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June 19, 2019

Hand Delivered

The Honourable Justice Darlene Jamieson
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, Nova Scotia

Dear Justice Jamieson:

Re: Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange for relief under the Companies' Creditors Arrangement Act – Hfx No. 484742

Submissions for Motion returnable June 27, 2019 at 2:00 p.m.

We are counsel for Ernst & Young Inc. ("EY") in its capacity as the monitor (the "**Monitor**") of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. ("**Quadriga**" or the "**Company**") d/b/a Quadriga CX and Quadriga Coin Exchange (collectively, the "**Applicants**"). On February 5, 2019 (the "**Filing Date**"), the Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the Initial Order (the "**Initial Order**") of the Nova Scotia Supreme Court (the "**Court**").

Filed with this motion is the Fifth Report of the Monitor dated June 19, 2019 (the "**Fifth Report**") and the Sixth Report of the Monitor dated June 19, 2019 (the "**Sixth Report**").¹ The Fifth Report addresses the current status of the Monitor's investigation related to the Applicants' business and operations prior to the Filing Date and Sixth Report addresses the approval of the fees and activities of the Monitor in connection with the CCAA proceedings (the "**CCAA Proceedings**"). To assist the Court with some additional background information, the Monitor has also filed a compendium which includes a copy of the Affidavit of Jennifer Robertson sworn January 30, 2019 filed in support of the Initial Order, the other Reports of the Monitor filed in the CCAA Proceedings and the Orders granted by the Court in the CCAA Proceedings.

¹ All capitalized terms used but not defined herein have the meaning ascribed to them in the Fifth Report.

A. Issues

These submissions address the approval of the fees and activities of the Monitor during the CCAA Proceedings and approval of the fees of Representative Counsel.

B. Facts

1. Background of the CCAA Proceedings

Prior to filing for creditor protection under the CCAA, Quadriga operated a cryptocurrency exchange which permitted Users to sell and trade cryptocurrency. Following the death of the Applicants' Chief Executive Officer and sole director, Mr. Gerald Cotten, the Applicants were unable to locate reserves to satisfy their liabilities to Users which were estimated at the Filing Date to total over \$200 million. The Applicants subsequently filed for creditor protection under the CCAA and EY was appointed as Monitor of the Applicants. The Monitor indicated early in the proceedings that it would investigate the affairs of Quadriga pursuant to section 23(c) of the CCAA and assist the Company with asset recovery in order to maximize recovery for Users.

In addition to the appointment of the Monitor, the parties were before the Court on seven (7) occasions in person or via teleconference during the CCAA Proceedings between February 5, 2019 and April 18, 2019. Various motions were brought and ultimately the Court issued fifteen (15) Orders during the CCAA Proceedings.

Following a hearing on March 5, 2019 involving submissions from various proposed counsel, the Court issued an Order ("**Rep Counsel Order**") appointing Representative Counsel for the Users of Quadriga ("**Representative Counsel**"). Representative Counsel (Miller Thomson LLP and Cox & Palmer as Nova Scotia local counsel) were appointed to provide representation to Quadriga's broad and diverse User group which includes approximately 76,000 individuals and entities. The other Orders granted by the Court in the CCAA Proceedings included:

- (a) Banking Arrangements Order: An Order granting various relief in respect of banking arrangements for the Monitor and the Company in order to permit various funds to be deposited;
- (b) Platform Access Order: An Order requiring Amazon Web Service Inc. to grant access to the Monitor to the account used to store Quadriga's platform;
- (c) Order Appointing Chief Restructuring Officer: An Order appointing Peter Wedlake of Grant Thornton LLP as Chief Restructuring Officer ("**CRO**") of the Applicants to address certain governance issues with respect to the Applicants and assist the Company with a possible sale and/or restructuring;

- (d) Stay Extension Order: An Order extending the stay of proceedings following the comeback hearing;
- (e) Order Appointing Official Committee of Affected Users: An Order appointing a committee of Users to represent Quadriga's Users and provide instructions to Representative Counsel;
- (f) Order Removing Counsel of Record: An Order authorizing Stewart McKelvey to withdraw as counsel to the Applicants as described below;
- (g) Order Amending Fee Cap for Representative Counsel: An Order increasing the fee cap for Representative Counsel;
- (h) Asset Preservation Order: As described below, an Order preventing the sale or transfer of assets of the estate of Gerald Cotten and certain other related parties;
- (i) Termination and Bankruptcy Assignment Order: As described below, an Order directing the Applicants to file assignments into bankruptcy and certain ancillary relief related to transition into proceedings under the *Bankruptcy and Insolvency Act* (the "BIA");
- (j) Third Party Payment Processor Order: An Order requiring third party payment processors to deliver certain information and property of the Applicants to the Monitor;
- (k) Ancillary Termination and Bankruptcy Assignment Order: An Order granting ancillary relief related to the transition into bankruptcy and extending the stay of proceedings under the Initial Order; and
- (l) Ancillary Third Party Payment Processor Order: An Order granting certain relief in respect of companies related to Mr. Jose Reyes and POSConnect Inc.

