

Clerk's Stamp



C1100233

COM  
Nov 13, 2024

COURT FILE NUMBER 2401-04879  
COURT COURT OF KING'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
APPLICANT DURISOL LTD.  
RESPONDENT CANDESTO ENTERPRISES CORP., D-3  
INFRASTRUCTURE SERVICES INC., AND SAFE  
ROADS ALBERTA LTD.

DOCUMENT **AUTHORITIES OF ALVAREZ & MARSAL CANADA INC.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **GOWLING WLG (CANADA) LLP**  
Suite 1600, 421 – 7<sup>th</sup> Avenue SW  
Calgary, AB T2P 4K9

Telephone: 403-298-1018  
Fax: 403-263-9193  
Email: [sam.gabor@gowlingwlg.com](mailto:sam.gabor@gowlingwlg.com) /  
File No.: A172830

**Attention: Sam Gabor**

**APPLICATION BEFORE THE HONOURABLE JUSTICE C. FEASBY  
November 13, 2024 AT 11:00 AM ON THE CALGARY COMMERCIAL LIST  
VIA WEBEX**

Tab

**1**



CANADA

CONSOLIDATION

CODIFICATION

## Bankruptcy and Insolvency General Rules

## Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

Current to October 14, 2024

À jour au 14 octobre 2024

Last amended on March 25, 2011

Dernière modification le 25 mars 2011

## General

**2** Documents that by the Act are to be prescribed must be in the form prescribed, with any modifications that the circumstances require and subject to any deviations permitted by section 32 of the *Interpretation Act*, and must be used in proceedings under the Act.

SOR/92-579, s. 3; SOR/98-240, s. 1; SOR/2007-61, s. 2(E).

**3** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

SOR/98-240, s. 1.

**4** If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

**5 (1)** Subject to subsection (2), a notice or other document that is received by a Division Office outside of its business hours is deemed to have been received

**(a)** on the next business day of that Division Office, if it was received

**(i)** between the end of business hours and midnight, local time, on a business day, or

**(ii)** on a Saturday or holiday; or

**(b)** at the beginning of business hours of that Division Office, if it was received between midnight and the beginning of business hours, local time, on a business day.

**(2)** Subsection (1) does not apply to documents related to proceedings under Part III of the Act that are filed by facsimile.

SOR/78-389, s. 1; SOR/92-579, s. 4; SOR/98-240, s. 1; SOR/2005-284, s. 1.

**6 (1)** Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

**(2)** Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

**(a)** must be received by the addressee at least four days before the event to which it relates, if it is served,

## Dispositions générales

**2** Les documents à prescrire au titre de la Loi sont en la forme prescrite, avec les adaptations nécessaires et les différences de présentation permises par l'article 32 de la *Loi d'interprétation*, et sont utilisés dans les procédures engagées sous le régime de la Loi.

DORS/92-579, art. 3; DORS/98-240, art. 1; DORS/2007-61, art. 2(A).

**3** Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

DORS/98-240, art. 1.

**4** Lorsqu'un délai de moins de six jours est prévu pour accomplir un acte ou tenter une procédure en vertu de la Loi ou des présentes règles, les samedis et les jours fériés n'entrent pas dans le calcul du délai.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

**5 (1)** Sous réserve du paragraphe (2), les avis et autres documents que le bureau de division reçoit en dehors des heures d'ouverture sont réputés reçus :

**a)** le premier jour ouvrable suivant de ce bureau, s'ils sont reçus :

**(i)** après les heures d'ouverture et avant minuit, heure locale, un jour ouvrable,

**(ii)** le samedi ou un jour férié;

**b)** au début des heures d'ouverture de ce bureau, s'ils sont reçus entre minuit et le début des heures d'ouverture, heure locale, un jour ouvrable.

**(2)** Le paragraphe (1) ne s'applique pas aux documents concernant les procédures fondées sur la partie III de la Loi qui sont déposés par télécopieur.

