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COURT:	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
PLAINTIFF:	CANADIAN WESTERN BANK
DEFENDANT:	SHAMROCK VALLEY ENTERPRISES LTD.
DOCUMENT:	**BENCH BRIEF OF THE BOWRA GROUP INC. – DECEMBER 7, 2022, APPLICATION BEFORE THE HONOURABLE JUSTICE G. DUNLOP**

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PART 1 BACKGROUND

1. The Bowra Group Inc. ("**Bowra**" or the "**Receiver**") was appointed as the Receiver of all of the current and future assets, undertakings and properties, including all proceeds thereof, of Shamrock Valley Enterprises Ltd. by Order pronounced in the within Action on July 30, 2021 (the "**Receivership Order**"), the effect of which was stayed until August 27, 2021, by separate Order also pronounced on that date. The stay was lifted by Order pronounced on August 27, 2021.

2. The Receiver seeks various items of relief on this Application. This Bench Brief is submitted to assist this Honourable Court in its determination of three of those items; specifically (i) the approval of the interim fees of the Receiver and those of its counsel, (ii) the approval of the Receiver's activities as described in its Sixth Report to the Court (the "**Sixth Report**"), and (iii) an Order declaring the Claims Bar Date, as that term is defined by the Claims Process Order filed in this Action on May 4, 2022 (the "**CPO**"), applicable to the Claim of each of J. Corp. Ventures Inc. ("**J. Corp.**") and 1998372 Alberta Ltd. ("**199 Alberta**") to be extended *nunc pro tunc* to the date Proofs of Claim were delivered by J. Corp. and 199 Alberta.

3. The facts relevant to this Application are set forth in the Sixth Report as well as the Fee Affidavit of Kristin Gray (the "**Fee Affidavit**"), a copy of which is attached as Appendix "F" to the Sixth Report.

PART 2 THE LAW

The Approval of Interim Fees

4. Pursuant to s. 99 of the *Business Corporations Act*, the Court may make any Order it sees fit, including an Order approving a receiver or receiver-manager's accounts. Section 243(6) of the *Bankruptcy and Insolvency Act* provides that the Court may make any Order respecting the payment of the fees and disbursements of a Receiver appointed thereunder that it considers proper.

- *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(6) ("***BIA***") [**TAB 1**].

- *Business Corporations Act*, RSA 2000, c B-9, s. 99(c) [**TAB 2**].

5. Reference must also be made to the Receivership Order, paragraph 18 of which provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case incurred at their standard rates and charges. Paragraph 19 provides that the Receiver and its legal counsel shall pass their accounts from time to time.

- A copy of the Receivership Order forms Appendix "B" to the Sixth Report.

6. The governing principle in assessing a Receiver's fees is that they should be measured by the fair and reasonable value of its services. Thus, allowances for services performed are to be just, but nevertheless moderate rather than generous. The considerations applicable in determining the reasonable remuneration to be paid to a Receiver include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the Receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the Receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

- *Winalta Inc. (Re)*, 2011 ABQB 399 at para 25, citing *Federal Business Development Bank v. Belyea* (1983), 46 C.B.R. (N.S.) 244 at paras 3 and 9 ("***Winalta***") [**TAB 3**].
- See also *Piikani Nation v. Piikani Energy Corporation*, 2011 ABQB 450, wherein this Court applied the principles outlined in *Winalta* in the receivership context [**TAB 4**].
- And see *Servus Credit Union Ltd v Trimove Inc*, 2015 ABQB 745 ("***Trimove***") [**TAB 5**].

7. The onus rests upon the Receiver to provide clear and cogent affidavit evidence that its fees, and those of its counsel, are fair and reasonable in the circumstances.

- *Winalta* at para 32 [**TAB 3**].
- *Trimove* at para 29, citing *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA) as to the need for affidavit evidence [**TAB 5**].

8. As to the fees of the Receiver's counsel, regard may be had to the level of fees the company covenanted to pay in its agreements with the appointing creditors. In this case, the company covenanted to pay all costs and expenses on a full indemnity basis (including legal fees as between a solicitor and his own client) incidental to the exercise of CWB's rights or remedies, including all expenditures incurred by a Receiver.

- *Trimove* at paras 41-45 [**TAB 5**].
- Exhibit "C" to the Affidavit of Dean Chan, filed July 9, 2021, at Article 6(h)(iii).

9. The Sixth Report broadly outlines the activities of the Receiver since the date of its last report, and its fees in addition to those of its counsel are verified in detail by the Fee Affidavit. The Receiver respectfully submits that it has provided cogent evidence that the professional fees incurred to date are fair and reasonable with due regard to the above-referenced considerations adopted by this Honourable Court in *Winalta* and should therefore be approved.

The Approval of a Receiver's Activities

10. The principles applicable to the approval of the reports of a Court officer were first discussed, in the insolvency context, in *Target Canada (Re)*, a proceeding under the *Companies' Creditors Arrangement Act*. It has since been held that the same principles apply in receivership proceedings.

- *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161 at para 15 ("***Hanfeng***") [**TAB 6**].

11. Court approval serves several important practical and policy purposes. Specifically, it:

(a) Allows the Receiver to move forward with next steps in the proceedings;

(b) Brings the Receiver's activities to the forefront;

(c) Allows an opportunity for the concerns of stakeholders to be addressed and, if necessary, rectified;

(d) Enables the Court to satisfy itself that the Receiver has acted in the prudent and diligent manner;

(e) Provides protection for the Receiver not otherwise provided by the *BIA*;

(f) Protects creditors from the delay and distribution that would be caused by the re-litigation of steps taken to date and potential indemnity claims by the Receiver.

- *Hanfeng* at para 17 [**TAB 6**].

12. Where a Receiver is requesting the approval of its reports and activities in a general sense, some caution must be exercised to avoid a broad application of res judicata and related doctrines, and the benefit of the approval of the Receiver's activities should be limited to the Receiver itself.

The Extension of the Claims Bar Date

13. The objective of a CPO is to attempt to ensure that all legitimate claimants come forward on a timely basis. The question of whether a late claim should be considered is driven by equitable considerations, taking into account the specific circumstances of each case.

- *BA Energy Inc. (Re)*, 2010 ABQB 507 at paras 34 and 41 [**TAB 7**].

14. The well-established criteria to be applied in the assessment of late claims are as follows:

(a) Was the delay caused by inadvertence and if so, did the claimant act in good faith?

(b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

(c) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?

(d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

- *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 at para 26 [**TAB 8**].

15. With reference to the claims of J. Corp and 199, the only reason their claims were filed late is that through no fault of their own, and by reason of the Receiver's inadvertence, they did not get timely notice of the CPO and of the filing deadlines contained in that Order. Once they were notified of the claims process, they moved promptly to deliver their respective Proofs of Claim.

16. In the circumstances of this Receivership, where all proven claims will have been paid in full and there is a large cash surplus, the only party that might conceivably be prejudiced by allowing the late claims to be filed is Shamrock. The Receiver has been advised that Shamrock does not oppose the relaxation of the CPO deadlines to allow the late filing of the claims of J. Corp and 199. The Receiver therefore respectfully submits that it is reasonable and proper for the relief sought to be granted.

PART 3 CONCLUSION

17. The Receiver respectfully requests that this Honourable Court grant the relief sought on this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30 day of November, 2022.

PARLEE MCLAWS LLP

Per: 

Jeremy H. Hockin, Q.C. and
Steven A. Rohatyn

Solicitors for The Bowra Group Inc.

