

COURT FILE NUMBER 2303-06543
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON

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

AND IN THE MATTER OF AN PLAN OF COMPROMISE OR
ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE
GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD.,
279896 ALBERTA LTD., GRANDE PRAIRIE PLACE
ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and
627612 ALBERTA LTD.

APPLICANTS J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL
PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD.,
GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC.,
1170292 ALBERTA LTD. and 627612 ALBERTA LTD.

DOCUMENT **BOOK OF AUTHORITIES**

**FOR THE BENCH BRIEF OF ERNST & YOUNG INC., IN ITS
CAPACITY AS THE COURT-APPOINTED MONITOR OF
J.W. CARR HOLDINGS LTD., SPRUCE GROVE
INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896
ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES
(1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA
LTD.**

TO BE HEARD ON JULY 26, 2023 AT 10:00 A.M.

ADDRESS FOR SERVICE AND CONTACT
INFORMATION OF PARTY
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LIST OF AUTHORITIES

CASE LAW

1. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851;
2. *Belyea v Federal Business Development Bank (1983)*, 44 NBR (2d) 248 (CA);
3. *Re Nortel Networks Corporation et al*, 2017 ONSC 673;
4. *Redcorp Ventures Ltd. (Re)*, 2016 BCSC 188;
5. *Target Canada Co. (Re)*, 2015 ONSC 7574; and,
6. *Winalta Inc. (Re)*, 2011 ABQB 399.

TAB 1

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851

DATE: 20141201

DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

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 *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (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, 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.

Released:

"DEC -1 2014"
"EAC"

"Sarah E. Pepall J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree E.A. Cronk J.A."

TAB 2

FEDERAL BUSINESS DEVELOPMENT BANK v.
BELYEA and FOWLER
(No. 31/82/CA)

New Brunswick Court of Appeal
Hughes, C.J.N.B., Ryan and Stratton, JJ.A.
January 18, 1983.

COUNSEL:

BARRY R. MORRISON, for the appellant;
G.B. LJUNGSTROM, for the respondent.

This appeal was heard before HUGHES, C.J.N.B., RYAN and STRATTON, JJ.A., of the New Brunswick Court of Appeal, on April 27, 1982. The decision of the Court of Appeal was delivered on January 18, 1983, when the following opinions were filed:

STRATTON, J.A. - see paragraphs 1 to 17;
RYAN, J.A., dissenting in part - see paragraphs 18
to 27.

HUGHES, C.J.N.B., concurred with STRATTON, J.A.

Please note that a French translation appears below the

English language judgment.

[1] STRATTON, J.A.: 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.

[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 \$40,000.00, and the reasonableness of the Receiver's account of \$11,730.00. I agree with Mr. Justice Ryan 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), 24 D.L.R. 699 (Sask. 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% 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% 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. Nova Scotia 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 *Industrial Development Bank v. Garden Tractor and Equipment Co. Ltd.*, [1951] O.W.N. 47. 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* (1885), 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 Developments Ltd. v. Mount Citadel Ltd. et al.* (1978), 26 C.B.R. (N.S.) 17, Saunders, Master, concluded that remuneration on a 5% 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% 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 *Corpus Juris Secundum*, p. 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.), Vol. 10, pp. 928-929 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 Engineering Ltd. v. James K. Allen et al.* (1982), 52 N.S.R.(2d) 321; 106 A.P.R. 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 Amalgamated Syndicate*, [1901] 2 Ch. 181. 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:

. . . 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 evidence, 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 suppose 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% 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 \$30,075.00 and that the total receipts from all sources were \$36,566.00. The receiver charged a fee for its services of \$11,730.00 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* 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 \$6,000.00.

[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 \$750.00.

[18] RYAN, J.A. [dissenting in part]: 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 \$40,000.00 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), 38 N.B.R.(2d) 162; 100 A.P.R. 162, at pp. 163-4:

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, who 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 \$11,730.00 reasonable?

[21] The same issues were raised on this appeal.

[22] As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of \$40,000.00 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.

[23] 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.

[24] 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, in so far 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.

[25] 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.

[26] 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 Limited, Lister and Lister v. Dunlop Canada Limited* (1982), 42 N.R. 181 delivered May 31, 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.

[27] 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.

Appeal allowed.

[1] M. LE JUGE STRATTON: J'ai eu l'avantage de lire le jugement rédigé par mon collègue Ryan et je regrette de ne pouvoir souscrire en tout point à la décision qu'il propose pour le règlement du présent appel.

[2] Dans son mémoire, l'avocat de MM. Belyea et Fowler soulève deux moyens d'appel, à savoir le bien-fondé du refus de la Banque fédérale de développement d'accepter l'offre faite par M. Sam Gamblin d'acheter le stock de Chase Camera & Supply Limited pour la somme de 40 000 \$ et la légitimité du compte de 11 730 \$ soumis par le séquestre. Je suis d'accord avec le juge Ryan que le refus de la banque d'accepter l'offre de M. Gamblin était raisonnable, compte tenu des circonstances. Cependant, je ne partage pas son opinion selon laquelle le séquestre aurait établi de façon satisfaisante le caractère juste et raisonnable du compte qu'il a soumis pour services rendus.

[3] Il n'existe aucun taux fixe ni aucune échelle déterminée pour calculer le montant de la rémunération à accorder au séquestre. Il reçoit habituellement, soit un pourcentage des recettes réalisées, soit une somme forfaitaire calculée d'après le temps, le travail et le degré de responsabilité en cause. Il semble que le principe qui régit la rémunération accordée au séquestre est que le calcul de la rémunération est établi d'après la valeur juste et raisonnable des services du séquestre et, bien qu'elle doive être assez importante pour inciter les personnes compétentes à assumer ce rôle, la mise sous séquestre doit être administrée le plus économiquement possible, compte tenu des circonstances. Par conséquent, la rémunération accordée pour services rendus doit être juste, mais doit néanmoins être plutôt modérée que généreuse.

[4] Les principes applicables au calcul de la rémunération à accorder au séquestre ont été discutés dans un certain nombre d'arrêts. Dans l'arrêt *Campbell v. Arndt* (1915), 24 D.L.R. 699 (C.s. Sask.), fréquemment cité, il a été sig-

nalé que, d'ordinaire, le séquestre est rémunéré au moyen d'une commission sur le montant brut de ses recettes, à un taux variant de 2% à 5% en proportion du travail effectué et des difficultés rencontrées. Dans cette cause, la Cour a conclu que, bien que le séquestre avait dû consacrer un temps considérable à son travail et avait fait face à bien des difficultés, celles-ci n'étaient pas d'une nature assez exceptionnelle pour qu'il ait droit à une rémunération beaucoup plus élevée que celle ordinairement accordée; et il a donc obtenu, à titre de juste rémunération, une commission de 5% sur les fonds qu'il avait réalisés.