2. Activities of the Monitor

The Monitor's efforts to recover funds for the Users and data and information related to the Monitor's investigation at the commencement of the CCAA Proceedings are described in earlier Reports of the Monitor and included:

- (a) Securing the remaining cryptocurrency under the Applicants' control in wallets controlled by the Monitor;
- (b) Securing the hardware devices used by Mr. Cotten prior to his death in the operation of the business;

- (c) Obtaining access to Quadriga's platform database which includes transaction history of the Users on the Company's Platform and balances necessary in any claims process in respect of the Applicants;
- (d) Seeking Orders from the Court related to banking arrangements which permitted the Monitor to deposit funds recovered related to Quadriga's business as the Company previously had been unable to open a bank account due to the nature of its business;
- (e) Communicating with third party payment processors ("TPPs") in possession of property and/or information related to Quadriga's property and seek Orders from the Court seeking the recovery of such property and/or information;
- (f) Seeking information from other cryptocurrency exchanges which Quadriga and/or Mr. Cotten may have deposited on the exchanges; and
- (g) Seeking information related to the assets of the estate of Mr. Cotten and certain related parties, and ultimately sought an Asset Preservation Order from the Court to freeze such assets pending further Order of the Court.

The Monitor also carried on its investigation of the Company and reported on preliminary information from its investigation in the Third Report of the Monitor dated March 1, 2019. As described in the Fifth Report, the Monitor's actions in undertaking in the investigation included:

- (a) Obtaining access to certain of Mr. Cotten's email and other communication records;
- (b) Conducting preliminary discussions and interviews with certain of the Applicants' directors and independent contractors;
- (c) Preserving the Platform data;
- (d) Assembling and analyzing transaction records recovered from certain TPPs;
- (e) Assembling and analyzing Cryptocurrency records and performed blockchain analysis in order to trace certain transactions; and
- (f) Securing the hardware devices used by Mr. Cotten prior to his death in the operation of the business.

3. Transition to Bankruptcy Proceedings

As described in the Fourth Report of the Monitor dated April 1, 2019, at an earlier motion the Court requested that Applicants' counsel and the Monitor consider the purpose and future structure of the CCAA Proceedings considering the limited ongoing operations of the Applicants. Subsequent to that request Stewart McKelvey also withdrew as counsel to the Applicants. In response, the Monitor consulted with Representative Counsel and the CRO regarding possible alternative insolvency processes rather than the CCAA Proceedings. Following that period of consideration, it was determined that the best path forward was to transition the CCAA Proceedings to proceedings under the BIA. Given the limited possibility that Quadriga would restructure, the parties believed the best path forward to maximize recoveries for Users was for the Applicants to make assignments under the BIA.

On April 11, 2019, the Court issued an Order (the "**Termination Order**") authorizing and directing the CRO to assign the Applicants into bankruptcy.² The Termination Order contemplated that EY would be appointed as trustee-in-bankruptcy of the Applicants' estates and administer the estates under the BIA. The Termination Order contemplated that the role of Representative Counsel would continue in the proceedings under the BIA (the "**Bankruptcy Proceedings**") and the CRO and the Monitor would be discharged upon filing a certificate after providing notice to the Service List. The stay of proceedings in the CCAA Proceedings was also extended until June 28, 2019 as the Monitor indicated its intention to file another Report regarding the status of its investigation and seek approval of its fees incurred in the CCAA Proceedings. The Applicants were assigned into bankruptcy on April 15, 2019. The directors of Quadriga have now resigned.

Following this motion the Monitor will be in a position to provide notice to the Service List that it intends to file a certificate terminating the CCAA Proceedings in accordance with the Termination Order. If no objection is received, the certificate will be filed with the Court terminating the CCAA Proceedings and discharging the Monitor and CRO. The administration of the Applicants' estates will continue in the Bankruptcy Proceedings where it is anticipated that the Trustee will conduct a claims process in accordance with the BIA and continue recovery efforts for the benefit of Quadriga's Users.

C. Submissions

1. Approval of the Fees of the Monitor

Paragraph 32 of the Initial Order provided that the "[t]he Monitor and its legal counsel shall pass their accounts from time to time before a judge of this court or a referee appointed by a judge." In *Belyea*

² See Tab 1.

