

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

**BOOK OF AUTHORITIES OF THE RECEIVER
(Motion for Approval of Fees returnable November 20, 2017)**

November 13, 2017

STIKEMAN ELLIOTT LLP

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**Lawyers for the Receiver,
Ernst & Young, Inc.**

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**ONTARIO
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IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)

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TAB 1

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE

JUSTICE

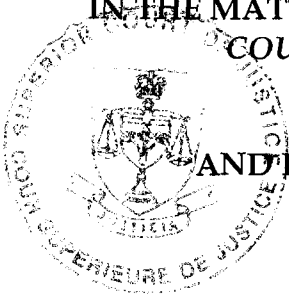
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FRIDAY, THE 31st

DAY OF JULY, 2015

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)



AND IN THE MATTER OF HANFENG EVERGREEN INC.

ORDER

THIS MOTION, made by Ernst & Young Inc., in its capacity as the receiver (the "Receiver") of Hanfeng Evergreen Inc. ("Hanfeng"), for an order clarifying and expanding the Receiver's powers was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Second Report of the Receiver dated July 17, 2015 (the "Second Report") and the Supplement to the Second Report of the Receiver dated July 22, 2015 (the "Supplement"), and on hearing the submissions of counsel to the Receiver and Yu Xinduo, no one appearing for any other person on the Service List, although properly served as appears from the affidavit of service, filed:

1. **THIS COURT ORDERS** that the time for service of the motion record in respect of this Motion is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Second Report.
3. **THIS COURT ORDERS** that the Receiver is empowered and authorized to exercise any shareholder rights that Hanfeng has, including Hanfeng's rights as sole shareholder of Hanfeng Slow-Release Fertilizer Co., Ltd. (the "**Chinese Subsidiary**"), including but not limited to, to change the legal representative and directors of the Chinese Subsidiary.
4. **THIS COURT ORDERS** that the Receiver is authorized to take any necessary steps to assert its ownership of and effect control over the Chinese Subsidiary and the Heilongjiang Assets, including but not limited to, the bank account no. 23001866251050505638 opened with the China Construction Bank in the name of the Chinese Subsidiary.
5. **THIS COURT ORDERS** that the Receiver is authorized and directed to engage Mr. Rong-kai Hong ("**Mr. Hong**") and his company, Formosa Supply Services Co., Ltd, ("**FSS**"), to provide interim management services in connection with the Chinese Subsidiary, including appointment of Mr. Hong as the legal representative (the "**New Legal Representative**") and a director of the Chinese Subsidiary.
6. **THIS COURT ORDERS** Mr. Yu Xinduo to provide full and timely cooperation to the Receiver, including, but not limited to the following:
 - (a) attending at Harbin Administration of Industry and Commerce ("**HAIC**") in order to facilitate the change of legal representative of the Chinese Subsidiary;

- (b) taking any steps within Mr. Yu's control and permitted by law to effect the surrender of all chops, including the company chop and finance chops relating to the Chinese Subsidiary and any of its subsidiaries to the New Legal Representative;
- (c) taking any steps within Mr. Yu's control and permitted by law to effect the surrender of all online banking tokens of the Chinese Subsidiary to the New Legal Representative; and
- (d) taking any steps within Mr. Yu's control and permitted by law to effect the surrender to the New Legal Representative all corporate licenses, certificates and registrations of the Chinese Subsidiary and any of its subsidiaries, including the original business license, replicate business license, organizational code certificate, tax certificate and safe registration.

7. **THIS COURT ORDERS** that the First Report, the Second Report and the Supplement and the conduct and activities of the Receiver as described in each of the reports are hereby approved.

THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the People's Republic of China to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:



JUL 31 2015



A. Anissimova
Registrar

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)
AND IN THE MATTER OF HANFENG EVERGREEN INC.

Court File No. CV-14-10667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

ORDER

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Lawyers for the Applicant

TAB 2

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE) MONDAY, THE 5TH
JUSTICE HAINES) DAY OF OCTOBER, 2015

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

ORDER

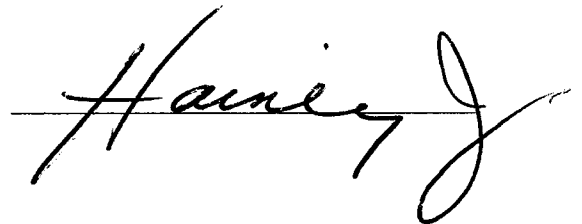
THIS MOTION, made by Ernst & Young Inc., in its capacity as the receiver
(the "**Receiver**") of Hanfeng Evergreen Inc. ("**Hanfeng**"), for an order approving:

- (a) The Third Report of the Receiver dated September 24, 2015 (the "**Third Report**"); and
- (b) The Receiver's conduct and activities as described in:
 - (i) the Second Report of the Receiver dated July 17, 2015 and the supplement thereto dated July 22, 2015 (together, the "**Second Report**"); and
 - (ii) the Third Report,

was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Second Report and Third Report, and on hearing the submissions of counsel to the Receiver, no one appearing for any other person on the Service List, although properly served as appears from the affidavit of service, filed:

1. **THIS COURT ORDERS** that the time for service of the motion record in respect of this Motion is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that the Third Report is approved.
3. **THIS COURT ORDERS** that the Receiver's conduct and activities as described in the Second Report and the Third Report are approved.

A handwritten signature in black ink, appearing to read "Haining", written over a horizontal line.

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)
AND IN THE MATTER OF HANFENG EVERGREEN INC.

Court File No. CV-14-10667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

ORDER
(RE: APPROVAL OF
REPORTS AND ACTIVITIES)

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Lawyers for the Receiver

TAB 3

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAM

)

WEDNESDAY, THE 20TH

JUSTICE MATHESON

)

DAY OF AUGUST, 2014

)

IN THE MATTER OF AN APPLICATION UNDER
SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

ORDER
(Appointment Order)

THIS APPLICATION made by the Applicant Hanfeng Evergreen Inc. (the "**Applicant**") for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing Ernst & Young Inc. ("**E&Y**") as receiver and manager (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties of the Applicant acquired for, or used in relation to a business carried on by the Applicant, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Jonathan Pollack sworn August 13, 2014 and the Exhibits thereto and on hearing the submissions of counsel for Hanfeng and for Harris Christopoulos, no one appearing for anyone else although duly served as appears from the affidavits of service sworn August 14, 2014 and the affidavit of Sheila van Spronsen dated August 20, 2014, filed, and on reading the consent of E&Y to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 101 of the CJA, E&Y is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Applicant acquired for, or used in relation to a business carried on by the Applicant, including all proceeds thereof (the "**Property**").

RECEIVER'S POWERS

3. THIS COURT ORDERS that 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 such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transaction contemplated by the share transfer agreement with Heilongjiang Pengcheng Fertilizer Co., Ltd. dated August 8, 2014;
- (b) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (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 manage, operate, and carry on the business of the Applicant, 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 Applicant;
- (e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (f) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Applicant or any part or parts thereof;
- (g) to receive and collect all monies and accounts now owed or hereafter owing to the Applicant and to exercise all remedies of the Applicant in collecting such monies, including, without limitation, to enforce any security held by the Applicant;
- (h) to settle, extend or compromise any indebtedness owing to the Applicant;
- (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 Applicant, for any purpose pursuant to this Order;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Applicant, 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;

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
 - (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;
- and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.
- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
 - (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
 - (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
 - (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for

and on behalf of and, if thought desirable by the Receiver, in the name of the Applicant;

- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Applicant, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Applicant;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Applicant may have;
- (s) to seek Court approval of and conduct a procedure for the solicitation, determination and resolution of claims against the Applicant;
- (t) to seek Court approval to distribute any proceeds of any sale of the Property to the stakeholders of the Applicant in accordance with their relative priorities pursuant to further Order of the Court;
- (u) to take such steps and execute such documents as may be necessary or desirable to purchase tail director and officer liability insurance coverage; and
- (v) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Applicant, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the

Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that 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 Applicant, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that 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. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least

seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days' notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

9. THIS COURT ORDERS that no Proceeding against or in respect of the Applicant or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Applicant or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Applicant, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided that nothing in this paragraph shall (i) empower the Receiver or the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) exempt the Receiver or the Applicant from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Applicant are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Applicant's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Applicant 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

13. THIS COURT ORDERS that 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

14. THIS COURT ORDERS that all employees of the Applicant shall remain the employees of the Applicant until such time as the Receiver, on the Applicant'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 *Bankruptcy and Insolvency Act* (Canada) ("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* (Canada).

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), 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 Applicant, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the

Canadian Environmental Protection Act, the *Environmental Protection Act* (Ontario), the *Water Resources Act* (Ontario), or the *Occupational Health and Safety Act* (Ontario) and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part 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* (Canada).

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that 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 legal fees and disbursements, incurred at the standard 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.

SERVICE AND NOTICE

21. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<http://www.ey.com/ca/hanfeng>'.

22. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

23. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

24. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Applicant.

25. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the People's Republic of China to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

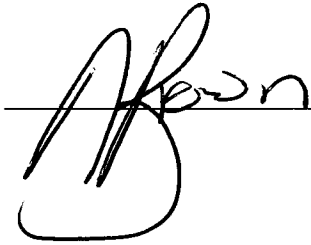
26. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized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

27. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (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.

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Natasha Brown
Registrar

TAB 4

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164
O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

**IN THE MATTER OF THE PROPOSALS OF CONFECTIONATELY YOURS,
INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC.,
CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.**

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.8 Remuneration of receiver

VII.8.a Accounts

Headnote

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

Table of Authorities

Cases considered by *Borins J.A.*:

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Atkinson Estate, Re (1951), [1952] O.R. 685, [1952] 3 D.L.R. 609 (Ont. C.A.) — considered

Atkinson Estate, Re, (sub nom. *National Trust Co. v. Public Trustee*) [1953] 2 S.C.R. 41, [1953] 3 D.L.R. 497, 1953 CarswellOnt 136 (S.C.C.) — referred to

Avery v. Avery, [1954] O.W.N. 364, 1954 CarswellOnt 200 (Ont. H.C.) — referred to

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

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

BT-PR Realty Holdings Inc. v. Coopers & Lybrand, 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190, 1996 CarswellBC 1083 (B.C. C.A.) — referred to
Chartrand v. De la Ronde, 1999 CarswellMan 248, 9 C.B.R. (4th) 20, [1999] 9 W.W.R. 631, 139 Man. R. (2d) 36 (Man. Q.B.) — considered

Cohen v. Kealey & Blaney, 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 376 (Ont. C.A.) — referred to
Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — considered

Ferguson v. Imax Systems Corp., 44 C.P.C. 17, 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188, 1984 CarswellOnt 155 (Ont. Div. Ct.) — referred to

Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd., 46 C.B.R. (N.S.) 117, 1983 CarswellNS 44 (N.S. T.D.) — referred to

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In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch), 45 O.A.C. 241 at 247, 1991 CarswellOnt 830 (Ont. Div. Ct.) — referred to

MacPherson (Trustee of) v. Ritz Management Inc., 1992 CarswellOnt 3213 (Ont. Gen. Div.) — referred to
Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp., 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered

Murano v. Bank of Montreal, 111 O.A.C. 242, 163 D.L.R. (4th) 21, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) — considered

Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc., 40 C.P.C. (2d) 280, 1989 CarswellOnt 464 (Ont. H.C.) — referred to

Prairie Palace Motel Ltd. v. Carlson, 35 C.B.R. (N.S.) 312, 1980 CarswellSask 25 (Sask. Q.B.) — considered
R. v. S. (R.D.), 1997 CarswellNS 301, 1997 CarswellNS 302, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — followed

Silver v. Kalen, 52 C.B.R. (N.S.) 320, 1984 CarswellOnt 165 (Ont. H.C.) — referred to

Toronto Dominion Bank v. Park Foods Ltd., 13 C.P.C. (2d) 302, 62 C.B.R. (N.S.) 68, 77 N.S.R. (2d) 202, 191 A.P.R. 202, 1986 CarswellNS 49 (N.S. T.D.) — referred to

Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd., 19 C.B.R. (N.S.) 252, 1974 CarswellOnt 73 (Ont. S.C.) — referred to

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Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

s. 21(2) — referred to

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

s. 39(2) — referred to

Trustee Act, R.S.O. 1990, c. T.23

s. 61(1) — referred to

s. 61(3) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.02(1) — considered

R. 57.01(3) — referred to

R. 74.17(1)(i) [en. O. Reg. 484/94] — considered

R. 74.18(1)(a) [en. O. Reg. 484/94] — considered

R. 74.18(9) [en. O. Reg. 484/94] — considered

APPEAL by shareholders of debtor companies from judgment reported at [2001 CarswellOnt 1784](#), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

Borins J.A.:

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook, consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately \$24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

THIS COURT ORDERS that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately \$6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from \$175 to \$550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

- receiver's fees and disbursements of \$1,080,874.93, inclusive of GST.
- legal fees of Goodmans of \$209,803.46, inclusive of GST.
- legal fees of Goodman and Carr of \$92,292.32, inclusive of GST.
- legal fees of Kavinoky & Cook of \$2,583.23.

7 The Parravanos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

- (1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;
- (2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and
- (3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow

the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

- (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.
- (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.
- (3) The receivership was difficult and "rather unique".
- (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".
- (5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.
- (6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.
- (7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he emphasized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours $\times$ hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

[An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.
- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.

- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".
- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.
- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) *The procedure to be followed on the passing of the accounts of a court-appointed receiver*

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

. . . the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. . . . Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just

as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).¹ I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."² In *Holmsted and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order,

as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, e.g., *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); *aff'd* [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, e.g., *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. 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.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

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.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bkcty.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, e.g., *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on

balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) Cross-examination of the receiver

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the

motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . . "

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, e.g., *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.

- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded from any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- Mr. Pape was given a full opportunity to make submissions.

(3) *The remuneration claimed by the receiver and its solicitor*

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

Catzman J.A.:

I agree.

Doherty J.A.:

I agree.

Appeal allowed in part.

Footnotes

- 1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.
- 2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

TAB 5

2017 ONSC 673
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2017 CarswellOnt 1122, 2017 ONSC 673, 275 A.C.W.S. (3d) 696, 44 C.B.R. (6th) 289

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. c-36, AS AMENDED**

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS
CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL
NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

Newbould J.

Heard: January 12, 2017
Judgment: January 27, 2017
Docket: 09-CL-7950

Counsel: Jessica A. Kimmel for Monitor

Susan Philpott for Former Nortel employees

Lily Harmer for Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Byron Shaw for Administrator of the Nortel Networks Managerial and NonNegotiated Pension Plan and Nortel
Networks Negotiated Pension Plan

Thomas McRae for Nortel Canadian continuing employees

Michael E. Barrack, D.J. Miller for Nortel Networks UK Pension Trust Limited and Board of the Pension Protection
Fund

Adam Slavens for Nortel Networks Inc.

Michael Wunder for Unsecured Creditors Committee

Gavin H. Finlayson, Amanda C. McLachlan for Ad Hoc Group of Bondholders

Matthew-Milne Smith for EMEA Debtors

John Salmas for Indenture Trustee, Wilmington Trust, N.A.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.2](#) Initial application

[XIX.2.g](#) Monitor

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

Passing accounts — Telecommunications company N, which had over 140 corporate entities in 60 jurisdictions, became insolvent — Canadian N debtors filed for Companies' Creditors Arrangement Act (CCAA) protection in 2009 — Monitor was twice granted extraordinary expanded powers, resulting in Monitor and its counsel undertaking significantly greater scope of work than in typical CCAA case — In 2017, Monitor of Canadian debtors brought motion for order passing its accounts in amount of CA\$122,972,821.96, accounts of its Canadian legal counsel in amount of CA\$99,994,744.85, and accounts of its U.S. legal counsel in amount of \$31,352,136.73, incurred between 2009 to 2016 — Motion granted — Accounts approved — Monitor's duties were far more complex than normal due to matrix way in which N's business was operated — Extensive joint discovery process to resolve claims played large role in costs

getting out of hand, and was not fault of Monitor — Monitor and counsel tried to be as efficient as possible in difficult circumstances and overall achieved very favourable outcomes for Canadian creditors — Proceedings were unprecedented in terms of size, complexity, international aspects and vast number of competing interests — Nature, extent and value of assets realized for creditors was significant — Billings over relevant period comprised combined total of 384,652.6 professional hours — Monitor and counsel's professional rates and disbursements were reasonable.

