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COURT FILE NUMBERS B201-979735 / 25-2979735
 COURT COURT OF KING'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY

NB
 C111174

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
 R.S.C. 1985, c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
 PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION,
 GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON
 PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED,
 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA
 LTD., and SPICELO LIMITED

APPLICANTS GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON
 PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS
 CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801
 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD.,
 and SPICELO LIMITED

DOCUMENT **BENCH BRIEF OF THE SECURED LENDERS**
Trafigura Canada Limited and Signal Alpha C4 Limited

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File No.: 137093.1011

**Hearing via Webex before the Honourable Justice Sidnell
 on the Commercial List, on November 8, 2023, commencing at 2:00 p.m.**

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Respondents, Trafigura Canada Limited (“**Trafigura**”) and Signal Alpha C4 Limited (“**Signal**” and collectively, the “**Lenders**”) in response to the the Applicants, Griffon Partners Operation Corp. (“**GPOC**”), Griffon Partners Capital Management Ltd. (“**GPCM**”), Griffon Partners Holding Corp. (“**GPHC**”), Spicelo Limited (“**Spicelo**”), Stellion Limited (“**Stellion**”), 2437801 Alberta Ltd. (“**2437801**”), 2437799 Alberta Ltd. (“**2437799**”), and 2437815 Alberta Ltd. (“**2437815**”) (collectively, the “**Debtors**”), application to:
 - (a) extend the Debtors’ time for filing a Proposal to December 23, 2023 (the “**Stay Extension**”);
 - (b) approve the key employee retention plan (the “**KERP**”) and granting a second priority ranking Court-ordered charge (the “**KERP Charge**”) as security for payments made under the KERP in the amount of \$100,000; and
 - (c) approve the interim fees and disbursements (the “**Interim Fees**”) of Alvarez & Marsal Canada Inc. in its capacity as Proposal Trustee (the “**Proposal Trustee**”) and its counsel, Torys LLP.
2. For the reasons further described below, this Court should not grant the KERP or KERP Charge. It is inappropriate and unnecessary to give discretionary bonuses to individuals who are not arms-length and already have a material interest in the restructuring efforts of the Debtors. Further, this Court should not grant the Interim Fees without the benefit of supporting evidence or full understanding of what value the Proposal Trustee is bringing to this process.
3. The Lenders do not oppose the Stay Extension but reserve their rights to bring an application to terminate the stay prior to the expiry of the next 45-day period, in the event of further material prejudice to their position.

II. STATEMENT OF FACTS

A. The Parties

4. The Lenders are the largest and primary secured creditors of GPOC, GPCM and GPHC (collectively, the “**Griffon Entities**”). The Lenders also have a priority secured interest in Stellion, 2437801, 2437799, and 2437815 (collectively, the “**Shareholder Guarantors**”), which are holding

companies, and each legally or beneficially owned by one of the four directors of GPOC (Elliott Choquette, Jonathan Klesch, Trevor Murphy and Daryl Stepanic).¹

5. GPOC is a small oil and gas company with a few producing assets in the Viking formation in Saskatchewan (the “**GPOC Assets**”).² The value of the GPOC Assets is uncertain, but the highest valuation is no more than \$30,000,000, and likely much lower than that, and subject to commodity pricing and risk. GPOC operates the GPOC Assets through a small group of contractors³
6. GPHC and GPCM are each holding companies, have no assets other than their direct or indirect ownership in GPOC, and do not carry on any active business operations. None of the Griffon Entities have employees.⁴
7. Spicelo is unrelated to the Griffon Entities and Shareholder Guarantors and does not have employees or carry on any active business operations. Spicelo’s only asset is 5,506,833 shares in the capital of Greenfire Resources Ltd. (the “**Pledged Shares**”). Unlike the other Debtors (excluding GPOC), Spicelo is not a direct or indirect shareholder of GPOC.⁵

B. The Indebtedness

8. In July of 2022, the Lenders agreed to loan the sum of \$35,000,000 USD to GPOC (the “**Loan**”) to fund the acquisition of the GPOC Assets from Tamarack Valley Energy Ltd. (“**Tamarack**”) (the “**Transaction**”). The Transaction was fully financed by the Lenders and by the subordinate secured creditor, Tamarack, with the shareholders of GPOC contributing no cash equity to the Transaction.⁶
9. As security for the Loan, GPOC provided a fixed and floating charge debenture over all GPOC’s present and future real and personal property. Further, GPCM, GPHC, Spicelo, Stellion, 2437801, 2437799, and 2437815 (collectively, the “**Guarantors**” and each a “**Guarantor**”) each provided corporate guarantees for the Loan. In the case of Spicelo, a Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 (the “**Share Pledge**”) was entered with respect to the Pledged Shares.⁷
10. The Loan went into default almost immediately, within four months of its advance. On November 1, 2022, GPOC defaulted on the Loan Agreement by failing to meet mandatory principal

¹ Affidavit of Dave Gallagher, sworn September 19, 2023 (“**First Gallagher Affidavit**”) at paras 3-8; Affidavit of Daryl Stepanic sworn September 14, 2023 (“**First Stepanic Affidavit**”) at paras 6-10, Exhibit “B”.

² First Gallagher Affidavit at para 3.

³ Second Gallagher Affidavit at para 22.

⁴ Affidavit of Dave Gallagher, sworn October 17, 2023 (“**Second Gallagher Affidavit**”) at para 3.

⁵ Second Gallagher Affidavit at para 7.

⁶ Second Gallagher Affidavit at paras 9-11.