*v. Federal Business Development Bank*³, the New Brunswick Court of Appeal endorsed a number of applicable factors to be considered in approving a Court officer's fees:

- (a) The nature, extent and value of the assets;
- (b) The complications and difficulties encountered;
- (c) The degree of assistance provided by the debtor;
- (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.⁴

As further explained in *Nortel Networks Corp. (Re)*⁵, approving the fees of the Monitor requires an overall assessment of the work done by the Monitor and consideration of the results achieved rather than a line by line particularization of each discrete task performed.⁶

The Monitor's work in this case has been extensive and far reaching. The Applicants did not have a management group following the death of Mr. Cotten and since its appointment, the Monitor has been primarily responsible for administering the CCAA Proceedings and Bankruptcy Proceedings and seeking to recover funds on behalf of Quadriga and its Users. The Monitor has also had to conduct an extensive investigation into the affairs of Quadriga without the benefit of the primary source of information regarding those affairs, Mr. Cotten. As part of its recovery efforts and investigation, the Monitor has had to address a number of complicating factors arising from the existing structure of Quadriga's business, including the lack of book and records, the extensive use of third parties to store information and property and the lack of institutional knowledge regarding Quadriga's affairs.

³ (1983), 44 N.B.R. (2d) 248, Tab 2. See also *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.), Tab 3.

⁴ *Ibid* at para. 9.

⁵ 2017 ONSC 673, Tab 4.

⁶ *Ibid* at para. 21.

The Quadriga case is also the first insolvency proceeding in Canada involving a cryptocurrency company. The nature of the industry, cryptocurrency and the blockchain presented significant and unique issues in the CCAA Proceedings and required specialized resources necessary for the Monitor's investigation. As noted above, a number of matters required the Court's assistance on an urgent basis and the Monitor was bringing its own motions for relief which required preparing various materials to be presented to the Court. The quantum of the Monitor's fees and those of its counsel should be considered in light of the above.

The Monitor submits that its fees and its counsel fees are reasonable in the circumstances of the case and should be approved. Fees incurred in the Bankruptcy Proceedings will be subject to review by the Inspectors of the Applicants' estates and review by the Court as set out in the Termination Order.

2. Approval of Monitor's Activities

It is common in CCAA proceedings for the Monitor to seek approval of its activities set out in its Reports filed in the proceedings and the relief is "routinely" granted.⁷ Approval of the Monitor's activities:

- (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.⁸

This Court has granted the same relief requested by the Monitor in other proceedings under the CCAA in Nova Scotia.⁹

⁷ See *Target Canada Co. (Re)*, 2015 ONSC 7574 at para. 2, Tab 5.

⁸ *Ibid* at para. 23.

The Monitor's activities are described in the Reports filed in connection with these CCAA proceedings and a summary of the activities is set out in the Sixth Report. The various Reports have been served on the parties on the Service List and posted on the Monitor's website through the proceedings. The Monitor has also consulted with the CRO and Representative Counsel on various steps taken in the CCAA Proceedings. The Monitor submits that in the circumstances the Court can grant the requested relief and approve its activities as described in the various Reports filed in the CCAA Proceedings.

3. Approval of the Fees of Representative Counsel

Paragraph 24 of the Rep Counsel Order provided "Representative Counsel shall pass their accounts from time to time before a judge of this court or a referee appointed by a judge." The Rep Counsel Order originally provided that Representative Counsel shall be paid their fees up to an aggregate of \$250,000. The original fee cap was subsequently raised by the Court to \$400,000 exclusive of HST and disbursements. The fees of Representative Counsel are described in the Sixth Report and the fee affidavits filed in connection with the Sixth Report.

The Monitor submits the Court should consider similar factors in approving the fees of Representative Counsel as when approving the fees of a Court officer. Representative Counsel has played an important role in the CCAA Proceedings since its appointment representing the primary stakeholder in the proceedings. The Monitor has liaised extensively with Representative Counsel during the CCAA Proceedings and have worked cooperatively with them. The Monitor has reviewed the fees of Representative Counsel and believes they are reasonable in the circumstances and submits that their fees should be approved by the Court.

Yours truly,

A handwritten signature in black ink, appearing to read "per [unclear] P.", is written over the typed name Elizabeth Pillon.

Elizabeth Pillon

EP/kl

cc. Service List

⁹ See Discharge Order dated April 17, 2014, *NewPage Port Hawkesbury Corp. (Re)*, Hfx. No. 355063, Tab 6.

TAB 1

2019



Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:

Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. d/b/a Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "**Companies**" and the "**Applicants**"), for relief under the *Companies' Creditors Arrangement Act*

ORDER

(Re Termination and Bankruptcy Assignment Order)

BEFORE THE HONOURABLE JUSTICE MICHAEL J. WOOD

UPON MOTION, in the proceedings of Quadriga Fintech Solutions Corp. ("**Fintech**"), Whiteside Capital Corporation ("**Whiteside**"), and 0984750 B.C. Ltd. dba Quadriga CX ("**Quadriga**") and Quadriga Coin Exchange ("**Exchange**") under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceedings**"), by Ernst & Young Inc. ("**EY**"), in its capacity as Court-appointed Monitor of the Applicants (the "**Monitor**");

UPON READING the Fourth Report of the Monitor dated April 1, 2019;

AND UPON HEARING the submissions of counsel to the Applicants, counsel for the Monitor, Representative Counsel (as defined below), Grant Thornton Limited in its capacity as the Chief Restructuring Officer of the Applicants (the "**CRO**"), counsel to Jennifer Robertson, and such other individuals who appeared and were heard on the Motion;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. If necessary, the service of the Notice of Motion, the Motion Record and supporting documents are hereby abridged and service is hereby deemed adequate notice so that the Motion is properly returnable today and further service thereof is hereby dispensed with.