DORS/78-389, art. 1; DORS/92-579, art. 4; DORS/98-240, art. 1; DORS/2005-284, art. 1.

**6 (1)** Sauf disposition contraire de la Loi ou des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime de la Loi ou des présentes règles sont signifiés, remis en mains propres ou envoyés par courrier, par service de messagerie, par télécopieur ou par transmission électronique.

**(2)** Sauf disposition contraire des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime des présentes règles :

**a)** doivent être reçus par le destinataire au moins quatre jours avant l'événement auquel ils se

delivered personally, or sent by facsimile or electronic transmission; or

**(b)** must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

**(3)** A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

**(4)** The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

SOR/98-240, s. 1; SOR/2007-61, ss. 3(E), 63(E).

**7** An assignment, proposal or notice of intention that is respectively offered, lodged or filed pursuant to the Act must be offered, lodged or filed by service, personal delivery, mail, courier, facsimile or electronic transmission.

SOR/78-389, s. 1; SOR/98-240, s. 1.

**8** An interim receiver, a trustee, an administrator of a consumer proposal, an official receiver or a representative of the Superintendent is not required to be represented by a barrister or solicitor or, in the Province of Quebec, an advocate when appearing before a registrar on any court proceeding under the Act.

SOR/98-240, s. 1; SOR/2007-61, s. 4(E).

## Court Proceedings

**9 (1)** All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words “in Bankruptcy and Insolvency”.

**(2)** Every document used in the filing of a bankruptcy application or used after the filing of an assignment must be entitled “In the Matter of the Bankruptcy of ...”.

**(3)** Every document used in the filing of a proposal before bankruptcy must be entitled “In the Matter of the Proposal of ...”.

**(4)** Every document used in the course of a receivership must be entitled “In the Matter of the Receivership of ...”.

**(5)** Unless the Chief Justice, Associate Chief Justice or Commissioner, as the case may be, referred to in

rappellent, s'ils sont signifiés, remis en mains propres ou envoyés par télécopieur ou par transmission électronique;

**b)** doivent être envoyés au destinataire au moins 10 jours avant l'événement auquel ils se rapportent, s'ils sont envoyés par courrier ou par service de messagerie.

**(3)** Le syndic, le séquestre ou l'administrateur qui remet ou envoie un avis ou tout autre document doit remplir un affidavit ou obtenir une preuve à cet effet, et conserver l'affidavit ou la preuve dans ses dossiers.

**(4)** Le tribunal peut, sur demande *ex parte*, dispenser toute personne de l'application du paragraphe (2) ou ordonner les modalités d'application qu'il juge indiquées, notamment un délai différent.

DORS/98-240, art. 1; DORS/2007-61, art. 3(A) et 63(A).

**7** La cession, la proposition ou l'avis d'intention à présenter ou à déposer sous le régime de la Loi sont soit signifiés, soit remis en mains propres, soit envoyés par courrier, par service de messagerie, par télécopieur ou par transmission électronique.

DORS/78-389, art. 1; DORS/98-240, art. 1.

**8** Le séquestre intérimaire, le syndic, l'administrateur d'une proposition de consommateur, le séquestre officiel ou le représentant du surintendant n'ont pas à être représentés par un avocat lorsqu'ils comparaissent devant le registraire au sujet d'une procédure judiciaire engagée sous le régime de la Loi.

DORS/98-240, art. 1; DORS/2007-61, art. 4(A).

## Procédure judiciaire

**9 (1)** Tous les actes de procédure présentés devant le tribunal sont datés et portent en titre le nom du tribunal visé et la mention « En matière de faillite et d'insolvabilité ».

**(2)** Les documents utilisés lors du dépôt d'une requête en faillite ou après le dépôt d'une cession portent le titre « Dans l'affaire de la faillite de ... ».

**(3)** Les documents utilisés lors du dépôt d'une proposition antérieure à la faillite portent le titre « Dans l'affaire de la proposition de ... ».

