

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

- and -

BRAD DUBY PROFESSIONAL CORPORATION

Respondent

APPLICATION UNDER SUBSECTION 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

FACTUM OF THE RECEIVER

(Motion Returnable October 13, 2022)

September 22, 2022

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Court-appointed Receiver of Brad Duby
Professional Corporation

TO: Service List

Court File No. CV-21-00667820-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

9052526 CANADA INC.

Respondent

PART I – THE MOTION

MNP Ltd. (“**MNP**”) in its capacity as Court-appointed receiver (the “**Receiver**”) appointed pursuant to the Order of the Honourable Justice Cavanagh dated February 25, 2021 (the “**Appointment Order**”) of the Property of the Respondent, Brad Duby Professional Corporation (“**BDPC**”) seeks the following relief:

1. An Order:
 - a. Approving the First Report of the Receiver dated June 28, 2022 (the “**First Report**”) and the Supplementary Report to the First Report dated September 21, 2022 (the “**Supplemental Report**”), and the activities of the Receiver and its legal counsel, Harrison Pensa LLP (“**HP**”) set out therein;
 - b. Approving the professional fees and disbursements of the Receiver and those of its independent legal counsel, HP, as set out in the First Report;
 - c. Seeking the Court’s direction with respect the Sliding Fee Structure, as defined below, and if so directed that the Sliding Fee Structure be approved and binding,

nunc pro tunc, on all New Counsel (as defined below) and the active former clients of BDPC (the “**Clients**”) with respect to BDPC’s interest in the Client Files (as defined below);

- d. Expanding the Receiver’s authority with respect to the Receiver’s right to and the requirement of New Counsel to disclose information with respect to the Client Files, including but not limited to any proposed or finalized settlement or award figures, New Counsel retainer/fee agreements, statement of disposition of the settlement or awarded funds, disbursement invoices and New Counsel’s account(s), invoices of unpaid suppliers/deferred accounts and any relevant information reasonably required by the Receiver associated the BDPC’s interest in the Client Files (collectively, the “**Determinable Information**”); and,
2. Such further and other relief as counsel may request and this honourable court may permit.

The Position of the Receiver

3. The primary asset in this estate is BDPC’s interest as former personal injury counsel in the monies successfully recovered from the Client Files which have been transferred from BDPC to New Counsel.
4. The Receiver seeks the direction of this Court with respect to the Sliding Fee Scale applying to the Client Files and the Determinable Information in relation to the Client Files, while recognizing the position of all opposing parties. The Receiver files this factum to provide facts and points of law for the Court to consider in reaching a conclusion on the issues that the Receiver, as an officer of the Court, seeks direction on.

5. The Receiver has worked with New Counsel in its attempts to facilitate and establish the Sliding Fee Structure. Certain New Counsel have agreed to the Sliding Fee Structure, while other New Counsel oppose the application of the Sliding Fee Structure and have made their criticism of same clear to the Receiver. As a result, the Receiver seeks directions from this Court with respect to the Sliding Fee Structure.
6. The Receiver believes that the Sliding Fee Structure is, on balance, fair and reasonable, and provides the following for the Court's consideration (all capitalized terms as defined herein):
 - a. This Court possesses the jurisdiction to rule on the Fees and Disbursements and the Sliding Fee Structure, which power is not divested from it by way of the *Solicitors Act*;
 - b. The Court's application of the Sliding Fee Structure would be consistent with the Single Proceedings Model, and grounded in the Court's broad mandate pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**");
 - c. Given the lack of information available to the Receiver from the records of BDPC, the particular circumstances of the herein receivership proceedings, the large number of Client Files, and the Receiver's limited resources, the Receiver submits that there are "compelling circumstances" which could argue in favour of dispensing with the rights of BDPC's former clients to individual *Solicitors Act* assessments;
 - d. The Receiver is empowered and obligated by the Appointment Order to realize on the Property of BDPC in the most cost-effective and timely manner, for the benefit of BDPC's creditors;
 - e. The balance of public policy favours the application of the Sliding Fee Structure and the integrity of the herein insolvency proceedings;