Termination of the CCAA Proceedings

2. The Monitor shall establish a reserve (the "**Post-filing Reserve**") from the funds held in the Disbursement Account (as defined in the Initial Order dated February 5, 2019 (the "**Initial Order**")) to pay: (a) any outstanding fees and disbursements of the CRO, the Monitor, counsel to the Applicants, counsel to the Monitor and Representative Counsel

(collectively, the “**Professional Fees**”); and (b) any fees, expenses and disbursements properly incurred by the Monitor, Representative Counsel or the Applicants following the date of the Initial Order (the “**Post-filing Expenses**”). In the name and on behalf of the Applicants, the Monitor shall pay the Professional Fees and Post-filing Expenses in accordance with the procedures set out in prior orders of this Court in these CCAA proceedings in respect of payment thereof.

3. The Monitor, in the name of and on behalf of the Applicants, is authorized and directed to make a payment from the funds in the Disbursement Account to the Trustee (as defined below) appointed in respect of Whiteside in the amount of \$25,000 to serve as a third party deposit to guarantee the costs of administration of the trustee, without any personal liability to the Monitor in connection therewith.
4. The Monitor shall have no personal liability to make any payments contemplated herein, and nothing in this Order shall be construed as obligating the Monitor to make any such payment, unless and until the Monitor is in receipt of funds adequate to effect any such payment in full.
5. Upon the filing of a certificate of the Monitor substantially in the form attached hereto as Schedule "A" (the "**Monitor's Discharge Certificate**") certifying that, to the best of the knowledge and belief of the Monitor, the Post-filing Expenses and the Professional Fees have been satisfied, the within CCAA Proceedings shall be dismissed without any other act or formality (the "**CCAA Termination Time**").
6. The Monitor shall, at least seven (7) days prior to the proposed CCAA Termination Time, provide notice to the E-Service List of the Monitor's intention to file the Monitor's Discharge Certificate.
7. The Administration Charge and Directors' Charge (as defined in the Initial Order) shall be terminated, released and discharged effective at the CCAA Termination Time.
8. Effective at the CCAA Termination Time, EY shall be discharged and relieved from any further obligations, liabilities, responsibilities or duties in its capacity as Monitor pursuant to the Initial Order and any other Orders of this Court in these CCAA proceedings.
9. Effective at the CCAA Termination Time, Grant Thornton Limited shall be discharged and relieved from any further obligations, liabilities, responsibilities or duties in its capacity as CRO in these CCAA proceedings.
10. Effective at the CCAA Termination Time, in addition to the protections in favour of the Monitor in any Order of this Court in these CCAA proceedings or the CCAA, EY, the Monitor, the Monitor's legal counsel, the CRO, and each of their respective affiliates and officers, directors, partners, employees and agents (collectively, the "**Released Parties**") are hereby released and discharged from any and all claims that any person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the CCAA Termination Date in any way relating to, arising out of or in respect

of the within CCAA Proceedings or with respect to their respective conduct in the within CCAA Proceedings (collectively, the "**Released Claims**"), and any such Released Claims are hereby released, stayed, extinguished and forever barred and the Released Parties shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability arising out of any negligence or actionable misconduct on the part of the Released Parties.

Assignment in Bankruptcy

11. The stay of proceedings is lifted or amended insofar as may be necessary to allow the present motion to be brought and heard.
12. The CRO is authorized and directed to cause the Applicants to file assignments in bankruptcy pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in the City of Halifax, Province of Nova Scotia naming EY as the trustee in bankruptcy (in such capacity, the "**Trustee**"), and in that regard to sign such documents in the names of the Applicants and take all such steps as are necessary to make the assignment in bankruptcy and commence proceedings under the BIA (the "**BIA Proceedings**"). For greater certainty, no resolutions or other authorizations from the directors, officers or shareholders of the Applicants will be required to commence the BIA Proceedings.
13. The Monitor shall transfer to the Trustee of Quadriga, Whiteside and Fintech, as applicable, the funds remaining in the Disbursement Account, the Wallet (as defined in the Initial Order), and the Separate Account following establishment of the Post-filing Reserve as soon as commercially possible after the commencement of the BIA Proceedings.
14. Following the payment of the Post-filing Expenses and the Professional Fees, the Monitor shall transfer to the Trustee of Quadriga, Whiteside and Fintech, as applicable, the funds remaining in the Post-filing Reserve.
15. The Applicants, their present and former officers, directors, solicitors, agents, servants, shareholders, contractors, any persons acting on their instructions and all other persons having notice of this Order are hereby restrained and enjoined from disturbing or interfering with the Trustee and with the exercise by the Trustee of its powers and the performance by the Trustee of its duties pursuant to the BIA and any order made in the BIA Proceedings.