⁷ Second Gallagher Affidavit at paras 9-10.

amortization payments as required under section 2.5(2) of the Loan Agreement. The Loan remains in default to the present date.⁸

11. In May of 2023 and again in August of 2023, the Lenders proposed a forbearance agreement to GPOC, which was rejected. As a result, on August 16, 2023, the Lenders issued formal demands for repayment from the Debtors. In response, the Debtors filed Notices of Intention to File a Proposal (“**NOI**”) on August 25, 2023 (the “**NOI Proceedings**”).⁹
12. As of August 16, 2023, the Lenders were owed USD\$37,938,054.69, plus legal fees, costs, expenses and other charges which are due and payable pursuant to the terms of the Loan (collectively, the “**Indebtedness**”). The Indebtedness represents 68% (\$51,413,652.14 of \$75,681,542.85 CAD) of the claims of GPOC and substantially all the claims of the other Debtors in these NOI Proceedings.¹⁰

C. Spicelo and Pledged Shares

13. Spicelo’s only asset is the Pledged Shares. The Pledged Shares represent a key component of the collateral pledged to the Lenders as security for the Loan as the neither GPOC nor the Guarantors contributed cash equity to the Transaction and the GPOC Assets were insufficient to fully collateralize the Loan. No other creditor in these NOI Proceedings have recourse to the Pledged Shares.¹¹
14. The Pledged Shares have significant value. The Pledged Shares have recently participated in a transaction whereby, among other things, these shares were exchanged for shares of a related entity pursuant to a statutory plan of arrangement, and as of September 20, 2023, such shares (including the Pledged Securities) were listed and posted for trading on the New York Stock Exchange. On the day of the public listing, the estimated valuation was \$10.10 USD/share. The Pledged Shares are also entitled to a special dividend in the amount of \$6,600,000 USD, but payment of that special dividend is conditional upon certain events which have not yet occurred.¹²
15. As of September 20, 2023, the estimated value of the Pledged Securities and the special dividend was \$62,200,000 USD, or approximately \$84,900,000 CAD. When the Lenders issued their demands in August 2023, a sale of the Pledged Shares alone would have been sufficient to see the Indebtedness paid off.¹³ However, since the commencement these NOI Proceedings, the value of the Pledged Shares has fluctuated from a high of \$10.10 USD/share (upon listing September

⁸ Second Gallagher Affidavit at para 12.

⁹ First Gallagher Affidavit at paras 33-37.

¹⁰ First Gallagher Affidavit at para 28.

¹¹ Second Gallagher Affidavit at paras 10-11.

¹² Second Gallagher Affidavit at para 23.

¹³ Second Gallagher Affidavit at para 23.

20, 2023) to just over \$4.00 USD/share (October 3, 2023).¹⁴ Unsurprisingly, these fluctuations have raised concerns that the Lenders may be exposed to becoming undersecured, should the share price fall even further

16. The Lenders, on one hand, and the Debtors and Proposal Trustee, on another, disagree about whether the Pledged Shares can be sold right now for the purpose of resolving the Indebtedness, by virtue of the existence of a Lock Up Agreement. This issue has not yet been determined.

D. Previous Marketing Attempts

17. In March and April 2023, GPOC retained Imperial Capital, LLC (“**Imperial**”) and ARCO Capital Partners Inc. (“**ARCO**”) to explore M&A and/or capital-raising alternatives to find a solution to GPOC’s Continued Defaults. Imperial and ARCO presented a broad set of solutions such as a potential sale of the GPOC Assets, debt refinancing and capital raising to fund drilling activity. Despite contacting multiple parties there was limited feedback from prospective buyers or capital providers.¹⁵

E. NOI Proceedings

18. On September 22, 2023, the Debtors brought an application to, among other things, extend the time for filing a Proposal to November 8, 2023. At this application the Lenders agreed that the Debtors (except Spicelo) should be entitled to a 45-day extension. However, the Lenders argued that Spicelo should be carved out of these NOI Proceedings. The basis for this position is that the Pledged Shares are Spicelo’s only asset and those assets were pledged to the Lenders only. The terms of the Share Pledge permit the Lenders to appoint a receiver over Spicelo in the event of default. Therefore, if the Court declined to grant an extension of the initial stay of proceedings (by reason of termination or expiry), the Lenders would be able to appoint a receiver over Spicelo and prepared a receivership application for that eventuality. However, the Court extended the stay for the Debtors (including Spicelo), and so the receivership application was never decided on its merits. The Lenders have not brought a receivership application since.¹⁶
19. On October 18, 2023, the Debtors brought an application for approval of a SISP. While the Lenders conceded that a SISP was necessary with respect to the GPOC Assets, the Lenders took exception to the lengthy timelines proposed by the Debtors. The SISP was ultimately granted by the Court.¹⁷

¹⁴ Second Gallagher Affidavit at para 26.

¹⁵ First Gallagher Affidavit at paras 29-32; Second Gallagher Affidavit at paras 15-19.

¹⁶ Affidavit of Dave Gallagher sworn November 6, 2023 (“**Third Gallagher Affidavit**”) at para 14.

¹⁷ Third Gallagher Affidavit at para 15.

III. LAW AND ARGUMENT

A. The KERP is Unnecessary

20. The Debtors seek approval of a KERP and KERP Charge in the amount of \$70,000. The proposed KERP Charge is subordinate to the Administration Charge (as defined below) and will stand in priority to the Lenders' primary secured position.¹⁸
21. Whether a KERP or KERP Charge should be approved is a matter of discretion that should be evaluated on a case-by-case basis.¹⁹ KERPs are controversial in insolvency proceedings and should be subject to careful scrutiny before being granted to ensure that only *true* key employees are covered and the KERP does not do more harm than good.²⁰
22. The factors a Court may consider when deciding to approve a KERP are set out in *Grant Forest*²¹ and summarized in *Aralez*²² as follows: (i) there are arm's length safeguards in place; (ii) necessity of the program; and (iii) reasonableness of design.²³ To determine whether the KERP is appropriate, information relating thereto needs to be disclosed to the Court, the Lenders, and other stakeholders (on a sealed basis if necessary), in order to inform the these factors.
23. The Lenders submit that the proposed KERP fails to meet the criteria set out in *Aralez* for the following reasons:
- (a) The proposed key employee, Mr. Stepanic, is in a conflict position. Mr. Stepanic is the beneficial owner of 2437815 – one of the Debtors in these NOI Proceedings. 2437815 has guaranteed GPOC's Indebtedness owing to the Lenders. 2437815 has an ownership interest in the GPOC Assets subject to the SISP process.²⁴ The KERP is unnecessary because Mr. Stepanic should already be incentivized to support the SISP process given his material interest in the success of these NOI Proceedings.
 - (b) Mr. Stepanic is not independent or objective. In *Grant Forest* the Court took in account the fact that a proposed key employee was not a shareholder in deciding whether to grant a KERP. The Court noted that "[o]ne can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive

¹⁸ Third Report of the Proposal Trustee dated October 31, 2023 ("**Third Report**") at paras 22-23.