[5] La Cour d'appel de la Nouvelle-Ecosse a accordé une somme forfaitaire aux séquestres dans l'arrêt *Eastern Trust Co. v. Nova Scotia Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237. En rendant sa décision, la Cour a déclaré à la p. 240:

Afin de déterminer la rémunération due aux séquestres et aux liquidateurs, nous sommes autorisés, à notre avis, à examiner toutes les opérations dont ils ont été responsables depuis leur nomination, à tenir compte du temps que chacun a consacré à ses fonctions et de la nature des responsabilités qui leur incombent en tant que séquestres et liquidateurs, et à déterminer quel aurait été le coût du travail nécessaire, s'il avait été effectué de façon prudente et économique.

[6] Un séquestre s'est également vu accorder une somme forfaitaire à titre de juste indemnité pour services rendus dans l'arrêt *Industrial Development Bank v. Garden Tractor and Equipment Co. Ltd.*, [1951] O.W.N. 47. Dans cet arrêt, le conseiller-maître Marriott a déclaré à la p. 48:

Dans sa détermination de la rémunération à accorder à un séquestre, la Cour a toujours eu plein pouvoir d'accorder la somme jugée juste et raisonnable, compte tenu de toutes les circonstances, mais un séquestre n'a de prime abord aucun droit à un taux fixe comme c'est le cas pour un syndic agissant en matière de faillite en vertu de la *Loi sur la faillite*. Dans l'ouvrage *Kerr on Receivers*, 11^e éd. 1946, on énonce à la p. 279: "Dans le cas de séquestres ou de gérants, il n'y a pas d'échelle fixe. Ils obtiennent parfois 5 pour cent des recettes; dans d'autres cas, leur rémunération est fixée à une somme forfaitaire ou déterminée par le temps mis par le séquestre, ses associés

et ses préposés". Le chancelier Boyd a déclaré dans l'arrêt *Re Fleming* (1885), 11 P.R. 426: "Une commission de cinq pour cent peut être raisonnable dans bien des cas; cependant, si le patrimoine est important et les services rendus sont de courte durée et ne comportent pas de lourdes responsabilités, un tel taux pourrait être excessif".

[7] En accordant à un séquestre une somme forfaitaire plutôt qu'une commission basée sur un certain pourcentage dans l'arrêt *Ibar Developments Ltd. v. Mount Citadel Ltd. et al.* (1978), 26 C.B.R. (N.S.) 17, le conseiller-maître Saunders a conclu qu'une commission de 5% était trop élevée. Il a statué que le séquestre avait droit à une juste rémunération fondée sur le quantum meruit, compte tenu du temps consacré, du travail effectué et du degré de responsabilité assumé.

[8] Il conviendrait peut-être de signaler que des arrêts américains viennent appuyer la proposition voulant que, dans le cas où les fonctions d'un séquestre consistent à liquider l'actif, le prélèvement d'une commission sur la somme réalisée constitue un mode de rémunération plus approprié que le versement d'un juste prix pour le travail effectué et le temps consacré; et ce mode de rémunération est le plus souvent utilisé. Lorsque la rémunération est ainsi calculée, un taux de 5% est habituellement employé dans des cas ordinaires. Ce taux varie cependant, compte tenu du degré de difficulté éprouvé par le séquestre dans la réalisation de ses recettes: voir 75 *Corpus Juris Secundum* p. 1067.

[9] A mon avis, les points à considérer dans la détermination de la juste rémunération à accorder au séquestre sont: la nature, la quantité et la valeur de l'actif en question, les complications et les difficultés rencontrées, l'aide apportée par la compagnie, ses dirigeants et ses employés, le temps qu'il a mis à remplir son mandat, les connaissances, l'expérience et la compétence du séquestre, le soin et la minutie dont il a fait preuve, la nature des responsabilités qu'il a assumées, les résultats de ses efforts et le coût de services comparables lorsqu'ils sont rendus de façon prudente et économique.

[10] Les avocats d'expérience savent qu'il peut être difficile de prouver qu'une demande d'honoraires pour services rendus est juste et raisonnable. Ceux-ci entreprennent souvent d'établir ce fait au moyen du témoignage de personnes qui exercent la même profession afin de démontrer que les

honoraires exigés par le demandeur sont ceux ordinairement exigés pour des services analogues rendus par les membres de cette profession dans leur région. En l'espèce, cependant, où le séquestre était un comptable agréé, aucun membre de la profession comptable n'a témoigné relativement aux honoraires habituels demandés pour des services analogues à ceux rendus par le séquestre et, de fait, aucun témoin n'a été appelé, sauf le séquestre lui-même, pour établir la légitimité des honoraires qu'il a exigés unilatéralement pour ses services.

[11] *Williston on Contracts* (3^e éd.) vol. 10 mentionne aux p. 928 et 929 le montant en cause comme l'un des facteurs concluants dans la détermination de la valeur raisonnable des services rendus par des avocats. Formulée autrement, cette proposition signifie que, bien qu'un professionnel ait droit à une rémunération juste et raisonnable basée sur la valeur raisonnable des services rendus, les honoraires réclamés doivent constituer une certaine proportion raisonnable du montant en question ou de la valeur des biens faisant l'objet du différend ou desquels le séquestre doit s'occuper. Par conséquent, lorsque le professionnel est au courant de la somme d'argent en question, les tribunaux vont imposer une limite sous-entendue, implicite ou maximum sur les honoraires qu'ils permettront d'exiger, cette limite étant fondée sur ce qu'ils estiment raisonnable, compte tenu de la valeur monétaire en cause dans chaque cas particulier; voir l'arrêt *J.W. Cowie Engineering Ltd. v. James K. Allen et al.* (1982), 52 N.S.R. (2d) 321; 106 A.P.R. 321 (C.A.).

[12] De façon générale, les tribunaux sont peu disposés à accorder une rémunération basée uniquement sur le temps consacré par la personne désignée dans l'exercice de ses fonctions: voir l'arrêt *Re Amalgamated Syndicate*, [1901] 2 Ch. 181. Ils préfèrent accorder, soit une somme forfaitaire, soit une commission sur le montant recouvré ou réalisé par le séquestre. Cependant, qu'il s'agisse d'une commission ou d'une somme forfaitaire, la rémunération accordée à un séquestre doit être juste et raisonnable, compte tenu de tous les faits déterminants de la cause en question. Lorsqu'un tribunal détermine si la rémunération d'un séquestre est juste et raisonnable, il est bon, à mon avis, qu'il se rappelle les commentaires du juge Barker à ce sujet, faits dès 1894 dans l'arrêt *Hall v. Slipp*, 1 N.B. Eq. 37:

... alors qu'il importe d'accorder une rémunération

conforme à la responsabilité assumée dans l'exercice des fonctions, il importe également de ne pas permettre que ces fonctions deviennent un simple moyen d'engloutir l'argent des créanciers et d'autres personnes dont il incombe à la présente Cour de protéger les intérêts.