- f. Absent the application of the Sliding Fee Structure, the Receiver will be unable to complete a timely, cost-effective administration of BDPC's estate, nor will it be able to realize on BDPC's assets, to the detriment of the estate's creditors and contrary to its duties under the Appointment Order and the BIA; and,
 - g. There will be little or no actual prejudice to the former clients of BDPC should the Sliding Fee Structure be adopted. In cases of mature files, the Sliding Fee Structure, could result in a windfall to New Counsel over and above what they would be entitled to at a *Solicitors Act* assessment;
 - h. With regard to the former clients of BDPC, the Sliding Fee Structure would mainly apply to New Counsel's fees. The Receiver has arranged for experienced personal injury counsel who has agreed to the Sliding Fee Structure to take on any former clients of BDPC for whom New Counsel are unwilling or unable to represent should the Sliding Fee Structure be approved; and,
 - i. The Receiver is not seeking to recover Fees and Disbursements where legitimate claims of malfeasance, such as fraud or negligence are satisfactorily supported against Mr. Duby/BDPC.
7. The Receiver has reached agreements that the Sliding Fee Structure applies with 3 New Counsel who have carriage of approximately 37 Files. There are 4 New Counsel who oppose the application of the Sliding Fee Structure, with carriage of approximately 122 files.

PART II – FACTS/OVERVIEW

The Debtor and the Appointment of the Receiver

8. The Respondent, BDPC (also operating as Duby & Associates), was a company through which Bradley Robert Alfred Duby ("**Mr. Duby**"), a lawyer licensed to practice law in Ontario, provided legal services to clients in the area of personal injury law until Mr. Duby's

sudden death on January 28, 2021. Prior to forming BDPC, Mr. Duby had operated in a partnership with another lawyer until August 31, 2018 under the name “Hanson Duby Lawyers”.

Reference: First Report, at paras 1-2.

9. On February 25, 2021, the Applicant (hereinafter the “**Bank**”) applied for and obtained the Appointment Order, appointing MNP as court-appointed Receiver of the of BDPC.

Reference: First Report, at paras 4-6 and Appendix “A” thereto

10. Concurrent with the Appointment Order, the Law Society of Ontario (the “**LSO**”) was appointed as Trustee over the property and records relating to BDPC, primarily the roughly 570 client files held by BDPC at the date of Mr. Duby’s death (the “**Client Files**”).

Reference: First Report, at paras 7 and 20 and Appendix “B” thereto

Client Files and New Counsel

11. Pursuant to its practice as a personal injury law firm, BDPC entered into a number of retainer agreements, which governed the relationship between BDPC and its Clients. Separate retainer agreements were used by BDPC for its Clients’ tort and accident benefit claims (collectively, the “**Retainer Agreements**”).

Reference: First Report, at paras 14-16 and Appendices “C” and “D” thereto

12. The primary asset of BDPC is the recovery of BDPC’s interest in the monies successfully recovered from its Clients damages/compensation and benefit claims (the “**Fees**”), plus disbursements (the “**Disbursements**”), plus applicable Harmonized Sale Tax. Pursuant to the terms of the respective Retainer Agreements, BDPC was typically entitled to receive between thirty percent (30%) and thirty-three percent (33%) of these monies.

Reference: First Report, at paras 17 and 21

13. Pursuant to the terms of the respective Retainer Agreements, where BDPC terminated the relationship, and monies are later recovered by the Client, BDPC is entitled to be compensated for its reasonable charges. The factors determining the quantum of the reasonable charges to be paid to BDPC include, *inter alia*, the time and effort required, the complexity and importance of the matter, the value of the claim, and the results obtained.

Reference: First Report, at para 59

14. The Client Files remain the property of respective Clients, and the LSO has released the Client Files on request by/to the Client, or to new counsel retained by the client (the “**New Counsel**”).