Bankruptcy Proceedings Administration

16. The time periods for the Trustee to perform its statutory obligations prescribed by Sections 16 and 21 of the BIA are hereby extended until further Order of this Court, and until such Order is made, the Trustee shall be relieved from performing any such obligations.
17. Miller Thomson LLP, as lead counsel, and Cox & Palmer, as local counsel, shall continue to act as representative counsel (collectively, "**Representative Counsel**") to represent the interests of the Affected Users (as defined in the Order of this Court dated February 28, 2019 (as amended, the "**Rep Counsel Order**") in the BIA Proceedings on the same terms and conditions outlined in the Rep Counsel Order. The committee of Affected Users (the

“**Official Committee of Affected Users**”) appointed to act as representatives of Affected Users pursuant to the terms of the Order appointing the Official Committee of Affected Users dated March 19, 2019 (the “**Official Committee Order**”) shall continue to act and in accordance with its mandate and subject to the terms and conditions outlined in the Rep Counsel Order and the Official Committee Order. The reasonable legal fees and disbursements incurred by the Representative Counsel shall be paid by the Trustee on a periodic basis upon rendering of accounts by Representative Counsel (readacted to preserve any claim for privilege) to the Trustee and that, in the event of any disagreement regarding such fees and disbursements such matters may be remitted to this Court for determination. The Trustee shall have no personal liability to make any payments to Representative Counsel, and nothing in this Order shall be construed as obligating the Trustee to make any such payment, unless and until the Trustee is in receipt of funds adequate to effect any such payment in full.

18. The Trustee shall be deemed to satisfy its obligations under Section 102 of the BIA by, within 5 days of the commencement of the BIA Proceedings: (a) sending an electronic version of this Order to the Service List in the CCAA Proceedings, any Opt-out Individuals (as defined in the Rep Counsel Order as at the date of the Applicants’ assignments in bankruptcy), and any other known creditors of the Applicants; (b) providing a copy of this Order to the Representative Counsel for circulation to the Affected Users; (c) posting a copy on the website of Quadriga (www.quadrigacx.com); (d) posting a copy on the Monitor’s website for these proceedings (www.ey.com/quadriga); (e) posting a copy on www.reddit.com/r/quadrigacx; and (f) no later than 5 days before the first meeting of creditors, publishing a notice of this Order and the commencement of the BIA Proceedings in the Globe and Mail.
19. The passing of the accounts of the Trustee, the Trustee’s counsel and Representative Counsel shall be directed to a Judge of this Court.
20. For purposes of satisfying its obligations under Section 102(2) of the BIA, the list of creditors prepared by the Trustee shall contain a single line noting the number of Affected Users and the aggregate amount of the Affected Users claims. For greater clarity, the Trustee shall keep the identity and any other personal or identifiable information of individual Affected Users confidential.
21. At the first meeting of creditors of the Applicants, the Representative Counsel shall be entitled to file an omnibus proof of claim on behalf of all of the Affected Users (other than the Opt-out Individuals) and vote the claims of the Affected Users (other than the Opt-out Individuals) pursuant to direction from the Official Committee of Affected Users without the need for individual proxies.
22. Pending further Order of the Court, the Trustee shall maintain the identities of any Affected Users that submit claims for the purposes of voting at the first meetings of creditors of the Applicants (by proxy or otherwise) confidential and shall not disclose them to any third party.
23. The Trustee is authorized and empowered, but not obligated, to continue the investigation

commenced as Monitor under the CCAA, obtain legal services, take or commence such Court proceedings, and/or conduct such examinations under section 163 of the BIA as it considers necessary for the recovery or preservation of the Applicants' property prior to the first meetings of creditors of the Applicants.

24. All of the terms of the Platform Access Order dated March 5, 2019 shall continue to apply in the BIA Proceedings *mutatis mutandis* and Amazon Web Services Inc. and any of its affiliates shall continue to be bound by the terms of the Platform Access Order pending further Order of the Court.
25. All of the terms of the Banking Arrangements Order dated February 22, 2019 shall continue to apply in the BIA Proceedings *mutatis mutandis*.
26. All of the terms of the Preservation Order dated April 8, 2019 shall continue to apply in the BIA Proceedings *mutatis mutandis*.
27. All of the terms of the Third Party Processor Order dated April 8, 2019 shall continue to apply in the BIA Proceedings *mutatis mutandis*.

