undermine the integrity of the process and would force AHS to additional expense that would likely be borne by taxpayers. Consequently, the application to withdraw the application for a bankruptcy order was denied.

In addition to the above applications Networc's landlord, Healthcare Property Holdings Ltd. (the "Landlord"), brought an application returnable on May 11, 2010, requiring the interim receiver to

personally affirm and adopt the remainder of the lease with Networc or to abandon the premises or to allow the Landlord to terminate the lease

In addressing that application, Justice Romaine stated that as a general rule, in a receivership, a tenant's interest in a lease does not rest with the receiver but remains in the name of the debtor. In a court-appointed receivership, the receiver is not bound by the debtor's existing contracts, nor is it personally liable for the performance of those contracts. If the receiver occupies the premises, it may be liable for occupation rent, but that was not the situation in this case given the Receiver's limited role. Nevertheless, AHS agreed to pay the rent due and owing during the course of the receivership and assured the landlord that rent would be paid until at least January 31, 2011.

Justice Romaine found that there was no requirement in all cases, particularly in the circumstances such as this with the limited powers of the receiver, that a receiver must affirm or disclaim a contract previously entered into by a debtor. She also found that "[a]llowing the Landlord to terminate the lease and evict Networc would certainly destroy the purpose of this receivership: to ensure that surgical services provided by Networc to the public in Alberta are not interrupted". Given the strong public policy issues, the fact that rent would continue to be paid for at least a portion of the receivership and that the landlord was only prejudiced by a delay in its ability to enforce its rights under the lease, Justice Romaine declined to lift the stay to allow the termination of the lease. The Landlord's application to compel the receiver to affirm or disclaim the lease was dismissed.

Were it not for the strong public policy considerations at play in this case, the outcome may well have been different on a number of the applications.

V. ***Re BA Energy Inc.*** **(2010) ABQB 507 (Alta. Q.B.) (August 5, 2010)**

In *Re BA Energy Inc*, the Alberta Court of Queen's Bench considered the entitlement of a party to file a late amended claim. The issue was whether Dresser-Rand Canada, Inc. ("**DR**"), having initially filed a claim which it characterized as fully secured, was entitled to file a late amended claim alleging that a large portion of its claim was unsecured.

In December 2008 BA Energy Inc. ("**BA Energy**") applied for protection under the CCAA. In accordance with the established Claims Process DR filed a Proof of Claim on May 15, 2009. DR was owed US $1.6 million in relation to a US $8.5 million agreement for sale for a compressor and ancillary equipment. The Proof of Claim filed by DR identified the amount owing to it as a secured claim of US $1.6 million and identified that DR held assets of BA Energy valued at US $1.6 million (i.e. the

compressor). A subsequent Proof of Claim was submitted by DR for $1.65 million but again the claim was characterized as secured and again it was stated that DR held assets of BA Energy valued at US $1.6 million.

Through various communications between the Monitor and counsel for DR from December 2009 through March 2010, DR maintained the secured characterization of its claim. On March 15, 2010, BA Energy served its notice of motion for approval to circulate a plan of arrangement and to hold a meeting of creditors. DR was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

On March 26, 2010, DR submitted a late amended proof of claim in which it stated that it had an unsecured claim of US $1.47 million and a secured claim of US $177,382. On April 5, 2010, the Monitor issued a notice of revision with a revised claim amount of zero, citing a variety of reasons for the disallowance, including:

(1) that the claim had been previously reviewed and set at zero since DR had acknowledged that it held equipment of a value equal to its secured claim - which acknowledgement was relied on by BA Energy and the Monitor in calculating the dividend in the plan of arrangement filed March 10, 2010

(2) that the late filed claim was barred pursuant to the Claims Procedure Order,

(3) that the inclusion of the late amended claim would significantly affect the calculations contained in the plan, would significantly affect the creditor review of the plan and would prejudice BA Energy and its creditors.

The Monitor stated that allowance of the amended claim would allow DR to circumvent the CCAA process, the Claims Procedure Order and provide DR an unjustified and improper advantage.

DR filed a notice of dispute, submitting that there was no resolution of its claim asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim and that not accepting the claim would be prejudicial to DR and not prejudicial to BA Energy or its creditors.

The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person. The rest voted by proxy. No one voted against the plan. At the time of the vote the majority of the creditors were not aware of the amended claim by DR.

DR applied for acceptance of its late amended proof of claim so that it could participate in a distribution to unsecured creditors under the Plan. In doing so DR submitted that the amended proof was not a "late claim" but an amendment to the September 2009 proof of claim which was filed in compliance with the Claims Procedure Order. DR also submitted that it was "just and equitable" for the amended proof of claim to be accepted.