**(4)** Les documents relatifs à une mise sous séquestre portent le titre « Dans l'affaire de la mise sous séquestre de ... ».

**(5)** À moins que le juge en chef, le juge en chef adjoint ou le commissaire, selon le cas, visé à l'article 184 de la Loi

Tab

**2**



Province of Alberta

## JUDICATURE ACT

# ALBERTA RULES OF COURT

### **Alberta Regulation 124/2010**

With amendments up to and including Alberta Regulation 126/2023

Current as of January 1, 2024

Office Consolidation

© Published by Alberta King's Printer

Alberta King's Printer  
Suite 700, Park Plaza  
10611 - 98 Avenue  
Edmonton, AB T5K 2P7  
Phone: 780-427-4952

E-mail: [kings-printer@gov.ab.ca](mailto:kings-printer@gov.ab.ca)  
Shop on-line at [kings-printer.alberta.ca](http://kings-printer.alberta.ca)

### **Copyright and Permission Statement**

The Government of Alberta, through the Alberta King's Printer, holds copyright for all Alberta legislation. Alberta King's Printer permits any person to reproduce Alberta's statutes and regulations without seeking permission and without charge, provided due diligence is exercised to ensure the accuracy of the materials produced, and copyright is acknowledged in the following format:

© Alberta King's Printer, 20\_\_.\*

\*The year of first publication of the legal materials is to be completed.

### **Note**

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

- (3) Service under subrule (1) is effected
- (a) if the document is served under subrule (1)(a), on the date specified by these rules for when service is effected, or
  - (b) if the document is served under subrule (1)(b), in accordance with the law of the jurisdiction in which the person is served.
- (4) Service under subrule (2) is effected on the date service is effected under the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

AR 124/2010 s11.26;36/2020

## Division 6

### Validating, Substituting, Dispensing with and Setting Aside Service

#### Validating service

**11.27(1)** Except in respect of a document that must be served in accordance with Division 8, the Court may, on application, make an order validating the service of a document served inside or outside Alberta in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served.

(2) On application, the Court may make an order validating the service of a document served inside or outside Alberta if the Court is satisfied that the document would have been served on the person or would have come to the attention of the person if the person had not evaded service.

(3) If service is validated by the Court under this rule, service is effected on the date specified in the order.

(4) Subrules (1) and (3) apply despite any previous order that permitted or directed service of the document by a particular method.

AR 124/2010 s11.27;140/2013;36/2020

#### Substitutional service

**11.28(1)** If service of a document, inside or outside Alberta, is impractical, the Court may, on application, make an order for substitutional service.

(2) The application must be supported by an affidavit

- (a) setting out why service is impractical,
- (b) proposing an alternative method of service, and
- (c) stating why the alternative method of service is likely to bring the document to the attention of the person to be served.

**(3)** Unless otherwise ordered, an order for substitutional service of a document must be served with the document except when substitutional service is by advertisement, in which case the advertisement must contain a reference to the order.

**(4)** If a document is served in accordance with an order for substitutional service, service is effected on the date specified in the order.

#### **Dispensing with service**

**11.29(1)** On application, the Court may make an order dispensing with service, inside or outside Alberta, if service of a document by a method prescribed by these rules is impractical or impossible.

**(2)** The application must be supported by an affidavit

- (a) setting out that all reasonable efforts to serve the document have been exhausted or are impractical or impossible,
- (b) stating why there is no or little likelihood that the issue will be disputed, and
- (c) stating that no other method of serving the document is or appears to be available.