TABLE OF AUTHORITIES

Statutes

Cases

TAB 1

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 November 16, 2022

Last amended on September 1, 2022

À jour au 16 novembre 2022

Dernière modification le 1 septembre 2022

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 16, 2022. The last amendments came into force on September 1, 2022. Any amendments that were not in force as of November 16, 2022 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 16 novembre 2022. Les dernières modifications sont entrées en vigueur le 1 septembre 2022. Toutes modifications qui n'étaient pas en vigueur au 16 novembre 2022 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a 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

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de 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) 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.

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.

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 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.

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, 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.

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).

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 ».

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).

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).

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.

Lieu du dépôt

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

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

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

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.

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.

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.

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.

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.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

TAB 2

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of May 31, 2022

Office Consolidation

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
Shop on-line at kings-printer.alberta.ca

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.

Regulations

The following is a list of the regulations made under the *Business Corporations Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Business Corporations Act		
Business Corporations	118/2000	*231/2000, 191/2001, 206/2001, 251/2001, 83/2005, 218/2005, 35/2007, 68/2008, 104/2009, 31/2012, 105/2012, 170/2012, 125/2013, 146/2015, 115/2017, 10/2019, 128/2019, 86/2022*

business of the corporation to protect the security interest of those on behalf of whom the receiver is appointed.

1981 cB-15 s90

Directors' powers during receivership

95 If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

1981 cB-15 s91

Court-appointed receiver or receiver-manager

96 A receiver or receiver-manager appointed by the Court shall act in accordance with the directions of the Court.

1981 cB-15 s92

Duty under debt obligation

97 A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of the Court made under section 99.

1981 cB-15 s93

Duty of care

98 A receiver or receiver-manager of a corporation appointed under an instrument shall

(a) act honestly and in good faith, and

(b) deal with any property of the corporation in the receiver's or receiver-manager's possession or control in a commercially reasonable manner.

1981 cB-15 s94

Powers of the Court

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;

(f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95;1987 c15 s9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

(a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

(b) take into the receiver's or receiver-manager's custody and control the property of the corporation in accordance with the Court order or instrument under which the receiver or receiver-manager is appointed,

(c) open and maintain a bank account in the receiver's or receiver-manager's name as receiver or receiver-manager of the corporation for the money of the corporation coming under the receiver's or receiver-manager's control,

(d) keep detailed accounts of all transactions carried out by the receiver or receiver-manager as receiver or receiver-manager,

(e) keep accounts of the receiver's or receiver-manager's administration that must be available during usual business hours for inspection by the directors of the corporation,

(f) prepare at least once in every 6-month period after the date of the receiver's or receiver-manager's appointment financial statements of the receiver's or receiver-manager's

TAB 3

Court of Queen's Bench of Alberta

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

Date: 20110624
Docket: 1003 06865
Registry: Edmonton

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

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

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

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.
>
> (Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

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

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

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

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

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

(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something “required to be independent from the engagement” ($10,000.00).

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

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

II. A Quick Look Back

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

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

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

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

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

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

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

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

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

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

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

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

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

III. Analysis

A. Proper Charges

1. General Principles

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

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

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

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

(i) approval of Canadian and American counsel fees in a cross-border insolvency (***Re Muscletech Research & Development Inc.*** (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.)); or

(ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (***Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.*** (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Non-Partner Services

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Professional staff (non-partner)*

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

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

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

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

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

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

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

3. <u>Duplication of work by partners</u>

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

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

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

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

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

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

4. The administration charge

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

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

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

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

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

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

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

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

5. Mathematical errors

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

6. Internal quality reviews

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

B. Breach of Fiduciary Duty/Conflict of Interest

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

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

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

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

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

(1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

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

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

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

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

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

   (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

   (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

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

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

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

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

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

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender. [Emphasis added.]

[88] Clause 30 of the Initial Order states:

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

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

Step 2: Assessing the Monitor's actions

(a) *Principles of interpretation*

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

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

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

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

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

(ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and

(iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Step 3

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

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

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

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

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

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

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

(b) Ascertaining the appropriate fee reduction

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

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

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

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

IV. Conclusions

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

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

[127] In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Heard on the 21st day of March, 2011
Dated at the City of Edmonton, Alberta this 24th day of June, 2011.

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

Appearances:

Kentigern Rowan
For Deloitte & Touche Inc.

Darren Bieganek
For the Winalta Group

TAB 4

Court of Queen's Bench of Alberta

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

Date: 20110719
Docket: 0901 18791, 0901 15297
Registry: Calgary

Between:

0901 18791

Piikani Nation

Plaintiff

- and -

Piikani Energy Corporation

Defendant

And Between

0901 15297

Piikani Nation and Chief Crow Shoe

Plaintiff

-and-

Piikani Investment Corporation

Defendant

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

Introduction

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

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

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

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

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

Relevant Law

[5] Counsel for the directors referred me to:

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

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

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

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

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

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

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

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

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

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

> 24 *Re Hess* (1977), 23 C.B.R. (N.S.) 215 sets out the principles to be applied when taxing trustee's fees. These include:
>
> 1. The trustee is entitled to fair compensation for its services.
>
> 2. One object of the taxation is to encourage the efficient, conscientious administration of the bankrupt estate for the benefit of the creditors and in the interests of the proper carrying-out of the objectives of the BIA.
>
> 3. The court should take into account the views of the creditors or the inspectors if they are expressed. Considerable weight should be given to their approval or disapproval.
> 4. The trustee should not be allowed fees for services not clearly performed or for work based on errors in judgment.
>
> 25 It is not disputed that the onus is on the trustee to satisfy the court that the remuneration claimed is justified.

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Heard on the 05th day of July, 2011.
Dated at the City of Calgary, Alberta this 8th day of July, 2011.

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

Appearances:

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

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

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

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

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

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

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

TAB 5

Court of Queen's Bench of Alberta

Citation: Servus Credit Union Ltd v Trimove Inc, 2015 ABQB 745

Date: 20151125
Docket: 1503 06388
Registry: Edmonton

Between:

Servus Credit Union Ltd

Applicant

- and -

Trimove Inc. and Geeta Luthra

Respondents

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] The court-appointed receiver asks for approval of its, and its lawyer's, fees.

[2] The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.

[3] The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately $1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The

receiver recovered a total of approximately $1.1 million, of which approximately $863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately $298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately $82,000.00.

[4] The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be $3,000.00.

[5] The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

[6] Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in ***Belyea***, ***Bakemates*** and ***Diemer***.

[7] Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, 'We'll make sure you get nothing", the nature of the assets – rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

[8] While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in ***Bakemates***, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive.":***BT-PR Realty Holdings***. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

[9] If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in ***Bakemates***.

Cases and authority cited:

[10] **By the debtors**: ***Federal Business Development Bank v Belyea*** [1983] N.B.J. No. 41; ***Bank of Nova Scotia v Diemer (c.o.b. Cornacre Cattle Co.)*** 2014 ONCA 851.

[11] **By the court**: ***Bakemates International Inc. (Re)*** [2002] O.J. No. 3569***; BT-PR Realty Holdings Inc. v Coopers & Lybrand*** [1997] O.J. No. 1097***; 911502 Alberta Ltd. v. Elephant Enterprises Inc.***2014 ABCA 437; ***Sidorsky v CFCN Communications Ltd.*** [1995] A.J. No. 174 (Q.B.); ***Trinier v Shurnaik*** 2011 ABCA 314.

1. Background

[12] Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

[13] Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately $1.1 million. As a representative example,

in the $700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

> 1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

[14] Geeta Luthra guaranteed the repayment of those facilities.

[15] Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

> On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed . . . . In response to this statement Karan stated that "We'll make sure you get nothing".

[16] When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

[17] On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had $146,480.00 in outstanding accounts payable and no funds to pay them.