With respect to the first ground, the Honourable Madam Justice B. Romaine rejected the submission that the late claim was simply an amendment of the claim filed in September 2009. Justice Romaine found that the amended claim asserted, for the first time, an unsecured claim that would qualify as an affected claim under the plan as opposed to the fully secured claim previously asserted. Such a change was so significant as to be considered a new claim and not merely an amendment.

Having determined that the late claim was in fact a new claim, and not an amendment, Justice Romaine proceeded to assess whether the late filed claim should be accepted. In doing so Justice Romaine determined that while this case was neither a case of a creditor "lying in the weeds" nor clearly the kind of late claim reviewed by the Alberta Court of Appeal in *Re Blue Range Resource Corp*, the principles set out in the *Blue Range* case were relevant to the application. Those criteria were as follows:

(1) Was the delay caused by inadvertence and if so, did the claimant act in good faith?

(2) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

(3) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?

(4) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Justice Romaine noted that it was clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

On the issue of inadvertence and good faith, Justice Romaine was of the view that it could not be said that DR's amended proof of claim arose from inadvertence. While there was insufficient evidence to reach the conclusion that DR acted in bad faith, it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. DR

delayed approximately 8 months before taking any substantial steps to value the assets in its possession. Justice Romaine was of the view that the consequences of that delay should be borne by DR. The determination of the resale value of the compressor was a question within the reasonable control of DR. Further, the Claims Procedure Process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage.

DR was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and it did so on September 22, 2009, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, DR characterized its claim as a fully secured claim and conceded that it believed to that point in time that the compressor was worth at least as much as its claim.

BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from DR. Justice Romaine was of the view that given what had been communicated among the parties with respect to DR's claim at that point in time, the position of BA Energy was not unreasonable.

Justice Romaine went on to state that it was difficult to determine what the effect DR's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted by proxy and some of those proxies were authorized before DR served other creditors with the notice of motion with respect to its revised claim.

With respect to the materiality of the claim, the evidence was that if the claim was accepted it would comprise 5.4% of the total pool of affected creditors and, if paid under the Plan, would reduce the amount available to unsecured creditors from $.55 per dollar to $.53 per dollar of claim. The DR claim was not as insignificant as the late claims accepted by the court in *Blue Range*.

Justice Romaine indicated that the test of prejudice under the second criteria from *Blue Range* is whether creditors, by reason of the late claim, lost a realistic opportunity to do anything that they otherwise might have done. The fact that creditors may receive less money if the late claim is accepted is not prejudice under the second criterion. Justice Romaine went on to note that in this case, it was not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It was only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

The second criterion also requires consideration of prejudice to the debtor company or other interested parties. Justice Romaine concluded that the parties prejudiced by this late amended claim were BA Energy and its parent Value Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan.

In this case, DR filed a late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. DR's recovery would be improved considerably by its very late recharacterization of claim if DR's new submissions with respect to the resale value of the compressor were accepted. Justice Romaine cited the proposition that a "CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself. ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

Justice Romaine also addressed the DR submission that equity favoured its application as it had a legitimate claim that had been compromised by the CCAA proceedings. Justice Romaine found that DR still had possession of the compressor and current estimates of a deficiency were still speculative. She held that there was no overwhelming equitable consideration that would counter-balance the relevant prejudice to BA Energy of the late claim.

In the result, Justice Romaine concluded that it would not be fair or equitable to accept this late amended claim. Given the facts of this case, there were no conditions that would alleviate relevant prejudice.

VI. ***Alberta (Superintendent of Bankruptcy) v. Inveridge Development Corp*. (2010) ABQB 391 (Alta. Q.B.) (June 10, 2010)**

The court in this case considered whether the levy payable to the Office of the Superintendent of Bankruptcy("**OSB**") pursuant to s. 147 of the BIA should be paid in the circumstances of this case. At issue were funds from the sale of certain lands owned by Inveridge Development Corp. and 844712 Alberta Ltd. (collectively "**Inveridge**") that were paid to the second mortgage unit holders by the Trustee who was also acting as Agent for the second mortgage unit holders.

Inveridge was the developer of a condominium project. The development was financed by a syndicated first mortgage, of which $500,000 was outstanding and a $3 million syndicated second mortgage on the development lands.

Inveridge filed a notice of intention to make a proposal under Part III of the BIA on October 12, 2006 and subsequently filed its proposal on December 20, 2006 (the "**Proposal**"). The Proposal provided, *inter alia*, that:

(1) Inveridge's assets, primarily the development lands, would be sold and the monies would be paid to the Alger and Associates Inc. ("Alger") who were acting as the Proposal Trustee.