. . .

... bien qu'en règle générale, une commission de cinq pour cent sur les recettes réalisées soit acceptable, des exceptions sont faites dans certains cas particuliers, soit en augmentant la rémunération, si un travail considérable est nécessaire, soit en la diminuant, si les sommes en cause sont importantes ou si peu de travail a été requis.

. . .

Il est évident que si les dépenses nécessaires engagées dans l'administration d'une succession dans la présente Cour constituent une proportion aussi élevée du montant en cause, en pratique le résultat est simplement d'enrichir les auxiliaires de la justice aux dépens des demandeurs. A mon avis, cependant, la pratique de la Cour ne permet pas un pareil résultat; et je crois qu'il est bon de faire remarquer que c'est une erreur de présumer que les personnes qui exercent les fonctions de séquestre ont droit de réclamer ou obtiendront une rémunération fixée conformément à un tarif applicable aux meilleurs avocats.

[13] Nulle preuve n'a été fournie, en l'espèce, d'une convention explicite ayant trait à la rémunération devant être versée au séquestre. Je ne crois pas non plus qu'il convienne, dans la cause qui nous occupe, de limiter la rémunération payable au séquestre à un pourcentage raisonnable de l'actif en question. Par contre, si je confirmais la décision du juge de première instance, je permettrais, de fait, au séquestre d'obtenir une rémunération équivalente à 35% du montant réalisé par la vente de l'actif.

[14] Le dossier révèle que le séquestre a vendu le stock de Chase Camera & Supply Limited pour la somme de 30 075 \$ et que les recettes globales provenant de toutes les sources s'élevaient à 36 566 \$. Le séquestre a demandé des honoraires de 11 730 \$ pour ses services et il a prélevé cette somme des fonds qu'il avait en sa possession, remettant le

solde à la banque. Aucun élément de preuve n'a été fourni pour démontrer que la mise sous séquestre dont il est question avait présenté quelque complication. De fait, la preuve a plutôt démontré que les dirigeants de Chase Camera & Supply Limited ont beaucoup aidé le séquestre dans la liquidation de l'actif. Compte tenu de toutes les circonstances, je suis d'avis que les honoraires déduits par le séquestre, qu'un employé de la banque a qualifiés d'"élevés", étaient déraisonnables par rapport à la somme réalisée sur la vente du stock et que ces droits auraient dû être réduits. Je suis d'avis que le juge de première instance, en omettant d'effectuer cette réduction, a commis une erreur de principe.

[15] L'avocat de la Banque fédérale de développement n'a pas appelé à témoigner les personnes qui ont réellement effectué le travail relatif à la mise sous séquestre en question, à l'exception de M. Fowler qui en était responsable. Il n'a pas non plus présenté en preuve aucun "enregistrement ou inscription d'un acte, d'une condition ou d'un événement dans le cours normal" des affaires du séquestre. Faute d'une telle preuve, il est difficile de voir de quelle façon l'art. 49 de la *Loi sur la preuve* pourrait aider le séquestre à établir la légitimité de son compte. Oui plus est, la seule preuve fournie, à l'exception de celle obtenue de M. Fowler, ayant trait à la légitimité du compte du séquestre, a été le témoignage de l'avocat-maison de la banque qui a déclaré que, dans une cause semblable à celle qui nous occupe, "il se serait attendu à une facture du séquestre de 5 000 \$, disons entre 4 000 \$ à 6 000 \$, ce qui aurait été une somme que nous aurions pu raisonnablement prévoir". Compte tenu de cette preuve, je suis d'avis qu'une rémunération raisonnable à accorder au séquestre, en l'espèce, serait la somme de 6 000 \$.

[16] Ainsi que l'a indiqué mon collègue Ryan, il ne nous incombait pas de trancher la question du bien-fondé d'une mise en demeure de payer effectuée le jour même où la banque avait été avisée de la vente possible du stock de la compagnie. Il n'a pas non plus été indiqué de façon précise sur quel manquement de la compagnie s'était fondée la banque pour réclamer le droit de cristalliser sa débenture. Ces questions n'ont donc pas été considérées dans le présent appel.

[17] Je suis d'avis d'accueillir l'appel et de réduire la somme du jugement rendu en première instance à 4 591,03\$. Les défendeurs ont droit aux dépens du présent appel que je fixe à 750 \$.

[18] M. LE JUGE RYAN. [dissident]: Le présent appel est formé par les défendeurs contre une décision d'un juge de la Cour du Banc de la Reine qui a rendu jugement en faveur de la demanderesse contre les défendeurs, conjointement et solidairement, pour la somme de 10 249,03\$ avec dépens. L'action de la demanderesse contre les défendeurs avait trait à un solde qu'elle prétendait lui être dû aux termes d'une garantie consentie par les défendeurs pour garantir un prêt de 40 000 \$ que la demanderesse avait avancé à Chase Camera & Supply Ltd.

[19] Voici les faits tels qu'énoncés aux p. 163 et 164 de la décision du juge de première instance publiée dans (1982), 38 N.B.R. (2d) 162; 100 A.P.R. 162:

Au cours de l'été 1978, la demanderesse a prêté 40 000 \$ à la compagnie. Pour garantir ce prêt, la demanderesse a accepté une débenture qui lui donnait le droit de nommer un séquestre. Les défendeurs ont garanti ce prêt. La débenture et la garantie ont été reçues en preuve.

Aucun incident n'est survenu dans les relations entre la compagnie et la demanderesse jusqu'au 27 août 1979 alors qu'une suite d'événements s'est rapidement déroulée. Au cours de la matinée du jour susmentionné, M. Belyea a rendu visite à M. Donald O'Leary, un agent de crédit principal de la demanderesse, et l'a informé que la compagnie se trouvait dans une situation financière précaire et que M. Sam Gamblin, de la firme Gem Photo, était prêt à acheter le stock de la compagnie pour la somme de 40 000 \$. M. Belyea a signalé que ce montant était plus que suffisant pour acquitter la dette de la compagnie envers la demanderesse, qui était alors d'environ 34 000 \$. M. Belyea a demandé à la demanderesse l'autorisation d'effectuer cette opération.

Au cours de l'après-midi du même jour, la demanderesse a conclu qu'elle ne pouvait pas consentir à cette opération et elle a désigné la firme H.R. Doane Ltd. à titre de séquestre et lui a demandé de prendre les mesures nécessaires pour effectuer la liquidation du stock. M. Bev Fowler, un associé de la firme Doane, était le représentant de la firme responsable de cette liquidation.