Reference: First Report, at paras 51-52

15. As at May 17, 2022, approximately 256 Client Files had been transferred to New Counsel.

Reference: Supplemental Report, at para 19

Original Fee Arrangement

16. In consultation with HP and other stakeholders with expertise in the area of personal injury law and practices, the Receiver advised New Counsel of the Receiver’s and BDPC’s interest in the Client Files taken over by New Counsel and set out the terms on which the Receiver wished to address the payment due to the Receiver for such interests (the “**Original Fee Arrangement**”).

17. Consistent with both the normal practice in personal injury litigation and the terms of many of the Retainer Agreements, the Original Fee Arrangement required New Counsel

to, *inter alia*, pay the unbilled disbursements incurred by BDPC for the respective Client File, and also required payment of twenty percent (20%) of the Fees received by New Counsel following the resolution of any Client File (the “**NC Fees**”).

Reference: First Report, at paras 56-57 and Appendix “H” thereto

18. Where legitimate claims of malfeasance, such as fraud or negligence are satisfactorily supported against Mr. Doby/BDPC to the detriment of his former Clients, the Receiver has not pursued any Fees and Disbursements from such Clients or the New Counsel retained.

Reference: First Report, at para 66
Supplemental Report, at para 26(b).

Sliding Fee Structure

19. Following discussions with certain of the New Counsel, and without obligation to do so, the Receiver presented the following revised fee structure to New Counsel, with a view of greater fairness, in particular to Client Files with lesser:

- a) twenty percent (20%) on each case where total the NC Fees are forty thousand dollars (\$40,000) or higher;
- b) fifteen percent (15%) on each case where the NC Fees are less than forty thousand dollars (\$40,000) but are twenty thousand dollars (\$20,000) or higher; and,
- c) ten percent (10%) on each case where the NC Fees on such case are under twenty thousand dollars (\$20,000).

(the “**Sliding Fee Structure**”)

Reference: First Report, at para 62

20. As set out above, while 3 New Counsel have accepted the Sliding Fee Structure, 4 New Counsel have objected to same, primarily on the basis that:

- d) little or no work had been completed by BDPC, the work completed was poor or the file was not that far advanced, that there is evidence of fraud or negligence regarding certain Client Files, and/or that the entitlement to fees should be limited to the hours incurred by BDPC; and,
- e) unless the fees being sought by the Receiver are nominal, the appropriate forum to address fees is at an assessment hearing.

**Reference: First Report, at para 69
Supplemental Report, at paras 21-22 and 25**

21. In the event that the Court approves the Sliding Fee Structure, and same become binding, the Receiver has arranged for separate, reputable personal injury counsel to take any file that New Counsel no longer wish to act on, provided that the Client also agrees. This counsel has agreed to adopt the Sliding Fee Structure.

Reference: First Report, at paras 72 and 78

Expansion of Powers – Determinable Information

22. In its communications with certain New Counsel, the Receiver has also encountered refusals to communicate Determinable Information on the basis of solicitor-client privilege.

Reference: First Report, at para 69

23. Absent such information, the Receiver will be unable to confirm, *inter alia*:

- f) That it is receiving the appropriate quantum of Fees and Disbursements owing to BDPC, should the Sliding Fee Structure be ordered by this Court;

- g) That any settlements which may be entered into with New Counsel regarding any disputed Fees and/or Disbursements are reasonable; and,
- h) Whether any allegations of fraud or negligence raised by New Counsel are supported by the available evidence.

**Reference: First Report, at para 82.
Supplemental Report, paras 27-29**

24. It is the Receiver's position that the Determinable Information is required in order for the Receiver to carry out its duties with regard to BDPC's estate, as well as its mandate under the Appointment Order.

**Reference: First Report, at para 82.
Supplemental Report, paras 27-29**

25. The Receiver has circulated a Protocol on how it intends to deal with Determinable Information. This Protocol addresses the protection of privileged information and documentation.

Reference: Supplemental Report, paras 12, 27-29

Approval of Accounts

26. Each of the Receiver and its counsel, HP, has properly incurred fees and disbursements as detailed in the First Report, and are required to pass their accounts from time to time pursuant to the Appointment Order.