¹⁹ *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 ("**Grant Forest**") at para 8.

²⁰ *Grant Forest* at para 9 citing Kevin McElcheran, *Canadian Insolvency in Canada* (LexisNexis-Butterworths) at 231.

²¹ *Grant Forest* at paras 8-22.

²² *Aralez Pharmaceuticals Inc., (Re)*, 2018 ONSC 6980 at ("**Aralez**") paras 27-30.

²³ *Aralez* at para 30.

²⁴ First Stepanic Affidavit at paras 6-10, Exhibit "B"; Third Gallagher Affidavit at para 22, Exhibit "C".

of the company who is not a shareholder and thus not conflicted".²⁵ By virtue of Mr. Stepanic's shareholdings in 2437815 he is not independent or impartial in this process.

- (c) There has been a lack of objective business input in the design of the KERP. There has been no input sought from the Lenders or other creditors about the design and development of the KERP. The Court in *Aralez* placed a significant degree of weight on the support of the secured creditors in terms of establishing the arm's length and market tested nature of the proposed KERP.²⁶
- (d) Other than the Proposal Trustee's assertion that Mr. Stepanic is a critical key employee no other evidence is provided about what he does, how much he is currently being paid for his services, and whether these services extend beyond what he would have already been performing as an executive of an oil and gas company.²⁷ Since the proposed KERP Charge will further subordinate the Lenders position, the Court and Lenders should be given a reasonable opportunity to review this information.
- (e) There is no information provided about whether Mr. Stepanic will leave his position if the KERP Charge is not granted. Given that Mr. Stepanic is beneficial owner of one the Debtors, 2437815, his participation in these NOI Proceedings will likely continue regardless of whether the KERP is granted.
- (f) Mr. Stepanic is already being fully compensated for his past and current efforts as a contractor of GPOC. In the last 8-weeks GPOC has accrued \$742,000 in field operator and office consultant costs.²⁸ Mr. Stepanic has likely been paid for his ongoing efforts from these sources. Further, the Court specifically granted GPOC a supplier charge in the amount of \$700,000 to pay pre-filing suppliers deemed necessary for ongoing operations and/or restructuring efforts of GPOC. If Mr. Stepanic is deemed critical, then the Lenders expect he has been paid for past services from this Court-ordered charge. In the absence of further information about what services Mr. Stepanic is providing, there is no necessity to grant the KERP.
- (g) The Proposal Trustee's 13-week Cash Flow Forecast ending January 19, 2024 (THE "**Forecast R&D**") estimates that GPOC will be in a net positive cash flow position.²⁹ The Third Report also does not indicate a need to draw on DIP financing. There is no evidence

²⁵ *Grant Forest* at para 16

²⁶ *Aralez* at para 34.

²⁷ Third Report at para 8.

²⁸ Third Report at para 25, pg. 10.

²⁹ Third Report at para 29, pg. 12.

to suggest that there is a risk of GPOC not being able to pay Mr. Stepanic for his ongoing services.

24. For the foregoing reasons, the Lenders submit that the KERP is unwarranted and there is no legal basis for Mr. Stepanic to acquire priority over other creditors seeking to be compensated in these proceedings. Repaying the Lenders and other creditors in this NOI Proceeding must be given priority over disbursing incentive bonuses to non-arm's length contractors who are already being paid for their services. Given the lack of evidence provided to support the necessity of the KERP, this Court should not grant this relief.

B. The Interim Fees should not be approved without further evidence

25. On August 25, 2023, this NOI Proceeding was commenced by the Debtors. Since this time nearly \$900,000 in professional fees have rapidly accrued from various sources. The professional fees are summarized in the Third Report's 8-week cash flow ending October 20, 2023 ("**Actual R&D**") as follows³⁰:

Cash Disbursements	Actuals (Rounded)
Pre-filing professional fees	\$199,000
Debtors counsel fees	\$193,000
Proposal Trustee's fees*	\$235,000
Proposal Trustee's counsel fees and retainer**	\$101,000
Restructuring Advisor fees and retainer***	\$172,000
TOTALS:	\$900,000.00

*The Proposal Trustee's fees are for the period of August 26, 2023 to October 15, 2023.

**The Proposal Trustee's counsel's fees and retainer are for the period of August 26, 2023 to October 6, 2023.

***The Restructuring Advisors' fees are for services and retainer incurred up to October 7, 2023.

26. The Forecast R&D estimates another \$845,000 in professional fees and \$450,000 in Restructuring Advisor fees (\$1,295,000 total) accruing between October 21, 2023, and January 19, 2024.³¹

27. Against this backdrop the Debtors bring an application on behalf of the Proposal Trustee and its counsel to have the Interim Fees approved in the amount of approximately \$336,000.

³⁰ Third Report at para 25, pg. 10.

³¹ Third Report at para 29, pg. 12.