M. Fowler a décrit les diverses possibilités qui s'-

offraient à lui à l'époque de même que ses efforts pour vendre le stock en question à une compagnie de Bridgewater en N.-E. pour la somme de 30 000 \$, laquelle a été conclue après un appel d'offres. La demanderesse a également réalisé la somme de 4 925,24\$ en plus de la somme réalisée par le séquestre. Un solde de 7 749,03\$ restait impayé sur la somme de 34 231,85\$ due à la date de la mise en demeure. M. O'Leary a mentionné un solde de 8 279,30\$ dû le 10 novembre 1981, mais il n'a pas expliqué davantage la provenance de ce montant plus élevé.

[20] Lors d'une conférence préalable au procès, les parties ont convenu que les questions à être tranchées par le juge de première instance étaient les suivantes:

- a) La demanderesse a-t-elle agi de façon raisonnable en refusant d'accepter l'offre de M. Gamblin? et
- b) Les honoraires de 11 730 \$ réclamés par le séquestre étaient-ils raisonnables?

[21] Le présent appel soulève les mêmes questions.

[22] Pour ce qui est de la première question, le juge de première instance a conclu que la demanderesse était justifiée dans son refus d'accepter l'offre de 40 000 \$ faite par M. Gamblin pour le stock de Chase Camera & Supply Ltd., parce qu'une somme d'argent importante était due à la demanderesse, que la valeur du stock sur lequel elle détenait une sûreté lui était inconnue et que le défendeur Belyea avait divulgué à la demanderesse la situation financière précaire de la compagnie. Il ne fait aucun doute que la demanderesse considérait que ces facteurs mettaient en danger sa position de créancier. A mon avis, le refus d'accepter l'offre de Gamblin constituait un jugement d'homme d'affaires que je ne peux qualifier de déraisonnable.

[23] Dans son exposé, l'avocat des défendeurs a soutenu que non seulement la demande d'honoraires du séquestre était déraisonnable, mais que celui-ci n'avait pas prouvé que le travail pour lequel il réclamait une rémunération avait de fait été accompli. M. Fowler, un comptable agréé et syndic autorisé, était un vérificateur associé de la firme H.R. Doane Limited, se spécialisant dans le domaine de l'insolvabilité. Il a expliqué que chaque employé de la firme est tenu d'inscrire sur une fiche de travail les

heures qu'il a consacrées chaque jour aux divers comptes sur lesquels il travaille. M. Fowler a ajouté qu'à la fin de chaque semaine, les heures sur les fiches sont calculées et ces renseignements sont inscrits dans le compte du grand livre de chaque client. Il a produit des photocopies de toutes les fiches de travail et des pages du grand livre relatives au compte de Chase Camera et, du commun accord des avocats, ces photocopies ont servi à déterminer le temps consacré par chaque employé qui avait travaillé sur ce compte.

[24] Dans ses efforts pour prouver la légitimité du compte présenté par le séquestre, l'avocat de la demanderesse n'a pas présenté en preuve les fiches de travail des employés et les pages du grand livre relatives au client et il ne s'est pas prévalu de l'art. 49 de la *Loi sur la preuve*, L.R.N.-B. 1973, c. E-11, dont voici le texte:

L'enregistrement ou l'inscription d'un acte, d'une condition ou d'un événement dans le cours normal des affaires d'une entreprise sont, dans la mesure où ils sont pertinents, admissibles comme preuve de leur contenu si la cour est convaincue de leur identité et est convaincue que l'enregistrement a été fait ou l'inscription établie au moment ou quasi au moment de l'acte, de la condition ou de l'événement.

[25] Quoique les photocopies des fiches de travail et des feuilles du grand livre relatives au client n'ont pas été présentées en preuve, l'avocat des défendeurs a contre-interrogé longuement M. Fowler sur leur contenu comme si ces photocopies avaient été présentées en preuve. Pour cette raison, et parce que les avocats des parties, lors d'une conférence préalable au procès, avaient convenu que la question à trancher par le juge de première instance, relativement au compte du séquestre, était de savoir si ce compte était raisonnable et juste, je suis convaincu que le juge de première instance avait droit de se fonder sur les inscriptions contenues sur les fiches de même que sur le témoignage verbal de M. Fowler pour décider si le compte en question était raisonnable et juste. La conclusion du juge de première instance selon laquelle le compte du séquestre était juste et raisonnable constitue une conclusion sur les faits qui est appuyée par la preuve. Qui plus est, les défendeurs n'ont fourni aucune preuve pour établir que ce compte était déraisonnable ou que le travail n'avait pas été effectué. Puisque la conclusion du juge de première instance ne contient aucune erreur manifeste ou dominante,

la présente Cour ne la modifiera pas.

[26] Le présent appel n'a pas soulevé la question de la nécessité de donner un avis raisonnable à un débiteur lorsqu'une dette est remboursable à demande. Cette exigence a été illustrée par la décision de la Cour suprême du Canada dans l'arrêt *Ronald Elwyn Lister Limited, Lister and Lister c. Dunlop Canada Limited* (1982), 42 N.R. 181, prononcée le 31 mai 1982 après la clôture des débats sur le présent appel. Il ne nous incombe pas, dans le présent appel, de déterminer si les circonstances en l'espèce donnent lieu à une cause d'action contre la demanderesse.

[27] Pour les raisons précitées, je suis d'avis de rejeter l'appel avec dépens qui seront fixés conformément au tarif en vigueur au moment de l'introduction de l'action.

Appel accordé.

TAB 3

CITATION: Re Nortel Networks Corporation et al, 2017 ONSC 673
COURT FILE NO.: 09-CL-7950
DATE: 20170127

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

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

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

**APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

BEFORE: Newbould J.

COUNSEL: *Jessica A. Kimmel*, for the Monitor

Susan Philpott, for the Representative Counsel of former Nortel employees

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

Byron Shaw, for the Administrator of the Nortel Networks Managerial and Non-
Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan

Thomas McRae, for the Representative Counsel for the Nortel Canadian
continuing employees

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

Adam Slavens, for Nortel Networks Inc.

Michael Wunder, for the Unsecured Creditors Committee

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

Matthew-Milne Smith, for the EMEA Debtors

John Salmas, for Wilmington Trust, N.A. as indenture trustee

HEARD: January 12, 2017

ENDORSEMENT

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

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.

² EMEA is an acronym for 19 Nortel subsidiaries in Europe, the Middle East and Africa

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 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

³ A majority but not all of the bondholders under the particular Indenture Trust are a party to the Settlement Agreement.

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 (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 at para. 51 (Ont. C.A.) ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para. 5 (S.C. J.), aff'd (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

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

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

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

[15] Justice Pepall further stated:

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

[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 (Q.B.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Comm. 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 this 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

⁴ See *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171.

[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:

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.