Table of Authorities

Cases considered by Newbould J.:

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — followed
Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed
Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed
Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to
Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to
Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to
Tepper Holdings Inc., Re (2011), 2011 NBQB 311, 2011 CarswellNB 592, 82 C.B.R. (5th) 293, 984 A.P.R. 1, 381 N.B.R. (2d) 1, 2011 CarswellNB 849, 2011 NBBR 311 (N.B. T.D.) — 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
Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
 Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
 Generally — referred to
Pensions Act, 1995, c. 26
 s. 75 — considered
Pensions Act 2004, 2004, c. 35
 Generally — referred to

MOTION by monitor of insolvent company for passing of accounts of monitor and its counsel incurred during *Companies' Creditors Arrangement Act* proceedings.

Newbould J.:

Introduction

1 Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the "Canadian Debtors"), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

2 The background to this sorry saga has been described in a number of decisions.¹

3 At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA² region, as well as the Caribbean and Latin America and Asia. NNC, the Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

4 On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the UK Insolvency Act, 1986. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

5 The Monitor was appointed in the Initial Order of January 14, 2009 which directed that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice." It is normal in CCAA proceedings for the Monitor to pass its accounts periodically. This was no normal CCAA proceeding and the Monitor chose not to pass its accounts periodically but rather wait until the end of the proceedings. One advantage in having all of the accounts passed at this stage is that up to date information as to the level of success achieved by the Monitor, one of the key factors to be considered, is now available as a result of the settlement recently achieved in the allocation dispute.

6 Normally a Monitor performs a neutral role as a court officer in a CCAA proceeding. However in this case there were two orders giving the Monitor extraordinary powers. On August 10, 2009, Nortel announced the departure of its then CEO, Mike Zafirovski, and on the same day five members of NNC's and NNL's boards of directors resigned. As a result of this change in circumstances, on August 14, 2009, this Court granted an Order that expanded the Monitor's role and powers to include, *inter alia*, the ability:

(a) to conduct, supervise and direct the sales processes for the Canadian Debtors' property or business and any procedure regarding the allocation and/or distribution of proceeds of any sales;

(b) to cause the Canadian Debtors to exercise the various restructuring powers authorized under paragraph 11 of the Initial Order and to cause the Canadian Debtors to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Canadian Debtors in dealing with their property, operations, restructuring, wind-down, liquidation or other activities; and

(c) to administer the claims process established pursuant to the Claims Procedure Order dated July 30, 2009 and any other claims bar and/or claims resolution process or protocol approved by the Court.

7 Following the resignation of the Canadian Debtors' remaining directors and officers in October 2012, the Monitor's role and powers were further expanded by order dated October 3, 2012, to authorize and empower the Monitor to, amongst other things, exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors.

8 The changing circumstances of the CCAA proceedings and the resulting expansion of the Monitor's powers have resulted in the Monitor and its counsel undertaking a scope of work that is beyond the typical role of a monitor in a CCAA proceeding. Indeed, since October 2012 substantially all activities undertaken by or on behalf of the Canadian Estate, including the massive litigation, have been undertaken by the Monitor's professionals with the assistance of the Monitor's counsel. It has been the Monitor that has been the effective defendant in the claims made against the Canadian Debtors and the effective plaintiff in the allocation trial seeking a portion of the \$7.3 billion of the escrowed sale proceeds.

9 The provision in the Initial Order that the Monitor pass its accounts from time to time was not changed with these orders enhancing the Monitor's powers and so what is included in the accounts to be passed is far more and different than what would ordinarily be included in a Monitor's accounts to be passed.

10 Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the \$7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

11 The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

12 The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel.³ It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

13 There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 (Alta. Q.B.) that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

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.

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.

14 So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may

be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) at para. 51 ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 5, aff'd, (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- 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.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

15 Justice Pepall further stated:

45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

16 As stated, The Bank of New York Mellon, as Indenture Trustee took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts. It offered a suggestion that a practical solution is to refer the matter to a Master, an Assessment Officer or an outside expert. I do not agree with this suggestion. In my view there is sufficient evidence to undertake a proper consideration of the accounts of the Monitor taking into account the factors to be considered in arriving at a fair and reasonable result.

17 The time and expense of referring the accounts to someone else would be very time consuming, create further expense and delay completion of this matter that has gone on far too long. The Initial Order directed the accounts to be passed by this Court. That makes sense, particularly as no other person has the familiarity of what has gone on in the Nortel insolvency as the Court has. These considerations have led other courts to decline to send the accounts out for review by others. See *Tepper Holdings Inc., Re* (2011), 381 N.B.R. (2d) 1 (N.B. T.D.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83.

18 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund has been involved in these proceedings from the outset in January, 2009 and has been a member of the Canadian Only Creditors

Committee (the "CCC"). The Superintendent supports the motion for an order passing the accounts of the Monitor and opposes the appointment of a special fee examiner to review the Monitor's accounts. It takes the position that his would create unnecessary and unwarranted additional expense and potential delay by virtue of the need to educate the examiner with respect to these hugely complex proceedings, particularly if the examiner was independent of the court with additional professional costs. The Superintendent further states that it is satisfied with a high level assessment of the Monitor's accounts in this case by this Court, given this Court's familiarity with many of the complexities of the proceedings, and by reference to the significantly higher costs incurred by the other Estates.

19 Morneau Shepell Ltd., was appointed the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan in October 2010 and has been actively involved in the CCAA restructuring process. It is one of the largest creditors of the Canadian Debtors. It takes the same position as the Superintendent regarding any attempt to have the accounts of the Monitor examined by some other party. It states that more litigation or court process in relation to the Monitor's accounts should be strongly discouraged and avoided. Far too much time and too much of the Canadian estate's resources have been consumed with seemingly endless litigation. More court process only delays, and may diminish, the distribution of assets available to creditors.

20 Michel E. Campbell is a former engineer employed by Nortel. Since the January 2009 CCAA filing, he has been heavily involved in the proceedings as a court-appointed representative of approximately 21,000 Nortel former employees, as an active member of the Nortel Retirees and Former Employees Protection Canada ("NRPC"), and as a claimant against the Nortel estate for the loss of severance and termination pay. He estimates that he has spent over 4,000 hours on issues in the proceedings relating to employee issues. As one of the former employees and as a court-appointed Representative, he has a financial stake in these proceedings. He too supports the passing of the Monitor's accounts and does not think a referral of the accounts to some third party is desirable. He states in his affidavit:

44. Moreover, given the volume and nature of the information provided in the Monitor's materials filed for this motion, and the fact that the fees as disclosed are subject to this Court's approval, I see no reason for another third party review or assessment. In any event, such a third party review would create more expense and delay in these proceedings, and would likely further postpone approval of the Plan of Arrangement and distributions on claims, which is far from desirable. The Former Employees have been waiting now for almost eight years to receive some payment for their losses. Further, it would be difficult for a third party who lacks background knowledge of this case to conduct a reliable, meaningful or accurate assessment of the Monitor's fees without the expenditure of considerable additional time and resources of the Monitor to provide information to the third party reviewer. This Court is by far the more appropriate arbiter of the Monitor's fees.

21 This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose.

Consideration of the Monitor's accounts

22 The Monitor engaged Goodmans LLP ("Goodmans") as its Canadian legal counsel, Allen & Overy LLP ("A&O") as its U.S. legal counsel and Buchanan Ingersoll & Rooney PC ("BIR") as its Delaware local legal counsel. A large number of professionals from the Monitor's firm E & Y, from Goodmans and from A&O were involved throughout these proceedings. The accounts from each of those firms are included in the passing of accounts with affidavits supporting the accounts.

23 The Monitor seeks approval of its accounts in the amount of CA\$122,972,821.96, inclusive of applicable taxes. This amount includes billings for 200,065.4 professional hours at an average hourly rate of CA\$540.

24 The Monitor also seeks to pass the accounts of Goodmans in the amount of CA\$99,994,744.85, inclusive of applicable taxes. This amount includes billings for 134,562.4 professional hours at an average hourly rate of CA\$643.

25 The Monitor also seeks to pass the accounts of A&O in the amount of \$31,352,136.73, inclusive of applicable taxes. This amount includes billings for 46,448.4 professional hours at an average hourly rate of \$639.

26 These amounts are enormous by any measure, even taking into account that they cover eight years of work. However, when one understands the enormity of the work that had to be done by the Monitor and its counsel to regularize the insolvency proceedings, to gather in the assets and to protect the interests of the Canadian creditors against the relentless attacks made by the other estates, these amounts become more understandable. It is unquestionable that the work of the Monitor added value to the assets.

27 In this case, the Monitor has delivered its 132nd Report in which the services performed over the last 8 years have been extensively discussed in some 113 pages plus a number of attachments. Throughout the entire matter what has taken place has been described in the Monitor's previous 131 Reports.

28 I do not intend to discuss at length what all the Monitor has done. Suffice it to say, the job the Monitor has performed has been massive in a case that knows no equal.

29 The normal things required of a Monitor in any CCAA case, such as cash flow forecasting, were far more complex than normal in light of the matrix way in which the business was operated by Nortel. Prior to the CCAA filing, Nortel had no cash flow forecasting model or cash flow reporting process that allowed for weekly cash flow forecasting and reporting on an entity level. One of the earliest activities (and focuses) of the Monitor was assisting the Canadian Debtors in preparing both a consolidated and unconsolidated global weekly cash flow forecasting and reporting process for Nortel's global operations so Nortel could understand its entity-level cash position in "real time". These and subsequent cash flow forecasting efforts by the Monitor have included: creating cash flow templates for approximately 60 Nortel entities (including joint venture entities) in North America, APAC, CALA and EMEA; creating a global process to retrieve cash flow data on a weekly basis, reviewing and analyzing variances, discussion with management from all regions, preparing consolidated, regional and entity cash flows, and reporting on cash flows and related analysis to stakeholders on a weekly basis from January 14, 2009, until Estate separation in 2011; after the Estate separations until the end of 2012, preparing and reporting on the Canadian Debtors and APAC entities cash flows to stakeholders, initially on a weekly basis and subsequently on a bi-weekly basis; continuing to prepare cash flow forecasts for the Canadian Debtors on a bi-weekly basis and reporting thereon to stakeholders; and preparing and filing cash flow forecasts and reconciliations in connection with stay extension motions in the CCAA proceedings.

30 One issue that was central to the CCAA proceedings in the first six months was a means of addressing the significant cash burn being experienced by NNL as a result of it continuing to incur significant corporate overhead and R&D costs to preserve the enterprise value of the LOBs and coordinate global restructuring efforts notwithstanding the post-filing cessation of ordinary course payments to NNL under Nortel's transfer pricing system. The Monitor recognized these issues, in particular NNL's funding crisis and the risk it posed to both stabilizing Nortel's business and achieving either a successful restructuring or a coordinated going-concern sale of the Nortel LOBs. Accordingly, the Monitor engaged with representatives of the other Estates and key stakeholders in an attempt to address these matters.

31 On June 9, 2009, NNL, NNI, NNUK and the Joint Administrators (among other parties) entered into an Interim Funding and Settlement Agreement (the "IFSA") that assisted in addressing these issues. First, pursuant to the IFSA, NNI agreed to pay \$157 million to the Canadian Debtors which, together with a \$30 million payment made in January 2009, was in satisfaction of any claims of NNL for corporate overhead and research and development costs incurred by NNL for the benefit of the U.S. Debtors for the period from the Filing Date to September 30, 2009. Second, NNL agreed to pay NNUK \$20 million on a deferred basis (secured by a Court-ordered charge) and the EMEA Debtors, on the one hand, and the Canadian Debtors and U.S. Debtors, on the other, agreed to the settlement of any transfer

pricing obligations between them for the period from the Filing Date to December 31, 2009. Third, pursuant to the IFSA, the Estates reached certain agreements that facilitated the LOB transactions that would be entered into in the coming months, including an agreement that the execution of sale documentation or closing of a transaction of material assets would not be conditioned upon reaching agreement on either allocation of the sale proceeds of such sale or a binding procedure for the allocation of such sale proceeds and that all sale proceeds would be deposited in escrow pending resolution of their allocation.

32 On December 23, 2009, the Canadian Debtors, the Monitor and the U.S. Debtors entered into a Final Canadian Funding and Settlement Agreement (the "CFSA") pursuant to which NNI agreed to make a payment of approximately \$190 million to NNL in full satisfaction of its reimbursement obligations in respect of corporate overhead, R&D, and other costs incurred by any of the Canadian Debtors for the benefit of the U.S. Debtors for the period October 1, 2009, through the end of the CCAA proceedings. In addition, pursuant to the CFSA NNL agreed to admit a \$2.0627 billion claim by NNI (the "NNI Claim") in settlement of, among other things, any transfer pricing overpayments made by NNI to NNL for the period 2001 through 2005 and an outstanding revolving loan.

33 Over the period March 2009 through March 2011, Nortel entered into and closed nine Lines of Business transactions involving businesses carried out by Nortel entities around the world. They were as follows:

LOB	Sale Process Approval Date	Initial (Stalking Horse) Sale Price	Final Sale Price	% Increase in Sale Price	Closing Date
Layer 4-7	2/27/2009	\$17,650,000	\$17,650,000	-	3/31/2009
CDMA/LTE	6/29/2009	\$650,000,000	\$1,130,000,000	74%	11/13/2009
NGPC	9/29/2009	n/a	\$10,000,000	n/a	12/8/2009
Enterprise	8/4/2009	\$475,000,000	\$900,000,000	89%	12/19/2009
MEN	10/15/2009	\$390,000,000	\$769,000,000	97%	3/19/2010
GSM/GSM-R	10/15/2009	n/a	\$103,000,000	n/a	3/31/2010
CVAS	1/6/2010	\$282,000,000	\$282,000,000	-	5/28/2010
GSM Retained Contracts	n/a	n/a	\$2,000,000	n/a	6/4/2010
MSS	9/1/2010	\$39,000,000	\$65,000,000	67%	3/11/2011
TOTAL			\$3,278,650,000		

34 To be noted, the final sale price for these LOB sales was far in excess of the initial stalking horse sale prices.

35 During that period the Monitor also oversaw the sale of significant Canadian assets, including various businesses and real estate assets.

36 Once the LOB sales had been completed a process in conjunction with the other Estates was undertaken to sell the Residual IP used by various Nortel entities around the world. This was preceded by a consideration of the potential ways to monetize NNL's portfolio of approximately 7,000 patents and patent applications that remained following the conclusion of the LOB sales including considering both a potential sale of the Residual IP and the possibility of establishing an "IP Co." Eventually it was decided after much work to sell the Residual IP.

37 The sale of the Residual IP was by way of an auction after a stalking-horse bid from Google of \$900 million was approved. The auction brought in \$4.5 billion. During the auction the Monitor and its counsel vigorously negotiated with representatives of the other Estates and their stakeholders to ensure the auction continued when certain Estate representatives indicated they were satisfied with the bid price achieved at that point and wanted to terminate the auction. The continuation of the auction resulted in numerous additional rounds of bidding and a further \$1.3 billion being paid for the Residual IP.

38 The claims process in this case was enormous. A total of 1,146 claims have been filed in the CCAA Claims Process totalling approximately CA\$39.9 billion. Of the 1,146 claims filed in the CCAA Claims Process, 1,012 claims with a claim

value of approximately CA\$2.9 billion (original filed claim amount of approximately CA\$12.5 billion) were classified by the Monitor as "Accepted or Reviewed and unadjusted" as at May 31, 2016. Accordingly, with respect to claims resolved through the Period, the Monitor reduced the value of those claims by approximately CA\$9.6 billion, or approximately 77%.