Reference: First Report, at paras 84-89 and Appendices "L" and "M" thereto

27. The Receiver seeks the approval of the Professional Fees, and payment of same, as defined in the First Report.

Reference: First Report, at para 90.

PART III – ISSUES, LAW, AND ARGUMENT

Issues

28. This motion raises the following issues:

- i) Should the activities of the Receiver and its counsel, as set out in the First Report and the Supplemental Report, be approved?
- j) Should the Sliding Fee Structure be approved?
- k) Should the New Counsel be required to provide the Receiver with the Determinable Information?
- l) Should the Professional Fees of the Receiver and its counsel, HP, be approved?

The Receiver's Activities

29. The Receiver's activities as set out in the First Report were undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, pursuant to the Appointment Order. The Receiver has acted reasonably and in the best interests of the Debtor's stakeholders, and this Court has the inherent jurisdiction to approve such activities.

Reference: *Bank of America Canada v. Willann Investments Ltd. (1993) 20 C.B.R. (3d) 223 (ONSC), at paras. 3 and 4*

30. All of the Receiver's activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible. It is respectfully submitted that the Receiver's activities, and those of its counsel, should be approved by this Court.

The Sliding Fee Structure

New Counsel Objections

31. The New Counsel who have filed responding materials to the herein motion have raised, *inter alia*, the following objections to the Sliding Fee Structure:

- m) That a separate *Solicitors Act* assessment is required for each Client file, and that applying the Sliding Fee Structure would usurp the jurisdiction of the Assessment Office and run contrary to the provisions and purpose of the *Solicitors Act*;
- n) That no transfer accounts have been received in relation to the Client Files, and that certain Disbursements claimed by the Receiver are improper;
- o) That there is evidence of fraud and/or negligence in relation to certain of the Client Files which would preclude the Receiver and/or BDPC from seeking to collect on same, and/or which would result in no recovery from the Client Files; and,
- p) That the objecting New Counsel and their clients would be prejudiced by the Sliding Fee Structure, and that certain New Counsel may not be able to continue to act for some former BDPC clients should the Sliding Fee Structure be imposed.

32. For the reasons set out below, the Receiver submits that the Sliding Fee Structure is on balance, fair and reasonable, and asks that the Court consider the following points of law in concluding on the Receiver's request for advice and direction..

Forum and Jurisdiction

33. The herein matter lies at the crossroads of several different areas of law: insolvency under the BIA, tort, and the general scheme of the *Solicitors Act*. As a result, there is little or no direct guidance from the Court to be found. As such, a general view of this Court's inherent powers is a necessary starting point when determining the overarching fairness of the Sliding Fee Structure, and the jurisdiction of this Court to approve same.

Inherent Jurisdiction

34. The inherent jurisdiction of provincial Superior Courts is a broad power which is "exercisable in any situation where the requirements of justice demands it", and which a Superior Court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ... do justice between the parties".

Reference: *Endean v. British Columbia*, 2016 SCC 42 at para 23, as cited in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552 at para 66

35. Except where the Legislature has divested a specific power from that of the Court, the Superior Court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters.", and assumed to apply, subject also to fulfilling the underlying purpose of the doctrine of protecting and regularizing the administration of justice.

Reference: *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), at para 9

Re Michie Estate and City of Toronto et al., [1968] 1 O.R. 266, at para 11

Jurisdiction – Solicitors Act

36. Ontario Courts have recognized that, while the right of a client to a *Solicitors Act* assessment is an important one, it may be taken away in "compelling circumstances", and that the Superior Court possesses the jurisdiction to do so.

Reference: *Borden Ladner Gervais LLP v. Cohen*, 199 OAC 9 (Div. Ct.), at paras 12-14 [*BLG*].