Nortel Estate Main Advisors Professional Fees For the period January 14, 2009 - December 31, 2015 (in USD millions)			
	Fees	Disbursements	Total Fees & Disbursements
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
Freshfields Bruckhaus Deringer LLP ³	7.3	1.7	9.0
Total	257.5	8.8	266.3
Allen & Overy LLP	28.5	1.6	30.1
Buchanan Ingersoll & Rooney PC	1.1	0.4	1.5
Total Professional Fees	287.1	10.8	297.9
Fees and Expenses of Main Advisors of:			
US Debtors ⁴			389.9
EMEA Debtors ⁵			581.9
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, Ernst & 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.

Newbould J.

Date: January 27, 2017

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Redcorp Ventures Ltd. (Re)*,
2016 BCSC 188

Date: 20160209
Docket: S091670
Registry: Vancouver

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

And

In the matter of the *Canada Business Corporations Act*,
R.S. 1985 c. C-44

And

In the Matter of the *British Columbia Business Corporations Act*,
S.B.C. 2002, c. 57

And

In the Matter of Redcorp Ventures Ltd. and
Redfern Resources Ltd.

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (From Chambers)

Counsel for Alvarez & Marsal Canada Inc.,
Receiver of Redcorp Ventures Ltd. and
Redfern Resources Ltd.:

H.L. Williams

Counsel for Secured Noteholders
Whitebox Advisors LLC, GMP Investment
Management LP, Sandleman Partners LP
and VR Global Partners LP:

N. Renner
(attendance by telephone)

Place and Date of Hearing:

Vancouver, B.C.
December 14, 2015

Place and Date of Judgment:

Vancouver, B.C.
February 9, 2016

[1] Alvarez & Marsal Canada Inc. ("Alvarez") in its capacity as a Court appointed Interim Receiver and Receiver ("Receiver") of the assets, undertakings and properties of Redcorp Ventures Ltd. ("Redcorp") and Redfern Resources Ltd. ("Redfern") applies for a number of Orders including that:

- (a) The reports of the Receiver filed in these proceedings, including the Tenth Report of the Receiver dated December 8, 2015 ("Tenth Report"), and the actions and conduct of the Receiver as particularized therein be approved;
- (b) The fees and disbursements of the Receiver and its counsel as set out in the Tenth Report, be approved;
- (c) The Receiver be authorized to destroy any and all records of the Companies.
- (d) Upon the filing of a Receiver's Discharge Certificate, the Receiver shall be discharged as Receiver of the assets, undertaking and property of the Companies, provided that notwithstanding its discharge herein: (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein; and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Alvarez in its capacity as Receiver.
- (e) Alvarez be hereby released and discharged from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, Alvarez be hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.
- (f) Notwithstanding any provision herein, this Order shall not affect any person to whom notice of these proceedings was not delivered as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and regulations thereto, any other applicable enactment or any other Order of this Court.

BACKGROUND

[2] Redcorp and Redfern made a filing under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *British Columbia Business Corporations Act*, R.S.B.C. 2002, c. 57. An Order was made on March 4, 2009 in response to the filing ("Initial Order").

[3] On May 29, 2009, Alvarez was appointed Receiver, without security, of the current and future personal assets, undertakings and properties of Redcorp and Redfern ("Appointment Order"). Under the Appointment Order, the sum of \$1,000,000 (exclusive of any interest earned thereon) as secured by the Administration Charge set out in the Initial Order was to be held and administered by the Receiver. The sum of \$5,000,000 (exclusive of any interest earned thereon) as secured by the Directors' Charge set out in the Initial Order was also to be held and administered by the Receiver.

[4] The Appointment Order contained the following provision limiting the liability of Alvarez as Receiver:

THIS COURT ORDERS that the Receiver shall incur no personal liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the B.I.A. [*Bankruptcy and Insolvency Act*, R.S.C, 1985, c. B-3] or by any other applicable legislation.

DISCUSSION, CASE AUTHORITIES AND DECISION**(a) Approval of the "Actions and Conduct of the Receiver" and the Release and Discharge of the Receiver**

[5] What is requested in (a) and (e) above amounts to insurance for the Receiver in addition to any liability insurance that may be available to Alvarez. Not only are the "actions and conduct" of the Receiver as "particularized" in all of the ten Reports of the Receiver approved but also the Receiver is to be released and discharged from "any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions..." whether or not the "actions and

conduct” are particularized in any of the ten Reports filed with the Court by the Receiver.

[6] While the personal liability and obligation of the Receiver is protected in the Initial Order save and except for gross negligence or wilful misconduct, the effect of the release and discharge sought in (e) above goes beyond what is set out in the Initial Order and does not make it clear that “gross negligence or wilful misconduct” are not released or discharged. The effect of (e) is that the Receiver is to be released from personal liability or obligations arising as a result of its appointment including any liability for gross negligence or wilful misconduct. Pepall J. in *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, [2009] O.J. No. 4265 (Ont. S.C.J. Commercial List) made this statement in that regard:

It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions.

(at para. 14)

[7] The combined effect of what is sought in (a) and in (e) above is so broad as to attempt to protect the Receiver from any and all liability. There is no obvious inherent jurisdiction to exempt even its own officer from the general operation of statutes or to excuse liability for negligence or willful misconduct. That is why the standard appointment order excludes “gross negligence or wilful misconduct” from the exclusion given to a receiver for any “personal liability or obligation.”

[8] The position of a court appointed Receiver was set out in *Ed Mirvish, supra*, where Pepall J. stated:

A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish

additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.

Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act* provides that the discharge of a trustee discharges him [or her] from all liability in respect of any act done or default made by him [or her] in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.

(at paras. 8 and 9)

[9] Counsel for the Receiver indicated that the shortfall to creditors is in the neighbourhood of \$110 million and those creditors who will already suffer a shortfall had agreed to the passing of accounts of the Receiver, the passing of accounts of counsel for the Receiver, and for the releases sought by the Receiver.

[10] I am satisfied that this is not a sufficient answer to the questions raised by the applications of the Receiver. The Receiver is a Court appointed officer and the Court retains and must exercise a reasonable review of the actions taken by the Receiver and of the seriousness of any omissions relating to actions not taken by the Receiver. The Court cannot be bound by the corporate “monetary” decision taken by a creditor or by creditors who will have to bear the cost of an appropriate review by the Court.

[11] An order following the format of the “Model Discharge Order” does not automatically include such a broad release and discharge as is contemplated in (e) above. Rather, if such a broad release and discharge is to be included, that inclusion must be drawn to the attention of the Court. The B.C. Model Insolvency Order Committee provided this comment in this regard:

The BCMIOC was divided as to whether a general release might be appropriate. On the one hand, the Receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the Receiver

likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity and as the Court's officer, so the Court may be of the view that it is appropriate to insulate the Receiver from liability by way of a general release. Some members of the BCMIOC felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership.