28. Although the Debtors' application appears to only seek approval of the Interim Fees, the Actual R&D demonstrates that the total fees (inclusive of retainers) incurred to October 20, 2023, total \$508,000.³² This includes the \$172,000 (inclusive of retainer) incurred by the Restructuring Advisor.
29. Notably, the Proposal Trustee's fees only accrue to October 15, 2023, the Proposal Trustee's counsel's fees to October 6, 2023³³, and the Restructuring Advisors' fees to October 7, 2023³⁴. These accounts would not reflect all work performed by the parties to obtain the SISP (granted on October 18, 2023), implement the SISP or preparation of the Third Report. As a result, the total professional fees incurred is likely significantly higher than what is being reported by the Proposal Trustee.
30. The Lenders' primary secured interest will be further primed if the Administration Charge is increased. The Lenders strongly believe that the amount of fees incurred by the Proposal Trustee and its counsel are excessive and unreasonable given the relative size of the GPOC Assets and estate of the Debtors. Reasonableness of the work performed by a Proposal Trustee must be informed by: the work done, the time spent, the reasonableness of the time spent, the necessity of doing the work, and the results obtained".³⁵ A determination of fairness and reasonableness is a contextual assessment that takes in account the concerns of interested parties about whether the administration has been unnecessarily expensive.³⁶ Consideration must also be given to the overall value added to the process.³⁷
31. Notably, there is no fee affidavit supporting the Proposal Trustee and its counsel's Interim Fees. The only evidence before this Court regarding the fairness and reasonableness of the accounts is the Proposal Trustee's own assertion.³⁸ This statement alone is insufficient to satisfy the Lenders given the rapidly accruing professional fees in this NOI Proceeding.
32. For the foregoing reasons, the Lenders take issue with approval of the Interim Fees at this juncture. It is prejudicial to the Lenders' position to approve the Interim Fees without first providing them an opportunity to assess the work performed or, alternatively, have those accounts submitted to taxation to independently determine their reasonableness. The Lenders submit that this Court should direct the Proposal Trustee and its counsel to provide unredacted fee affidavits for the work

³² Third Report at para 25, pg. 10.

³³ Third Report at para 32.

³⁴ Third Report at para 26(e).

³⁵ *Piikani Nation v. Piikani Energy Corp*, 2011 ABQB 450 at para 8.

³⁶ *Ibid* at para 7.

³⁷ *Triple-I Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 23-26.

³⁸ Third Report at para 36; See for example *Winalta Inc. (Re)*, 2011 ABQB 399 at para 32 the Court states that the "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".

performed to date³⁹ and, if necessary, provide the Lenders an opportunity to request that those accounts be submitted to this Court or taxation for review before approval.

IV. CONCLUSION

33. For the reasons further described above, the Lenders submit that this Court should decline to grant the (i) KERP and KERP Charge; and (ii) decline to grant the Interim Fees at this juncture.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6 DAY OF NOVEMBER 2023

STIKEMAN ELLIOTT LLP



By: _____

Karen Fellowes, K.C.
Lawyer for the Applicants,
Trafigura Canada Limited and Signal Alpha
C4 Limited

³⁹ See *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 at paras 38-40 for the proposition that accounts should be verified by affidavit.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1	<u><i>Grant Forest Products Inc. (Re)</i>, 2009 CanLII 42046</u>
2	<u><i>Aralez Pharmaceuticals Inc., (Re)</i>, 2018 ONSC 6980</u>
3	<u><i>Piikani Nation v. Piikani Energy Corp</i>, 2011 ABQB 450</u>
4	<u><i>Winalta Inc. (Re)</i>, 2011 ABQB 399</u>
5	<u><i>Triple-I Partners Limited v. 12411300 Canada Inc.</i>, 2023 ONSC 3400</u>
6	<u><i>Confectionately Yours Inc. (Re)</i>, 2002 CanLII 45059</u>

TAB 1

**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 Grant Forest Products Inc., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS
GP

Applicants

BEFORE: Justice Newbould

COUNSEL: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant
Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank

Stuart Brotman for the Independent Directors

DATE HEARD: August 6, 2009

ENDORSEMENT

[1] KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was

made without prejudice to the right of GE Canada Leasing Services Company (“GE Canada”) to move to oppose the KERP provisions.

[2] GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

[3] The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

[4] The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

[5] Grant Forest has total funded debt obligations of approximately \$550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately \$400 million. The second lien lenders are owed approximately \$150 million.

[6] Grant Forest has unsecured trade creditors of over \$4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. \$6.5 million.

[7] The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately \$50 million for debt financing provided to the business.

Analysis

[8] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

[9] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by

the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

[10] I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

[11] The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

[12] Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

[13] It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that

case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Re Warehouse Drug Store Ltd.*, [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

[14] I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp.* [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a “potential” loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

[15] In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch’s age in the uncertain circumstances that exist with the applicants’ business.

[16] It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

[17] It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

[18] A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

[19] The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

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

[20] The first lien security holders owed approximately \$400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(1) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

[21] With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately \$400 million are consenting and the second lien lenders owed approximately \$150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be

any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately \$50 million, supports the KERP provisions for Mr. Lynch.

[22] In his work, *Canadian Insolvency in Canada*, *supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated “staged bonuses”. While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

[23] In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

[24] I have been referred to the case of *Re MEI Computer Technology Group Inc.* (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are

necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

[25] The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

DATE: August 11, 2009

NEWBOULD J.

TAB 2

CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

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

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ
PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or “KERPs”) and Key Employee Incentive Plans (or “KEIPs”). At the conclusion of the hearing, I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

[4] As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

[5] In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors – Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. – possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

[6] These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a “floor” under sale proceeds of approximately \$240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately \$275 million.

[7] I understand that a motion may be brought in the United States to challenge some aspects of Deerfield’s security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield’s input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield’s pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield’s benefit.

[8] Stated differently – Deerfield has significant “skin in the game” when it comes to a KERP or KEIP.

[9] Deerfield’s interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield’s secured claims.

Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

[10] This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

[11] The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

[12] While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

[13] The Canadian KERP impacts three employees of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be \$256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

[14] The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

[15] The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the “super-stretch” targets could rise to as much as \$4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of \$240 million.

[16] Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

[17] The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company’s Board was involved as was the debtor’s counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

[18] The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

[19] With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

[20] The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim – and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

[21] In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

[22] Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

[23] KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

[24] The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. “Key” is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out “key” in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise “key” employees;
- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;
- it is easy to overstate the risk of loss of key employees if a “bunker mentality” causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and
- “business as usual” is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

[25] While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;
- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and
- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more – sometimes covering for colleagues who have been laid off or who have left for greener pastures - while earning a fraction of their former income.