39 The development of the compensation claims process was complicated by a number of factors:

(a) Nortel's employment records were incomplete, out of date and resided in various physical locations. This required that the Monitor spend considerable time and resources to consolidate the information, validate the data and organize it a manner that would allow for the automation of the compensation claims process. In addition, given the uncertainty over the accuracy of the data, the process had to provide employees with the opportunity to review the information and allow for the correction of data that may have been inaccurate.

(b) The process identified approximately 20 different claim types that could be held by any particular employee. The potential combinations of such claims complicated the creation of a single claim form and necessitated extensive consultations between the representatives and the Monitor.

(c) Each of the approximately 20 different types of claims included a number of variables and formulas that were negotiated between the Monitor and the representatives. These variables and formulas had to be explained to the claimants in a manner that could be understood. The Monitor worked closely with the representatives to develop a user guide and glossary of terms that simplified this process.

40 Two significant claims were made against the Canadian Debtors by the EMEA estates and by the UKPC. They were eventually litigated at enormous expense. At the outset, both EMEA and UKPC took the position that their claims should be arbitrated because of the terms of the IFSA. This issue was litigated in both this Court and in the Delaware Bankruptcy Court. Both Courts held that there was no binding agreement to arbitrate and that EMEA and UKPC had attorned to the jurisdiction of the courts. Appeals by EMEA and UKPC to the Ontario Court of Appeal and to the U.S. Third Circuit Court of Appeals were dismissed. There followed very expensive litigation of these claims.

41 With respect to the claims made against the Canadian Debtors by the EMEA estates, although they were not capable of precise quantification, the total amount of quantified claims against NNL alone exceeded CA\$9.8 billion. In addition to unsecured claims, EMEA also asserted trust and/or proprietary claims against the Canadian Debtors' assets that could have resulted in effective priority treatment for such claims. Certain of the EMEA claims were also asserted against the Nortel directors and officers. Following completion of a lengthy and costly discovery process and several months of negotiation between the Monitor and the Joint Administrators, the EMEA Claims were settled on the eve of the commencement of the EMEA and UKPC Claims trial for a maximum admitted general unsecured claim against NNL of \$125 million. This represented very little to EMEA because Nortel's books and records indicated that the consolidated intercompany book debt payable from the Canadian Debtors to the EMEA debtors as at January 14, 2009, was approximately \$203 million. When netted against pre-filing intercompany amounts shown in Nortel's books and records to be payable by the EMEA debtors to the Canadian Debtors, there was a net \$101 million payable to the EMEA Debtors. Accordingly, the EMEA claims were settled for an amount only slightly in excess of the net consolidated pre-filing debt shown as being payable by the Canadian Debtors to the EMEA debtors in Nortel's books and records.

42 With respect to the claim against the Canadian Debtors made by the Board of Trustees of NNUK's U.K. Pension Plan and the Pension Protection Fund (the "UKPC"), although a total liquidated claim amount was not specified, the UKPC Proofs of Claim filed by the Trustee against NNL included: (i) £495.25 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee dated November 21, 2006; (ii) \$150 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee; and (iii) an unspecified claim in respect of liability owing pursuant to the FSD regime under the *U.K. Pensions Act 2004*. Although no liquidated claim amount was specified with respect to the alleged FSD liability, the claim noted that the section 75 debt of NNUK had been estimated to be £2.1 billion as at January 13, 2009, and that the Joint Administrators had stated that an informal

estimate of the section 75 debt of NNUK was \$3,055 billion. Accordingly, the FSD claim raised the possibility of a claim in excess of \$3 billion against NNL. The same FSD liability was claimed against each of the other Canadian Debtors. Accordingly, the UKPC claims contemplated aggregate claims against the Canadian Debtors of nearly \$20 billion. The FSD claims before the U.K. regulatory body were contrary to the stay imposed in the Initial Order and appropriate orders were made in this Court and upheld by the Ontario Court of Appeal. An amended UKPC claim in this CCAA proceeding asserted an FSD related claim of up to £2.1 billion against each of NNC and NNL.

43 The UKPC claim went to trial. The issues were extremely complex and the trial lasted 15 days based on a shortened trial procedure ordered by the Court. The reasons for decision of this Court were 127 pages. All of the claims against Nortel were dismissed except for a claim for of £339.75 million, which was approximately £152 million less than the amount sought by the UKPC on account of such claim.⁴

44 The allocation dispute was a heavily contested matter involving the issue of which Nortel Estates were entitled to the \$7.3 billion proceeds from the asset sales being held in escrow. A joint trial was held by this Court with Judge Gross of the U.S. Bankruptcy Court in Delaware that lasted for 24 days. It was a very complicated matter. The trial decision in this Court numbered some 115 pages. Reconsideration motions were brought in each Court, largely unsuccessful. Leave to appeal to the Ontario Court of Appeal was refused. The matter was appealed in the U.S. to the District Court. A lengthy mediation process took place with retired Judge Farnan in the U.S. and a settlement was reached in October 2016.

45 Relative to the claims asserted by the other estates, the Canadian Estates were successful. The position of the U.S. interests at the trial of the allocation dispute was that the Canadian Debtors were entitled to only approximately \$770 million of the \$7.3 billion, or approximately 10.6% of the total sale proceeds. The position of the EMEA debtors at trial was that the Canadian Debtors were entitled to receive either \$836 million or \$2.3 billion, depending on the theory the Courts adopted. Based on the settlement of the allocation dispute reflected in the settlement, the Canadian estates will receive an allocation in excess of \$4.1 billion, or approximately 57.1% of the total sale proceeds.

46 One other large issue that had to be dealt with was a claim by the bondholders to post-filing interest on their bonds which had the covenants of both the Canadian Debtor NNC or NNL and the U.S. Debtor NNI. At the time the matter was litigated, this claim for interest was in excess of \$1.6 billion. The Monitor successfully took the position that the bondholders were not entitled to any post-filing interest. A decision of this Court denying the bondholders any post-filing interest was upheld by the Ontario Court of Appeal and leave to the Supreme Court of Canada was denied. In the U.S. the matter was settled but in the end, no post-filing interest was obtained by the bondholders because the U.S. Estate was not solvent as a result of the allocation of the \$7.3 billion.

47 Given the overlap between the \$7.3 billion allocation dispute and the EMEA and UKPC claims, an Allocation Protocol proposed by the Canadian Debtors and the Monitor (and ultimately approved by the Courts) contemplated a joint discovery and litigation process to resolve the three claims. Unfortunately the discovery process got out of hand.

48 The Monitor proposed certain proportionate limitations on discovery, including that each core party be restricted to identifying 10 fact witnesses and that documentary discovery be restricted to electronic documents and indices of boxes of hard copy documents. Various core parties opposed the Monitor's proposal and advocated for a discovery plan that imposed no restrictions on the number of depositions or discovery generally. Ultimately because of the need to accommodate the U.S. parties' broader discovery rights, the litigation timetable and discovery plan proposed by the U.S. debtors that imposed no restrictions on the number of depositions or on discovery generally had to be adopted.

49 Ultimately, more than 3 million documents were produced and approximately 140 fact and expert witness depositions were conducted in, among other cities, Toronto, Montreal, Ottawa, New York, Boston, Chicago, Washington, London, Paris, Brussels and Hong Kong. In addition, the start date for the hearings contemplated by the Allocation Protocol was extended from January 6, 2014, to March 31, 2014, and subsequently to May 12, 2014, to allow for further time for the litigation and discovery process to be completed.

50 As the custodian of the largest number of documents, the Canadian Debtors (and, by extension, the Monitor and its counsel) bore a substantially higher burden than other parties in the document review and production process. The scope of the document requests and interrogatories received by the Canadian Debtors was wide ranging and related to documents going back to the 1980s, and in some cases earlier. Given the scope and overlap of the document requests and interrogatories served by the core parties, they worked together to develop an agreed set of consolidated document requests and interrogatories, itself a significant undertaking. The consolidated document requests contained 140 total document requests grouped into 26 broad categories with more than 85 sub-categories of documents identified. Similarly, the consolidated interrogatories contained 54 individual requests spanning some 25 pages.

51 Before the broad discovery that took place, there were several mediations. One was with a mediator in New York in which the parties tried to come to some agreement on a protocol for resolving disputes concerning the allocation of sale proceeds from sale transactions governed by the IFSA. The mediation took place in November 2010 and April 2011. The work involved on behalf of the Monitor was extensive, including having to review 43,000 documents posted in the mediation data room and other information exchanged by the Estates in advance of the mediation.

52 There were two unsuccessful mediations in the U.S. with a retired judge to try to settle the allocation dispute. There was later a mediation with then Chief Justice Winkler in an attempt to settle the allocation dispute. The mediation was ordered in June 2011. Mediation briefs were eventually filed and mediation took place from April, 2012 until discontinued on January, 2013. There was then the final mediation in New York with retired U.S. Judge Farnan that took several months and was eventually successful.

53 Overall, the Monitor and its Canadian counsel estimate that approximately 40% of their total fees in these proceedings relate to work done in connection with the allocation dispute, the EMEA claims and the UKPC claims, including the allocation and claims litigation and the various mediation and settlement efforts directed at resolving those disputes. The extensive discovery process, which was not the fault of the Monitor, played a large role in the costs getting out of hand.

54 In his affidavit, Mr. Campbell described his view of the efforts of the Monitor regarding the litigation. I view his evidence as being particularly relevant and helpful. Mr. Campbell is independent of the Monitor and the Monitor's counsel and has been involved throughout the process. Mr. Campbell stated:

40. The Canadian Estate was the main target of claims globally because Nortel's head office and parent corporation were located in Canada. From early in the CCAA proceedings, the Monitor was forced to deal with massive claims and persistent attacks on Canadian assets. Even then, the Monitor was consistently the voice of reason in what were often fractious and unnecessarily litigious cross-border proceedings. The Monitor advocated for limits on the scope of the allocation litigation process, which was rejected in favour of the more expansive American style with the hugely expensive document and deposition discovery process. The Monitor spearheaded a coordinated approach with the Canadian creditors in the mediations and Allocation Litigation which had the effect of consolidating and rationalizing resources and containing costs.

55 Morneau Shepell Ltd., the Administrator of the Nortel pension plans has also commented positively on the actions of the Monitor and its counsel. It stated in its brief:

The Canadian estate has faced a multitude of claims asserted by the other estates and by creditors more closely aligned with the other estates. In addition, the Nortel estates and the key creditors worldwide have been engaged in a long-running allocation dispute that included a series of intense mediation efforts and a complex and hard fought cross-border trial, with subsequent appeals. On behalf of the Canadian estate, the Monitor has had to respond to and participate in all of these matters for the benefit of Canadian stakeholders. Without the extensive effort, dedication and leadership of the Monitor and its counsel, the Canadian estate would not have achieved the favourable outcomes

accomplished in the claims litigation and allocation trial, nor would it have achieved the favourable resolution of the outstanding litigation by way of the settlement.

Because of its active involvement in the case and firsthand dealings with the Monitor, the Administrator observed directly the efforts of the Monitor to be mindful of costs and to seek efficiency wherever possible. As one of many examples, the Monitor was instrumental in organizing and coordinating the trial effort with creditors (where coordination was feasible) to avoid duplication of effort. Even though different positions were advanced, the Monitor did not allow that to preclude coordination to achieve efficiency. In addition, in respect of the design of the very complex trial process, the Monitor took positions directed at reducing complexity throughout the trial process.

56 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund spoke of the claims by the U.S. and UK/EMEA estates and bondholders to enhance their recoveries at the expense of the Canadian creditors. The Superintendent stated:

The amount of the Monitor's time and effort required to protect the Canadian Estate and its creditors by resisting all these attacks was an enormous undertaking. Because the Monitor worked cooperatively with the CCC on these issues, duplication of many costs was avoided.

The cost savings to the Canadian Estate and the Superintendent regarding the allocation trial are significant. The Superintendent's costs and that of the CCC could have been significantly (possibly as much as 50%) higher, or more, if we did not work cooperatively with the Monitor.

57 These comments by interested, knowledgeable but independent parties are strong evidence that the Monitor and its counsel tried to be as efficient as possible in very difficult circumstances and that overall they achieved very favourable outcomes for the Canadian creditors.

58 There were a number of other matters that the Monitor and its counsel had to deal with during the 8 years from the time of the CCAA filing. Some included (i) dealing with and settling a large dispute with Flextronics, Nortel's largest contract manufacturer, including a \$7 billion claim; (ii) developing an employee hardship process which has provided for interim relief for employees; (iii) restructuring eleven Nortel entities in the APAC region; (iv) negotiating an employee settlement agreement covering a number of issues; (v) developing a Health & Welfare Trust allocation methodology and distribution to those entitled; (vi) estate separation and wind-down activities to enable them to become stand-alone entities; (vii) dealing with French employee claims brought by NNSA employees in the Versailles Employment Tribunal in France; (viii) selling residual IP owned by the Canadian Estate, consisting of 17 million internet protocol; (ix) dealing with environmental issues arising from several Nortel properties in Ontario and claims by the MOE; (x) settling a number of transfer pricing issues amongst the various estates; (xi) dealing with a claim by the French liquidator of NNSA brought in the Versailles Commercial Court; (xii) financial reporting and tax issues; (xiii) dealing with claims by Frank Dunn, a former CEO of Nortel, and by 110 Calgary employees; (xiv) dealing with a class action brought in New York against a number of former officers and directors of NNC under the Securities and Exchange Act; (xv) dealing with a claim brought by SNMPRI in this Court and in the U.S. In most of these issues, court proceedings were taken, often with appeals to the Ontario Court of Appeal and to the Supreme Court of Canada.

59 SNMPRI asserted claims against the Canadian Debtors alleging unauthorized use and transfer of SNMPRI's software and claimed damages of \$200 million. It unsuccessfully sought to lift the stay to permit the case to be tried in the U.S. before a jury. In April, 2016 this Court on a summary judgment motion dismissed the bulk of the claim. Leave to appeal to the Ontario Court of Appeal was dismissed.

60 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund strongly supports the efforts made by the Monitor. It states:

The Monitor's motion materials reflect an enormous amount of work over many years, all ultimately in aid of maximizing recoveries in the Canadian estate. The stakes being so high; the huge number of interested and well

funded parties and the lengths to which they have been prepared to go given the amounts at issue, and the global nature of Nortel, are unprecedented.

The Monitor's fee, absent context, is quite large. However, in context, from the perspective of the Superintendent, who paid its way and did not receive funding from the Estate, the fee appears fair and reasonable. The Monitor's strong, fair, balanced and practical approach to this file, from the perspective of the Superintendent, likely saved the Estate millions to tens of millions of dollars.

61 I will deal briefly with the *Belyea* factors to be taken into account.

1. Nature, extent and value of the assets being handled

62 There can be no question about the significant nature, extent and value of the assets that were realized upon so that they could be available to creditors.

2. Complications and difficulties encountered

63 These proceedings are unprecedented in terms of their size, complexity, international aspects and the vast number of competing interests. It was in part due to these unprecedented complications and difficulties that the Monitor's role and powers had to be twice expanded, first in August 2009 and again in October 2012.

64 The Monitor, with the involvement of its counsel, has delivered 132 reports, participated in more than 200 motions and hearings before this Court and 23 leave to appeal applications and appeals before the Ontario Court of Appeal or Supreme Court of Canada, and been integrally involved in the 10 cross-border sales processes and transactions for the LOBs and residual intellectual property as well as a further 18 transactions through the relevant period in respect of other assets of the Canadian Debtors. The allocation dispute and the EMEA and UKPC Claims were hotly contested and complex.

3. Degree of assistance provided by the company, its officers or its employees

65 The Monitor was granted enhanced powers in mid-2009 and authorized to exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors since October 2012. This has resulted from the liquidating nature of this case, including the transfer or termination of most employees by early 2010 and the ultimate resignation of the few remaining officers and directors of the Canadian Debtors in October 2012. Substantially all activities undertaken by or on behalf of the Canadian Estate have been undertaken by the Monitor's professionals with the assistance of Monitor's counsel. This expanded role has resulted in the Monitor and its counsel undertaking a significantly greater scope of work than in a typical CCAA case.