[18] On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

[19] On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

> [the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security. . . .

> Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands. . . . I provided him the following items . . . list of equipment, I recalled from my memory and locations . . .

[20] Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

[21] Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

[22] Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

[23] Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

[24] In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

[25] The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

2. Testing receivers' and lawyers' fees

[26] I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in ***Belyea*** and ***Diemer***.

[27] In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is ***Bakemates***, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

[28] The other case to which I must refer is ***BT-PR Realty Holdings.*** That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as ***Diemer***, but also any contract in relation to legal fees. As Farley J. said***:***

> I do not particularly quarrel with the list of factors set out in the Bank of Montreal v. Nicar Trading Co. (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):

(a) the nature extent and value of the cases;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the parties;

(d) time spent by the receiver;

(e) the receiver's knowledge, experience and skill;

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and,

(i) the cost of comparable services.

However I would add

(j) other material considerations –

for example in this case:

(i) the April 12 agreement to the fees;

(ii) the priority receivership of the Bank in this co-receivership relationship; and
(iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).

I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

In other words, in ***BT-PR Realty Holdings***, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

3. Applying the principles in this case

a) Receiver's fees

[29] Information about the receiver's fees is attached to an affidavit in the manner recommended by ***Bakemates.*** The debtors do not provide any evidence on the issue of fees.

[30] It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed

some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

[31] More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

[32] In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

[33] The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

[34] Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

[35] Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

[36] It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

[37] Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for $3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

[38] In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.

b) Lawyer's fees

[39] The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in ***Bakemates***: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

[40] However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

[41] More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in ***Elephant Enterprises.***

[42] As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in ***Sidorsky***, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

> 5 There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
>
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
>
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

[43] As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in ***Trinier***:

> G. Any Discretion?
>
> 39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.
>
> 40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.
>
> 41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.
>
> 42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: ***BT-Pr Realty Holdings Inc.***

[44] In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

[45] However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

4. Proposal to hire an expert to review the receiver's fees

[46] If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in ***Bakemates*** rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the ***Bakemates*** procedure does not arise.

5. Costs

[47] The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Heard on the 18th day of November, 2015.
Dated at the City of Edmonton, Alberta this 24th day of November, 2015.

J.B. Veit
J.C.Q.B.A.

Appearances:

Kentigern A. Rowan, QC, Ogilive LLP
for the Receiver MNP Ltd.

Thomas Gusa, Miller Thompson LLP
for the Applicant, Servus Credit Union Ltd.

Darren R. Bieganek, QC, Duncan Craig LLP
for AFSC (Agricultural Financial Service Corporation)

Vishal Luthra and Geeta Luthra
own their own behalfs

TAB 6

CITATION: Hanfeng Evergreen Inc., (Re), 2017 ONSC 7161
COURT FILE NO.: CV-14-10667-00CL
DATE: 20171130

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. c.C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

Applicant

BEFORE: F.L. Myers J.

COUNSEL: *Daniel S. Murdoch and Haddon Murray,* counsel for Ernst & Young Inc., receiver
David C. Moore and Karen M. Mitchell, counsel for the Lei Lo and Xinduo Yu

HEARD: November 20, 2017

ENDORSEMENT

[1] Ernst & Young Inc. moves for approval of its activities as receiver and manager of Hanfeng Evergreen Inc. as described in the Supplement to its First Report, its Fourth Report, and its Fifth Report. It also seeks approval of its fees and disbursements including the fees and disbursements of its counsel here and abroad.

[2] Xinduo Yu, the founder and former CEO of Henfeng Evergreen Inc. and his spouse Lei Li oppose the approval of the receiver's reports at this time. They seek, at minimum, the imposition of conditions to protect their positions in separate litigation that the receiver has brought against them. They also argue that the receiver has failed or refused to deliver sufficient evidence to support its claim for approval of its fees and disbursements. They invite the court to require the receiver to engage in a document disclosure process so as to create a sufficient factual record on which they can make submissions and the court can meaningfully assess the fees and disbursements of the receiver and its counsel.

[3] For the reasons that follow the receiver's motion is granted on the terms set out below.

Brief Background

[4] Hanfeng Evergreen Inc. is an Ontario public corporation. Henfeng was a financing vehicle to raise money from investors who were interested in investing in the fertilizer business operated by a subsidiary in the People's Republic of China. By 2014, Henfeng's sole operations were limited to the fertilizer business.

[5] When this proceeding began, Mr. Yu was a member of the board of directors of Henfeng. He was a principal contact for the receiver. He controlled Chinese management of the business.

[6] The receiver advises that in 2011, Henfeng's biggest customer was a company run by the state in China. It sought to buy 30% of the fertilizer business to ensure its control over its supply. By February, 2013, an agreement had been prepared whereby Henfeng would sell its shares in the fertilizer subsidiary to a company controlled by Mr. Yu. Mr. Yu agreed to sell 30% of that company's shares to the state actor. The transactions were expected to close in April, 2013.

[7] The deal did not close as expected. Eventually Henfeng established a special committee representing shareholders independent of management. Acrimony developed between the special committee and Mr. Yu. In December, 2013, the purchaser terminated the transaction. The board of directors proceeded to fire Mr. Yu.

[8] A proxy battle ensured. During the proxy battle, Henfeng's auditor KPMG resigned. Thereupon, the rest of the board of directors resigned. Ultimately, Mr. Yu regained control of the public corporation.

[9] In April, 2014, Mr. Yu brought forward a transaction to sell the operating subsidiary to an established third party business in China for a price of approximately $40 million. The transaction would have provided meaningful recovery to shareholders. The transaction required shareholder approval. However, without an auditor, Henfeng could not produce the material required to call a shareholders' meeting under Ontario securities laws. Therefore, this receivership was proposed as a way to convey title in a solvent transaction.

[10] Negotiations with the buyer proved difficult. The receiver retained the Mayer Brown law firm to help it obtain a deposit of approximately $2.4 million required by the agreement and to deal with some Chinese regulatory matters that arose. The purchaser was also supposed to put funds in escrow. With Mayer Brown's assistance some funds were escrowed. But then they were released back to the purchaser by the escrow agent ostensibly with Mr. Yu's cooperation. In addition, the receiver says that the buyer's name seems to have changed subtly in the documents over time. While initially Mr. Yu represented that the buyer was an established third party, the ultimate buyer may have been a company with a similar name that is actually a shell controlled by Mr. Yu. Further, the receiver alleges that while the transaction was playing out, Mr. Yu obtained very substantial loans in China on the credit of the subsidiary so that they he has effectively taken the value of the business leaving the other shareholders with nothing.

[11] The receiver has sued Mr. Yu and Ms. Li for damages exceeding $100 million.

[12] In addition, the ostensible purchaser has sued the receiver in China for the return of the $2.4 million deposit. Mr. Yu is a defendant in that case as he is a guarantor under the terms of the relevant agreement. Whether he is also behind the plaintiff/purchaser remains to be proven.

[13] The purchaser succeeded against the receiver at first instance in China. But an appellate court overruled the first decision. As of this moment therefore, the deposit has been forfeited and

is properly counted among the funds realized by the receiver. The purchaser has appealed from that decision however and the further appeal is pending.

[14] In this receivership proceeding, Mr. Yu is concerned to ensure that the receiver does not consume the deposit on its own fees and disbursements in case it is required to return the deposit to the purchaser by the ultimate appeal court in China. If the purchaser succeeds in China, there may be a priorities dispute between the purchaser and the receiver over which has a better claim to the deposit funds in the receiver's hands. In any event, Mr. Yu argues that as guarantor of the return of the deposit, he has an interest in protecting the deposit in the receiver's hands and in minimizing or delaying the receiver's use of the deposit to pay its fees and disbursements until the Chinese litigation ends.