(2) $4,000 would be made available to satisfy Crown claims, the claims of any preferred creditors and the claims of ordinary unsecured creditors on a pro rata basis.

(3) The sale proceeds from the development lands would be applied to repay first the DIP financing, then to pay out the first mortgage and lastly to pay, in part, the second mortgage.

(4) Alger would be accepting an appointment as agent for the second mortgage unit holders ("Agent") upon receiving an independent legal opinion that the second mortgage was valid and enforceable.

The Proposal was accepted by the creditors and approved by the court. The lands were sold and funds were paid in accordance with the proposal with the second mortgage unit holders receiving approximately $1.1 million.

The OSB claimed payment of the Superintendent's levy, pursuant to ss. 60(4) and 147 of the BIA, on the payments that Alger made to the second mortgage unit holders.

Alger applied for a declaration that no levy was payable to the OSB as Alger was acting as Agent on behalf of the second mortgage unit holders in making the payments to them and that it had complied with s. 13.4 of the BIA.

At issue were ss. 147 and 13.4(1) of the BIA. Section 147 provides for a levy to be paid to the OSB on all payments made by trustees and s. 13.4(1) permits a trustee to act for a secured creditor to assert a claim against the estate or to deal with the secured creditor's security provided the trustee has obtained a written

opinion that the security is valid and enforceable against the estate. Directive No. 10 issued by the OSB was also considered as it provides, in part, that one of the exceptions to the application of the s. 147 levy is where the assets are sold while the trustee acts as an agent or receiver but not as trustee.

The Honourable Madame Justice J. Strekaf found that Alger was acting as both Trustee under the Proposal and as the Agent for the second mortgagees at the time the lands were sold and funds paid out to the second mortgage unit holders. The issue then became, in what capacity was Alger acting when it made payments to the second mortgage unit holders? If Alger was acting as Trustee the levy is payable, if it was acting as Agent it is not.

In reaching her decision that the levy was payable in these circumstances Justice Strekaf applied the decision of the British Columbia Supreme Court (affirmed on appeal) in *Re Brittain Steel Ltd.* to hold that the answer to the question of capacity is one of fact. In reviewing the facts of this case Justice Strekaf reviewed the terms of the Proposal and in particular the provisions that provided that all monies payable under the Proposal were to be paid to the Trustee who would then disperse the funds in accordance with the terms of the Proposal. She also noted that the Proposal provided that any payments made by the Trustee to the Affected Creditors (defined in the Proposal to included the second mortgage unit holders) would be made by the Trustee net of any levies payable or due under the BIA.

Having reviewed the specific facts, Justice Strekaf found that the payments made to the second mortgage unit holders were made by Alger acting in its capacity as Trustee pursuant to the express terms of the Proposal. The payments were not made by the Trustee acting as Agent outside the administration of the bankrupt's estate. As a result the s. 147 levy was payable to the OSB.

VII. *Re JED Oil Inc.* (2010), ABQB 495 (Alta Q.B.) (May 3, 2010)

The issue in this case was whether holders of preferred shares who had filed proofs of claim for their dividends where entitled to be included in the class of Unsecured Creditors and receive a distribution of Class B Special Shares under the Plan. The Court determined that the dividend claims were equity rather than debt and as such the preferred shareholders were excluded from the class of creditors.

In August 2008 JED Oil Inc. and related companies ("**JED**") filed for protection under the CCAA. JED developed a plan of arrangement (the "**Plan**"), which provided for four classes of affected creditors. One of those classes was Unsecured Creditors. The Plan provided that the Unsecured Creditors class would receive Class B Special Shares of the restructured JED in proportion to their claims. The Monitor and JED accepted the dividend claims of the preferred shareholders as being unsecured claims and included

them in the Unsecured Creditors class. Other creditors brought an application to exclude the preferred shareholders from the Unsecured Creditors class. The Plan was approved and sanctioned by the court, but subject to the exclusion application.

The creditors who brought the exclusion application argued that the dividend claims were not debt and should not rank equally with the other unsecured creditors. The issue therefore was whether the dividend claims were debt or equity.

The Honourable Madam Justice C.A. Kent reviewed the relevant terms of the Series B Preferred Shares at issue. She noted that they provided for entitlements to receive dividends calculated at the rate of 10% per annum of the redemption amount, accruing from the date of issuance to the date each such Series B preferred share was converted to a common share or redeemed by the Corporation and payable quarterly. The parties agreed on a number of facts including that as of February 1, 2008, JED was insolvent. They also agreed on the principle that debt ranks ahead of equity and that the dividends are equity until they are declared at which time they become debt.