4. Time spent

66 The billings over the relevant period comprise a combined 384,652.6 professional hours by the Monitor and its counsel. Throughout, the professional fees and disbursements of the Monitor, its counsel and other professionals being funded by the Canadian Debtors have been disclosed in Monitor's reports along with forecasts of expected fees and disbursements which were part of the restructuring costs. Starting in April 2013, the Monitor provided in its relevant reports detailed breakdowns of the Canadian Debtors' restructuring costs, including total fees for advisors as well as an aggregate total of the fees and disbursements of the Monitor, Goodmans and A&O. In sum, there has been full disclosure throughout the period of the activities of the Monitor and its counsel, including the estimated and resulting fees and disbursements.

5. Knowledge, experience and skill

67 To ask the question is to answer it. The professionals in this case from the Monitor and its counsel are the cream of the crop.

6 Diligence and thoroughness displayed

68 The same applies to this question. The 132 reports of the Monitor make clear that these qualities were brought to bear.

7. Responsibilities assumed

69 In this case, particularly with the two orders granting the Monitor extraordinary powers, the responsibilities assumed were enormous.

8. Results Achieved

70 I have dealt with this at some length. The results achieved were commendable.

9. The cost of comparable services when performed in a prudent and economical manner

71 I am quite satisfied that the Monitor's professional rates and disbursements, as well as those of its counsel, are comparable to the rates charged by other professional firms in the Toronto, New York or Wilmington market for the provision of similar services regarding significant complex commercial restructuring matters.

72 Indeed, the professional fees and disbursements of the Monitor and its counsel, together with the fees and disbursements of the Canadian Debtors' main advisors, are less, and in some cases significantly less, than the fees and disbursements of the main advisors to the other Estates. The fees and disbursements of the main advisors to the Canadian Estate for the period January 14, 2009, through December 31, 2015, are approximately 76% of the fees and disbursements of the main advisors to the U.S. Estate, and approximately 51% of the fees and disbursements of the EMEA Estate advisors, as detailed in the following chart⁵:

Nortel Estate Main Advisors**Professional Fees****For the period January 14, 2009 - December 31, 2015****(in USD millions)**

	<i>Fees</i>	<i>Disburse-ments</i>	<i>Total Fees & Disburse-ments</i>
Ernst & Young Inc.{1,2}	100.1	2.9	103.0
Goodmans LLP{1,2}	77.8	2.4	80.2
Norton Rose Fulbright Canada LLP{1,2}	63.3	1.6	64.9
Gowling Lafleur Henderson LLP{2}	9.0	0.2	9.2
Fresbfields Bruckhaus Deringer LLP{3}	7.3	1.7	9.0
<i>Total</i>	<i>257.5</i>	<i>8.8</i>	<i>266.3</i>
Allen & Overy LLP	28.5	1.6	30.1
Buchanan Inersoll & Rooney PC	1.1	0.4	1.5
<i>Total Professional Fees</i>	<i>287.1</i>	<i>10.8</i>	<i>297.9</i>
<i>Fees and Expenses of Main Advisors of:</i>			
US Debtors{4}			389.9
EMEA Debtors{5}			581.9

Notes: 1 Fees exclude undrawn retainer 2 Foreign exchange rates used based on Bank of Canada Monthly Average Noon-Exchange Rates 3 Foreign exchange rates used based on Federal Reserve Monthly Average Noon-Exchange Rates 4 US Debtors professionals included are Cleary Gottlieb Steen & Hamilton LLP, Emst & Young LLP (US), Huron Consulting Group, John Ray, Torys LLP, Chillmark Partners, LLC and Morris, Nichols, Arsht & Tunnell LLP, based on monthly fee applications filed in the United States Bankruptcy Court for the District of Delaware 5 Based on Joint Administrators' Abstract of Receipts and Payments from January 14, 2009 to January 13, 2016

73 The comparison is all the remarkable when one considers the extra work that the Monitor had to do because the head office of Nortel was in Canada and the fact that the Monitor had to respond to the many issues raised in the foreign proceedings as those issues had the potential to affect the recovery by the Canadian creditors.

74 I could be somewhat critical regarding the number of counsel in the courtroom during the allocation trial. At the outset, there were four or five lawyers in court for the Monitor. When a witness was giving evidence in Delaware, counsel for the Monitor doing the cross-examination attended in the Delaware courtroom with fewer lawyers in the Toronto courtroom. However, it was quite obvious that the Monitor risked being outmatched. The U.S. debtors had five lawyers in the courtroom throughout the trial, as well as many in the Delaware courtroom, the EMEA debtors had two or three each day, the UKPC had usually two lawyers each day, the UCC had two and the bondholders usually had two. All of these other parties were lined up against the Monitor. After a while, the Monitor began sending fewer lawyers to court. In a case of this size and complexity, I am not in a position to know exactly what role each of the Monitor's lawyers had played in preparation for the trial or to say that they should not have been there.

75 My general impression was that there were far too many lawyers in the courtrooms in Toronto and in Delaware, some of whom (not the Monitor's counsel) spent much time on their blackberries. The accounts of all of these other parties are not before this Court for approval.

76 It is fair to say that each of the *Belyea* factors supports the accounts of the Monitor and its counsel being passed and I approve them.

Insolvency culture

77 I cannot leave this passing of accounts without some discussion of what is becoming prevalent in insolvency cases in Toronto.

78 My comments are restricted to the trial procedures. Prior to the litigation becoming the focus of the work, the parties worked very cooperatively to achieve an asset realization that was remarkable and much more than forecasted.

79 Justice Pepall dealt recently with a receiver's costs in *Diemer*. The concerns she raised are no different than in a CCAA or BIA case. One concern is the extent of "over lawyering" a file.

80 In my early days in this Nortel matter, Judge Gross and I faced shortly before trial a large number of "pre-trial" motions, consisting largely of motions to strike various parts of expert reports as being outside the expertise of the particular expert. There were very thick briefs, responding briefs and reply briefs with lengthy facta. Motions of this kind are routinely made during the course of a trial without all of the briefs and facta. The motions were dismissed and the parties were left free to make such arguments during the trial. Needless to say, the issues evaporated.

81 We were also faced with arguments over the length of affidavits that could be filed and the time available to the various parties during the trial. The debate seemed endless and Judge Gross and I had to settle the issues. In the end, the time allotted was more than necessary and it too never became an issue during the trial.

82 These sorts of things should not have occurred. The Nortel case was unique in that there were no significant secured creditors who had an interest in controlling costs. That is, there was no typical client whose own money was at stake, such as a bank, which normally would put a brake on excess lawyering taking place.

83 There are too many occasions when a large number of lawyers will attend at court on a matter that is on consent or knowingly without opposition, usually conducted in chambers because of those circumstances. Usually there is no need for most of the lawyers to attend and no need for senior lawyers at all. Courts must be mindful when this occurs to register a concern and, if costs are in the discretion of the court, to refuse to provide costs to those who need not have attended.

84 In Nortel, during the allocation trial, there were far too many lawyers in Court in both Toronto and Delaware. Five lawyers for a party, such as was the case invariably with the U.S. debtors, were likely not needed. That situation breeds disrespect for the legal system in general and particularly so in a case in which thousands of pensioners and disability claimants have had to wait far too long for this proceeding to end. I realize that a judge does not know what all goes on in terms of preparation, and it may be that there is a need for several counsel during a particular witness, but in the Nortel case there had been extensive discovery and all of the evidence of the witnesses was known before the trial began and contained in affidavits or expert reports that were used as their evidence in chief.

85 Some have criticized the Courts in this case for letting things get out of hand. It may be that the criticism is merited, but in my view there is not so much in the point. What got out of hand was the extensive discovery process that ensued once the size of the value of the residual patents at \$4.5 billion was known. The U.S. Debtors and the EMEA Debtors changed their initial position from the Canadian Debtors owning the residual patents to the U.S. Debtors taking the position that they owned all of the interests in the patents in their market and the EMEA debtors saying that the patents were jointly owned. In the allocation decision I referred to this and said:

In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation.

86 Professor Janis Serra wrote an article in the *Globe & Mail* shortly after the allocation decision was made. The headline was "The Nortel judgments were fair. Uncontrolled legal costs are not". In her article, Professor Serra said:

While parties should be able to assert their claims, the disproportionate negative effects of protracted litigation on smaller creditors are tremendous.

Few people dispute that professionals need to be paid for their services and that parties need lawyers and financial professionals to help guide them through complex insolvency cases. However, the Nortel case represents the extreme in the amount of fees directed away from creditors to professionals, with more than \$1-billion already paid to the experts, illustrating the problem of uncontrolled costs.

87 Against the wishes of the Monitor, a broader discovery process was permitted because of the rights under U.S. law permitting wide-ranging depositions. To have ignored those rights in this innovative cross-border proceeding would likely have led to reversible error of any decision made contrary to those parties who had such rights. However, what should have happened is that the parties should have engaged in meaningful negotiations far sooner and settled the matter for the benefit of those who have lost so much in the Nortel insolvency.

88 While there are some who would like to see the Court "punish" the lawyers in this case, it should be recognized that the only party that is subject to the Court's jurisdiction over its costs is the Monitor. For the reasons already given, it would be unjust to center out the Monitor or its counsel for the blame.

89 What Nortel teaches us is that the gatekeepers of expenses in insolvency cases must exercise as much vigilance as possible to see that costs are maintained at a proper level. Nortel was unusually complex, to be sure, but lessons learned can be useful for less complex insolvencies.

Conclusion

90 The Monitor's accounts and those of its counsel including the respective fees and disbursements incurred during the period January 14, 2009, through to and including May 31, 2016, are approved, being:

(a) for the Monitor, CA\$122,972,821.96, inclusive of applicable taxes;

(b) for Goodmans, CA\$99,994,744.85, inclusive of applicable taxes;

(c) for A&O, US\$31,352,136.73, inclusive of applicable taxes; and

(d) for BIR, US\$1,476,489.87.

Motion granted.

Footnotes

- 1 See the decision regarding the allocation of the \$7.3 billion escrowed sales proceeds: *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]).
- 2 EMEA is an acronym for 19 Nortel subsidiaries in Europe, the Middle East and Africa
- 3 A majority but not all of the bondholders under the particular Indenture Trust are a party to the Settlement Agreement.
- 4 See *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]).
- 5 It is apparently unclear from the information available to the Monitor whether the expenses of the EMEA Debtors include disbursements for experts. If they do, a comparison would require those expert fees to be deducted. The Canadian and US Debtors' experts' fees are not included in the chart. The chart goes to the end of December, 2015, which does not include work done since then, and so should be taken as a guide rather than as amounts fixed in stone.

TAB 6

2017 ONSC 4205
Ontario Superior Court of Justice

Canadian Imperial Bank of Commerce v. Urbancorp (Leslieville) Developments Inc.

2017 CarswellOnt 11378, 2017 ONSC 4205, 282 A.C.W.S. (3d) 775

**Canadian Imperial Bank of Commerce (Applicant) and Urbancorp
(Leslieville) Developments Inc., Urbancorp (Riverdale) Developments
Inc., Urbancorp (The Beach) Developments Inc. (Respondents)**

G.B. Morawetz R.S.J.

Heard: May 30, 2017

Judgment: July 20, 2017

Docket: CV-16-11409-00CL

Counsel: Clifton Prophet (Agent), for Canadian Imperial Bank of Commerce
Pamela Huff, Kelly Peters, for Alvarez & Marsal Canada Inc., Construction Receiver
Barbara Green, for Terra Firma Capital Corporation
Philip Horgan, for Commercial Two, Lien Claimant (Leslieville)

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Related Abridgment Classifications

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 — Remuneration of receiver — Remuneration — General principles

Debtors were developers involved in condominium development project — Receiver was appointed over debtors' assets, including in capacity of construction lien trustee — Settlement was reached that resulted in project being sold to one creditor with court approval — Receiver had employed general counsel, real estate counsel, and independent counsel — Receiver sought fees in amounts of \$1,390,042.50 for itself, \$629,161.50 for general counsel, \$44,562 for real estate counsel, and \$1,328,389.60 for independent counsel, plus HST and disbursements for each — Receiver brought motion for approval of fees — Motion granted — Independent counsel's fees were reduced by \$35,000 plus HST to reflect some duplication arising from having 16 lawyers involved in file, but fees were otherwise approved — Fact that physical state of construction project had been well advanced did not, in itself, have any correlation to complexity of issues involved in receivership proceedings or indeed to quantum of issues — Two reports of receiver detailed number of activities in which receiver and its counsel were involved, and issues raised by creditor had been fully addressed in reports — Results achieved had translated into tangible recovery for creditor — Creditor's complaint about choice of receiver and independent counsel was without foundation, and rates charged by them were consistent with market rates for receivership proceedings in Toronto.

Table of Authorities

Cases considered by G.B. Morawetz R.S.J.:

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — considered

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — considered

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

Nortel Networks Corp., Re (2017), 2017 ONSC 673, 2017 CarswellOnt 1122, 44 C.B.R. (6th) 289 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

MOTION by receiver for approval of fees for itself and its counsel.

G.B. Morawetz R.S.J.:

1 Alvarez & Marsal Canada Inc. ("A&M"), as receiver and manager (in such capacity, the "Receiver"), and as construction lien trustee (in such capacity, the "Construction Lien Trustee"), (the Receiver, together with the Construction Lien Trustee, the "Construction Receiver") of all the assets, undertakings and property (the "Property") of Urbancorp (Leslieville) Developments Inc., ("UC Leslieville"), Urbancorp (Riverdale) Developments Inc. ("UC Riverdale"), and Urbancorp (The Beach) Developments Inc. ("UC Beach"), together with UC Riverdale, the "Guarantors", and the Guarantors, together with UC Leslieville, the "Debtors" brought this motion for, among other things, approval of various court orders: the Purchaser Package Approval Order, the Settlement Approval Order, the Beach Project Order, and the Receivership Administration Order.

2 As part of the Receivership Administration Order, the Construction Receiver sought approval of the fees and disbursements of the Construction Receiver and its counsel Gowling WLG (Canada) LLP ("Gowling or Construction Receiver's Counsel"), Blake, Cassels & Graydon ("Blakes" or "Independent Counsel") and Miller Thomson LLP ("MT" or "Construction Receiver's Real Estate Counsel") (the "Fee Approval Motion").

3 On May 2, 2017, the Construction Receiver sought and obtained approval of the various agreements and arrangements that give effect to the proposed settlement (the "Settlement") agreed to among Canadian Imperial Bank of Commerce ("CIBC") in its capacity as Administrative Agent (the "Administrative Agent") to the senior secured lending syndicate consisting of CIBC, Canadian Western Bank, and Laurentian Bank of Canada (collectively, the "Syndicate"), Terra Firma Capital Corporation ("Terra Firma"), the *ad hoc* Leslieville Purchasers, and CRAFT Development Corporation ("CRAFT") as the contractor proposed by Terra Firma to complete construction of the Leslieville Project (collectively, the "Settlement Parties").