Approval of the Receiver's Activities

[15] In *Target Canada Co. (Re)*, 2015 ONSC 7574 (CanLII), Morawetz RSJ discussed the process for approval of the reports of a court officer. In that case the court dealt with a Monitor under the CCAA. The same principles apply in a receivership in my view.

[16] In *Target*, Morawetz RSJ recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, such as a sale transaction, express findings of fact may be required to support the relief being sought. An affidavit may be delivered to support the findings or not. In either case, the court is called up to address squarely specific facts and to make specific findings that will be binding in future.

[17] However, the context of a general approval of activities, such as the motion that is currently before me, is different. As discussed by Morawetz RSJ:

> [20] 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.

[18] In this case, Mr. Yu and Ms. Li do not want the approval of the receiver's activities to impact on their litigation with the receiver including their desire to counterclaim against the receiver in that litigation. Apparently they have sought directions regarding a possible counterclaim although no motion for leave to proceed has been heard as yet. Regional Senior Justice Morawetz held that the general approval of a court officer's activities should not affect third party dealings generally. He accepted however that the approval of the receiver's activities does affect the court officer's own status. For example, there is case law suggesting that a stronger showing on the merits is required to obtain leave to sue a receiver in respect of activities that have been approved than for unapproved activities.[1]

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[1] Compare and contrast for example, *Bank of America Canada v Wilann Investments Ltd*. (1993), 23 CBR (3d) 98 (Ont. Gen. Div) with *GMAC Commercial Credit Corporation - Canada v.*

[19] Mr. Yu and Ms. Li argue that if they are prejudiced by the approval of the receiver's activities, then they would be required to contest in this motion the substance of their concerns in order to protect themselves in their other litigation. I agree that it is not the purpose of this summary proceeding to engage in fact finding that might prejudge or affect the fact finding process in other litigation. As such, there is no need to delve deeply into the concerns raised by the objectors with the receiver's characterization of their behaviour or the other details of specific issues of fact that may become the subject matter of proceedings later. There will be no findings of contested facts that might bind Mr. Yu or Ms. Li elsewhere.

[20] The receiver argues that it seeks broad, general approval for its decisions to bring litigation against Mr. Yu and Ms. Li and to defend the litigation in China. It notes that its prior activities have already been approved in relation to the approval of its earlier reports.

[21] Under the terms of its appointment order, the receiver is already authorized to litigate on behalf of the debtor generally. As such, Mr. Yu and Ms. Li argue that it does not need any further approval of its litigation activities. But, I agree with Morawetz RSJ that there are additional proposes to a court officer's reporting and the court's approval functions such as those listed in para. 23 of T*arget* above. In this case for example, concerns of stakeholders can be considered and addressed in real time rather than waiting until matters are concluded some years hence. Moreover, stakeholders are given an opportunity to bring to the fore any concerns with the receiver's prudence and diligence in the issues under consideration. Here, for example, no one – not even Mr. Yu or Ms. Li - contest the prudence of the receiver's decisions to defend the deposit in China or to commence the litigation here against Mr. Yu and Ms. Li.

[22] The receiver also argues that is wants its activities approved so as to protect it from personal liability for costs in the event that it is later determined that the deposit must be returned to the purchaser with the result that the receiver may not have any assets left in the estate to fund any costs liability that it may incur. The receiver refers to the decision of Pattillo J. in *Essery Estate (Trustee of) v Essery*, 2016 ONSC 321. At para. 72 of that decision, Pattillo J. wrote:

> [72] In receiverships, the general rule is that costs are awarded against a receiver personally in rare cases. Where a receiver engages in litigation in its capacity as receiver in the normal course of the receivership, is it is subject to the costs in accordance with s. 131 of the CJA and Rule 57.01. To the extent that costs are awarded against a receiver they are normally covered by receivership funds or by an indemnity agreement with a

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T.C.T. Logistics Inc., 2006 SCC 35 (CanLII). See also: Houlden, Morawetz & Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act*, (Thomson Reuters, Toronto) at L§26. Whether *Wilann* remains good law after *TCT* is an issue that is not before the court today.

> secured creditor. It is only when the receiver embarks on a course of action extraneous to the credit-driven relationship which effectively undermines its neutral position as an officer of the court and turn itself into a "real litigant' [*sic*] that a receiver exposes itself to costs personally: see *Akagi v Synergy Group (2000)*, 2015 ONCA 771 (Ont. C.A.), at para. 18.

[23] In my view, the receiver reads too much into this quotation. I do not read *Essery* as altering the receiver's risk of personal liability for costs. Rather, Pattillo J. explains the court's historic hesitation to award costs against receivers because they can bear personal liability for costs. In my view *Essery* does not create any special protection for receivers' costs liability. Neither does the approval of a receiver's activities provide it with any special protection in relation to costs awards in subsequent litigation. That is the reason that Pattillo J. noted that before undertaking litigation, receivers typically will consider the sufficiency of the assets under their charge to meet a costs award or obtain an indemnity from a creditor to protect themselves from the risk of adverse costs.

[24] It is clear therefore that in approving the receiver's general activities broadly and summarily in this motion, I am not finding any facts beyond expressing satisfaction with the general scope and direction of the receiver's activities as set out in the three reports that are before me. However, if the law post-*TCT* still provides that the approval of a receiver's conduct raises the bar for those who seek to sue a receiver, as referenced in the footnote above, that is indeed a consequence of approval and nothing I say or do not say should affect that outcome. The fact that approval may have some effect is not a basis to withhold or deny approval. Rather it reflects the intention of the law as it applies in circumstances where the court is satisfied with the activities undertaken by its officer and with the protections that the law affords court officers in such circumstances as discussed by Morawetz RSJ above.

[25] I also do not see the existence of an outstanding appeal in China as a basis to defer or withhold approval of the receiver's activities, especially its activities in defending and participating fully in that case. Approval does not affect the ongoing litigation in China. Neither does it affect the priorities in the deposit or authorize or embolden the receiver to distribute to itself or to its counsel funds that it currently holds. If the court in China rules that the funds are a deposit that are to be returned to the purchaser, legal results flow. As noted above, if that creates a priority issue here, that issue may have to be determined.

[26] As argument of this aspect of the motion was drawing to a close, it appeared that counsel might be able to agree upon language to resolve the issues in dispute. I invited them to advise me within 48 hours if they reached agreement. On November 22, 2017, counsel advised that while they had not agreed to resolve the objections of Mr Yu and Ms. Li, they had agreed upon some language to limit the relief granted should I determine to approve the receiver's activities.

[27] The term agreed upon by counsel reflects the limitations that I have discussed above as follows:

> THIS COURT ORDERS that the approval of the Fourth Report and the Fifth Report shall be without prejudice to any of the procedural or substantive rights of the Receiver, Xinduo Lu and Lei Li in respect of Action No. CV-16-11325-00CL, and, without limiting the generality of the foregoing, shall be deemed not to constitute any finding or determination of any kind whatsoever in respect of any allegations, issues or defences in said Action.

[28] While this term does not satisfy all of the concerns of Mr. Yu and Ms. Li, it does satisfy mine. Accordingly, it is appropriate to approve the activities of the receiver as set out in the three reports that are before the court on the term set out in the immediately preceding paragraph.