General

28. Notwithstanding the discharge of EY as Monitor and the termination of the CCAA Proceedings, this Court shall remain seized of any matter arising from these CCAA Proceedings, and each of the Applicants, EY, Representative Counsel and any interested party that has served a Notice of Appearance in these CCAA Proceedings, shall have the authority from and after the date of this Order to apply to this Court to address matters ancillary or incidental to these CCAA Proceedings notwithstanding the termination thereof. EY is authorized to take such steps and actions as Monitor following date of this order until the CCAA Termination Time. In completing or addressing any such ancillary or incidental matters, EY shall continue to have the benefit of all Orders made in the CCAA Proceedings in relating to its capacity as Monitor, including approvals, protections, and stays of proceedings in favour of EY in its capacity as Monitor.
29. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction outside of Nova Scotia is requested to give effect to this Order and to assist the Applicants, the Monitor and their respective 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 Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.
30. This Order and all of its provisions are effective as of 12:01 a.m. Atlantic Standard Time on the 8th day of April, 2019.

Issued at Halifax, Province of Nova Scotia, this 11th day of April, 2019.



AMANDA HAWBOLDT
Deputy Prothonotary

SCHEDULE "A"

2019

Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:

Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. d/b/a Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "**Companies**" and the "**Applicants**"), for relief under the *Companies' Creditors Arrangement Act*

Monitor's Certificate (Re Termination and Bankruptcy Assignment Order)

RECITALS

- A. Pursuant to an Order of the Honourable Justice Michael J. Wood of the Nova Scotia Supreme Court (the "**Court**") dated February 5, 2019, Ernst & Young Inc. ("**EY**") was appointed as the monitor (the "**Monitor**") of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. ("**Quadriga**" or the "**Company**") (collectively, the "**Applicants**"). The proceedings commenced by the Applicants under the CCAA will be referred to herein as the "**CCAA Proceedings**".
- B. The CCAA Proceedings have been completed in accordance with the Orders of this Court and under the supervision of the Monitor.
- C. Pursuant to the Order of this Court dated April 8, 2019 (the "**Termination Order**"), the Monitor may be discharged and the CCAA Proceedings may be terminated upon filing of this Monitor's Certificate with the Court.
- D. All capitalized terms used but not defined herein shall have the meaning ascribed to them in the Termination Order.

THE MONITOR CERTIFIES the following:

1. To the best of the knowledge and belief of the Monitor, the Post-filing Expenses and the Professional Fees have been satisfied.

DATED at Halifax, Nova Scotia this ____ day of _____, 2019.

ERNST & YOUNG INC., solely in its capacity as
Monitor of Quadriga Fintech Solutions Corp., Whiteside
Capital Corporation and 0984750 B.C. Ltd. and not in its
personal or corporate capacity

By: _____

Name: George C. Kinsman
Title: Partner, Senior Vice President

IN THE MATTER OF APPLICATION BY QUADRIGA FINTECH SOLUTIONS CORP.,
WHITESIDE CAPITAL CORPORATION AND 0984750 B.C. LTD. D/B/A QUADRIGA CX
AND QUADRIGA COIN EXCHANGE UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT

Hfx No. 484742

**IN THE SUPREME COURT
OF NOVA SCOTIA**

Proceeding commenced in Halifax

**ORDER
RE: TERMINATION AND BANKRUPTCY
ASSIGNMENT ORDER**

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon LSO#: 35638M
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Lawyers for Ernst & Young Inc., Monitor

TAB 2

Most Negative Treatment: Not followed

Most Recent Not followed: [Northland Bank v. G.I.C. Industries Ltd.](#) | 1986 CarswellAlta 426, 60 C.B.R. (N.S.) 217, 38 A.C.W.S. (2d) 337, 73 A.R. 372, [1986] 4 W.W.R. 482, 45 Alta. L.R. (2d) 70 | (Alta. Q.B., May 6, 1986)

1983 CarswellNB 27
New Brunswick Court of Appeal

Belyea v. Federal Business Development Bank

1983 CarswellNB 27, [1983] N.B.J. No. 41, 116 A.P.R. 248, 18
A.C.W.S. (2d) 19, 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244

BELYEA and FOWLER v. FEDERAL BUSINESS DEVELOPMENT BANK

Hughes C.J.N.B., Ryan and Stratton JJ.A

Judgment: January 18, 1983
Docket: No. 31/82/CA

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.3 Appointment

VII.3.b Application for appointment

VII.3.b.ii Person entitled to make application

VII.3.b.ii.A General principles

Debtors and creditors

VII Receivers

VII.8 Remuneration of receiver

VII.8.b Remuneration

VII.8.b.iii Miscellaneous

Headnote

Receivers --- Appointment — Application for appointment — Person entitled to make application — General

Receivers --- Remuneration of receiver — Remuneration

Secured creditors — Receiver appointed by document — Remuneration — Factors to be considered.

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. The considerations applicable in determining the reasonable remuneration to be paid to a receiver should 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 costs of comparable services when performed in a prudent and economical manner. Whether an account for services is fair and reasonable is a matter of some difficulty. In many cases, attempts have been made to establish this fact by calling as witnesses persons who engage in the same profession or calling to testify that the charges made are the usual and normal charges for similar services made by

members of that particular profession or calling in their locality. Even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, the courts will impose an underlying or implied limit or maximum on the professional fees it will allow, based on what is reasonable in relation to the dollar amount involved in the particular case. Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case.