37. The Receiver requests the Court to consider that there is no provision of the *Solicitors Act*, or of any other relevant legislation, such as the *Courts of Justice Act*, which would divest this Court from its inherent jurisdiction to order that the Sliding Fee Structure be applied to same. The Superior Court has jurisdiction over fee disputes. Further, as set out in *BLG*, Ontario Courts have explicitly recognized that the right to a *Solicitors Act* assessment is not absolute and may be removed in "compelling circumstances".

Single Proceedings Model

38. The "single proceeding model" has long been the approach taken by Ontario Courts to insolvency proceedings.

Reference: *Royal Bank of Canada v. Mundo Media Ltd.*, 2022 ONSC 2147, at para 19 [*Mundp*].

39. While the single proceeding model is most commonly utilized by Courts to centralize claims of creditors *against* a debtor into a single proceeding, this Court has explicitly recognized the application of this model to claims advanced by the debtor against third parties, based on the principle that this model is used to avoid inefficiency and chaos in insolvency matters which would result from a multiplicity of related proceedings.

Reference: *Mundo*, at paras 21-23
Essar Steel Algoma Inc. Et al, 2016 ONSC 595

40. As stated by the Court in *Mundo*,

These cases stand for the proposition that claims by a debtor against a third party may be required to be heard in the insolvency proceedings rather than in the jurisdiction or proceedings that would otherwise have applied. The determining factor is the degree of connection of the claim to the insolvency proceedings. That degree of connection has been characterized as involving a consideration of whether the third party is a “stranger to the bankruptcy”.

Reference: *Mundo*, at para 27

41. Further, the Court found in *Mundo* that section 243 of the BIA, being the statutory underpinning of the Appointment Order, provides supervising judges with the “broadest possible mandate in insolvency proceedings to enable them to react to the unique circumstances of each case and to do what “justice dictates” and “practicality demands”.

Reference: *Mundo*, at para 30

Appointment Order

42. The Receiver requests the Court to consider that the Single Proceeding Model be viewed, along with the Court’s inherent jurisdiction and broad powers under the BIA, in the context of the Receiver’s enumerated powers under the Appointment Order.

43. The Appointment Order provides the Receiver with, *inter alia*, the following powers which the Receiver is empowered and authorized to exercise “where the Receiver considers it

necessary or desirable” to receive and collect the Fees and Disbursements, to initiate proceedings and take steps reasonable incidental to these powers.

Reference: Appointment Order, at Appendix “A” to the First Report, at para 3

44. The Appointment Order also provides that the transfer of any Client Files to the New Counsel is without prejudice to the Receiver’s claim(s) with respect to unpaid disbursements, work in progress, or fees earned by BDPC in relation to same.

Reference: Appointment Order, at Appendix “A” to the First Report, at para 29

45. Further, the Receiver is obligated to maximize the return to creditors of BDPC’s estate from the proceeds of the Property, which, as mentioned above, largely consists of BDPC’s outstanding accounts receivable.

46. The Receiver has concluded that seeking a case-by-case assessment of each individual Client File would cause excessive delay and costs to the administration of BDPC’s estate and would run contrary to the Receiver’s powers and obligations under the Appointment Order, and to the overarching purpose of the Bankruptcy and Insolvency Act, to the detriment of the creditors of BDPC’s estate, whose recovery would be negatively impacted.

Reference: First Report, at para 76

47. The Receiver has limited resources and submits that it is neither financially efficient nor practical for the Receiver to review each file and negotiate BDPC’s interest or deal with assessments on a file-by-file basis.

Reference: First Report, at para 76

48. The Receiver requests that, when the above factors are considered, this Court consider that it does have the jurisdiction to apply the Sliding Fee Structure, and that this Court is the proper forum for such relief, for the following reasons:

- q) This Court possesses the inherent jurisdiction to rule on the Fees and Disbursements, which power is not divested from it by way of the *Solicitors Act*;
- r) Given the lack of information available to the Receiver from the records of BDPC, the particular circumstances of the herein receivership proceedings, the large number of Client Files, and the Receiver's limited resources, the Receiver submits that there are "compelling circumstances" which would argue in favour of removing the rights of BDPC's former clients to individual *Solicitors Act* assessments;
- s) The Court's application of the Sliding Fee Structure would be consistent with the Single Proceedings Model, and grounded in the Court's broad mandate pursuant to the BIA;
- t) None of the affected parties, being either New Counsel who have been retained on the Client Files, nor the former Clients of BDPC, are strangers to these proceedings, as BDPC's accounts receivable form the majority of BDPC's recognizable assets;
- u) The Receiver is empowered and obligated by the Appointment Order to realize on the Property of BDPC in the most cost-effective and timely manner, for the benefit of BDPC's creditors; and,
- v) The balance of public policy favours the application of the Sliding Fee Structure and the integrity of the herein insolvency proceedings. As set out in detail below:
 - i. Absent the application of the Sliding Fee Structure, the Receiver will be unable to complete a timely, cost-effective administration of BDPC's estate, nor will it be able to realize on BDPC's assets, to the detriment of the estate's creditors and contrary to its duties under the Appointment Order and the BIA; and,
 - ii. There will be little or no actual prejudice to the former clients of BDPC should the Sliding Fee Structure be adopted.

Approval of the Sliding Fee Structure

49. Aside from the larger questions of forum and jurisdiction, objecting New Counsel have raised a number of specific issues in their responding materials in opposition to the relief sought. The Receiver will address the remaining points below raised by objecting New Counsel in their responding materials.

Transfer Accounts and Disbursements

50. Opposing New Counsel have argued that, as no transfer accounts have been provided by or on behalf of BDPC, an individual *Solicitor's Act* assessment will be required in relation to each Client File.

51. As set out in the First Report, BDPC kept minimal records, and in particular, did not keep time dockets or current accounting records in relation to the Client Files. As Mr. Duby is deceased, he is unable to provide any clarification or information on the work he completed on the various Client Files.

Reference: First Report, at paras 27-28

52. The Receiver submits that, in the absence of such records, the Sliding Fee Structure offers a mechanism by which the creditors of BDPC receive a reasonable return on Client Files for which BDPC has already invested time and effort, while ensuring that Fees payable to the Receiver are commensurate with the amount of work New Counsel are required to invest in order to reach a settlement or judgment.

53. Regarding Disbursements, the Receiver is not requesting that the Sliding Fee Structure apply to Disbursements.

Fraud and Negligence

54. Objecting New Counsel have stated that the Sliding Fee Structure is unfairly prejudicial to themselves and their clients in cases where Mr. Duby and/or BDPC is found to have committed acts of fraud or negligence in relation to the Client Files.
55. As set out in the First Report and the Supplemental Report, where legitimate claims of malfeasance, such as fraud or negligence, are satisfactorily supported against Mr. Duby/BDPC to the detriment of his former Clients, the Receiver has not pursued any Fees and Disbursements from such Clients, or the New Counsel retained.

**Reference: First Report, at para 82.
Supplemental Report, at para 26(b)**

56. Further, in order to properly determine whether allegations of fraud or negligence are properly supported in relation to any particular Client File, the Receiver requires access to the Determinable Information. By refusing to provide such information to the Receiver, objecting New Counsel is failing to provide the Receiver with the ability to determine the applicability of the Sliding Fee Structure, or indeed, any form of fee structure approved by this Court, or any potential settlement on a file-by-file basis.

Prejudice to New Counsel and Clients

57. Objecting New Counsel have taken the position that the Sliding Fee Structure would be unduly prejudicial to themselves and their clients, as it would result in recovery to BDPC/the Receiver that is disproportionate to the work conducted by BDPC. Certain New Counsel have indicated that, should the Sliding Fee Structure be imposed, they would no longer be able to act for certain Clients.
58. The Receiver has the Court to consider that, on the whole, the Sliding Fee Structure will apply mainly to fees of New Counsel, not the recovery of their clients, and therefore such prejudice will be limited.

59. The Receiver notes that as the Sliding Fee Structure scales upwards along with recovery by New Counsel, it will not unduly prejudice New Counsel on files where their recovery is low. On larger, more mature files where New Counsel recovers significant fees, recovery to BDPC would be capped at 20% of total New Counsel fees, which in many cases may be less than the amount which BDPC would be entitled to in a *Solicitors Act* assessment.