#### **Proving service of documents**

**11.30(1)** Service of a document in Alberta and service of documents other than commencement documents outside Alberta may be proved to have been effected

- (a) by an affidavit
  - (i) stating that the person was served,
  - (ii) describing the method of service, and
  - (iii) stating the date and place of service,
- (b) by an acknowledgment or acceptance of service in writing by the person served or by a lawyer on the person's behalf, or

Tab

**3**



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to October 14, 2024

À jour au 14 octobre 2024

Last amended on June 28, 2024

Dernière modification le 28 juin 2024

province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

## PART XI

# Secured Creditors and Receivers

### Court may appoint receiver

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

### Restriction on appointment of receiver

**(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

### Definition of receiver

**(2)** Subject to subsections (3) and (4), in this Part, **receiver** means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

## PARTIE XI

# Créanciers garantis et séquestres

### Nomination d'un séquestre

**243 (1)** Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

- a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;
- b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;
- c) à prendre toute autre mesure qu'il estime indiquée.

### Restriction relative à la nomination d'un séquestre

**(1.1)** Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

- a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;
- b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

### Définition de séquestre

**(2)** Dans la présente partie, mais sous réserve des paragraphes (3) et (4), **séquestre** s'entend de toute personne qui :

- a) soit est nommée en vertu du paragraphe (1);
- b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

business carried on by the insolvent person or bankrupt — under

- (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

#### Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

#### Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

#### Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

#### Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

#### Meaning of *disbursements*

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu’une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

#### Définition de *séquestre* — paragraphe 248(2)

(3) Pour l’application du paragraphe 248(2), la définition de *séquestre*, au paragraphe (2), s’interprète sans égard à l’alinéa a) et aux mots « ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant ».

#### Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d’un contrat ou d’une ordonnance mentionné à l’alinéa (2)b).

#### Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

#### Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu’il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l’égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s’il est convaincu que tous les créanciers garantis auxquels l’ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l’avance et se sont vu accorder l’occasion de se faire entendre.

#### Sens de *débours*

(7) Pour l’application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

### Intellectual property — sale or disposition

**246.1 (1)** If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition by the receiver, that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

### Intellectual property — disclaimer or resiliation

(2) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property, the disclaimer or resiliation of that agreement by the receiver does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2018, c. 27, s. 268.

### Good faith, etc.

#### 247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

### Powers of court

**248 (1)** Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

### Propriété intellectuelle — disposition

**246.1 (1)** Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans une disposition d'actifs par le séquestre, cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

### Propriété intellectuelle — résiliation

(2) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle, la résiliation de ce contrat par le séquestre n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2018, ch. 27, art. 268.

### Obligation de diligence

**247** Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

### Pouvoirs du tribunal

**248 (1)** S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à

Tab

**4**



Province of Alberta

# **PERSONAL PROPERTY SECURITY ACT**

Revised Statutes of Alberta 2000  
Chapter P-7

Current as of June 1, 2024

Office Consolidation

© Published by Alberta King's Printer

Alberta King's Printer  
Suite 700, Park Plaza  
10611 - 98 Avenue  
Edmonton, AB T5K 2P7  
Phone: 780-427-4952

E-mail: [kings-printer@gov.ab.ca](mailto:kings-printer@gov.ab.ca)  
Shop on-line at [kings-printer.alberta.ca](http://kings-printer.alberta.ca)

address of the person to be notified as it appears on the financing statement referred to in subsection (6)(c).

**(8)** This section does not apply to a security interest in an accession to which section 38 applies.

1988 cP-4.05 s39;1990 c31 s28

### **Subordination of interest**

**40(1)** In an agreement or otherwise, a secured party may subordinate the secured party's security interest to any other interest, and the subordination

- (a) is effective according to its terms between the parties, and
- (b) may be enforced by a third party if the third party is the person or one of a class of persons for whose benefit the subordination was intended.

**(2)** An agreement to subordinate

- (a) the right of a person to performance of an obligation to the right of another person to the performance of another obligation of the same debtor, or
- (b) the secured party's security interest to another interest

does not, by virtue of the subordination alone, create a security interest.

RSA 2000 cP-7 s40;2023 c5 s9(21)

### **Rights of assignee of intangibles and chattel paper**

**41(1)** In this section,

- (a) "account debtor" means a person who is obligated under an intangible or chattel paper;
- (b) "assignee" includes
  - (i) a secured party who has a security interest in an intangible or chattel paper as original collateral or as proceeds, and
  - (ii) a receiver.