Table of Authorities

Cases considered:

Considered by majority:

Amalg. Syndicates, Re, [1901] 2 Ch. 181, 17 T.L.R. 486 — referred to
Campbell v. Arndt (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) — referred to
Cowie (J.W.) Enrg. Ltd. v. Allen (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) — referred to
Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd. (1938), 13 M.P.R. 237 (N.S.C.A.) — referred to
Hall v. Slipp (1894), 1 N.B. Eq. 37 — referred to
Ibar Devs. Ltd. v. Mount Citadel Ltd. (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) — referred to
Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd., [1951] O.W.N. 47 (H.C.) — referred to

Considered in dissent:

Lister (Ronald Elwyn) Ltd. v. Dunlop Can. Ltd., [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 — referred to

Statutes considered:

Evidence Act, R.S.N.B. 1973, c. E-11, s. 49.

Authorities considered:

75 C.J.S. 1067.

Williston on Contracts, 3rd ed. (1967), vol. 10, pp. 928-29.

Action by secured creditors against debtor for deficiency owing under guarantee; claim that receiver's remuneration excessive.

Stratton J.A. (Hughes C.J.N.B. concurring):

1 I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal [from 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162, 100 A.P.R. 162].

2 In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for \$40,000, and the reasonableness of the receiver's account of \$11,730. I agree with Ryan J.A. that the refusal by the bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the receiver satisfactorily established that its account for services was fair and reasonable.

3 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.

4 The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.), it was pointed out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2 to 5 per cent in proportion to the care and trouble involved. The court in that case concluded that, although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and, accordingly, he was awarded as a fair remuneration a commission of 5 per cent of the funds coming into his hands.

5 A lump sum was awarded to receivers by the Nova Scotia Court of Appeal in *Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237. In making their award, the court said at p. 240:

As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

6 A lump sum was also awarded a receiver as fair compensation for his services in *Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.). In that case, Marriott, Master, said at p. 48:

In fixing the compensation of a receiver, the Court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no *prima facie* right to any fixed rate as a trustee in bankruptcy has under The Bankruptcy Act. In *Kerr on Receivers*, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1886), 11 P.R. 426, Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

7 In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.), Saunders, Master, concluded that remuneration on a 5 per cent basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

8 It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the fund is a more appropriate method of compensation than that based on a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5 per cent is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see 75 C.J.S. 1067.

9 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.

10 Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and

normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

11 One of the compelling factors referred to in *Williston on Contracts*, 3rd ed. (1967), vol. 10, pp. 928-29 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case: see *J.W. Cowie Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.).

12 Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalg. Syndicates*, [1901] 2 Ch. 181, 17 T.L.R. 486. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker J. on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37 -39:

... while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.

... while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.

... It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result; and I think it only right to point out that it is a mistake to support that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

13 In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35 per cent of the amount realized on the sale of the assets.

14 The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for \$30,075 and that the total receipts from all sources were \$36,566. The receiver charged a fee for its services of \$11,730 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

15 Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence,

it is difficult to see how s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, can be of any assistance to the receiver in establishing its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately \$5,000.00, say in the range of \$4,000.00 to \$6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be \$6,000.

16 As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the bank as entitling it to crystallize its debenture. Therefore, these matters were not considered on this appeal.

17 I would allow the appeal and reduce the judgment at trial to \$4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of \$750.

Ryan J.A. (dissenting):

18 This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of \$10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of \$40,000 advanced by the plaintiff to Chase Camera & Supply Ltd.

19 The following facts are set out in the decision of the trial judge reported in (1982), 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162 at 163 -64, 100 A.P.R. 162 :

In the summer of 1978 the plaintiff lent \$40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.

Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, was accompanied Mr. Belyea to the meeting, was prepared to pay \$40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately \$34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.

By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd. as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.

Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for \$30,000.00. In addition the plaintiff realized \$4,925.24 apart from the receiver's efforts. A balance of \$7,749.03 remained owing on the \$34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of \$8,279.30 as of November 10, 1981 but gave no details of this higher figure.

20 At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

- a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and
- b) Was the receiver's fee of \$11,730 reasonable?

The same issues were raised on this appeal.

21 As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of \$40,000 for the inventory of Chase Camera & Supply Ltd. because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

22 In his submission counsel for the defendants contended that, not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

23 In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, which provides that:

A record or entry of an act, condition or event made in the regular course of a business is, insofar as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

24 Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

25 This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 delivered 31st May 1982 after the present appeal had been argued. The question whether or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

26 In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

Directions given.

TAB 3

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 4

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)**

	Fees	Disburse-ments	Total Fees & Disburse-ments
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 5

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 6

APR 17 2016



SUPREME COURT OF NOVA SCOTIA

Hfx No. 355063

IN THE MATTER OF:

The *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended.