Reference: First Report, at para 76.

60. In the event that certain New Counsel decide to cease acting for certain Clients, the Receiver has arranged for experienced counsel, which has agreed to the Sliding Fee Structure, to take on any such Client Files.

61. The Receiver asks the Court to consider that prejudice to New Counsel and their clients from the Sliding Fee Structure would be minimal, and that the recovery to the Receiver would be reasonable and consistent with the terms of the Retainer Agreement and industry practice.

Determinable Information

62. As stated above, certain New Counsel have refused to communicate details of Determinable Information to the Receiver on the basis of solicitor-client privilege.

63. Pursuant to Osborne J.'s endorsement date June 20, 2022, the Receiver's counsel, HP, has sought to establish with New Counsel a mutually agreeable "consent protocol for the sharing of relevant information relating to fees and disbursements while protecting privilege as appropriate." The Receiver has circulated this Protocol on how it intends to deal with Determinable Information, which explicitly addresses the protection of privileged information and documentation.

**Reference: First Report, at paras 80-81
Supplemental Report, at paras 12, 27-29**

64. Absent such authority and access to this information, it shall be difficult or impossible for the Receiver to discharge its duties under the Appointment Order, in particular with regard to confirming the quantum owing to the Receiver by New Counsel in relation to BDPC's fees and disbursements.
65. While the Appointment Order does except "solicitor-client communication" from the definition of Records required to be turned over to the Receiver, the Receiver submits that the Determinable Information does not fall under this exception, and that the Determinable Information forms part of the Records which are required to be turned over to the Receiver pursuant to the Appointment Order.
66. Further, the Appointment Order already provides that the LSO is permitted and authorized to disclose to the Receiver "Records and/or information relating to the [Client Files]". As such, requiring the New Counsel to disclose the Determinable Information to the Receiver would not provide the Receiver with information that it is not already entitled to. As an officer of the Court without an adversarial relationship to any of the Clients, the Receiver is both obligated to refrain from releasing such information to third parties, as set out in the draft Protocol circulated, and would have no motivation or opportunity to utilize such information in a manner that would prejudice the Clients.

Reference: Appointment Order, at Appendix "A" to the First Report, at paras 3(q) and 16

67. The Receiver submits that the Determinable Information is necessary for the proper administration of BDPC's estate and that it is entitled to same from the New Counsel, and further submits that no prejudice to the Clients would result should such information be turned over to the Receiver.

Fees and Disbursements of the Receiver and its Counsel

68. The Receiver respectfully submits that the Fees and Disbursements of the Receiver and the Receiver's Counsel, as detailed in the First Report, should be approved.

69. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable.

Reference: *Bank of Nova Scotia v. Diemer, 2014 ONCA 851, at paras. 33 and 45.*

70. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the respective party's standard rates and charges, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and by its counsel in connection with the receivership.

PART IV – ORDER REQUESTED

71. The Receiver seeks the directions and relief as set out herein and in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of September, 2022



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Lawyers for MNP Ltd., in its capacity as
Court-appointed Receiver of Brad Duby
Professional Corporation

SCHEDULE “A”**LIST OF AUTHORITIES**

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Endean v. British Columbia*, 2016 SCC 42
3. *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552
4. *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.)
5. *Re Michie Estate and City of Toronto et al.*, [1968] 1 O.R. 266
6. *Borden Ladner Gervais LLP v. Cohen*, 199 OAC 9 (Div. Ct.)
7. *Royal Bank of Canada v. Mundo Media Ltd.*, 2022 ONSC 2147
8. *Essar Steel Algoma Inc. Et al*, 2016 ONSC 595
9. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS, & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

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.

THE TORONTO-DOMINION BANK

Applicant

-and-

BRAD DUBY PROFESSIONAL CORPORATION

Respondent

Court File No. CV-21-00657656-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE RECEIVER

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