[26] What is wanting to sort out these competing interests is one thing that the court – on its own at least – is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial “eyes and ears of the court” comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

[27] What the court is unable to supply on its own can be summed up in the phrase “business judgment”. Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company’s business judgment. In my view, the court’s role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

[28] Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

[29] My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re)*, 2012 ONSC 3767 (CanLII),

relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)¹. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

- (a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly

¹ See also Pepall J. (as she then was) in *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 49-52.

benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

- (b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.
- (c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

[31] In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

[32] The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

[33] The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed

incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

the debtor companies or completion of the sales process and – for the KERP program at least – the perceived level of retention risk. The Monitor’s input was sought at each level of the design and finalization of the programs.

[41] The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees – critical to the Canadian business being sold – would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

[42] The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

[43] At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

[44] I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

[45] The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is \$256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of \$62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

[46] The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

[47] The KEIP program provides for incentive payments to participants based on the debtors’ performance relative to target established for cash flow targets during the

bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold², Target, Stretch and Super Stretch).

[48] The real controversy on the motion was in respect of the KEIP.

[49] It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest “super-stretch” level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the “target” level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

[50] They also object to the level of incentives relative to salary as being unacceptably high.

[51] The answer to both of these objections lies in the peculiar facts of this case.

[52] The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight – and the past efforts of the employees – that has made the targets appear to be such an easy goal.

[53] Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

² The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

[54] I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

[55] The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

[56] I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

[57] In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

[58] Order accordingly.

S.F. Dunphy J.

Date: November 21, 2018

TAB 3

Court of Queen's Bench of Alberta

Citation: Piikani Nation v. Piikani Energy Corporation, 2011 ABQB 450

Date: 20110719

Docket: 0901 18791, 0901 15297

Registry: Calgary

Between:

0901 18791

Piikani Nation

Plaintiff

- and -

Piikani Energy Corporation

Defendant

And Between

0901 15297

Piikani Nation and Chief Crow Shoe

Plaintiff

-and-

Piikani Investment Corporation

Defendant

**Memorandum of Decision
of the
Honourable Mr. Justice R.A. Graesser**

Introduction

[1] This decision follows an application for approval of the Receiver's accounts covering the period May 20, 2010 to March 31, 2011.

[2] Alger & Associates Inc. (Alger) was appointed Receiver of Piikani Energy Corporation (PEC) on May 20, 2010, having previously been appointed Interim Conservator on December 21, 2009. Alger had undertaken an investigation of the financial affairs of PEC in its role as Investigator of Piikani Investment Corporation (PIC).

[3] Alger had submitted accounts totaling \$66,616.52 representing its fees and disbursements over that period. Additionally, accounts from its solicitors in a similar amount were submitted for approval.

[4] No objection was taken to the accounts by counsel for PEC, or by the CIBC as Trustee of the Piikani Trust, or by the Piikani Nation, the ultimate shareholder of PEC. Its board of directors, however, objected to the accounts on a number of bases:

1. The Receiver has not pursued the Chief and Council of Piikani Nation for repayment of funds owed to PEC by the Nation;
2. The Receiver has not pursued recovery of funds the directors claim are owed to PEC arising out of its investment in the Oldman Hydro Project;
3. The Receiver should not be compensated (and its lawyers should not be paid) for the unsuccessful attempt to assign PEC into bankruptcy because of the position taken by the Superintendent of Bankruptcy or the application to amend the Receivership Order to expressly authorize the Receiver to make an assignment into bankruptcy;
4. The Receiver (and its lawyers) should not be compensated for attempts to pursue fraudulent preference claims against Mr. McMullen or Ms. Ho Lem as the reasonableness of such pursuit has been called into question, or at a minimum, any decision on those portions of the fees relating to the fraudulent preference claims should be deferred until a decision has been made on the claims themselves;
5. The Receiver has improperly communicated with counsel for the Nation regarding the fraudulent preference claims; and
6. The time charges by the Receiver are not supported by the description of services.

Relevant Law

[5] Counsel for the directors referred me to:

- s. 39(2) of the *Bankruptcy and Insolvency Act*, which provides that Trustees' remuneration is not to exceed 7.5% of receipts, subject to the discretion of the court under (5) to increase or reduce the remuneration;
- Frank Bennett, *Bennett on Receiverships* 2nd Edition, Toronto: Carswell Thomson Professional Publishing, 1999 at pp. 459-460, 463, 471;
- *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (C.A.);
- *Columbia Trust Cop. v. Coopers & Lybrand Ltd.*, 1986 CarswellAlta 259 (C.A.);
- *Re Omni Data Supply Ltd.*, 2002 CarswellBC 3111 (S.C.); and
- *Re Au (Bankrupt)*, 2001 ABQB 966 (Master).

[6] I take from these authorities that the 7.5% calculation is a guideline, but not a rule. Just as with solicitors' accounts, the accounts of trustees and receivers are subject to judicial scrutiny and they must be "fair and reasonable".

[7] A determination of fairness and reasonableness is a contextual assessment, and interested parties have status to make complaints about calculations, whether the services were authorized, complaints about alleged negligence or misconduct or the lack of reasonable prudence, or whether the administration has been unnecessarily expensive.

[8] As noted in *Bennett* at p. 471, the general principles of taxation apply, which include: the work done, the responsibility imposed, the time spent in doing the work, the reasonableness of the time expended, the necessity of doing the work and the results obtained.

[9] The court is required to "put a fair value on the receiver's efforts without regard to the realization and distribution to the creditors".

[10] *Belyea* holds at para. 3, that:

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.

[11] There, the Court noted a general reluctance to award remuneration based solely upon the time spent (at para. 12), although those comments must be viewed in the context of the era and practices of the day.

[12] In *Columbia Trust*, the Alberta Court of Appeal rejected the ability of the receiver to recover overhead in addition to that expected to be included in the hourly rates of professionals.