Receiver's Fees

[29] In accordance with the principles set out in *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), the receiver delivered affidavits supporting its fees and disbursements including those of its counsel. Cross-examinations ensued. Mr. Yu and Ms. Li argue that there is insufficient disclosure of information to enable the court to determine the reasonableness of the receiver's fees and disbursements. They say they have delivered letter after letter for months seeking production of documents relating to matters set out in the receiver's invoices so as to be able to understand the work performed by the receiver and to make proper submissions on the fees and disbursements sought in relation to the work. In addition, the receiver delivered dockets (belatedly in some cases) that are heavily redacted to prevent disclosure of the subject matter of much of the work that is the subject of the docket entries.

[30] The receiver argues that the scope of its discussions with its counsel and the work being performed by its counsel on its behalf are privileged – both under lawyer client privilege and litigation privilege. I agree. Disclosing the subject matter of a meeting is essentially disclosing the communication from client to lawyer (or vice versa) concerning the topic on which advice was being sought or given. That does not mean however that the receiver is entitled to approval of its fees or disbursements without providing proper supporting evidence. If the claims of privilege prevent the court from making the assessment required, then the motion will not succeed until sufficient evidence is duly adduced to meet the required standard.

[31] In *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), the Court of Appeal discussed the test for assessment of a receiver's fees as follows:

> [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.

[32] The Court of Appeal also noted in *Diemers* that while the calculation of billable hours times hourly rates is not the most desirable metric for conducting this review, it is the predominant methodology in the case law. Moreover, while counsel for Mr. Yu and Ms. Li submitted that this is not to be a mathematical exercise, the bulk of their complaints are essentially directed to the question of whether there has been duplication in the dockets or, more specifically, whether the claims of privilege prevent them and the court from determining with any degree of precision whether there is duplication in the dockets that ought to be excluded from the value calculus. While I certainly do not dismiss the risk of duplication in an assessment of the reasonableness of the fees, it is but one factor and not an especially important one in my view. Duplication might suggest a lack of value-added but not necessarily so in a holistic review. If an issue takes time to resolve, there may be several docket entries that look similar. That does not make them duplicative. More than one person may be involved providing different services and docket to the same issue – either at different levels of seniority or different subject matters. Reading brief docket descriptions years after complex work is performed is a poor method to learn precisely what was accomplished by any single person on any given day. A full assessment of the file accompanied by oral narrative is required to assess professional accounts. That is what

assessment officers routinely do in formal cost assessment hearings. But that is not what is anticipated or even desirable in fee approval hearings of this type.

[33] It is not lost on me that what was also at play on Mr. Yu's side of the table is possibly a desire for discovery in the other litigation or at least opening up a threat to the receiver's remuneration as a strategy to provide bargaining leverage. Thus, rather than responding to the receiver's request for the specifics of documents required or bringing their own motion (or 9:30 appointment) seeking production of documents that they actually need, Mr. Yu and Ms. Li were content to make request after request and then graciously offer to allow the receiver an adjournment to give it time to make yet further production. I have little doubt that were any further documents produced, Mr. Yu and Ms. Li would just ask for more. After all, if you want to assess what every person acting for counsel and the receiver have done every day, then every draft of every document and communication is ostensibly relevant. The eight, non-exhaustive *Belyea* factors do not require or anticipate a full fee assessment process. Mr. Yu and Ms. Li's digging for more and ever more documents ostensibly to allow them to review in minute detail the receiver's fees was misdirected from the outset.

[34] Mr. Yu and Ms. Li make much of the fact that the receiver's Ontario counsel had 27 billers on the file over a period of three years. Counsel for the receiver took me through each biller's name and role. Apart from a few students, there was one partner and an associate in each relevant area at each time. The associate generally performed the bulk of the work. As the project evolved from a consensual corporate transaction to contested litigation, the identities and focus of the partners involved changed. There is nothing untoward or even suspicious in the identification of the lawyers engaged despite the effort to evoke an emotional reaction to the overall number of billers. I am perfectly satisfied that given the complexity and evolution of the matter over time, staffing raises no significant concerns. Given the limited numbers of people involved in each specialty area, and the swing from corporate to contested litigation, duplication is not a significant issue in my view.

[35] The receiver has not provided docket level evidence of activities from its litigation counsel in China. However that lawyer was retained on a fixed fee of $100,000. The litigation involved securing the receiver's right to keep the deposit of approximately $2.4 million. A fee of 4% of the fund whose preservation is in issue strikes me as quite reasonable. Dockets would not assist the understanding of the flat fee account in this circumstance.

[36] Other counsel were retained for other specific purposes. Each had to be briefed so, once again, it is not surprising to see docket entries where people discuss similar things. They are instructing or reporting back to each other. Mr. Yu and Ms. Li pointed to docket entries in which telephone inter-firm communications are set out but only by one firm. The unstated implication is that unless both sides docketed the call, then the docket that was recorded is suspect and may be fraudulent. I do not know a more innocent word to characterize a docket of a call that did not happen. But Mr. Yu and Ms. Li forgot to account for the International Date Line. When one looks to see if telephone calls from this side of the globe were docketed in China on the next day, many of the calls were indeed recorded. I cannot draw an inference of fraud, or even suspicion from noting that a firm did not record every single telephone call it ostensibly received or made.

Docketing practices can differ. I did not look to see if the calls that were not recorded by both sides were recorded as being short or long duration for example. In any event, I do not see how a few calls has much impact on the assessment of the *Belyea* factors.

[37] The receiver's counsel has provided a lengthy assessment of the *Belyea* factors in para. 60 of its factum. Again, without making findings of fact on the level of cooperation or the lack thereof by Mr. Yu and Ms. Li, in my view in para. 60 the receiver provided a very fair analysis of the relevant factors and I adopt it in full.

[38] In all, I am satisfied that the fees and disbursement of the receiver, including those of its counsel, are fair, reasonable and ought to be approved as sought.

[39] Costs should be agreed upon. Barring exceptional circumstances, I would expect them to follow the event on a partial indemnity basis. If counsel cannot agree on costs then they should exchange Costs Outlines and schedule a telephone case conference through my Assistant for oral argument of costs.

F.L. Myers J.

Date: November 30, 2017

TAB 7

Court of Queen's Bench of Alberta

Citation: BA Energy Inc. (Re) 2010 ABQB 507

Date: 20100805
Docket: 0801 16292
Registry: Calgary

In the Matter of Section 193 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended; and in the matter of the *Judicature Act*, R.S.A. 2000, c. J-2, as amended,

And in the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.

And in the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended; and in the Matter of BA Energy Inc.

Corrected judgment: A corrigendum was issued on August 13, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act.*

[2] The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim,

is entitled to file a late amended claim that now alleges that a large portion of the claim is unsecured.

Facts

[3] In 2006, BA Energy had entered into an agreement of sale with Dresser-Rand for the purchase of a wet-gas compressor and ancillary equipment for use at the proposed Heartland Upgrader, a heavy oil upgrader that BA Energy was in the process of constructing at a site near Fort Saskatchewan, Alberta. The total purchase price for this compressor was USD $8,577,942.39.

[4] On December 30, 2008, BA Energy was granted an initial order under the *Companies' Creditors Arrangement Act,*R.S.C. 1985, c. C-36 as amended (the "CCAA").

[5] At the time of the filing under the CCAA, BA Energy had paid USD $7,021,918 pursuant to the purchase agreement, leaving a balance owing of USD $1,651.543.63. The compressor was still in the possession of Dresser-Rand at its premises in Edmonton, with the exception of some of the ancillary equipment which had been delivered to the proposed site of the Heartland Upgrader.