The applicants relied on five main arguments. First, on the date that the shares were issued, there was no debt because dividends had not been declared. Only on the last calendar day of each quarter would the company have sufficient information, including the identity of the payee, to declare the dividends. Secondly, the board would not know the status of the company until the end of each quarter so they could not declare the dividends until then. Third, the corporation cannot issue shares that in effect make the shareholders creditors. Fourth, as a result of s. 43 of the Alberta *Business Corporations Act* (the "**ABCA**"), any share term which purports to make an advance declaration of dividends would be *ultra vires* the corporation. Finally, they argued that even if the dividend has been declared, if there are no funds to pay it, the declaration is a nullity.

The preferred shareholders argued s. 43 of the ABCA makes a distinction between declaring and paying a dividend. There was nothing in the ABCA preventing the set up of shares so that dividends were declared in advance but not paid until the payment date, when the company knew if it was able to pay. At the date the shares were issued, all the information was available to declare the dividend. At the end of each quarter, shareholders could elect to take cash or shares. At the end of the first quarter of 2008, although the directors did not pay any cash because JED was insolvent, they did pay in shares until such time as it was realized that issuing that many shares would change control of the company. The act of issuing the shares showed that the board had already declared a dividend.

Justice Kent determined that the issue before her was whether the dividends were declared before February 1, 2008. She found that the only way that she could make that determination was if she could conclude that the wording of shares could be construed to mean that the dividends were declared as of the date of issuance of the shares. In short, that the wording meant that the shareholders became creditors of the company from the date that they were issued their shares. Justice Kent reviewed the wording and held that the substance of the relationship between the shareholders and the corporation at the time they purchased their shares was not that of creditor and debtor. She held that to find otherwise would require more explicit wording in the shares than existed in these circumstances. As a result she granted the application that the preferred shareholders be excluded from the Unsecured Creditors class and determined that they were not entitled to any distribution within that class.

VIII. ***Re Respec Oilfield Services Ltd*. (2010), ABQB 277 (Alta. Q.B.) (April 28, 2010)**

While there are a number of issues addressed by the court in this case the primary one relates to the allocation of costs among the various creditors of Respec Oilfield Services Ltd. ("**Respec**").

In May 2009 Respec applied for protection under the CCAA. The CCAA reorganization failed and Respec was placed in receivership on November 30, 2009. The primary creditors were Canadian Western Bank ("**CWB**") which held a first secured position, Business Development Bank ("**BDC**") which was the second ranking secured creditor, and a number of lenders and finance companies who each held a purchase money security interest ("**PMSI**") over a significant number of pieces of heavy equipment. The PMSIs were in priority to CWB and BDC in relation to the specific pieces of equipment.

A number of pieces of heavy equipment were sold by auction by Ritchie Brothers Auctioneers ("**Ritchie Bros.**") prior to the termination of the stay under the CCAA. The auction was carried out pursuant to a court-order which provided that the holders of the PMSIs could remove specific equipment covered by the PMSI from the auction upon paying the Monitor a deposit on account for any portion of the allocated costs it was ultimately required to pay. A number of the PMSI holders removed their equipment from the auction.

Ritchie Bros provided a guaranteed price which would be paid to the Receiver regardless of the results of the auction. The auction generated less money than the guaranteed price, so the guaranteed price (for those pieces of equipment sold at auction) was paid by Ritchie Bros.

The Monitor applied, *inter alia*, for:

(1) approval to apportion its costs, the costs of conducting the auction and Debtor-in-

Possession ("**DIP**") financing costs (collectively the "**allocated costs**") among all creditors on a *pro rata* basis;

(2) approval 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;

(3) where a creditor removed the equipment upon which it had security from the auction the deposit paid to the Monitor approval to apply the deposit to its share of the allocated costs;

(4) where the deposit is inadequate to cover its share in full judgment in favour of the Monitor against that creditor for the shortfall;

(5) approval that 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;

(6) approval to distribute the balance of the auction proceeds accordingly; and

(7) an order increasing the priority administration charge of the Monitor on the assets of the Respec from $200,000 to $240,000.

The DIP costs represented the amount of monies Respec borrowed to keep its operations afloat during the stay period. The DIP costs ($1.36 million) had been repaid leaving only the issue of which parties should bear the ultimate responsibility for the costs and in what proportion.

The evidence was that CWB was likely to recover its entire indebtedness BDC would suffer a significant shortfall. The relative security positions of the two banks had the effect of ultimately redistributing to BDC any contribution CWB made to the allocated costs. It was therefore in BDC's interest to ensure that the PMSI creditors bore as many of the costs as possible. The Honourable Madame Justice Bielby noted that the proposed allocation would require the two banks to contribute to the indirect costs of the auction notwithstanding that it was highly unlikely they would receive any of the auction proceeds given their status as second (and third) in priority creditors behind the PMSI holders.