[13] *Omni Data* holds at paras. 24 and 25:

24 *Re Hess* (1977), 23 C.B.R. (N.S.) 215 sets out the principles to be applied when taxing trustee's fees. These include:

1. The trustee is entitled to fair compensation for its services.
2. One object of the taxation is to encourage the efficient, conscientious administration of the bankrupt estate for the benefit of the creditors and in the interests of the proper carrying-out of the objectives of the BIA.
3. The court should take into account the views of the creditors or the inspectors if they are expressed. Considerable weight should be given to their approval or disapproval.
4. The trustee should not be allowed fees for services not clearly performed or for work based on errors in judgment.

25 It is not disputed that the onus is on the trustee to satisfy the court that the remuneration claimed is justified.

[14] In *Au*, Master Quinn reduced the trustee's account applying the 7.5% rule and on the basis that \$80.00 per hour attributed to non-professional employees was "exorbitant".

Analysis

[15] I gave oral reasons at the hearing on July 5, 2011 in relation to the first 5 items of objection. By way of summary, I ruled that complaints 1 and 2, relating to work that the receiver did not do, were not valid reasons to object to remuneration for work actually done. Had the receiver carried out the steps suggested by the directors, the time spent and charges for such services would have been much greater than contained in the existing accounts.

[16] With regard to the so-called 7.5% rule, I noted that relates to bankruptcies and while it may be a useful reference point, it is not binding on the court when asked to approve accounts.

[17] As to complaint 3, I ruled that the Receiver was not negligent in making the initial assignment into bankruptcy. A judgment call was made that the existing order granted sufficient power to do so. If correct, the Receiver would have avoided having to come back to court for a variation. Ultimately, the Superintendent required a variation to the order. In my view, the

Receiver's judgment call was reasonable, and he (and his solicitors) should be compensated for such efforts.

[18] As to complaint 4, I am well familiar, as the judge case managing this receivership and the proceedings relating to Piikani Investment Corporation, with the circumstances surrounding the allegations of fraudulent preferences. A hearing on the merits is scheduled for July 25, 2011. The Receiver's accounts are to the end of March, 2011. In my view, it was reasonable for the Receiver to pursue the fraudulent preference claims. That does not mean that I have prejudged the matter in any way, but the timing and circumstances of the payments made were suspicious to the Receiver, and one of his duties it to pursue claims that, in his professional judgment, have a reasonable prospect of success. The claims here are not frivolous. Thus the Receiver (and his lawyers) should be compensated for services to the end of March for pursuing those claims.

[19] Whether the claims are successful or not may be considered in relation to the Receiver's (and lawyers') accounts starting in April, 2011. There have been cross-examinations and exchanges of information since that time. Briefs of law and argument are to be submitted shortly. I may at some later stage have to determine whether the Receiver's actions after March 31 have been reasonable and warrant compensation, but the uncertainty of the claims is no valid reason for me to withhold approval of the Receiver's and solicitors' accounts to the end of March.

[20] As to complaint 5, that the Receiver and his lawyers have communicated with the Nation about the alleged fraudulent preferences, I see nothing improper or nefarious about that. The Nation is the ultimate shareholder of PEC, and is the shareholder of PIC, which is a major creditor of PEC's. Communications between the Receiver, his lawyers and the Nation would be expected. This is not a valid ground of complaint.

[21] As to complaint 6, that the time records do not support the charges, Mr. Alger was cross-examined on his affidavit in support of this application. The Alger accounts were rendered on a time basis, and the accounts break down the time spent by each Alger employee working on the matter. I am satisfied that the employees recording time on the file were not performing work that would be characterized as "overhead" - routine typing, filing, reception, etc. No objection was taken with respect to the accuracy or description of Mr. Alger's time charges. The cross-examination focused on the time logged by "GEB", who was described as an "associate".

[22] GEB was the employee most heavily involved in the "leg work" of this receivership. His time charges total more than half of Alger's total fees: \$35,005 of \$66,616.52.

[23] In argument (supported by excerpts from the cross-examination and documents referred to at the cross-examination), Mr. Fitzpatrick for the directors pointed out that the minimum time recorded by GEB was half an hour. Time was recorded for tasks which (confirmed by Mr. Alger) could not have taken that long by themselves. Mr. Alger's explanation for the apparent discrepancies was three-fold: firstly that GEB did not give very detailed descriptions of his services, secondly that he must have been doing other things during the recorded time interval, without recording the details of the services; and that since GEB was working on the PIC

Receivership at the same time, he must have broken his time between the two files by way of an estimate.

[24] Mr. Alger expressed confidence that GEB's time was accurately recorded, even if the services were not. As to the estimating of time between the two files, Mr. Fitzpatrick pointed out that there were no similar time entries for the relevant times in July, 2010 in the PIC accounts (which were also before the Court for approval, and which were approved without objection).

[25] When time times hourly rate is the basis for a professional account, and in the absence of agreement to the contrary, time is time. It has been well accepted that a minimum "billing unit" of a tenth of an hour is practical. That means if it takes a minute or two to read an email or leave a phone message, it is legitimate to record a tenth of an hour for that service. But if reading the email and replying to it take a total of 5 minutes, it is not legitimate to record time as if there were two separate services of a minimum billing unit each. Time is time, and five minutes does not equal a fifth of an hour.

[26] Some firms have minimum billing units greater than that a tenth of an hour. They may also have a practice that has the time recorder record at least a minimum billing unit for each service (such that .1 would be recorded for receiving and reviewing the email, and another .1 would be recorded for replying). But if such practices are to be enforced, or approved by the courts, the client must have agreed in advance to such practices.

[27] If accounts are to be rendered on a time basis, the reasonable expectation of the client is that the time spent will be accurately logged, and services will be accurately described so that the client will know what it is being charged for and why. Any element of value billing (urgency, difficulty, results, etc.) cannot honestly be done by way of increasing or exaggerating the amount of time actually spent.

[28] Mr. Fitzpatrick was critical of GEB's recording. It would be unfair for the court to make any assumptions or draw any conclusions about the records. Suffice it to say that Mr. Fitzpatrick was successful in creating doubt as to the accuracy of GEB's records. Mr. Alger's assumption that GEB must have done other file-related things, otherwise he would not have recorded more time than would be expected for the task described, and his confidence in his employee, do not give the court a sufficient basis on which to "put a fair value" on GEB's efforts.