[6] On March 9, 2009, counsel to Dresser-Rand enquired of counsel to BA Energy and counsel to the Monitor whether the balance of the purchase price would be paid, "failing which Dresser-Rand will be free to exercise its right of sale pursuant to the *Sale of Goods Act.*" On May 15, 2009, Dresser-Rand sent a Proof of Claim to the Monitor, signed by Dresser-Rand's General Manager in Canada, indicating that it had a secured claim for USD $1,655,477.95 and that "in respect of the said debt, we hold assets of the CCAA Debtor valued at $1,655,477.95 US as security". Under the Claims Procedure Order, claims were to be filed by June 15, 2009.

[7] On August 26, 2009, BA Energy repudiated the purchase agreement and advised Dresser-Rand that it had a duty to mitigate its losses with respect to the terminated agreement.

[8] In an email dated August 31, 2009, counsel to Dresser-Rand asked counsel to BA Energy to confirm that Dresser-Rand was free to deal with the compressor equipment in its possession and enquired whether BA Energy would return the parts in its possession. On the same day, counsel to BA Energy responded that Dresser-Rand could deal with the equipment subject to any requirement to act reasonably in performing its duty to mitigate and said that he would ask his client about the equipment in its possession.

[9] On September 18, 2009, the Monitor advised counsel to Dresser-Rand that, in light of the repudiation, Dresser-Rand's previous claim may have been stayed and that Dresser-Rand may have the right to file "Subsequent Claim" as set out in the Claims Procedure Order. The Monitor also told Dresser-Rand that BA Energy believed that the ancillary equipment in its possession was worth about $1 million. Counsel to Dresser-Rand responded that he did not believe his client would be interested in the equipment at that price.

[10] On September 22, 2009, Dresser-Rand submitted a Subsequent Claim for USD $1,651,543.63 (taking into account a further invoice paid by BA Energy). Again, Dresser-Rand in its claim form characterized the claim as secured and, again, the claim form states that Dresser-Rand held assets of the CCAA Debtor valued at USD $1,651.543.63.

[11] On December 16, 2009, the Monitor issued a Notice of Revision or Disallowance of the claim. This notice indicates that the Proof of Claim as submitted in the amount of USD $1,651,543.53 was revised and accepted at nil. The Monitor noted as follows:

> Retained Assets
> [Dresser-Rand] retained possession of certain assets as a result of the termination of the Purchase Order. In the Termination Letter the Applicant directed [Dresser-Rand] to mitigate its losses in respect of the termination of the Purchase Order. The Applicant noted in its review of [Dresser-Rand]'s Claim that the retained assets have a value in excess of the amount of [Dresser-Rand]'s Claim. Accordingly, the Applicant has revised [Dresser-Rand]'s claim to $0.00.

[12] On December 18, 2009, counsel to Dresser-Rand asked to meet with counsel to BA Energy and the Monitor to discuss the reasoning behind the Notice of Revision, commenting that "(p)reviously you did not dispute our priority to the extent of what we could realize from the equipment we have in our possession." The email also notes that the compressor is custom-made equipment and that its sale may take some time.

[13] On December 20, 2009, counsel to Dresser-Rand delivered a Notice of Dispute to the Monitor, with a covering letter that noted as follows:

> With respect to the enclosed Notice of Dispute, in reviewing the documentation you forwarded to Dresser-Rand Canada, Inc. in this regard, this simply may be a situation where there is misunderstanding of terminology between us. Looking at your statement about the "retained assets", you do not appear to be disputing Dresser-Rand Canada, Inc.'s right to retain the assets in question (being compressor equipment) and deal with it as it wishes. To this stage, we have always valued the retained assets as being worth as much or more than the debt that is owed by BA Energy Inc. to Dresser-Rand Canada, Inc. We do not believe that you should have put $0.00 beside the secured aspect of this claim in the Notice of Revision or Disallowance dated December 16, 2009.

[14] The Notice of Dispute lists $1,651.543.63 under the designation "Reviewed Claim or Subsequent Claim as Disputed" and characterizes this amount as "Secured". It makes no claim on an unsecured basis. The Notice stipulates that "(t)his claim is fully secured. The Notice of Revision or Disallowance did not reflect this fact."

[15] A without-prejudice conference call was held on January 6, 2010 among counsel to BA Energy, the Monitor and counsel to Dresser-Rand.

[16] In an email dated January 11, 2010, the Monitor asked Dresser-Rand's counsel whether he had been able to determine the appropriate person for the Monitor to speak to with respect to the equipment in the possession of BA Energy. Counsel to Dresser-Rand responded that he had not and that he was "awaiting the letter [counsel to BA Energy] indicated last week you would be sending on the other point that deals more generally with the claim, etc."

[17] On January 14, 2010, the Monitor sent counsel to Dresser Rand an email that attached a letter that he was asked to review, commenting: ... "let me know if it meets your needs before I finalize it."

[18] The letter, marked "draft", reads as follows:

> As Court Appointed Monitor of BA Energy Inc. I am sending this letter to you as a follow-up to our teleconference of January 5, 2010 and to provide more clarity with respect to the Notice of Revision and Notice of Dispute between BA Energy Inc. ("BA Energy") and Dresser Rand Canada, Inc. ("DRC").
>
> As agreed on our teleconference, BA Energy does not dispute DRC's rights to retain the assets in question and deal with them as it wishes. This right means DRC shall have no claim against BA Energy given that the value of the assets are at least as much or more than the claim amount. Furthermore, I must note that DRC will accept all potential risks and rewards of its actions in dealing with the assets. For further clarity, should DRC sell the assets for an amount greater than the amount of the claim filed against BA Energy, then this excess amount benefits DRC. Should DRC sell the assets for an amount less than DRC's claim against BA Energy, DRC will not be able to claim the difference against BA Energy.
>
> I trust this clarifies any misunderstanding between the parties. (emphasis added)

[19] Counsel to Dresser-Rand responded saying that the letter would be reviewed internally and by his client and that he would get back to the Monitor. Numerous emails ensued between counsel to Dresser-Rand and the Monitor. On January 25, 2010, counsel to Dresser-Rand advised the Monitor that "I am told that I should hear from someone in the US part of the organization tomorrow. Unfortunately, many people have become involved within my client and has made it more complex for me to get instructions."

[20] In an email dated January 27, 2010, counsel to Dresser Rand advised the Monitor that:

> ...my people as of yesterday were still assessing their position, including what can be done with the part of the compressor they have and those parts which BA has in its position. Unfortunately, these machines are very custom made for a

> particular customer and are not readily saleable or useable for anyone else. They [sic] inquiries out to see what they can do and hope to get back to me this week.

[21] On February 19, 2010 counsel to Dresser-Rand left a voice mail for the Monitor. The recording was not preserved. Counsel to Dresser-Rand in an email to his client said that in the voice mail, he enquired if BA Energy was interested in making an offer to Dresser-Rand for the compressor "with the concept being that if an acceptable cash offer was made to [Dresser-Rand] for that equipment, [Dresser Rand] would forego any further claim against [BA Energy] for the balance owing." The Monitor in an email to BA Energy said that in the voice mail, counsel to Dresser-Rand was enquiring whether BA Energy would like to acquire the compressor for an unnamed price and that "if [BA Energy] acquired this equipment then Dresser-Rand would withdraw their claim".

[22] On February 23, 2010, BA Energy advised the Monitor that it did not wish to purchase the compressor. On the same day, the Monitor filed its Ninth Report with the Court and served it on the parties on the service list. The report states that BA Energy anticipated filing a plan of arrangement which would result in a recovery that would be better than a liquidation, and that it was expected that the plan would be brought to the Court for approval in mid to late March, 2010. During this time period, the Monitor and BA Energy were finalizing the sale of a key asset necessary to fund the plan and were in the course of structuring the plan.