4 Justice Newbould granted the Purchaser Package Approval Order, the Settlement Approval Order, the Beach Project Order, and the Receivership Administration Order with one exception. The Fee Approval Motion was adjourned. The unofficial endorsement of Newbould J. of May 2, 2017 reads as follows:

No other party but Terra Firma has indicated an objection to the motion for approval of professional fees. The objections of Terra Firma are to be advanced as follows:

1. By Wednesday, May 10th, counsel for Terra Firm to provide a letter setting out the grounds and nature of each objection to the fees and disbursements, including particulars of any specific fee and/or disbursement amounts that are objected to and any additional evidence proposed to be filed;
2. By Monday, May 15th, counsel for the professionals subject to the objection to provide a response to each objection and particulars of any additional evidence proposed to be filed;

3. Terra Firma and the professionals subject to the objections will schedule a 9:30 appointment the week of May 15th to establish a timetable for the hearing and objections; and

4. The Construction Receiver will be seeking to have the matter heard before May 30th.

5 On May 16, 2017, Newbould J. ordered that the fee dispute be heard on May 30, 2017.

6 The Construction Receiver is seeking approval of its fees and those of its counsel in connection with the performance of their duties in the Receivership Proceedings in the following amounts:

(i) The Construction Receiver in the amount of \$1,390,042.50, plus HST and disbursements, for the period from May 30, 2016 to March 31, 2017;

(ii) The Construction Receiver's Independent Counsel in the amount of \$1,328,389.60, plus HST and disbursements, for the period from May 19, 2016 to May 31, 2017;

(iii) The Construction Receiver's Counsel in the amount of \$629,161.50, plus HST and disbursements, for the period from June 2, 2016 to March 31, 2017; and

(iv) The Construction Receiver's Real Estate Counsel in the amount of \$44,562.00, plus HST and disbursements, for the period from March 2, 2017 to March 31, 2017.

7 Terra Firma is the junior general secured creditor of the Debtors. Terra Firma objects to the magnitude of the fees being sought and, more specifically, seeks a reduction in the fees sought by the Construction Receiver and Blakes, by at least 30%. Terra Firma does not oppose the fees being sought by Construction Receiver's Counsel and Construction Receiver's Real Estate Counsel. The position of Terra Firma was supported by Commercial Two.

8 Terra Firma objects to the A&M fees and the Blakes fees for the following reasons:

1. The hourly rates charged are unreasonable in light of the nature of the work involved and the amounts in issue;

2. The time spent by multiple time keepers is unreasonable and disproportionate; and

3. The Construction Receiver and Blakes failed to minimize duplication or effect efficiencies.

9 The Second Report of the Construction Receiver is fifty-eight pages in length. Approximately twenty-eight pages are devoted to UC Leslieville. Six pages are devoted to UC Beach and two pages are devoted to UC Riverdale. The Second Report also covers a review of security and other potential prior ranking claims and these issues cover some ten pages. A summary of the Construction Receiver's activities covers another four pages and is followed by commentary related to the Construction Receiver's Statements of Receipts and Disbursements and estimated funding requirements, approval of fees and activities and conclusions and recommendations.

10 The Supplementary Report to the Second Report contained in the Supplementary Motion Record of the Construction Receiver contains extensive detail relating to the Fee Approval Motion. Attached to this Supplementary Report as appendices are:

(i) the Affidavit of Douglas R. McIntosh, President of Alvarez & Marsal;

(ii) the Affidavit of Milly Chow, Partner at Blakes;

(iii) the Affidavit of Lilly A. Wong, Partner at Gowling; and

(iv) the Affidavit of Ronald Fairbloom, Partner at Miller.

11 The affidavits of Mr. McIntosh, Ms. Chow, Ms. Wong and Mr. Fairbloom disclose, in detail, the name of each person who rendered services, the dates on which services were rendered, the time expended and the rate charged.

12 There was no suggestion that, in discharging its mandate, the Construction Receiver exceeded its authority.

13 In response to the preliminary objections raised by Terra Firma, the Construction Receiver submitted the Third Report dated May 23, 2017 and a Supplement to the Third Report dated May 29, 2017.

14 Terra Firma submitted a Responding Motion Record, a Supplementary Responding Motion Record, a Second Supplementary Responding Motion Record and a Third Supplementary Responding Motion Record. Affidavits were sworn by Glenn Watchorn, President of Terra Firma and Rachel Puma, a law student at Robins Appleby LLP., counsel to Terra Firma.

15 The Construction Receiver complained about the timelines of the filing of Terra Firma's materials. However, all of the materials were accepted for filing and have been considered by the court.

16 In his affidavits, Mr. Watchorn states that he has not had sufficient time to prepare a detailed response to the position put forward by the Construction Receiver in support of its claims for its fees and for those its counsel, nor did he have time to review all of the estimates provided to the Construction Receiver related to its estimated fees.

17 No affiant was cross-examined.

18 The timetable for the hearing of this matter was set by Newbould J. in his endorsements of May 2, 2017 and May 16, 2017. The matter proceeded, as scheduled, on May 30, 2017 and I must take the record as it was placed before the court on that date.

19 I do not propose to recite, in detail, the respective positions taken by the Construction Receiver and Terra Firma. In summary:

(i) the Construction Receiver is of the view that its hourly rates and those of its counsel, are reasonable. Terra Firma disagrees;

(ii) the Construction Receiver is of the view that the time spent by the Construction Receiver and its counsel was reasonable, Terra Firma disagrees; and

(iii) the Construction Receiver is of the view that the Construction Receiver and its counsel minimized duplication and operated efficiently in discharging their mandates. Terra Firma disagrees.

20 A&M was appointed as Construction Receiver, by order on May 31, 2016.

21 Terra Firma submits that the receivership involved three small residential projects of which the main project was the build out of a partially constructed fifty-five unit condominium townhouse development, which was 90% complete in terms of its construction at the time of this receivership. Terra Firma submits that it would be grossly excessive and unreasonable if the Receiver recovered its fees and those of its lawyers in the sum of \$3.41 million on account of such a small project. Terra Firma also references that the actual Construction Receiver's and Independent Counsel's fees incurred dramatically exceeded earlier estimates provided by the Construction Receiver to Terra Firma, upon which it relied. Terra Firma concludes that the Construction Receiver and Independent Counsel failed in their obligation to perform their tasks in an economic fashion.

22 The Reports of the Construction Receiver recite a very different state of affairs in the Receivership process. The history of the settlement negotiations is set out in detail in the Second Report. The Receiver notes that negotiations

among the parties were protracted; however, through the perseverance of the settlement parties, Tarion, Travellers, and the efforts of the Construction Receiver and its counsel, after over eight months of negotiations, resulted in the approval of the settlement definitive documents that give effect to the settlement agreed to among the settlement parties.

23 The Receiver comments that the settlement provides an opportunity for existing Leslieville purchasers to purchase their respective townhome units at a higher purchase price and on terms and conditions set out in a new agreement of purchase and sale following the completion of construction of the Leslieville Project. Financing is provided by the Syndicate and Craft, and guaranteed by Terra Firma. The Receiver notes that to date, thirty-nine fully completed opt-in packages have been received by the Construction Receiver, representing a 72% participation rate.

24 The Receiver contends that the settlement represents a successful resolution to the extensive negotiations for the benefit of stakeholders, including Terra Firma. The potential recoveries are set out in a Confidential Appendix to the Third Report.

25 From the standpoint of Terra Firma, the Receivership may have appeared to be straightforward. However, the fact that the physical state of the construction project was well advanced does not, in itself, have any correlation to the complexity of the issues involved in the Receivership Proceedings or indeed to the quantum of issues.

26 Furthermore, the interest of Terra Firma is, by definition, far narrower than the interests of the Construction Receiver. The Second Report and the Third Report detail a number of activities in which the Construction Receiver and its counsel were involved with, including:

- (i) conservatory and security measures;
- (ii) asset and construction lien review;
- (iii) review of Syndicate, Travellers and Terra Firma security positions;
- (iv) court/administrative and regulatory matters;
- (v) municipal issues;
- (vi) tax related issues; and
- (vii) Tarion negotiations in respect of the status of completion of the Leslieville Project.

27 The general involvement of the Construction Receiver in these matters may have been known to Terra Firma, but indeed, there is no indication that Terra Firma was fully aware of the specifics and extent of the involvement of the Construction Receiver and its counsel.

28 The affidavit of Mr. Watchorn, sworn May 26, 2017 principally raises objections relating to the negotiation and finalization of the Settlement. It does not comment on many of the other issues which the Construction Receiver has referred to in its Report.

29 In Mr. Watchorn's second affidavit, sworn May 30, 2017, Mr. Watchorn responds to a statement of the Construction Receiver to the effect that Terra Firma's principle objection relates to the negotiation and finalization of the Settlement. Mr. Watchorn states that that is simply not true and that Terra Firma objected to the duplication of services, fees too high relative to the size of the project, and poor effectiveness and efficiency. He states that it simply should have not have taken such a long time to finalize matters and he draws the conclusion that the Construction Receiver was not managing the process well.

30 Mr. Watchorn makes a number of generalized complaints with respect to the conduct of the Construction Receiver and its counsel, but the issues raised by Mr. Watchorn have been, in my view, fully addressed in the Reports submitted

by the Construction Receiver. Furthermore, the Reports comment on a number of issues that arose in the Receivership Proceedings that would have no impact on Terra Firma and thus there would be no reason for Terra Firma to have intimate knowledge of the issues addressed by the Construction Receiver's counsel.

31 It is understandable that Mr. Watchorn would focus on issues involving Terra Firma, but at all times it must be recognized that the Construction Receiver has a mandate to take into account the interests of all stakeholders as well as its obligations to the court.

32 Having had the opportunity to review the Reports filed by the Construction Receiver, I have concluded that this was not a straightforward engagement. In arriving at this conclusion, I have specifically taken into account paragraphs 19 - 42 of the Third Report.

33 In particular, I note the comments at paragraph 39 which reads as follows:

[39] To put this in context, the Terra Firma Motion was met with significant resistance and proceeded on a contested litigation path against a subset of forty-six (46) Ad Hoc Leslieville Purchasers. If the Ad Hoc Leslieville Purchasers had been successful on the Terra Firma Motion, the Construction Receiver would likely have been forced to sell the Leslieville Project subject to the pre-existing agreements of purchase and sale executed in 2011, at significant lower value than the then current market prices. As acknowledged by Terra Firma in the Terra Firma Motion, the gross purchase price (less deposits) under the 54 existing agreements of purchase and sale would not have been sufficient to generate any recovery to Terra Firma.

34 At paragraph 43 of the Third Report, the Construction Receiver concludes that the settlement represents a successful resolution of extensive negotiations for the benefit of the stakeholders, including Terra Firma.

35 There is no doubt that this receivership process has been expensive and the requested fees are beyond an amount expected by Terra Firma. However, the results achieved by the Construction Receiver, with the assistance of both Construction Receiver's Counsel and Independent Counsel have translated into a tangible recovery for Terra Firma.

36 The legal test for reviewing a receiver's fees and the fees of its counsel was recently restated by Newbould J. in *Nortel Networks Corp., Re*, 2017 ONSC 673 (Ont. S.C.J. [Commercial List]) at paras. 14 and 15:

So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 2002 CanLII 45059 (ON CA), 36 C.B.R. (4th) 200 at para. 51 (Ont. C.A.) ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (CanLII) at para. 5 (S.C. J.), aff'd (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- 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.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[15] Justice Pepall further stated:

45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

37 The legal test has to be considered in the context of the facts.

38 One of the complaints raised by Terra Firma in its factum is that the nature of this receivership did not require the "large resources and correspondingly higher rates of large firms such as A&M and Blakes". Terra Firma takes the position that there were other options of firms with good reputations and experience in development projects with far more reasonable rates. Terra Firma provided examples of receivership firms as well as firms with experienced insolvency counsel, who, in other mandates, have charged a lower hourly rate.

39 A&M was appointed Construction Receiver pursuant to the Appointment Order. There have been no subsequent motions by Terra Firma to substitute another receiver in place of A&M.

40 Terra Firma contends that, pursuant to a subordination agreement with CIBC, it was prohibited from opposing CIBC's appointment of A&M as a matter of contract law. Notwithstanding the provisions of subordination agreement, the appointment of A&M as Construction Receiver flows from the court order. The subordination agreement is a contract as between the parties. It does not fetter the discretion of the court on the issue of the appointment of a receiver. A&M is the Construction Receiver.

41 The Appointment Order authorized the Construction Receiver to engage counsel and I am not prepared to second guess the decision of the Construction Receiver to engage Blakes as its counsel of choice. The ability of a receiver to retain its choice of counsel was recognized by the Court of Appeal for Ontario in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (Ont. C.A.) at para. 44.

42 In my view, the complaint of Terra Firm with respect to the appointment of A&M as Construction Receiver and Blakes as its counsel is without foundation.

43 Terra Firma also objects to the hourly rates being charged by A&M and Blakes, but Terra Firma does not object to the hourly rates of Gowling. I fail to understand how, on a principled basis, Terra Firma can object to the hourly rates of the Construction Receiver and Independent Counsel and at the same time accept the rates charged by the Construction Receiver's Counsel. As pointed out in Blakes factum at paragraph 29(i) the average hourly rate for the Construction Receiver's professional team is \$537.71. The average hourly rate of Independent Counsel is \$630.94, which is lower than the average hourly rate of Construction Receiver's Counsel which is \$766.44.

44 Terra Firma has a direct economic interest in the Fee Approval Motion. The projections of the Construction Receiver are such that it is uncertain as to whether Terra Firma will achieve full recovery of its outstanding debt. If Terra Firma does suffer a shortfall, every dollar charged by the Construction Receiver and Independent Counsel will reduce the recovery to Terra Firma. Likewise, every dollar charged by Construction Receiver's Counsel has a corresponding effect on the economic position of Terra Firma. Logically, if Terra Firma was concerned about hourly rates, it would also object to rates charged by Construction Receiver's Counsel. By being selective in its attack on hourly rates, Terra Firma has undermined its argument.

45 In my view, there is no principled basis on which the position of Terra Firma can be sustained. The affidavits filed in support of the fee requests establish that the rates being charged by both A&M and Blakes are consistent with market rates for receivership proceedings in Toronto. I am satisfied that the Construction Receiver's professional rates and disbursements, as well as those of its counsel, are comparable to the rates charged by other professional firms in the Toronto market for the provision of similar services in a commercial receivership of this type. I am not prepared to reduce the hourly rates of either A&M or Blakes.

46 Terra Firma also takes the position that the time spent by multiple time keepers is unreasonable and disproportionate and that A&M and Blakes failed to minimize duplication or effect efficiencies.

47 Two sets of counsel were involved in this receivership acting on behalf of the Receiver. Gowling and Blakes.

48 As noted in the Third Report, the Construction Receiver was specifically authorized, pursuant to the Appointment Order, to retain counsel to the Syndicate, Gowling, as counsel to the Construction Receiver, save and except on matters upon which the Construction Receiver in its judgment, determined it requires independent advice, in which case the Construction Receiver was authorized to retain Independent Counsel.

49 Counsel to the Construction Receiver submits that given the realization options available, the competing interests of stakeholders, and the participation of its Syndicate represented by Gowling in the assessment of options and pursuant to the Settlement, the engagement of Independent Counsel to the Construction Receiver became critically important.

50 I am not prepared to second-guess the basis upon which the Receiver allocated the various tasks to Gowling and to Blakes. As a court officer, the Receiver is expected to obtain independent legal advice and, as noted above, was specifically authorized to obtain independent counsel. Likewise, the Receiver was authorized to retain Gowling for certain matters. I am satisfied, based on the facts set out in the Second Report and the detail set out in the invoices that the Construction Receiver and its counsel played an active role in negotiating the Settlement. I am also satisfied that the Construction Receiver, with the assistance of its Independent Counsel, combined to design a realization strategy that balanced the competing interests of the stakeholders while maximizing recoveries.

51 There were occasions when both Gowling and Blakes were involved. The Construction Receiver has addressed this issue at paragraph 35 of its Third Report as well as in the accompanying chart. I am not prepared to second-guess the decisions of the Construction Receiver on the allocation of legal services as between the two law firms. I also accept the explanations provided by the Construction Receiver in the Third Report which detail what firm was doing what work and at what time.

52 Terra Firma criticizes A&M and Blakes for failing to minimize duplication or effect efficiencies. With respect to the Receiver, Terra Firma points out that the work was, in some instances, duplicitous and, therefore, unduly expensive. Terra Firm submits that it was completely unnecessary to have two senior representatives of the Receiver attend at various meetings with their combined hourly rate of \$1,525.00. In directing its criticism towards Blakes, Terra Firma states that it would be fair to assume that given that Blakes had twenty-five time keepers on the receivership file with sixteen of them being lawyers, there was at least some amount of duplication, such as ramp-up time for the lawyers getting up to speed on various assigned tasks.