Without intending to express an opinion as to whether a general release is appropriate, the BCMIOC has decided not to include the general release language in the body of the model order. Whether such language is appropriate is a matter to be considered by the presiding Judge based on the specific circumstances of the case. If this relief is being sought, stakeholders should be specifically advised and given ample notice.

If a general release is ordered, the language approved by the BCMIOC is as follows:

[RECEIVER'S NAME] is hereby released and discharged from any and all liability that [RECEIVER'S NAME] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME] while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, [RECEIVER'S NAME] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

[12] In requesting this provision, counsel could not confirm that all “stakeholders” had been “specifically advised and given ample notice”. Rather, notice was only provided to “Secured Noteholders” who will suffer a shortfall as a result of the receivership. Even if all stakeholders had been notified, I cannot be satisfied that the breadth of the release sought is appropriate even though it is the wording that is set out in the Model Discharge Order. Despite the suggested wording, it could not have been contemplated by the drafters that “any and all liability relating to matters that were raised, or which could have been raised” would include a release and discharge of liability for gross negligence or wilful misconduct. First, it would be contrary to what was set out in the Appointment Order. Second, the Court should not countenance the release and discharge of any gross negligence or wilful misconduct of its own officer.

[13] Regarding the request that the Receiver be released and discharged from any liability it “may hereafter have”, I am satisfied that it is inappropriate for the Receiver to make such a request. First, such a request would include a release and

discharge of claims for gross negligence or wilful misconduct. Second, what is contemplated is that the Receiver will be discharged upon filing a “Receiver’s Discharge Certificate” so that the Court will not necessarily have the benefit of a further Report from the Receiver about future activities.

[14] The Tenth Report of the Receiver sets out a number of matters that remain unresolved and which will require further action by the Receiver. It is inappropriate to request that any future “acts or omissions” be released and discharged in view of this ongoing activity of the Receiver. Once all outstanding matters have been completed, the Receiver can re-apply for its discharge. At that time, the Court can take into account all activities of the Receiver and whether a claims bar process has been undertaken.

[15] Once the further actions contemplated in the Tenth Report are completed by the Receiver, the Receiver will be in a position to apply for what is requested in (d) above. In this regard, the Explanatory Notes attached to the Model Discharge Order note the following regarding what is requested by the Receiver in (d) above: “Counsel should consider including this provision only if the Receiver’s Report identifies any outstanding matters that should be completed before the Receiver’s discharge. “As well, what is requested in (d) above does not include the necessary phrase: “...upon the Receiver filing a certificate certifying that it has completed the remaining outstanding activities described in the Report”. Here, it is not clear whether all “outstanding matters that should be completed before the Receivers’ discharge” are specifically set out in the Tenth Report.

[16] So that the Court is in a position to confirm that all creditors and interested parties are aware of the effect of any release and discharge requested by the Receiver, the Receiver is in the position to establish “claims bar process” whereby all creditors and interested parties are notified that they will lose any rights to claim against the Receiver after a suitable period of time has elapsed and no application has been made to the Court to seek leave to proceed against the Receiver. In this regard, the Initial Order provided the following protection:

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

(para. 7)

[17] Receiver will be at liberty to reapply for its release and discharge.

THE ACCOUNTS OF THE RECEIVER AND ITS COUNSEL

[18] The Appointment Order provided the following regarding the accounts of the Receiver and its counsel:

THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property (the "Receiver's Charge") in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but excluding the charge on the ERIP Monies, the Administration Charge and the Directors' Charge.

THIS COURT ORDERS that the Receiver and its legal counsel shall pass their 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 Supreme Court of British Columbia and may be heard on a summary basis.

[19] Regarding the question of the duty of a Court appointed receiver to report to the Court and to pass its accounts, the following statements were made in *Re Confectionately Yours, Inc. et al* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.) by Borins J.A. on behalf of the Court:

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

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

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the

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

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

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

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

(at paras. 34-36)

(a) Receiver's Accounts

[20] Attached as an appendix to the Tenth Report of Receiver is a “summary of the receiver’s professional fees and disbursements for the period May 26, 2009 to September 27, 2014...” Those accounts total \$2,244,414.45 including out-of-pocket disbursements of \$123,408.26 and applicable taxes of \$153,611.29. What was attached in the appendix set out the following information relating to the 43 invoices issued by Alvarez: (a) invoice number; (b) invoice date; (c) invoice period/description; (d) total hours; (e) fees; (f) disbursements; (g) HST; and (h) invoice total. Despite the inclusion of the word “description”, no description of the services was included. As well, there is no detail regarding the date when services were rendered and no breakdown of the “total charges for each of the categories of services rendered”.

[21] Also attached as an appendix to the Tenth Report is a list of the seven “Staff Members” who had worked on the receivership with the following included in that appendix: (a) staff member names; (b) title of the staff member; (c) the total hours spent by the staff member; (d) the billing rate of the staff member; and (e) the amount billed. The total of hours billed is 3,705.8. The average of the rates charged is \$530.90, and the total billed is \$1,967,394.90. There is no indication whether the billing rates changed during the period of May 26, 2009 through September 27, 2014. As well, there is no indication of the seniority of the staff members who worked on the matter.

[22] The purpose of a Receiver passing its accounts is to afford all interested parties the opportunity to question the Receiver’s activities and conduct. In order to be in a position to ascertain whether the fees and disbursements of the Receiver were “properly made or incurred” and are “fair and reasonable” what was done should be set out. In *Re Bakemates International Inc.*, (2002) 36 C.B.R. (4th) 200 (Ont. C.A.), Borins J.A. on behalf of the Court, dealt with the accounts of a Court appointed receiver and manager and made the following statement in that regard:

The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended

each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (S.C.). 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.

Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). I agree.

(at paras. 37 and 38)

[23] In addressing the appropriate principles and factors to be considered in assessing the appropriate compensation for a receiver, Taggart J.A. on behalf of the Court in *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (2d) 315 (C.A.), made the following statements:

The principles which guided the Registrar were those set out in the Belyea [*Belyea and Fowler v. Federal Business Development Bank* (1983), 46 C.B.R. (n.s.) 244 (N.B.C.A.) case to which he referred. He applied the relevant considerations listing them at the end of his recommendations. They included: (a) the value of the assets; (b) complications and difficulties encountered by the Receiver; (c) degree of assistance provided by Nican; (d) time spent by the Receiver; (e) Receiver's knowledge, experience and skill; (f) diligence and thoroughness; (g) responsibilities assumed; (h) results; (i) cost of comparable services

In addition to those factors the Registrar took into the account the estimates made by the Receiver as to the cost of the receivership with particular reference to the various fee estimates provided from time to time.

(at pp. 320-321)

[24] In *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]), further "relevant considerations" were added including the existence of an indemnity agreement, the secured position for priority for payment, the demanding of efficiency by a debtor, and with special emphasis on the parties agreeing to a charged based on the number of hours times an hourly rate of the persons involved.