**(2)** Unless the account debtor has made an enforceable agreement not to assert rights, defences or claims arising out of the contract or a closely connected contract, the rights of an assignee of an intangible or chattel paper are subject to

- (a) the terms of the contract between the account debtor and the assignor that confer on the account debtor a right of contractual set-off or account combination,
- (b) any defence or claim arising out of the contract or a closely connected contract if the account debtor meets the requirements for set-off or abatement of price, and
- (c) any other defence or claim of the account debtor against the assignor, including set-off, that accrues before the account debtor has knowledge of the assignment.

**(3)** Notwithstanding subsection (2)(a), the rights of an assignee who acquires a security interest in an account as proceeds of original collateral are not subject to an account debtor's right of contractual set-off or account combination if

- (a) the assignee gives a notice to the account debtor before the security interest in the account as proceeds arises that
  - (i) states that the assignee expects to acquire an interest in the account as proceeds of its original collateral, and
  - (ii) provides details of the instrument, money or transfer of funds that will give rise to the account and the details are sufficient to permit the account debtor to reasonably ascertain the account transaction to which it relates,

and

- (b) the assignee's security interest in the account as proceeds is continuously perfected.

**(4)** Subsection (3) does not operate in favour of the assignee if the account debtor acquires, in addition to its rights, defences and claims as account debtor on the account, a security interest in the account that, under this Part, has priority over the security interest of the assignee.

**(5)** A notice referred to in subsection (3) may be given in accordance with section 72, but, if notice is given to a financial institution with respect to a deposit account, notice must be given at the account branch.

**(6)** For the purposes of subsection (5), the account branch is the branch of the financial institution

- (a) that is the branch whose address or name appears on the specimen signature card or other signing authority signed by the assignor with respect to the deposit account or that is

designated by agreement between the financial institution and the assignor at the time of opening the deposit account,

- (b) if no branch has been identified or agreed on under clause (a), that is designated as the account branch by the financial institution by notice in writing to the assignor, or
- (c) if neither clause (a) nor (b) applies, that is located at the mailing address identified in written communications between the financial institution and the assignor relating to the deposit account.

**(7)** To the extent that an assigned right to payment arising out of the contract has not been earned by performance, and notwithstanding notice of the assignment to the account debtor, any modification of or substitution for the contract, made in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's rights under the contract or the assignor's ability to perform the contract, is effective against the assignee unless the account debtor has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

**(8)** Nothing in subsection (7) affects the validity of a term in an assignment agreement that provides that a modification or substitution referred to in that subsection is a breach of contract by the assignor.

**(9)** Where collateral that is either an intangible or chattel paper is assigned, the account debtor may make payments under the contract to the assignor

- (a) before the account debtor receives a notice that
  - (i) states that the amount payable or to become payable under the contract has been assigned and payment is to be made to the assignee, and
  - (ii) identifies the contract under which the amount payable is to become payable,

or

- (b) after
  - (i) the account debtor requests the assignee to furnish proof of the assignment, and
  - (ii) the assignee fails to furnish the proof within 15 days from the date of the request.

(10) Payment by an account debtor to an assignee pursuant to a notice referred to in subsection (9)(a) discharges the obligation of the account debtor to the extent of the payment.

(11) A term in a contract between an account debtor and an assignor that prohibits or restricts assignment of the whole of the account or chattel paper for money due or to become due is binding on the assignor, but only to the extent of making the assignor liable in damages for breach of contract, and is unenforceable against third parties.

RSA 2000 cP-7 s41;2023 c5 s9(22)

## Part 4 Registration

### Personal Property Registry

**42(1)** The Central Registry and the Vehicle Registry continued under the *Chattel Security Registries Act*, SA 1983 cC-7.1, are continued as the Personal Property Registry for the purposes of registrations under this Act and for registrations that are permitted or required under any other Act to be made in the Registry.