53 With respect to the criticism levelled at the Construction Receiver for having two senior representatives attend at various meetings, at first glance, there may be occasion where this criticism may appear to be justified. However, it is reasonable, in my view, to assume that the representatives did not work in tandem on all aspects of the file and that each individual would have specific areas of responsibility. In addition, it is difficult to ascertain, in advance, what issues will be raised at a particular meeting, especially when negotiations are involved. Although it is inevitable that there is a degree of duplication, I am not prepared, in these circumstances, to second-guess the Construction Receiver on its staffing model. Accordingly, I do not give effect to this aspect of Terra Firma's opposition.

54 With respect to the criticism levelled at Blakes, I do not take issue with the time spent by the lawyers who were intensively involved in the file. These individuals would have significant knowledge of the engagement and would contribute accordingly. However, I do find that the number of time keepers who were involved to be excessive. Certain time keepers, who were involved in the file for a relatively insignificant time period, would likely have a difficult time trying to discern what specific contribution they made to the file. It is inevitable that a portion of their time would be devoted to learning the file prior to addressing the specific issue assigned to them.

55 In my view, there is little to be gained by conducting a minute docket-by-docket examination of the accounts. I have concluded that a minor reduction in Blake's account is appropriate to reflect a degree of duplication arising from having sixteen lawyers involved on the file. In this respect, it seems reasonable in the circumstances to discount the time spent by lawyers and students who contributed fewer than thirty hours of docketed time to the file. In my view, a reduction of the Blakes' fee of \$35,000, plus HST is appropriate.

56 I consider this reduction to be fair and reasonable in the circumstances.

57 In arriving at my conclusions, on the fee requests of all parties, I have considered the non-exhaustive list of factors that courts have relied on to determine whether a court officer's fees are fair and reasonable. These factors include:

- (a) The nature, extent and value of the assets handled;
- (b) The complications and difficulties encountered;
- (c) The degree of assistance provided by the company, its officers or employees;
- (d) The time spent;
- (e) The receiver's knowledge, experience and skill;
- (f) The diligence and thoroughness displayed;
- (g) The responsibilities assumed;
- (h) The results of the receiver's efforts; and
- (i) The cost of comparable services when performed in a prudent and economical manner.

58 These factors have been recognized in *Nortel Networks Corp., Re*, 2017 ONSC 673 (Ont. S.C.J. [Commercial List]) at para. 15, quoting *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 19, affirmed 2014 ONCA 851 (Ont. C.A.), quoting *Belyea v. Federal Business Development Bank*, 1983 CarswellNB 27 (N.B. C.A.). The specific application of the facts in this case to the list of factors is set out in the Blakes factum at para. 29.

59 In the final analysis, it cannot be overlooked that the settlement in which the Construction Receiver and Construction Counsel and Independent Counsel played a necessary role, placed Terra Firma in a position where it will achieve a significant recovery. In my view, the professional fees incurred were necessary to achieve such a result.

60 In the result, the fee requests of the Construction Receiver, Construction Receiver's Counsel (Gowling), Independent Counsel (Blakes) and Construction Receiver's Real Estate Counsel (Miller Thomson) are approved, subject to the modification referenced at paragraph [55] above with respect to the fees of Independent Counsel.

61 The parties have requested that the appendix consisting of projections respecting the potential recoveries for Terra Firma be sealed pending further order. I am satisfied that, having taken into account the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) that the disclosure of this information could be harmful to stakeholders. The appendix is to be sealed pending further order.

Motion granted.

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TAB 7

2014 ONCA 851
Ontario Court of Appeal

Bank of Nova Scotia v. Diemer

2014 CarswellOnt 16721, 2014 ONCA 851, 20 C.B.R. (6th) 292, 247 A.C.W.S. (3d) 584, 327 O.A.C. 376

**The Bank of Nova Scotia, Plaintiff (Respondent) and Daniel
A. Diemer o/a Cornacre Cattle Co., Defendant (Respondent)**

Alexandra Hoy A.C.J.O., E.A. Cronk, Sarah E. Pepall J.J.A.

Heard: June 10, 2014
Judgment: December 1, 2014
Docket: CA C58381

Proceedings: affirming *Bank of Nova Scotia v. Diemer* (2014), 2014 ONSC 365, 2014 CarswellOnt 666, A.J. Goodman J. (Ont. S.C.J.)

Counsel: Peter H. Griffin for Appellant, PricewaterhouseCoopers Inc.
James H. Cooke for Respondent, Daniel A. Diemer
No one for Respondent, The Bank of Nova Scotia

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.8 Remuneration of receiver

VII.8.b Remuneration

VII.8.b.iii Miscellaneous

Headnote

Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — Miscellaneous
Counsel fees — Bank held security over debtor's cattle farm operations, and was owed approximately \$2,000,000 — On application by bank, receiver was appointed — Receiver requested legal fees of \$255,955 on behalf of its counsel — Motion judge found legal fees were excessive, given size of receivership, and refused to approve them — Motion judge assessed fees at \$157,500, plus disbursements of \$4,434.92 — Receiver appealed — Appeal dismissed — Motion judge did not err in disallowing counsel's fees — Initial appointment order stating that counsel was to be compensated at "standard rates", and subsequent approval of receiver's reports, did not oust need for court to consider whether fees claimed were fair and reasonable — Motion judge made no palpable and overriding error in concluding that counsel's fees were not fair and reasonable — It was inappropriate for motion judge to simply apply rates of London counsel, but this was not fatal — Motion judge was informed by correct principles, which led him to conclude fees lacked proportionality and reasonableness — Certain comments made by motion judge were not justified, but different result should not ensue.

Table of Authorities

Cases considered by Sarah E. Pepall J.A.:

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
BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 29 O.T.C. 354, 1997 CarswellOnt 1246 (Ont. Gen. Div. [Commercial List]) — referred to
Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 312 N.R. 195 (note), 41 C.B.R. (4th) 28, 181 O.A.C. 197 (note) (S.C.C.) — referred to

HSBC Bank Canada v. Lechier-Kimel (2014), 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.) — referred to

Statutes considered:

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

s. 243(1) — pursuant to

s. 248(2) — considered

s. 243(6) — pursuant to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

APPEAL by receiver from judgment reported at *Bank of Nova Scotia v. Diemer* (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.), refusing to approve counsel fees in amount sought by receiver.

Sarah E. Pepall J.A.:

1 The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

2 This appeal involves a motion judge's refusal to approve legal fees of \$255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

3 For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

4 The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately \$4.9 million (approximately \$2 million and \$2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

5 On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

6 Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

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

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

7 Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

8 The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

9 The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of \$8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.
- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

10 After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

11 The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

12 The Receiver's fees amounted to \$138,297 plus \$9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of \$338.38. The highest hourly rate charged by the Receiver was \$525 per hour. Fees estimated to complete were \$20,000.

13 The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to \$255,955, plus \$4,434.92 in disbursements and \$33,821.69 in taxes for a total account of \$294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of \$643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of \$750.00. The rates of the other 10 people on the account ranged from \$950 per hour for a senior lawyer to \$195 for a student and \$330 for a law clerk.

14 Fees estimated to complete were \$20,000.

15 In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

16 As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

17 In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

18 On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- \$100,000 of BLG's fees be approved; and
- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

19 Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was \$500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to \$30,000.

Motion Judge's Decision

20 On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

21 In his reasons, the motion judge considered and applied the principles set out in *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (Ont. C.A.) [hereinafter Bakemates], leave to appeal refused, (2003), [2002] S.C.C.A. No. 460 (S.C.C.) (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]); and *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R.

(2d) 248 (N.B. C.A.). The motion judge considered the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

22 The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

23 He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension — the hours) submitted for reimbursement."

24 The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately \$8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

25 The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

26 He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of \$475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

27 The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at \$157,500 from which the \$100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of \$4,434.92 and applicable HST.

Grounds of Appeal

28 The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

29 The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721 (Ont. C.A.), at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

30 Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just.

As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

31 The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

32 In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- 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.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

34 In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

35 Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

36 There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

37 For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

38 The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "[Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated](#)" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, [at p. 2](#). And that was in 2002.

39 Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

40 This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

41 The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

42 Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

43 In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

44 In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

45 In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, *all* the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

46 It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

47 Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

48 The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

49 As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

50 I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

51 In this regard, the appellant makes numerous complaints.

52 The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two

farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

53 While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

54 In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

55 As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

56 Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

57 In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

58 Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

59 I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

60 While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

61 For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of \$5,500, together with disbursements and all applicable taxes.

Alexandra Hoy A.C.J.O.:

I agree

E.A. Cronk J.A.:

I agree

Appeal dismissed.

TAB 8

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation

Jeremy Dacks, for Target Canada Entities

Susan Philpott, for Employees

Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for Trustee of the Employee Trust

Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.b Approval by court](#)

[XIX.3.b.iv Miscellaneous](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Approval of reports — Monitor in proceedings under Companies' Creditors Arrangement Act (CCAA) brought application for approval of reports and activities set out in reports — Application was opposed by two of applicants' landlords — Application granted in part — Monitor played integral role in balancing and protecting various interests in CCAA environment — Court specifically mandated monitor to undertake various activities — In its reports, monitor had provided helpful commentary to court and to stakeholders about progress of CCAA proceedings — In circumstances where monitor was requesting approval of its reports and activities in general sense, caution was to be exercised to avoid broad application of res judicata and related doctrines — Benefit of any approval of monitor's reports and its activities should be limited to monitor itself — Limiting effect of approval addressed concerns of objecting parties and it did not impact prior court orders.

Table of Authorities**Cases considered by Morawetz R.S.J.:**

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — referred to

Forrest v. Vriend (2015), 2015 BCSC 1878, 2015 CarswellBC 2979 (B.C. S.C.) — considered

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 2006 CarswellOnt 2835, 19 C.B.R. (5th) 165 (Ont. S.C.J. [Commercial List]) — referred to

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2007), 2007 CarswellOnt 1182, 2007 ONCA 145, 31 C.B.R. (5th) 167 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 23(1) — considered

s. 23(2) — considered

APPLICATION by monitor for approval of reports and activities set out in reports.

Morawetz R.S.J.:

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

(2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

.....

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.

.....

30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

.....

37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that *res judicata* and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of *res judicata* and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval is limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

End of Document

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TAB 9

COURT FILE NOS.: 31-377993

31-377994

31-377995

31-377996

31-377997

DATE: 20030806

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE PROPOSAL OF	)	Kenneth W. Crofoot
BAKEMATES INTERNATIONAL INC.,	)	for KPMG Inc.
CONFECTIONATELY YOURS BAKERIES	)	
INC., CONFECTIONATELY YOURS, INC.,	)	Igor Ellyn, Q.C.
SWEET-EASE INC., and MARMAC	)	for Barbara and Mario Parravano
HOLDINGS INC.	)	
	)	Aubrey Kauffman
	)	for the Laurentian Bank
	)	
	)	Benjamin Frydenberg
	)	for Business Development Bank of Canada
	)	
	)	HEARD: May 28, 2003

GROUND J.

[1] The motion before this court is the latest step in protracted, bitter and generally unproductive litigation between KPMG Inc. as Receiver and Manager (the “Receiver”) of Bakemates International Inc., Confectionately Yours Bakeries Inc., Confectionately Yours, Inc., Sweet-Ease Inc., and Marmac Holdings Inc. (collectively the “Companies”) and Mario and Barbara Parravano (the “Parravanos”), the controlling shareholders of the companies.

[2] The motion before the court today is brought by KPMG Inc. for an order:

- (a) approving the conduct and activities of the Receiver as outlined in the Receiver’s Seventh Report dated December 19, 2003 (the “Receiver’s Seventh Report”);
- (b) approving the Settlement agreement (the “Settlement”) between the Receiver and the Companies’ insurer, St. Paul Fire and Marine Insurance Company (the “Insurer”), in respect of certain business interruption loss and property loss insurance claims (collectively, the “Insurance Claims”);

- (c) sealing the contents of Appendices 6 and 7 of the Receiver's Seventh Report and all of the Receiver's Eighth Report until the approval of the Settlement has been finally determined; and
- (d) authorizing a distribution of \$1,063,745.79, plus per diem interest from November 15, 2002 up to the date of distribution, to Laurentian Bank of Canada ("Laurentian") in the event the Settlement of the Insurance Claims is approved by the court and the companion summary judgment motion brought by the Insurer is successful.

Background

[3] The Settlement for which the Receiver seeks approval quantifies the business interruption claim for Settlement purposes at \$1,928,157.00 and quantifies the property loss claim at \$407,870. Interim payments were made by the Insurer in the amount of \$250,000 for the business interruption claim and \$287,000 for the property loss claim. As a result, the total Settlement, after allowing \$50,000 for professional fee coverage and deducting the \$500.00 deductible, is \$1,848,527.00.

[4] The Receiver had continued the retainer by the Companies of an insurance loss claims accountant, Donald Trench Inc. ("Trench") who valued the unpaid Insurance Claims at \$2,246,668.00 or \$4,405,132.00 depending upon whether a fifteen-month indemnity period or twenty-four indemnity period was used. The Settlement resulted after a prolonged period of negotiations with the Insurer having regard to various other issues and risks affecting the claims of the Companies.

[5] The Parravano's assert that the Settlement is improvident and rely upon a report prepared by Muccilli Consulting Ltd. (the "Muccilli Report") which provides a range of business interruption losses between \$3,742,388 and \$15,229,259. The Receiver's Eighth Report contains an exhaustive review of the differences between the Trench Report and the Muccilli Report.

[6] The Companies' assets in the hands of the Receiver included the Insurance Claims comprising a business interruption claim and a property loss claim resulting from an October 1999 recall of a product due to an insect infestation (the "Infestation") of products shipped to Costco US by Sweet-Ease Inc. ("Sweet-Ease"). Prior to the Infestation, Sweet-Ease had been selling the product which became infested (cereal snack bars) to Costco's US Western Region for six months from April, 1999. The Infestation resulted in a recall of Sweet-Ease products from the Western Region and a cessation of further sales to that Region. Prior to the Infestation, it had been believed by Sweet-Ease that its sales to the Western Region would continue to grow significantly. At the time of the Infestation, Sweet-Ease had been close to finalizing arrangements to sell its cereal snack bars to Costco US Eastern Region but the discussions to finalize these sales ended as a result of the Infestation. After the Infestation, Sweet-Ease and its US sales agent attempted to restart its sales to Costco US with limited success. While some sales were made to the Western Region in the Summer of 2000, these sales were short lived and no sales ever materialized to the Eastern Region. Notwithstanding the problems with selling the cereal snack bars to Costco US, Sweet-Ease, both before and during the receivership, continued to sell significant and increased quantities of product to Costco Canada.

[7] In preparing its report, Trench recognized that the duration of the claim was a very real and contentious issue. The maximum claim period under the insurance policy is 24 months. Trench assessed the loss using 15-month and 24-month indemnity periods and recognized that factors affecting the period were the insolvency of the Companies, the affect of the Infestation on the insolvency, the sale of the operating assets on December 29, 2000 and the fact that sales had resumed to Costco US in the summer of 2000 although in limited quantities.

[8] The Trench Report assumed that if the Infestation had not occurred, sales to the Western Region of Costco would have continued and sales to the Eastern Region of Costco would have commenced in December 1999. Trench relied upon the pre-Infestation average monthly sales data per store in the Western Region to project the likely sales after the Infestation in both the Western and Eastern Regions. The pre-Infestation average sales were adjusted annually to reflect the 44% growth rate of sales between 1999 and 2001 of this product to Costco Canada (i.e., Canadian sales growth rate applied to U.S. Sales). Also included in the business interruption claim are claims for \$16,000.00 for additional labour by Sweet-Ease and lost profit margins of infested finished goods of \$117,000. The Trench Report was provided by the Receiver to the solicitors for the Insurer and after a period of consultation and negotiation the Settlement resulted. The Settlement of the business interruption claim provides for an additional payment of \$1,678,157.35. The Settlement is based upon a 15-month indemnity period and projected annual sales growth rate of 10 per cent and also includes \$50,000 for professional fee coverage.