[29] The overall accounts do not seem unreasonable having regard to the nature of the work required of Alger & Associates, the complexity of it, and the difficulty they have had getting information and records. Had the accounts been rendered other than on the basis of hours times hourly rates, the amounts claimed might have been approved as reasonable compensation.

[30] However, the chosen method was to keep track of time and bill for the time. I endorse that practice, as it involves discipline on the part of the time recorder, and provides a basis for anyone looking at the accounts to assess their reasonableness. But when choosing that practice, it

is essential that the time be accurately recorded, with sufficient description to justify the time spent on the task.

[31] Here, GEB's records do not provide sufficient justification for the charges. I make no finding that the time was not accurately recorded; rather, the time recorded was not accurately or sufficiently explained. It is clear that GEB performed the majority of the work on the receivership to March 31, 2011. Mr. Alger was satisfied with his work on the file. But the onus remains on the receiver to establish the reasonableness of its fees. It has, in my view, failed to do so.

[32] Topolniski J. recently considered the reasonableness of a court-appointed monitor's fees in *Winalta Inc. (Re)*, 2011 ABQB 399. She conducted an extensive review of cases on trustees' and receivers' compensation including *Bulyea, Hess*, and *Columbia Trust* cited by the directors here. In that case, she remitted the accounts back to the monitor (at its expense) for further evidence and substantiation, rather than making any seemingly arbitrary adjustments to the accounts. Topolniski J. cited with approval the decision of Kyle J. in *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 252 where he was critical of the monitor's practices of recording minimum half-hour blocks of time and billing for discussions with junior staff.

[33] Having regard to the lack of detail given, I would be inclined to reduce the portions of the accounts relating to GEB's work by 15%, namely \$5250.75. However, in fairness to him and to Alger & Associates, they may prefer to submit further evidence to the court on the subject of GEB's time charges. If they intend to do so, I would expect to receive any such evidence by July 22, 2011.

Conclusion

[34] The Caron & Partners accounts are approved as submitted. The Alger & Associates accounts are not approved as submitted. They may submit further evidence as to the time recorded by GEB by July 22, 2011. Otherwise, the accounts will be approved but subject to a reduction of \$5250.75 plus applicable GST.

Heard on the 05th day of July, 2011.

Dated at the City of Calgary, Alberta this 8th day of July, 2011.

R.A. Graesser
J.C.Q.B.A.

Appearances:

Rick Gilborn
Caron & Partners LLP
for Alger & Associates Inc.

P. D. Fitzpatrick
Burstall Winger LLP
for Piikani Energy Corporation directors

Mark Klassen (no submissions)
McMillan LLP
for Piikani Investment Corporation

Ryan Zahara (no submissions)
Blake, Cassels & Graydon LLP
for CIBC Trust

Scott C. Chimuk (no submissions)
Miller Thomson LLP
for Dale McMullen

K.L. Fellowes (no submissions)
Davis LLP
for 607385 Alberta Ltd.

J.N. Thom, Q.C. (no submissions)
Miller Thomson LLP
for Raymond James (related action)

TAB 4

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 wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from \$65.89 per hour (clerical services) to \$460.79 per hour (senior management services).

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

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

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

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

[37] The Alberta Court of Appeal weighed in on the topic in *Columbia Trust 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 Rodriguez.

[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 led to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a CCAA monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

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

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

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

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

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

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

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

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

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

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

[77] A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank 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

TAB 5

CITATION: Triple-I Capital Partners Limited v. 12411300 Canada Inc., 2023 ONSC 3400
COURT FILE NO.: CV-22-00684372-00CL
DATE: 20230606

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

RE: Triple-I Capital Partners Limited, Applicant

AND:

12411300 Canada Inc., Respondent / Debtor

BEFORE: Peter J. Osborne J.

COUNSEL: Kevin Sherkin and Monica Faheim, for Crow Soberman Inc., Receiver

Hans Rizarri, for Crow Soberman Inc., Receiver

Avi Freedland, for the Respondent / Debtor

HEARD: June 6, 2023

ENDORSEMENT

1. Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.
2. The Respondent, 12411300 Canada Inc. (the “Debtor”), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the “Applicant”), nor the Second Mortgagees (defined below) appeared.

Chronology of This Matter

3. The Applicant advanced to the Debtor \$6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.
4. The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the “Receivership Order”). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft.².

5. As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of \$6,865,154 plus additional interest and accrued expenses.
6. Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the “Second Mortgagees”), were owed \$2 million, although on October 10 the Debtor made a payment to them in the amount of \$410,000, with the result that the principal amount owing to them was in the amount of \$1,590,000. There were no other significant creditors.
7. After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.
8. The Receiver then brought a motion for approval of a sales process.
9. Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.
10. On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.
11. That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.
12. On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.
13. On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor’s refinancing transaction.
14. That same day, funds in the amount of \$6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.
15. The payment was made in two tranches given the dispute that underlies this motion. The first tranche of \$6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of \$396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

Should the Fees of the Receiver and its Counsel be Approved?

Material Filed and Positions of the Parties

16. The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.
17. The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.
18. Today, the Receiver seeks approval of fees of \$106,722.25 plus disbursements of \$32,851.56 and HST in the amount of \$17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of \$91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to \$247,953.15.
19. The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.
20. The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.
21. The Respondent submits that this Court ought to approve 50 percent of total fees (\$53,361.13 instead of \$106,722.25) and 80 percent of disbursements (\$26,281.25 instead of \$32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent (\$45,507.47 instead of \$91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to \$125,149.85.
22. The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

The Test

23. The factors to be considered have been sent out by the Court of Appeal for Ontario: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:
 - a. the nature, extent and value of the assets;
 - b. the complications and difficulties encountered;
 - c. the degree of assistance provided by the debtor;

- d. the time spent;
 - e. the receiver's knowledge, experience and skill;
 - f. the diligence and thoroughness displayed;
 - g. the responsibilities assumed;
 - h. the results of the receiver's efforts; and
 - i. the cost of comparable services when performed in a prudent and economical manner.
24. The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer*, at para. 33, citing with approval *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460.
25. The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.
26. While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer*, at para. 45).