THE MATTER OF:

A Plan of Compromise or Arrangement of
NewPage Port Hawkesbury Corp.

Applicant

DISCHARGE ORDER

BEFORE THE HONOURABLE JUSTICE JOHN D. MURPHY IN CHAMBERS

UPON MOTION by Ernst & Young Inc. ("E&Y"), in its capacity as Monitor (the "**Monitor**") of NewPage Port Hawkesbury Corp. (the "**Applicant**" or "**NPPH**") for an Order approving the Monitor's actions, reports and fees, as well as the fees of its counsel, discharging E&Y as Monitor and terminating these CCAA proceedings;

UPON READING the Seventeenth Report of the Monitor dated February 6, 2014 (the "**Seventeenth Report**"), the Affidavit of George Kinsman sworn February 6, 2014 (the "**Kinsman Affidavit**"), the Affidavit of Maria Konyukhova sworn February 6, 2014 (the "**Konyukhova Affidavit**") and the Affidavit of Tim Hill sworn September 5, 2013 (the "**Hill Affidavit**");

AND UPON HEARING Elizabeth Pillon, counsel for the Monitor, together with such other counsel as were present;

NOW UPON MOTION:

IT IS HEREBY ORDERED AND DIRECTED THAT:

1. Any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Seventeenth Report.

APPROVAL OF ACTIVITIES

2. The actions of the Monitor as described in the Eleventh to the Seventeenth Reports of the Monitor, and the Supplement to the Thirteenth Report, are hereby approved.

APPROVAL OF FEES AND DISBURSEMENTS

3. The fees and disbursements of the Monitor for the period from September 9, 2011 to June 20, 2013, inclusive, and the Monitor's fees and disbursements, as estimated, to complete its remaining duties and the administration of these CCAA Proceedings, all as set out in the Kinsman Affidavit and the Seventeenth Report, are hereby approved.
4. The fees and disbursements of the Monitor's counsel, Stikeman Elliott LLP ("**Stikeman**") for the period from September 9, 2011 to November 15, 2013, inclusive, and Tim Hill ("**Hill**"), for the period from September 5, 2011 to April 10, 2013, inclusive, and Stikeman's and Hill's fees and disbursements, as estimated, in connection with the completion by the Monitor of its remaining duties and the administration of these CCAA Proceedings, all as set out in the Pilon Affidavit, the Hill Affidavit and the Seventeenth Report, are hereby approved.

DISCHARGE OF THE MONITOR

5. E&Y is discharged as Monitor of Newpage and shall have no further duties as Monitor, save and except as set out in paragraph 105 of the Seventeenth Report and paragraph 7 herein. E&Y's discharge is effective immediately on the filing of a certificate with the Court (the "**Discharge Certificate**") certifying that:
 - a. fees and disbursements of the Monitor and of its counsel have been paid in full; and
 - b. any and all matters that may be incidental to the termination of these CCAA Proceedings or any other matters necessary to complete the CCAA Proceedings have been completed.
6. The Monitor has satisfied all of its obligations pursuant to the CCAA and these CCAA Proceedings and shall have no further obligations, liabilities, responsibilities or duties as Monitor, save and except as set out in paragraph 105 of the Seventeenth Report and paragraph 7 herein and the filing of the Discharge Certificate.

7. Notwithstanding the foregoing, the Monitor shall have the authority from and after the date of this Order to complete any matters that may be incidental to the termination of these CCAA Proceedings or any other matters necessary to complete these CCAA Proceedings, including as set out in the Seventeenth Report.
8. In addition to the rights and protections afforded the Monitor under the CCAA, the Plan, the Initial Order and the Sanction Order, the Monitor shall not be liable for any act or omission on the part of the Monitor, or any reliance thereon, including without limitation, with respect to any information disclosed, any act or omission pertaining to the discharge of duties or obligations in the CCAA Proceedings and/or this Order or as requested by the Applicant, save and except for any claim or liability arising out of any negligence or misconduct on the part of the Monitor.
9. No action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court and on prior written notice to the Monitor.
10. Notwithstanding any provision of this Order, nothing contained in this Order shall affect, vary, derogate from or amend any of the protections in favour of the Monitor at law or pursuant to the Initial Order.

TERMINATION OF CCAA PROCEEDING

11. The Administrative Charge shall be and is hereby terminated, discharged and vacated in its entirety upon the Monitor's filing with this Court of the Discharge Certificate.
12. The CCAA Proceedings shall be and are hereby terminated upon the Monitor's filing with this Court of the Discharge Certificate.

DATED at Halifax, Nova Scotia, this 17th day of April, 2014.

Bonnie Walter
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document,
identified by the seal of the court, is a true
copy of the original document on the file herein.

APR 17 2014

Bonnie Walter
Deputy Prothonotary