In considering the proposed distribution of auction proceeds, Justice Bielby noted that 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. However, where there is no such order, the issue will be decided based on the facts in the case. She also noted that she had no obligation to attempt to allocate 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 but that it is fundamental that any allocation of court-ordered charges be fair and equitable.

In determining what was fair and equitable in these circumstances Justice Bielby addressed concerns raised by GE Canada Equipment Financing G.P. ("**GE**"), a PMSI holder who had removed its equipment from the auction. GE opposed the calculation of each creditor's *pro rata* share of the allocated costs on the basis of a comparison of the sale proceeds recovered on each asset against the total amount owed by Respec on that asset. GE argued that the calculation of each creditor's *pro rata* share of the allocated costs should be based on a comparison of the debt owed to it against the total debt that Respec owed to all of its creditors. GE also argued that its *pro rata* share of the allocated expenses should be calculated on an appraised value of its equipment of $990,000 rather than on the guaranteed minimum price offered by Ritchie Bros. of $1.4 million.

Justice Bielby rejected GE's argument on the method of calculation noting that the approach proposed by GE would have the effect of placing the greatest portion of the costs on the party likely to recover the least from the auction proceeds, BDC. Justice Bielby found that such a result would be unfair and contrary to established authority.

In relation to the value to be used in calculating GE's *pro rata* share Justice Bielby found that Ritchie Bros. had provided a guaranteed price for assets placed in the auction. Justice Bielby noted that GE had first in priority security on assets for which that guaranteed price was $1.4 million. GE elected to remove those assets from the auction and they remained in GE's possession, unsold, as of the date of the application with an appraised value of $990,000. In those circumstances Justice Bielby found that it would not be fair and equitable to permit a creditor to avoid the consequences of a poor business decision by foisting the costs in part on other creditors. The appropriate value to be used in the calculation of GE’s *pro rata* share of the costs was held to be $1.4 million.

Justice Bielby also heard argument from GE that there was no jurisdiction in the Court to grant judgment for the allocated costs. GE argued that there were no express provisions in the CCAA or other legislation that provided that jurisdiction, and as such, the Monitor was required to follow the normal steps in an action the first of which was to file a Statement of Claim based on the declaration of liability. Justice Bielby noted the previous court orders which set out a process to deal with the sale of the equipment and the requirement therein 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". While these orders could not confer any jurisdiction which did not otherwise exist the provisions evidenced that there was a plan in place to liquidate certain assets and to account for the costs incurred to that point. Justice Bielby found that the creation and implementation of such a plan was within her jurisdiction as a part of the overall scheme of the CCAA. She held that a court in a CCAA proceeding has the ability to deal with assets, debt and costs incurred in that proceeding and concluded that this jurisdiction included the ability to grant judgment against a party which it determines liable to contribute to those costs. As a result she granted the Monitor judgment against GE for its share of the allocated costs in the sum of $215,688.46, less any portion of the deposit paid by GE which had not been accounted for in the determination of that figure.

In the final result, the Court approved an apportionment of costs calculated based on 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 to be 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. Approval was granted as sought except in relation to a proposed apportionment of allocated costs to a "true" lessor of equipment.

In this case Jim Patterson Lease ("**JPL**") was a true lessor of five pieces of equipment. Justice Bielby found that as JPL had received no benefit from the CCAA proceedings it was not obliged to bear any portion of those costs. 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.

Finally, the Justice Bielby addressed the Monitor's request to increase its priority security charge under the initial CCAA order from $200,000 to $240,000. The evidence before the court was that the monitor had incurred fees to that point of $196,189.52 and that notwithstanding the appointment of the Receiver the Monitor had continued to function to bring those matters arising during the CCAA stay period to a conclusion. It was anticipated that those further costs would be in the nature of $35,000.

Justice Bielby referred to the argument made by GE that the additional costs should be paid as a cost in the receivership and determined that the result of doing so would be that BDC would bear all of those costs. She then determined that offloading costs that benefitted all secured creditors onto just one creditor would not be fair or within the principles of reasonable costs allocation. Justice Bielby also noted that there was nothing in the initial CCAA order, or any subsequently order, limiting an increase in the administration charge and that refusing the Monitor's application could have a chilling effect on future

CCAA applications where insolvency professionals, being unable to adequately predict their entire future costs, would be left exposed to the risk of being inadequately secured. As a result the charge granted to the Monitor under the initial CCAA 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 increase was granted 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.