[23] On March 15, 2010, BA Energy filed and served its Notice of Motion for approval to circulate a plan of arrangement and hold a meeting of creditors. Dresser-Rand was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

[24] Apparently, counsel to Dresser-Rand had not yet been added to the service list at this time and did not receive a copy of the Ninth Report until it was posted on the Monitor's web-site on March 16, 2010. Counsel to Dresser-Rand received a copy of the plan motion materials on March 17, 2010 and requested to be put on the service list on that date. The Monitor also informed counsel to Dresser-Rand on March 17, 2010 that BA Energy was not interested in purchasing the compressor from Dresser-Rand and that it took the position that the Dresser-Rand claim had been satisfied.

[25] On March 18, 2010, the Court approved the circulation of the plan of arrangement to creditors.

[26] On March 26, 2010, Dresser-Rand submitted a late amended proof of claim in which it stated it had an unsecured claim of USD $1,474,161.63 and a secured claim of USD $177,382.

[27] On April 5, 2010, the Monitor issued a Notice of Revision or Disallowance relating to Dresser-Rand's amended proof of claim, with a revised claim amount of zero. The Monitor set out the following as reasons for disallowance:

Dresser-Rand's Late Amended proof of claim dated March 26, 2010, claiming an unsecured claim in the amount of $1,474,161.63 USD and a secured claim in the amount of $177,382.00 USD (the "Late Amended Claim") is barred and extinguished pursuant to the claims procedure order dated April 29, 2009 (the "Claims Procedure Order"). The Late Amended Claim is in essence the same as the Initial Claim (as defined below) submitted by Dresser-Rand, which claim has been resolved as described below.

Dresser-Rand was aware of and participated in the claims process established under the Claims Procedure Order. Dresser-Rand's initial proof of claim was received by the Monitor on or about May 15, 2009, as amended to a Subsequent Claim (as defined in the Claims Procedure Order) on September 22, 2009 (the "Initial Claim") following BA Energy's repudiation of the purchase order. The Initial Claim by Dresser-Rand was for $0.00 unsecured and Dresser-Rand acknowledged it held equipment or collateral of a value equal to its claim.

On December 16, 2009, the Monitor issued a notice of revision or disallowance thereby disallowing the total claim amount listed by Dresser-Rand in its Initial Claim (the "NOR"). The reason for the disallowance in the NOR was that Dresser-Rand acknowledged that it retained possession of the collateral equipment that it held in full satisfaction of the Initial Claim amounts (the "POC Satisfaction"), therefore, Dresser-Rand had no claim against BA Energy. Dresser-Rand did respond by issuing a notice of dispute on December 21, 2009 (the "NOD"); however, the NOD served to only address a "misunderstanding of terminology" on the part of Dresser-Rand regarding the classification of the claim amounts and not a dispute as to or the rejection of the POC Satisfaction. After further discussions between the parties, the Monitor sent draft correspondence to Dresser-Rand's solicitors dated January 13, 2010 affirming the POC Satisfaction, that Dresser-Rand was retaining the equipment in full satisfaction of its claim and that it had the risk and benefit of any potential recovery. Throughout the process leading up to the Late Amended Claim, Dresser-Rand valued the collateral equipment as being worth as much or more than the debt owed by the Applicant.

BA Energy and the Monitor relied upon the proofs of claim as filed in the claims process, including the Initial Claim, in calculating the dividend in the BA Energy Plan of Arrangement filed March 10, 2010 (the "Plan"). The inclusion of the Late Amended Claim would have significantly affected BA Energy's/the Monitor's calculations and provisions contained in the Plan, and the subsequent BA Energy creditor review, consideration and implementation of the Plan.

The Dresser-Rand filing of the Late Amended Claim occurred only after distribution of the Plan proposing a 55% dividend. Allowance of the Amended Proof of Claim would: (i) circumvent the *Companies' Creditor Arrangement Act* (Canada) process, the Claims Procedure Order and provide Dresser-Rand an

> unjustified and improper advantage, and (ii) prejudice BA Energy and/or BA Energy's creditors generally in the pro rata or total distribution under the Plan.

[28] Dresser-Rand filed a Notice of Dispute on April 8, 2010, submitting that there was no resolution of its claim as asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim on March 26, 2010 and that not accepting the claim would be prejudicial to Dresser-Rand and not prejudicial to BA Energy or its creditors. Dresser-Rand filed a Notice of Motion with respect to its claim on April 12, 2010 and served the service list.

[29] The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person: the rest voted by proxy. No-one voted against the plan. Counsel to Dresser-Rand read a prepared statement indicating that it had filed an amended proof of claim that may impact the other creditors if ultimately validated.

Analysis

[30] Dresser-Rand submits that the amended proof of claim it filed on March 26, 2010 is not a "late claim", but merely an amendment to the September, 2009 proof of claim which was filed in a timely manner in compliance with the Claims Procedure Order. I cannot agree with this submission. The amended proof of claim purports to assert an unsecured claim for the first time, a claim that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changes the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment.

[31] Dresser-Rand initially filed its claim on the basis that it was in possession of assets of such a value as to satisfy its claim and that it was secured by its possession of such assets. It maintained that position for approximately eight months, leading the debtor and the Monitor to believe, not unreasonably, that Dresser-Rand would not be an affected creditor in a plan of arrangement. BA Energy structured its plan on that assumption. Dresser-Rand changed its approach and amended its claim to file in large part as an affected unsecured creditor at a time when it would have been clear to creditors that the distribution to unsecured creditors under a plan would be substantial, albeit prior to a formal vote by unsecured creditors on the plan.

[32] While this application involves a determination of whether Dresser-Rand's late amended claim should be accepted, it is neither a clear case of a creditor "lying in the weeds" nor is it clearly the kind of late claim reviewed by Wittmann, J. A. (as he then was) in *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Alta. C.A.), ("*Re: Blue Range Resource Corp.*"), the leading authority on the assessment of late claims. However, the principles set out in *Blue Range* are relevant to the application.

[33] Wittmann, J. A. set out the following as appropriate criteria for a court to apply to the assessment of late claims:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[34] In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act*. and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. Inadvertence and Good Faith

[35] Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

[36] BA Energy submits that Dresser-Rand's conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately $0.55 per dollar of claim.

[37] It is clear that Dresser-Rand was aware of BA Energy's process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand's amended proof of claim arose from inadvertence.

[38] BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

[39] While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At

the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

[40] The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

[41] The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

[42] The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[43] Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that

the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

B. Prejudice Caused by the Delay

[44] BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

[45] It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

[46] With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range.*

[47] As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

[48] During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

[49] Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

[50] The parties prejudiced by this late amended claim are BA Energy and its parent Value Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan. While there is no doubt that Value Creation benefits from BA Energy's restructuring under the CCAA as a continuing entity with surviving assets, the postponement of a portion of Value Creation's secured claim was arrived at in consideration of the status of creditor claims as they had been filed, without Dresser-Rand's late amended claim.

[51] It is not surprising that BA Energy did not attempt to alter its plan after having received notice of Dresser-Rand's amended proof of claim. Given the negotiations that necessarily proceed a vote on the plan, the status of proxy voting and the limited time to the creditors' meeting, BA Energy did not have a realistic opportunity to amend its plan to include Dresser-Rand without the risk of losing support from other creditors and jeopardizing the plan.

[52] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.) at para. 74, Huddart, J. held, in a case where there would have been no effect on other creditors if a late claim was accepted as it would be paid from post-arrangement revenue, that it was fair to refuse to grant leave to the late creditor to commence an action against the debtor company for a number of reasons, noting that "(a) CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

[53] While the facts of this case are distinguishable from the facts before the Court in *Lindsay*, Dresser-Rand filed a very late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. Dresser-Rand's recovery would be improved considerably by its very late recharacterization of claim if Dresser-Rand's new submissions with respect to the resale value of the compressor is accepted.