[25] In *Bakemates, supra*, Borins J.A. made the statement regarding what information should be available to the Court in the passing of accounts of a receiver.

When a "receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

(at para. 31)

[26] Here, the accounts of the Receiver were not verified by Affidavit. Such an Affidavit should include what is set out in *Nican, BT-PR Realty*, both *supra*. As well, there is no description of what was done by each of the personnel who worked on the file and whose time is reflected in the 43 invoices which were issued. There is no information regarding the "standard rates and charges" of each of the personnel. There is no ability to ascertain whether what was charged was at the "standard rates and charges" of the Receiver. It is not possible to ascertain whether the liability for the fees of the Receiver were expenditures or liabilities which were "...properly be made or incurred...." I adopt the statement made by Borins J.A. in *Bakemates, supra* regarding what should have been available:

Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

(at para. 38)

[27] Because any accounts actually rendered by the Receiver were not attached, because there was no actual description available to the Court about what the Receiver had accomplished, and because very few of the "relevant considerations" were provided to the Court, what was presented on behalf of the Receiver does not meet the requirements set out in *Nican, BT-PR Realty*, or *Re Confectionately Yours, all supra*. What should be presented must include copies of any invoices issued, information regarding the standard rates and charges of each of the personnel who had worked on the receivership, and an indication of seniority within the profession, a narrative description about what was done, statement of affairs setting out the assets and liabilities of the debtor, statement of receipts and disbursements, and time that the Receiver took to perform its duties. This information would allow the Court to determine the appropriateness of any standard rates and charges imposed. If there is any information in the invoices which is confidential, such information

could be redacted or sealed in the records of the Court. The reference to a “summary basis” does not relate to reduced information that should be before the Court. Rather, the phrase relates to the basis to have the Court rather than the Registrar consider the materials that would ordinarily be before the Registrar.

[28] I cannot interpret the phrase “pass their accounts from time to time” as meaning only once in the six years since the Receiver was appointed and close to the time when the activities of the Receiver have come to an end. Where total receipts of Redcorp and Redfern amount to in excess of \$39,500,000, an appropriate passing of accounts cannot be interpreted as being once in six years. The same goes for the total fees and disbursements of the Receiver of in excess of \$2,200,000. It is not unreasonable to expect that the passing of accounts “from time to time” would at least every two years. In this regard, s. 99(1) of the *Trustee Act, R.S.B.C. 1996 c. 464* provides for an “executor, administrator, trustee under a will” to pass his or her accounts every two years unless the accounts are approved and consented to in writing by all beneficiaries, or “the court otherwise orders”. While the Receiver is not an executor, administrator, or trustee, I see no reason why it would not be appropriate for a Receiver to pass his or her accounts at least every two years. If necessary, a Court application could be made to extend that period if the circumstances justify such an extension.

[29] If a lengthier time goes by, a Receiver will not have the benefit of any comments about the form of the accounts which can then be incorporated into later passing of accounts. By waiting six years, the Receiver has run the risk that what was presented was in a format which was unacceptable and lacking in the required detail.

[30] The Receiver will be at liberty to re-apply for the passing of its accounts.

(b) The Accounts of Counsel for the Receiver

[31] Attached as a further appendix to the Tenth Report is a “summary of the professional fees and disbursements for the Receiver’s legal counsel” for the period of May 30, 2009 through November 9, 2015. The total fees are \$1,065,788.24

including out-of-pocket disbursements of \$18,545.43 and applicable taxes of \$113,492.71. Also attached is a break-down of the 57 invoices rendered by counsel which include information under the following headings: (a) invoice number; (b) invoice date; (c) fees; (d) disbursements; (e) HST; and (f) invoice total. There was a breakdown of the personnel by “Staff Member” which included the following categories: students, associates, paralegals, partners, tax advisors, associate counsel, and “Word Processing”. There was also a break-down under the following headings: (a) name of staff member; (b) their title; (c) their total hours; (d) their billing rate which included varying rates depending on the year that the services were rendered; and (e) amount billed attributable to each of them. There is no indication as to what services were rendered by any of those listed.

[32] Regarding the “fees and disbursements” of legal counsel for the Receiver, the same comments can be made relating to what was presented. First, the accounts should have been verified by Affidavit. Second, there is nothing which would allow me to conclude that what was incurred for legal services was at the “standard rates and charges” of counsel. Third, because there is no description of the services rendered, it is not possible to ascertain whether this liability for legal fees was “properly...made or incurred”. Fourth, the assessment of fees should not be just a matter of calculating the number of hours spent times an hourly rate. There should be some correlation of the cost to the benefits derived by the receivership: *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para. 20. Fifth, counsel should keep in mind Rule 14-1(31) of the *Supreme Court Civil Rules* which provides: “A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a Registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.” Sixth, the Court should not automatically approve the “usual” hourly rates for counsel. In this regard, see *Diemer, supra*, where Goodman J. made the following statement:

In my view, the assumption that the court will automatically approve a “usual” hourly rate for Receiver’s counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312, the court, with the assistance of opposing counsel [if there is one], has to play the role of what a

client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.

(at para. 30)

[33] Regarding the fees and disbursements of counsel, I adopt the statement in *Bennett On Receiverships, supra*, where the learned author states:

The court must scrutinize the accounts carefully to assure that the appropriate lawyers are performing services to the receiver on the same basis and factors as the receivers. Where legal accounts have no relevance to the receivership, the court will reduce the fees. Similar factors are considered on the taxation or assessment of the legal accounts, namely:

- (1) the time expended;
- (2) the complexity of the receivership;
- (3) the degree of responsibility assumed by the lawyers;
- (4) the amount of money involved, including reference to the debt, amount of proceeds after realization, payments to the creditors;
- (5) the degree and skill of the lawyers involved;
- (6) the results achieved;
- (7) the ability of the client to pay; and
- (8) the client's expectations as to the fee.

[34] What should have been presented on behalf of legal counsel would be that which would have been presented to the Registrar on the assessment of an account being rendered to a client. As it was not, the Receiver will be in a position to reapply to have the fees and disbursements of the counsel for the Receiver approved.

(c) Should there be a Reference to the Registrar?

[35] The question which arises is whether it is appropriate to refer the question of the passing of accounts of the Receiver and the passing of accounts of the counsel for the Receiver to the Registrar or whether it is appropriate to assess costs summarily as is provided in the Appointment Order. In this regard, Rule 14-1(15) of the *Supreme Court Civil Rules* provides that a Court may award costs "of a proceeding" and "...in ordering those costs the court may fix the amount of costs, including the amount of disbursements". In the context of a trial and an order made

for costs, Donald J.A. made these statements on behalf of the Court in *Graham v. Moore Estate*, 2003 BCCA 497 :

There remains the issue whether the Plaintiffs' costs should have been assessed before the Registrar rather than by the trial judge. It is said that Mr. Campa was denied the procedural protections of a Registrar's hearing, and he did not have an adequate opportunity to challenge items in the solicitor's bill. The Registrar's hearing would have involved more litigation in a losing cause; a problem that underlies all of Mr. Campa's process arguments.