(2) Where any enactment permits or requires a registration to be made in the Registry, unless the regulations otherwise provide,

(a) the registration shall be in accordance with the regulations, and

(b) this Part applies to the registration.

(3) The Registrar may have a seal of office in the form prescribed by the Minister.

(4) The Minister may designate a person as Registrar and may designate any other persons to exercise the powers and perform the duties of the Registrar.

(5) The Registrar may designate one or more persons as deputy registrars.

(6) The Registrar shall direct and supervise the operation of the Registry under the direction of the Minister.

1988 cP-4.05 s42;1990 c31 s31;1992 c21 s34

### Registration of financing statements

**43(1)** A financing statement may be submitted for registration at an office of the Registry specified by the Minister.

(2) Registration of a financing statement is effective from the time assigned to it by the Registrar, and, where 2 or more financing

Tab

**5**

2015 ONSC 7574  
Ontario Superior Court of Justice

Target Canada Co., Re

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

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

Morawetz R.S.J.

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

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation  
Jeremy Dacks, for Target Canada Entities  
Susan Philpott, for Employees  
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.  
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal  
Jeff Carhart, for Ginsey Industries  
Lauren Epstein, for Trustee of the Employee Trust  
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals  
Linda Galessiere, for Various Landlords

***Morawetz R.S.J.:***

- 1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.
- 2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.
- 3 Such is not the case in this matter.
- 4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.
- 5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. potential indemnity claims by the monitor.

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

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

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

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

.....

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

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

.....

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Application granted in part.*

Tab

**6**

2023 ONSC 3400  
Ontario Superior Court of Justice [Commercial List]

Triple-I Capital Partners Limited v. 12411300 Canada Inc.

2023 CarswellOnt 8707, 2023 ONSC 3400

**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**

Triple-I Capital Partners Limited (Applicant) and 12411300 Canada Inc. (Respondent / Debtor)

Peter J. Osborne J.

Heard: June 6, 2023

Judgment: June 6, 2023

Docket: CV-22-00684372-00CL

Counsel: Kevin Sherkin, Monica Faheim, Hans Rizarri, for Receiver, Crow Soberman Inc.  
Avi Freedland, for Respondent / Debtor

***Peter J. Osborne J.:***

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.<sup>2</sup>.

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.

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.

*Order accordingly.*

Tab

**7**

2014 ONCA 851  
Ontario Court of Appeal

Bank of Nova Scotia v. Diemer

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

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

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

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

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

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

***Sarah E. Pepall J.A.:***

- 1 The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.
- 2 This appeal involves a motion judge's refusal to approve legal fees of \$255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.
- 3 For the reasons that follow, I would dismiss the appeal.

**Facts**

***(a) Appointment of Receiver***

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

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

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

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

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

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

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

***(b) Receiver's Activities***

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

9 The reports revealed that:

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

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

***(c) Application to Approve Fees***

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

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

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

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

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

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

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

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

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

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

**Motion Judge's Decision**

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

21 In his reasons, the motion judge considered and applied the principles set out in *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (Ont. C.A.) [hereinafter *Bakemates*], leave to appeal refused, (2003), [2002] S.C.C.A. No. 460 (S.C.C.) (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]); and *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.). The motion judge considered the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

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

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

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

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

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

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

## **Grounds of Appeal**

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

## **Burden of Proof**

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

## **Analysis**

### **(a) Appointment of a Receiver**

30 Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

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

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

**(b) Passing of a Receiver's Accounts**

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

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

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

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

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

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

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

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

### ***(c) The Rise and Dominance of the Billable Hour***

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

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

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

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

### ***(d) Fees in Context of Court Appointed Receiver***

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

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

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

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

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

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

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

***(e) Application to This Case***

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

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

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

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

51 In this regard, the appellant makes numerous complaints.

52 The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

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

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

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

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

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

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

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

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

## **Disposition**

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

***Alexandra Hoy A.C.J.O.:***

I agree

***E.A. Cronk J.A.:***

I agree

*Appeal dismissed.*