Application of the Test to This Case

27. In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.
28. The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.
29. The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.
30. The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor to challenge the activities that have already been approved by this Court (and therefore the

fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31. The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.
32. The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.
33. The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.
34. Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.
35. At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.
36. The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance premiums for the property which were necessary to preserve the asset of the value for the estate.
37. The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the

time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.

38. As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.
39. The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional (lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed \$5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.
40. The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.
41. The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.
42. Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.
43. In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.
44. The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.
45. The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

46. The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days, or “workdays” when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).
47. Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver’s work over that period of time [late July and early August, see para. 18 of the Debtor’s factum] “brought no value to the Corporation or its creditors, including the Second Mortgagees”. I cannot give any weight to this submission based on that evidence.
48. The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.
49. The Debtor made vigorous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.
50. The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.

The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.

51. The source for this submission is the lawyer’s own affidavit at paragraphs 29 – 32 (CaseLines B-1-17).
52. The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: “I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of the work”.
53. In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court

to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.

54. Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.
55. Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and disbursements of approximately \$248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately \$6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately \$125,000.
56. Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.
57. Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigorously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.
58. I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.
59. The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued and repeated pleas,

effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.

60. In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.
61. As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.
62. The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.
63. As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.
64. The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of \$247,953.15.

Approval of the Third Report and Activities

65. While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.
66. The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.
67. The Third Report and the activities described in it are approved.

Costs

68. Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of \$18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of \$10,719.18 on the same basis.
69. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.

70. Having considered the factors set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as they apply to this matter, in my view an appropriate award of costs is \$12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.
71. Order to go in accordance with these reasons.

P.J. Osborne J.

Date: June 6, 2023

TAB 6

DATE: 20020919
DOCKET: C36486

COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY AND BORINS J.J.A.

IN THE MATTER OF THE PROPOSALS OF

**CONFECTIONATELY YOURS, INC., BAKEMATES INTERNATIONAL
INC., MARMAC HOLDINGS INC., CONFECTIONATELY YOURS
BAKERIES INC., and SWEET-EASE INC.**

) **Martin Teplitsky,**
) **for the appellants**
) **Barbara and Mario Parravano**
)
) **Benjamin Zarnett and**
) **David Lederman,**
) **for the respondent**
) **KPMG Inc.**
)
) **Katherine McEachern,**
) **for the respondent**
) **Laurentian Bank of Canada**
)
) **Heard: April 8, 2002**

**On appeal from an order of Justice James M. Farley of the Ontario Superior
Court of Justice dated April 18, 2001.**

BORINS J.A.:

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

assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

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

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

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

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

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

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

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

[6] [6] In summary, KPMG sought approval of the following:

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

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

[8] [8] The appellants appeal on the following grounds:

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

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

Reasons of the motion judge

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

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

Perhaps it is the height – or depth – of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word “entitled”) to cross-examine the Receiver's representative

(Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

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

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

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

[13] [13] As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (H.C.J.) and *Re Mr. Greenjeans Corp.* (1985), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.). He went on to say at p. 26 that when there are questions about a receiver's compensation, “[t]he more appropriate course of action” is for the disputing party “to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions”.

[14] [14] The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

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

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

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

[16] [16] In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver

and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape “for attempting to show that Mr. Morawetz was not truthful or was misleading” in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

[17] [17] In assessing the receiver’s accounts, the motion judge made the following findings:

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

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

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

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

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

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

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

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

Issues and Analysis

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

(1) Bias

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

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

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.
- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.
- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".
- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.
- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

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

[25] [25] The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of

Canada in a number of cases. In dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

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

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

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

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

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

arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

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

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

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

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

[31] [31] Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When

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

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

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

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

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

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the

receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

[35] [35] The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

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

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

can direct a trial of the issues with directions [footnotes omitted] [emphasis added].

[37] [37] As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. 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.

[38] [38] Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).¹

^[1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Limited v. Fabulous Lobster Trap Cabaret Limited* (1983), 46 C.B.R. (N.S.) 117 (N.S.S.C.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."² ^[2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Director of Laboratories Services (Ont.)*, [1991] O.J. No. 210 (Div. Ct.) Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit

¹ [1] Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.

² [2] Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

. . . substantiating the hours spent and the disbursements”. This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 at 52-53 (Ont. C.A.), in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee’s accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

[39] [39] The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

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

[41] [41] In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver’s accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, e.g., *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C.C.A.); *Hermanns v. Ingle*,

supra; *Belyea & Fowler v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.); *Walter E. Heller, Canada Limited v. Sea Queen of Canada Limited* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C., Master); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. S.C.); *Cohen v. Kealey & Blaney* (1988), 26 C.P.C. (2d) 211 (Ont. C.A.). These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is “fair and reasonable”.

(3) Fair and reasonable remuneration

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

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

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

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

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

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

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

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

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

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

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

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

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

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

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

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

In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

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

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

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

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

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more

of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to “the checks and balances” of *Chartrand*.

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

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

Conclusion

(1) Bias

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

(2) Cross-examination of the receiver

[56] [56] The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver’s solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver’s accounts in implicitly not requiring that the receiver’s and the solicitors’ accounts be verified by affidavit. Whether the appellants’ lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed

by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

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

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

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

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

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

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

[63] [63] Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and

few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

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

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

[66] [66] Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the

passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

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

- • The appellants had the report for over two months.
- • The appellants had access to the backup documents for over two months.
- • The appellant had been given two adjournments to procure evidence.
- • The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- • The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- • The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded from any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- • Mr. Pape was given a full opportunity to make submissions.

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

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

[69] [69] In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal

view of what he called “human nature” that he argued should result in an automatic ten percent deduction from the times docketed by the receiver’s personnel. In my view, the receiver’s accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape’s personal opinions.

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

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

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

Result

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

Released: September 19, 2002

“S. Borins J.A.”

“I agree M. A. Catzman J.A.”

“I agree Doherty J.A.”