It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington was Royal Inland Hospital* (1995) 131 D.L.R. (4th) 15 [B.C.C.A.]. As in *Harrington*, the trial judge in the present case did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.

Mr. Campa was unable to demonstrate any denial of the opportunity to address the reasonableness of the bill. (at paras. 45-47)

[36] In view of the Appointment Order and in view of the desire to provide appropriate expediency to the procedures adopted by the Court, I am satisfied that the present Rule allows a summary determination by the Court rather than a reference to the Registrar on the question of costs. Such a summary determination by the Court is contemplated by the Appointment Order. This view is confirmed in the decision in *Gichuru v. Smith* (2014), 65 B.C.L.R. (5th) 72 (C.A.) where Harris and Goepel JJ.A. made these statements regarding the principles under which an assessment before a judge should take place:

The principle governing cost assessments under the Rules is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the Rules and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily. (at para 101)

The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by

that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs. (at para. 154)

[37] In protracted proceedings dealing with the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 proceedings or a receivership, where a judge has heard each of the applications that have come before the Court, and has received regular reports, the assigned Judge can ascertain whether the accounts should be approved summarily without a reference to the Registrar. That is the most expeditious way of determining that question and is consistent with the Appointment Order. However, this decision should be made by the assigned Judge after the form and the completeness of the materials filed in support of the application can be reviewed so that, if the materials do not meet the criteria set out above, the matter can be referred to the Registrar with directions regarding the materials that must be produced. It would also depend on the question of whether notice has been provided to all, not some, stakeholders and whether a claims bar process has been undertaken and completed.

(d) Destruction of Records

[38] The application contained the following request: "The Receiver is authorized to destroy any and all records of the Company in its possession." I am satisfied that this request runs contrary to the requirements set out in Provincial and Federal legislation regarding retention of records including the requirements of the Superintendent of Bankruptcy, of the Canada Revenue Agency, and of Provincial Legislation dealing with corporations. There is also an important reason "any and all records" of Redcorp and Redfern should not be destroyed. If, in the future, a party obtains the consent of the Receiver or the approval of the Court to proceed against the Receiver, the destruction of records means that the discovery process available pursuant to the *Supreme Court Civil Rules* would be meaningless. In the absence of

the expiry of a limitation period, a claims bar process or a Court Order, the records of Redcorp and Redfern should be retained in accordance with Provincial and Federal legislation.

COSTS

[39] Receiver will be at liberty to speak to the question whether the costs of this application should be born by the creditors of Redfern Resources Ltd. and Redcorp Ventures Ltd.

“Burnyeat J.”

TAB 5

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz and Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

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

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

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and 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

ENDORSEMENT

[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. Solomon, 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 Carswell BC 2979, 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 Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ 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].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

TAB 6

Court of Queen's Bench of Alberta

Citation: Winalta Inc. (Re), 2011 ABQB 399

Date: 20110624
Docket: 1003 06865
Registry: Edmonton

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

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

**Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski**

I. Introduction

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

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

[1] Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor

companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

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

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

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

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

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

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

II. A Quick Look Back

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

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

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

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

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

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

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

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

[14] The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs

associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

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

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

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

III. Analysis

A. Proper Charges

1. General Principles

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

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

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

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

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

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

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

[23] In *Re Triton Tubular Components Corp.* (2006), 20 C.B.R. (5th) 278 at para. 83 (Ont. S.C.J.), additional reasons at 2006 CarswellOnt 1029 (S.C.J.), Madam Justice Mesbur’s criteria in scrutinizing the propriety of a monitor’s counsel’s fee was that which “...one would expect from a resistant client.”

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

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

...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...

... The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

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

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

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

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

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

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

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

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

2. Non-Partner Services

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

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

(a) *Clerical, administrative, and IT staff*

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

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

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

... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should

be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

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

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

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

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

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

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

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

(b) Professional staff (non-partner)

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

[46] Like Hall J. in *Re Hickman Equipment (1985) Ltd.* (2002), 34 C.B.R. (4th) 203 at para. 20, 214 Nfld. & P.E.I.R. 126, I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

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

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

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

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

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

3. Duplication of work by partners

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

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

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

[55] Both Messrs. Rodriguez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriguez and Keeble.

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

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

4. The administration charge

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

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

Winalta Group's knowledge and implicit agreement to pay any administration charge in the CCAA.

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

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

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

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

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

5. Mathematical errors

[65] The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

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

B. Breach of Fiduciary Duty/Conflict of Interest

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

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

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

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

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

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

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

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

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

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

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.
2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.
3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:
 - (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and
 - (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

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

(a) *The monitor's fiduciary and ethical duties*

[74] Section 25 of the *CCAA* provides that:

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

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

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

opinion of an informed person to impair, their professional judgment (Rule 44).

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

[77] A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank of Canada* (1994), 29 C.B.R. (3d) 1 at 8 (N.B.C.A.); *Re Laidlaw Inc.* (2002), 34 C.B.R. (4th) 72 at para. 2 (Ont. S.C.J.); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 at para. 20 (B.C.S.C.); and *Re 843504 Alberta Ltd.*, 2003 ABQB 1015 at para. 19, 351 A.R. 223). The following observations made by Farley J. in *Re Confederation Treasury Services Ltd.*, (1995), 37 C.B.R. (3d) 237 at 247 (Ont. Ct. (Gen. Div.)) about a bankruptcy trustee's duty of impartiality resonate:

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

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

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

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

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

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

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

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

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

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

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

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

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

28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:

- (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender. [Emphasis added.]

[88] Clause 30 of the Initial Order states:

The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

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

Step 2: Assessing the Monitor's actions

(a) *Principles of interpretation*

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

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

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

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

- (i) assume that the parties carefully drafted the terms of the order;

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

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

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

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

[97] The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26:

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

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

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

[99] Section 23 of the *CCAA* sets out certain reporting requirements for a court-appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis

contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

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

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

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

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

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

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

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

[107] Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

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

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

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

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

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

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

[114] In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it

to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

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

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

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

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

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

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

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

(b) **Ascertaining the appropriate fee reduction**

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

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

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

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

IV. Conclusions

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

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

[127] In the result:

- (i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.
- (ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.
- (iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

- (iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.
- (v) The \$10,000.00 charged for internal quality reviews is to be deducted from the Fee.
- (vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.
- (viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Heard on the 21st day of March, 2011

Dated at the City of Edmonton, Alberta this 24th day of June, 2011.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Kentigern Rowan
For Deloitte & Touche Inc.

Darren Bieganek
For the Winalta Group