[9] In addition, the property loss claim filed in the sum of \$598,000 was settled for an additional payment of \$120,870.00 after allowing for payments of \$287,000 already made. One of the primary areas of discussion with respect to the property loss claim was the claim for work-in-process inventory by the Companies relating to a substantial inventory of processed cereal bar material that was not used when the product was produced. The Insurer took the position that this material had been ordered destroyed by the health authorities for reasons unrelated to the Infestation in that it had been infested by insects other than the Indian meal moths, which were the cause of the Infestation, and by various rodents. In addition, the Insurer took the position that some of this inventory was rancid and possibly more than a year old. Similar positions were taken with respect to a claim of \$80,830 respecting ingredients inventory. Trench produced a property loss report commenting on the position of the insurer and determining that contrary positions could be argued with respect to their assertions. This resulted in the Settlement of the property loss claim on a compromise basis to allow 50% of these items.

[10] The Settlement also provided that the Receiver retained the right to cancel the Settlement in the event that an interested party bought the claim for an amount equivalent to the amount of the proposed Settlement. This provided the Parravanos or any creditor with the right to proceed with the insurance claims at their own costs if they were of the view that the claims were worth more than the amount of the Settlement.

[11] The Parravanos have presented the Muccilli Report which challenges the methodology used by Trench and a number of the assumptions made by Trench in the preparation of the

Trench Report. The Eighth Report of the Receiver, done in conjunction with Trench, set forth its analysis of the Muccilli Report.

[12] The motion records filed on this motion, the reports of KPMG, the Parravano's affidavits, the Trench Report and the Muccilli Report and the facts and submissions of counsel to this court deal with a myriad of issues relevant to the approval of the Settlement by this court. The issues involve the process followed by the Receiver in arriving at the Settlement, the methodology used by Trench and Muccilli in preparing their Reports, the assumptions made by them and the risk factors taken into account or not taken into account by each of them. The risk factors and the assumptions included whether the Infestation was the cause of the insolvency of the companies or whether the insolvency resulted from other financial problems within the companies, the appropriate indemnity period to apply to the calculation of the loss, the causes of the insolvency of the Companies, the calculation of lost sales and profits as a result of the Infestation, the anticipated and growth rate of sales of the Companies, the anticipated sales and profits from prospective contracts with Kellogg's and with Effem Foods, the property loss claim for work in process inventory and infested inventory, the appropriate gross margin percentage to be applied, the appropriate per store sales figures to be used for anticipated future sales to Costco and numerous other issues.

Disposition

[13] Counsel for the Receiver and for the Laurentian Bank submit that the motion before this court to approve the Settlement entered into by the Receiver is analogous to a motion to approve a sales of assets by a court-appointed receiver and that the principles annunciated in *Royal Bank of Canada v. Soundair Corp.* (1991) 4 O.R. (3d) 1 and *Skyepharm plc v. Hyal Pharmaceutical Corp.* (1999) 12 C.B.R. 87 should be applied to the case at bar and that the only issues the court need consider are the propriety of the Receiver's conduct and whether the transaction entered into by the Receiver is a provident transaction. They further submit that, in determining these issues, the court should place considerable reliance upon the Receiver's experience and business judgment. It is their position that the major factors to be considered by the court in determining whether the Receiver has acted reasonably and providently in entering into the Settlement are the appropriate indemnity period for the claims, whether the Infestation was the cause of the insolvencies of the Companies and whether Infestation was also the cause of lost potential sales to Kellogg's and Effem Foods. These factors, they submit, account for substantially all of the difference between the valuation of the claims in the Trench Report and the Muccilli Report and can be determined by a consideration of the two Reports and by the submissions of counsel in their facts and before this court. The court should also, they submit, note that the Parravano's have had ample opportunity to purchase the Insurance Claims and have failed to do so, that there is no opposition by any other creditor to the proposed Settlement and that Business Development Bank, which will not be fully taken out by the amount of the Settlement and is a major secured creditor, supports the Settlement.

[14] Counsel for the Parravano's submits that this court requires *viva voce* evidence in order to make a determination as to which expert's opinion should be accepted before determining

whether the Settlement should be approved. He further submits that the conduct of the Receiver should not be approved in that the Receiver failed to proceed with the Insurance Claims expeditiously, that the Parravanos were not consulted sufficiently about the Insurance Claims or kept informed about the exchange of offers, that the interests of Mario Parravano as a secured creditor were not taken into account by the Receiver, that the Trench Report was kept from the Parravanos for nine months after it was prepared and that the Parravanos were given no opportunity to have any input into the Trench Report. Counsel for the Parravanos concedes, however, that a trial of issues has the risk of the court making findings which would be prejudicial to the position of the Receiver in any subsequent litigation with the Insurer if the Settlement is not approved.

[15] I am of the view that the characterization of this proceeding by counsel for the Receiver and for Laurentian Bank is correct. This is not a summary judgment motion where the court is being asked to dismiss a claim or a defence on the basis that there is no genuine issue for trial. Obviously, there are a great number of issues between the two experts' Reports but, having considered the Reports and the submissions made by counsel, I am satisfied that it was reasonable for the Receiver to conclude that the 15-month indemnity period was appropriate in the circumstances, that the Infestation was not the cause of the insolvency of the Companies, that the Infestation did not cause the loss of potential sales to Kellogg's and Effrem Foods and that the annual growth rate of sales of 10% was a reasonable rate to accept for the purposes of concluding a Settlement.

[16] In *Royal Bank v. Soundair*, *supra*, Galligan J.A. stated at page 17:

“As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver”.

[17] The failure of the Receiver to keep the Parravanos informed and to consult with them is certainly understandable in the circumstances of this case. The position of the Parravanos *vis-à-vis* the Receiver has been throughout the tortuous history of this matter one of accusations, antagonism and endless pointless litigation. The other criticisms of the conduct of the Receiver raised by counsel for the Parravanos are, in my view, minor at best and amount to nothing more than saying that another Receiver might have done things differently. I am satisfied that any such alleged shortcomings on the part of the Receiver do not impact on the reasonableness of the Settlement Agreement arrived at between the Receiver and the Insurer.

[18] The court should accept that a court-appointed receiver has acted properly unless there is strong evidence to the contrary. In *Royal Bank v. Soundair Corp.*, *supra*, Galligan J.A. stated:

“When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver’s expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver”.

[19] Similarly, *Skyepharma*, *supra*, Farley J. stated at paragraph 7:

“Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver’s decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

[20] There is no evidence before this court that the Receiver in the case at bar acted otherwise than reasonably and prudently in negotiating the Settlement Agreement with the Insurer.

[21] Accordingly, an order will issue:

- (a) sealing the contents of Appendices 6 and 7 of the Receiver’s Seventh Report and all of the Receiver’s Eighth Report until such time as this motion and the companion summary judgment motion by the Insurer are finally determined;
- (b) approving the conduct and activities of the Receiver as outlined in the Seventh Report of the Receiver dated December 19, 2002 (the “Receiver’s Seventh Report”);
- (c) approving the Settlement Agreement between the Receiver and the Companies’ Insurer, St. Paul Fire and Marine Insurance Company, in respect of the business interruption and property loss Insurance Claims of the Companies; and
- (d) authorizing distribution of \$1,063,744.79 plus per diem interest from November 15, 2002 up to the date of distribution, to Laurentian Bank of

Canada in the event that the companion summary judgment motion by the Insurer is successful.

[22] Counsel may make brief written submissions to me on the costs of this proceeding, on or before August 31, 2003.

Ground J.

Released: August 6, 2003

COURT FILE NO.: 31-377993
31-377994
31-377995
31-377996
31-377997
DATE: 20030806

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE PROPOSAL OF
BAKEMATES INTERNATIONAL INC.,
CONFECTIONATELY YOURS BAKERIES
INC., CONFECTIONATELY YOURS, INC.,
SWEET-EASE INC., and MARMAC HOLDINGS
INC.

REASONS FOR JUDGMENT

Ground J.

Released: August 6, 2003

TAB 10

2007 CarswellOnt 7322
Ontario Superior Court of Justice [Commercial List]

EnerNorth Industries Inc., Re

2007 CarswellOnt 7322, [2007] O.J. No. 4391, 162 A.C.W.S. (3d) 189, 38 C.B.R. (5th) 291

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF ENERNORTH INDUSTRIES INC.

IN THE MATTER OF AN APPLICATION FOR APPROVAL OF FEES AND ACTIVITIES OF INTERIM RECEIVER

Lax J.

Heard: July 5, 2007
Judgment: November 14, 2007
Docket: 31-454694

Counsel: Gavin H. Finlayson for Zwaig Associates Inc. in its capacity as Proposal Trustee and Interim Receiver of EnerNorth Industries Inc.

Matthew Milne-Smith for Responding Party, Oakwell Engineering Limited in its capacity as Opposing Creditor

George Benchetrit for RSM Richter Inc in its capacity as Trustee in Bankruptcy of EnerNorth Industries Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[IV Receivers](#)

[IV.2 Fees and expenses](#)

Bankruptcy and insolvency

[IV Receivers](#)

[IV.5 Miscellaneous](#)

Headnote

Bankruptcy and insolvency --- Interim receiver — Fees and expenses

Applicant was court appointed interim receiver of E Inc. under Bankruptcy and Insolvency Act ("Act") who withdrew its consent to act — Interim receiver argued that its dealings with dominant creditor in respect of litigation in India occupied majority of its time and effort — Interim receiver sought motion for order approving its activities and fees and releasing it as interim receiver — Motion granted — Rates charged by interim receiver for activities undertaken were within industry practice — Fees for which approval was sought were fair and reasonable — Significant costs were incurred in initiating proceedings in India, but these costs were attributable to actions of dominant creditor — Interim receiver should not be denied fees because its efforts did not result in proposal — This would not only have chilling effect on insolvency practice, but was clearly not intent of Act — Interim receiver and its counsel conducted ordinary administrative tasks associated with proposal in addition to extraordinary task of litigation in India — Distinction was drawn between receivers acting in midst of litigation as in present case and receivers acting in ordinary course of liquidating assets.

Bankruptcy and insolvency --- Interim receiver — Miscellaneous issues

Mandate — Applicant was court appointed interim receiver of E Inc. under Bankruptcy and Insolvency Act ("Act") who withdrew its consent to act — Receiver argued that E Inc.'s inability to pay its debts despite fact that book value of its assets far exceeded book value of its liabilities was attributable to cash flow problem caused by concurrent enforcement proceedings taken by dominant creditor in Canada and India on Singapore judgment — Receiver sought motion for order approving its activities and fees and releasing it as interim receiver — Motion granted — Decisions made by receiver

throughout were within broad bounds of reasonableness — Dominant creditor was incorrect that receiver was mandated to act like private liquidation receiver appointed for benefit of dominant creditor — Receiver was active as proposal trustee and interim receiver and its duties and mandate as receiver were tied to its duties and mandate as proposal trustee — As proposal trustee, receiver owed duty to creditors, but also to debtor to protect assets while value could be assessed and proposal formulated — Section 274 of Act is fail safe equalization method meant to penalize abuse of jurisdictional advantage in bankruptcy setting and was not substitute for order of priorities set out in Act — Dominant creditor was unsecured creditor whose claims ranked *pari passu* with other unsecured creditors — It was receiver and not dominant creditor that was appointed to manage E Inc.'s assets and had duty to other secured creditors with claims that had priority.

Table of Authorities

Cases considered by *Lax J.*:

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.) — considered

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 29 O.T.C. 354, 1997 CarswellOnt 1246 (Ont. Gen. Div. [Commercial List]) — considered

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 312 N.R. 195 (note), 41 C.B.R. (4th) 28, 181 O.A.C. 197 (note) (S.C.C.) — referred to

MacPherson (Trustee of) v. Ritz Management Inc. (1992), 1992 CarswellOnt 3213 (Ont. Gen. Div.) — followed
N.T.W. Management Group Ltd., Re (1994), 29 C.B.R. (3d) 139, 1994 CarswellOnt 325 (Ont. Bkcty.) — considered

Peat Marwick Thorne Inc. v. Deloitte & Touche Inc. (1995), 1995 CarswellOnt 3358 (Ont. C.A.) — referred to

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 47.1(1) [en. 1992, c. 27, s. 16(1)] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 274 — considered

MOTION by interim receiver for order approving its activities and fees and for releasing and discharging it as interim receiver.

Lax J.:

1 Between February 9 and March 22, 2007, Zwaig Associates Inc. served as Proposal Trustee and court-appointed Interim Receiver of EnerNorth Industries Inc. pursuant to s. 47.1(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. It also briefly served as its Trustee in Bankruptcy. It withdrew its consent to act on March 22, 2007. An order then issued on motion by Oakwell Engineering Limited, the dominant creditor of EnerNorth, directing the Official Receiver to accept Zwaig's Withdrawal of Consent to Act and its Certificate of Appointment and to appoint RSM Richter Inc. ("Richter") as Trustee in Bankruptcy of the estate. Zwaig now seeks an order approving its activities and fees and disbursements ("fees") and an order releasing and discharging it as Interim Receiver. Oakwell opposes Zwaig's motion for approval of its fees.

2 EnerNorth is a publicly-traded Ontario company with three employees, a head office and two subsidiaries. Its assets are fractional interests in working oil and gas wells in locations across Canada and shares held indirectly in two power

projects located in the Republic of India, one being Konaseema Gas Powder Limited ("KGPL"). Oakwell is a Singapore company that entered into a joint venture with EnerNorth in 1997 to build a power plant in India (the "KGPL plant"). The KGPL plant did not proceed as planned and the parties ultimately entered into a settlement agreement. When EnerNorth defaulted on its payment obligations under the settlement agreement, Oakwell brought action in Singapore in accordance with a jurisdiction clause in the governing agreement and obtained judgment for \$7 million. An appeal from this judgment was dismissed.

3 There is a long history of litigation animosity between EnerNorth and Oakwell that spilled over into the insolvency proceedings. An overview is necessary to provide context.

EnerNorth/Oakwell Litigation

4 In June 2004, Oakwell commenced an action in Ontario action to enforce its Singapore judgment. Recognition and enforcement was granted in June 2005. EnerNorth appealed the judgment granting recognition and enforcement to the Ontario Court of Appeal. The appeal was dismissed in June 2006. EnerNorth then brought a leave application to the Supreme Court of Canada and sought a stay of enforcement of the judgment pending the disposition of the leave motion. The Ontario Court of Appeal granted an order staying enforcement conditional on EnerNorth posting security in the amount of \$1.5 million, which it did. After deducting \$1.5 million posted as security, Oakwell asserts a claim (with costs and interest) of \$6.8 million on the Singapore judgment.

5 In January 2005, Oakwell filed an *ex parte* Execution Petition against EnerNorth before the Honourable High Court of Delhi at New Delhi in the Republic of India for enforcement of the Singapore judgment and an application seeking attachment and execution on EnerNorth's Indian assets. The KGPL shares have a book value of about \$3.1 million, but may have a significantly higher value in the near term. The reason for this is explained in Zwaig's Third Report dated March 5, 2007. At the time of its dual appointment, there was a hearing scheduled on February 14, 2007 before the Indian court to determine Oakwell's ability to execute on the KPGL shares. The Interim Receiver retained and instructed counsel prior to the Indian hearing and obtained an adjournment of the Indian proceedings until July 9, 2007. Oakwell resisted the adjournment and the Indian court imposed a term prohibiting any dealing with the KPGL shares.

6 In its Second Report dated February 23, 2007, the Interim Receiver reported that Oakwell had taken the position that it would continue with the Indian proceedings unless stayed by the Indian court in aid of the Ontario court. The Interim Receiver therefore instructed Indian counsel to initiate formal proceedings before the High Court of Delhi for aid and recognition of the Canadian insolvency proceedings and to seek the release of the KPGL shares to its custody in the Canadian proceedings for the benefit of all creditors. This application was brought on February 26, 2007 and a date for the hearing of the application was set for May.

BIA Proceedings

7 On February 9, 2007, EnerNorth filed a Notice of Intention to Make a Proposal naming Zwaig and simultaneously brought an *ex parte* motion to appoint the Proposal Trustee as Interim Receiver. Zwaig sought the appointment as Interim Receiver to provide stability and to preserve and protect the assets, particularly the KGPL shares, which it needed to make a proposal. On February 27, Oakwell advised that it intended to bring a motion under s. 50.4(11) of the *BIA* to terminate the stay period and put EnerNorth into bankruptcy. At this time, Oakwell's position was that it was entitled to continue to pursue its judgment in India until the Indian courts recognized the jurisdiction of the Ontario court. After the adjournment on February 14, Oakwell issued a press release to this effect.

8 Oakwell could not obtain time on the Commercial List for its motion to terminate the proposal proceedings until March 21. On March 7, Zwaig as Proposal Trustee, was obliged to return to court to seek an extension of time to file a proposal. Zwaig and its counsel believed that that this would be vigorously contested and prepared for the hearing on this basis. At the March 7 hearing, Oakwell opposed the extension, but indicated it would reserve the bulk of its argument for the March 21 hearing. The extension was granted. On March 16, Oakwell delivered its motion materials for its pending

motion to terminate the proposal proceedings. This included an affidavit from its Indian counsel explaining Oakwell's reason for refusing to withdraw its proceedings in India. In this affidavit, Anil Kumar Kher deposes that Oakwell is concerned that Enernorth has attempted to transfer its shares in KGPL to Canpower Development Corporation, its Barbados-based subsidiary and that "Oakwell has instructed me in no uncertain terms that it does not intend to seek preference over the legitimate creditors of EnerNorth, and will not take the benefit of the KGPL shares entirely for itself. If it is successful in obtaining the KGPL shares, Oakwell will share the proceeds with all legitimate creditors of Oakwell on a *pari passu* basis." This was the first time that Oakwell indicated it would not be seeking a preference.

9 Shortly after March 16, the Interim Receiver determined that further significant costs would be involved in responding to Oakwell's motion as Oakwell had indicated that it would not accept *any* proposal put forth by EnerNorth and would seek a liquidation of EnerNorth. As well, the Interim Receiver was approaching the limits of its administrative charge of \$300,000 and knew that Oakwell would challenge any increase. The Interim Receiver recommended an assignment into bankruptcy to EnerNorth's management who reluctantly agreed and on March 20, 2007, EnerNorth made a voluntary assignment, naming Zwaig as Trustee.

10 Once Oakwell was advised of the assignment, it informed the Interim Receiver that although it would not be proceeding with its motion scheduled for the following day, it would be seeking an order appointing Richter as Trustee in Bankruptcy instead of Zwaig. Recognizing that its administration of the estate of EnerNorth would be untenable, Zwaig determined that it should step aside. On March 22, I issued a consent order substituting Richter as Trustee in Bankruptcy.

Position of the Parties

11 The interim receivership order empowered the Receiver to take possession and control of the KGPL shares and restrained Oakwell from continuing the Indian proceedings. Zwaig acknowledges that the main focus of its activities and the fees it incurred were directed at this. Given the nature of its dual mandate, Zwaig asserts it was under a duty to attempt to gain control of the KGPL shares in order to make a proposal and to preclude Oakwell from obtaining a preference. It submits that the real question for the Court is whether it is equitable to punish Zwaig by denying it and counsel their fees for doing this in the face of Oakwell's refusal to terminate its execution proceedings in India.

12 Oakwell's version of events differs. It asserts that Zwaig aligned itself with management when it knew that no proposal could succeed without Oakwell's participation and consent. It argues that the KGPL shares "ultimately turned out to be a red herring", pointing out that Oakwell has taken no steps to seize the KPGL shares since EnerNorth's insolvency and that Zwaig's efforts produced nothing more than two adjourned motions. It argues that the execution proceedings, which had been progressing slowly in India for over two years, protected all creditors and prevented EnerNorth from disposing of the shares to Canpower. It submits that from the date Oakwell advised Zwaig that it would bring a s. 50.4(11) motion to terminate the proposal proceedings, the Receiver's activities were unreasonable and Zwaig should be denied its fees after this. If Zwaig's post-February 27 actions were reasonable, it disputes that the fees it incurred in carrying out its activities are fair and reasonable. It rhetorically asks whether it is reasonable for an interim receiver of a small company with no active business to incur about \$400,000 in fees and disbursements in 41 days where it did not liquidate any assets or advance the interests of the estate in any material respect.

Analysis

13 The general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and disbursements in carrying out the receivership are fair and reasonable: *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) at p. 214; leave to appeal to S.C.C. dismissed, (2003), 41 C.B.R. (4th) 28 (S.C.C.). The leading case in the area of receiver's compensation is the New Brunswick Court of Appeal decision in *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) where the court sets out the factors to be applied where compensation is to be determined on a *quantum meruit* basis. These include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the parties, the time spent, the receiver's knowledge, skill and experience, the diligence and thoroughness displayed, the responsibilities

assumed, the results, and the costs of comparable services when performed in a prudent and economical manner. (*per* Stratton J.A. at p. 247). This list is not exhaustive and other factors may be material depending on the circumstances of the receivership: *Confectionately Yours* at p. 216.

14 Receiverships should be administered as economically as reasonably possible: *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]). Farley J. put it in this way at para. 23:

... Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

15 While the court determines the reasonableness of the fees, courts are ill-equipped and should be reluctant to second-guess the considered business decisions made by a receiver, whose conduct is to be reviewed in the light of the specific mandate given to the receiver by the court: see, *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 5-6. As Doherty J.A. observed in *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.) at para. 40:

Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. ... The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision ... (Emphasis added).

16 Against these principles, I turn to consider the Interim Receiver's mandate and the fees in issue.

Mandate

17 EnerNorth became insolvent in February 2007 in that it was unable to pay its debts generally as they became due despite the fact that the book value of its assets of about \$14.5 million far exceeded the book value of its liabilities of about \$8.9 million. In the Receiver's view, as reported to the court, this was almost entirely attributable to cash flow problems caused by the concurrent enforcement proceedings taken by Oakwell in Canada and India on the Singapore judgment. The Receiver found it plausible, based on information from management and Indian counsel that the KPGL shares could have a significantly higher value than its book value of \$3.1 million in the relatively near term. EnerNorth's known creditors as at March 2, 2007 were six secured creditors with claims of approximately \$1.2 million and 46 unsecured creditors with claims of approximately \$7.7 million. Oakwell, with a claim of \$6.8 million, is EnerNorth's largest unsecured creditor, but certainly not its only creditor.

18 From the outset, Oakwell viewed the proposal proceedings as a hopeless undertaking and Zwaig, a court-appointed officer, as an adversary and a proxy for EnerNorth management. Each accuses the other of adopting an adversarial approach, but I find nothing in the conduct of Zwaig to support Oakwell's view. Rather, I believe that Zwaig tried to adopt an even-handed and transparent approach. In my view, it was Oakwell that viewed the proceedings as an extension of its long and bitter litigation with EnerNorth and was unwilling to give Zwaig the time and breathing room it needed to give the restructuring of Oakwell a fair chance to succeed. As a result, the proposal proceedings and interim receivership were carried out in difficult circumstances, across several time zones, and in courts on two continents.

19 Until March 16, 35 of the 41 days Zwaig was active as Proposal Trustee and Interim Receiver, Oakwell took the position that it was entitled to both direct the course of the insolvency proceedings in Canada and also realize on the KPGL shares in India in preference to other creditors, both secured and unsecured. By denying Zwaig access to the

shares, Oakwell knew that it was preventing the possibility of a proposal. In both of its capacities, Zwaig was charged with a duty to stabilize the business, gather assets and significantly, as Proposal Trustee, to assist the debtor, EnerNorth, in making a viable proposal. Its duties and mandate as Receiver were tied to its duties and mandate as Proposal Trustee. As Proposal Trustee, Zwaig owed a duty to creditors, but also to the debtor to protect assets while value could be assessed and a proposal formulated. Its mandate was not to liquidate and in the opinion of the Receiver, a bankruptcy was not inevitable in light of EnerNorth's debt to equity ratio and the current liquidity of the lending market.

20 In *N.T.W. Management Group Ltd., Re*, [1994] O.J. No. 2700 (Ont. Bkcty.); leave to appeal to Ont.C.A. refused, [*Peat Marwick Thorne Inc. v. Deloitte & Touche Inc.*] [1995] O.J. No. 2684 (Ont. C.A.), Chadwick J. pointed out the difference between a trustee in bankruptcy and a proposal trustee:

There is a distinction in the duties and responsibilities that a proposal trustee has in comparison to the trustee of a bankrupt estate. A proposal trustee has a limited statutory duty to the creditors and in the preparation of a formal proposal. (para. 18)

21 Oakwell appears to take the position that Zwaig was mandated to act like a private liquidation receiver appointed for the benefit of Oakwell's claim or like a trustee in bankruptcy. This was not the case and Zwaig was not subject to the demands of Oakwell because it was the dominant creditor. No other creditor opposed the proposal proceedings. Had the Receiver obtained control of the KPGL shares, it might have secured financing allowing it to pay out Oakwell's claim as part of a proposal. Zwaig's dilemma was that the KPGL shares were deliberately withheld from its control by Oakwell.

22 Oakwell points out that Richter, the current Trustee in Bankruptcy, has not demanded that Oakwell withdraw the Indian proceedings. It has not done this yet, but its mandate, to liquidate, is different as are the tools available to it. Further, Richter is operating under the same interim receivership order as Zwaig was, including language empowering it as Receiver to take possession of the KPGL shares and requiring everyone and particularly Oakwell to suspend proceedings in pursuit of the shares.

23 Oakwell offers s. 274 of the *BIA* as an answer to the preference argument advanced by Zwaig and argues that had it succeeded in realizing the KPGL shares, its claim would have been reduced accordingly in a bankruptcy. This argument overlooks that EnerNorth was not in bankruptcy at the time and that Zwaig was not appointed to liquidate assets and distribute proceeds. More importantly, s. 274 of the *BIA* is a failsafe equalization method meant to penalize abuse of jurisdictional advantage in the bankruptcy setting. It is not a substitute for the order of priorities set out in the Act. Oakwell was and is an unsecured creditor whose claim ranks *pari passu* with other unsecured creditors. It was the Receiver and not Oakwell that was appointed to manage EnerNorth's assets and had a duty to other secured creditors with claims that have priority.

24 At every step, Oakwell, was directly responsible for driving up the costs of these proceedings. When Oakwell for the first time stated in its motion materials that it would not seek a preference on the KPGL shares, this resolved a significant issue. Before this, the Interim Receiver may well have been criticized for not opposing Oakwell. At this point, Zwaig and its counsel recognized that continuing in the face of Oakwell's opposition to the proposal proceedings would result in burdensome costs that would not be fair and reasonable. In my view, the decisions made by the Receiver throughout were well within 'the broad bounds of reasonableness'. I turn then to the fees claimed.

Fees

25 I am unable to reconcile the amount claimed for fees and disbursements as set out in paragraphs 31 and 38 of Zwaig's Reply Factum with the amount that appears on the amended chart that was forwarded to me after the hearing. I propose to rely on the chart and trust counsel will inform me if this is incorrect. I understand the amount for which approval is sought, inclusive of GST, is \$370,790.11. This represents approximately 2.5% of the book value of the estate. Additional fees of \$35,767.00 were incurred between March 22 and May 5, but are not claimed as well as some unbilled amounts. I have taken this into account.

26 I am satisfied that the rates charged by Zwaig and Bennett Jones for the activities undertaken are within industry practice and on a weighted average basis are comparable to those charged by Richter and its counsel, Chaitons. Mr. Benchetrit acknowledged that the rates are comparable, although questioned whether the time was excessive. There is no justification for reducing the hourly rates on the arbitrary basis proposed by Oakwell.

27 Neither is there any justification for attempting to second-guess the time spent. Oakwell relies almost exclusively on a comparison to the fees incurred by its counsel during the period February 27 to March 22. This is not relevant as Oakwell and its counsel were engaged in different tasks than the Receiver and its counsel. Zwaig and its counsel were engaged in administering proposal proceedings, seeking alternative financing to make a viable proposal, managing litigation efforts here and in India, responding to information requests, attempting to address Oakwell's concerns and preparing for its own motion to extend the stay of proceedings anticipating vigorous opposition. Oakwell did not inform Zwaig or its counsel until the return of this motion that it would not fight this battle on March 7, but rather on March 21, the return date of its motion to terminate the proposal proceedings.

28 I do not propose to provide a detailed consideration of the individual *Belyea* factors. Taken collectively and applied to this receivership with particular regard to the dual mandate Zwaig performed in these unusual and challenging circumstances, I am satisfied that the fees for which approval are sought are fair and reasonable. Significant costs were incurred in initiating proceedings in India, but these costs have to be laid at the feet of Oakwell. It is true that Zwaig hired multiple Indian counsel, but I accept that it did so given its unfamiliarity with the Indian legal system and on the advice of contacts in India. I am sceptical that Oakwell continued its execution proceedings as it says to protect the KPGL shares. This surfaced for the first time in its March motion materials. It is more likely that Oakwell intended to terminate the proposal proceedings in advance of the May return date for the hearing of the aid and recognition application in order to further its attempt to obtain a preference. Whether or not this was its purpose, it did not withdraw its execution proceedings in the face of an *in personam* order of this court, thereby forcing the Receiver to take the steps it did.

29 I reject Oakwell's submission that Zwaig should be denied its fees or have them significantly reduced after February 27 because its efforts did not result in a proposal. This would not only have a chilling effect on insolvency practice, but is clearly not the intent of the *BIA*. While one would expect that in the usual case, there will be a proposal, there is no principled reason to deny compensation where one does not materialize as each situation must be considered on its own individual circumstances.

30 In its Second Report, Zwaig reported that "the major issue that has occupied the time and efforts of the Trustee/Interim Receiver since its appointments is its dealings with Oakwell in respect of the Indian proceedings". In its Third Report, the Interim Receiver reported that it was "mindful of the cost, time and risk associated with protracted litigation over the KPGL shares". At all times, the court and Oakwell were made aware that there were costs, likely significant costs, associated with these activities. Oakwell was on explicit notice that its actions and position were incurring costs to the estate.

31 Moreover, Zwaig engaged in other activities during the relevant period in its dual capacities as supported by its detailed dockets and described in its four Reports to the court. During its short restructuring period, Zwaig had discussions and meetings with thirteen finance and investment funds in Canada and the U.S. regarding obtaining strategic alternative financing for EnerNorth to satisfy its debts to its creditors. All potential financiers were clear that gaining possession and control of the KPGL shares was central to any financing. Zwaig and its counsel conducted the ordinary administrative tasks associated with a proposal in addition to the extraordinary task of litigating over the KPGL shares.

32 A distinction is drawn between receivers acting in the midst of litigation as was the case here and receivers acting in the ordinary course of liquidating assets. The comments of Lane J. in *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.) are apposite:

The position of receiver appointed in the midst of a bitter litigation is to be distinguished from one acting in the orderly liquidation of a business. The latter has far more control over events than the former. In the litigious situation, the receiver must often react to events over which it has no influence ... In such a case, a court-appointed receiver cannot be expected to function in an atmosphere of uncertainty as to payment of their reasonable accounts for responding to the acts of the contenders.

33 For these reasons, an order will issue approving the conduct and activities of Zwaig from February 9, 2007 to date; approving its fees and disbursements and those of its solicitors; and relieving, releasing and discharging it from its powers, duties and obligations as Interim Receiver.

Motion granted.

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. c. C.43 (as amended)

Court File No. CV-14-10667-00CL

AND IN THE MATTER OF HANFENG EVERGREEN INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**BOOK OF AUTHORITIES OF THE RECEIVER
(RETURNABLE NOVEMBER 20, 2017)**

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