[54] Dresser-Rand submits that, from its perspective, the Monitor's draft letter of January 14, 2010 was a "proposed resolution" of the claim, and that thus BA Energy and the Monitor should have been aware from early 2010 that the Dresser-Rand claim was unresolved and that Dresser-Rand would be claiming a deficiency in value as an unsecured claim. While the letter is marked "draft" and the Monitor requested a response before it was finalized, it refers to an agreement reached in the teleconference and the clarification of a misunderstanding arising from the Notice of Revision. While the Monitor was advised that this letter was being reviewed by Dresser-Rand, and Dresser-Rand invited a proposal for settlement on February 19, 2010, it was not until March 26, 2010, ten months after the expiry of the initial claims bar date that Dresser-Rand made its revised position clear to the debtor and the Monitor.

[55] Mr. Kaffka states in his affidavits that Dresser-Rand received a verbal estimate of value from an equipment dealer on January 28, 2010. It may well be that Dresser-Rand did not wish to

disclose the low resale value it was now alleging for the compressor at a point in time when it was hoping that BA Energy would make an offer to purchase the compressor, but this was a strategic decision by Dresser-Rand, and, again, the risk of further delay in clearly communicating its revised estimate of value because of this strategic decision must be borne by Dresser-Rand.

[56] Dresser-Rand also submits that it would have filed its amended claim sooner had the Monitor advised it sooner that BA Energy was not interested in purchasing the compressor. It is true that Dresser-Rand may have been able to file its amended claim at the end of February, 2010 instead of at the end of March, 2010 had the Monitor responded earlier to Dresser-Rand's suggestion that BA Energy may wish to make an offer on the equipment, but it should be noted that Dresser-Rand's "proposal" was merely an invitation to BA Energy to make a settlement offer, and not a proposal specifying an acceptable price for the compressor that may have alerted the Monitor to its importance. The Monitor in the Thirteenth Report to the Court dated April 30, 2010 explained that it did not place a high priority on its response to the voice-mail enquiry as it thought that it was one of several enquiries that Dresser-Rand was making to potential purchasers to of the compressor.

[57] Dresser-Rand submits that BA Energy knew as early as January 14, 2010 (the date of the Monitor's draft letter) that Dresser-Rand may have been in the position of recovering less than it was owed if it sold the equipment. While this was anticipated as a possibility in the January 14, 2010 letter, the responsibility for valuing the equipment Dresser-Rand claimed as its security cannot be transferred to the debtor or the Monitor. Dresser-Rand is in the business of manufacturing and marketing the equipment, and had as late as September 22, 2009 made the formal representation in its revised proof of claim that the equipment was worth the amount of its claim. It appears that in January 2010, an officer of BA Energy enquired of the Monitor whether BA Energy could recover any surplus proceeds from Dresser-Rand's sale of the compressor, further indicating that there is no evidence that either the debtor or the Monitor anticipated Dresser-Rand's late change of position on value.

C. *Other Considerations*

[58] Dresser-Rand submits that equity favours its application, as it is a wronged party with a legitimate claim that has been compromised by the CCAA proceedings. While if Dresser-Rand's current position with respect to value is accepted, it may suffer a deficiency in its claim of roughly $1.6 million still owing on the purchase price of roughly $8 million for the compressor, Dresser-Rand has possession of the compressor and current estimates of a deficiency are still speculative. There is no overwhelming equitable consideration that would counter-balance relevant prejudice to BA Energy of the late claim.

[59] Dresser-Rand submits that the situation is similar to that described in *Re Look Communications Inc*. (2005) 21 C.B.R. (5th) 265 (Ont. Sup. Ct. J.). However, this is not a situation where BA Energy was aware at all times of the applicant's claim and did not object, nor is it a case where, had court approval of the claim been sought prior to plan approval, it would be

clear that such approval would be granted as a matter of course. No assumptions can be made about the outcome if this amended claim had been brought in a timely way and disputed.

D. Conclusion on a Late Claim

[60] It would not be fair or equitable to accept this late amended claim. Given the facts of this case, there are no conditions that would alleviate relevant prejudice.

[61] If I am wrong in my assessment of whether the late revised claim should be accepted, I would agree with BA Energy that the claim should not in any event be accepted as set out in the Amended Proof of Claim, but should be remitted to the Monitor to allow a proper consideration of value. BA Energy and the Monitor have not been given an opportunity to test the allegations made as to the resale value of the compressor as would occur in the normal course of a claim, given the timing of the late claim in relation to the plan and its sanctioning. While the parties may not have discussed this in advance of the application, it is clear that this was not a normal claims dispute, but was restricted to the issue of whether the claim should be accepted.

E. Conduct Money

[62] In support of this application, Dresser-Rand filed and relied upon affidavits sworn by Mr. Kaffka, who resides in New York. Mr. Kaffka was cross-examined on these affidavits. Dresser-Rand submits that BA Energy should be required to pay conduct money for Mr. Kaffka's attendance at cross-examination.

[63] BA Energy objects to paying conduct money for Mr. Kaffka's cross-examination because he is not an employee of Dresser-Rand Canada Inc., because he had no involvement with the issues prior to January, 2010 and because Dresser-Rand has employees in Alberta who could have provided an affidavit, including Bill Colpitts, its recently-retired General Manager who was involved with the matter and signed the first Proof of Claim.

[64] Dresser-Rand submits that Mr. Kaffka was an appropriate affiant because he was primarily responsible for Dresser-Rand's mitigation efforts after January, 2010 and because he was the individual who determined the market value of the compressor.

[65] While Mr. Kafka's evidence of pre-2010 efforts by Dresser-Rand to mitigate and to assess value was of necessity hearsay, he was involved in 2010 mitigation efforts. He was not so clearly an inappropriate witness that Dresser-Rand is disentitled to reasonable conduct money. I direct that BA Energy be required to pay reasonable conduct money for Mr. Kaffka's attendance.

F. Costs

[66] This is not an appropriate case to depart from the usual practice with respect to costs in commercial insolvency applications, and therefore both Dresser-Rand and BA Energy will bear their own costs.

Heard on the 1st day of June, 2010.
Dated at the City of Calgary, Alberta this 5th day of August, 2010.

B.E. Romaine
J.C.Q.B.A.

Appearances:

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Corrigendum of the Reasons for Decision
of
The Honourable Madam Justice B.E. Romaine

The cite in paragraph [32] has been changed to read: *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Alta. C.A.), ("*Re: Blue Range Resource Corp.*").

TAB 8

Enron Canada Corp. v. National Oil-Well Canada Ltd., 2000 ABCA 285

Date: 20001024
Docket: 99-18564/18565
18566/18567/18568/18569/18570/18571 and 18802

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE SULATYCKY
THE HONOURABLE MR. JUSTICE WITTMANN

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF BLUE RANGE RESOURCES CORPORATION

BETWEEN:

ENRON CANADA CORP., and THE CREDITOR'S COMMITTEE

Appellants (Appellants)

- and -

NATIONAL OIL-WELL CANADA LTD. et al.

Respondents (Respondents)

Appeal from the Decision of
THE HONOURABLE MR. JUSTICE LoVECCHIO
Dated the 9th day of November, 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WITTMANN
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE SULATYCKY

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REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE WITTMANN

Introduction

[1] The ***Companies' Creditors Arrangement Act***, R.S.A. 1985, c. C-36, as amended ("***CCAA***"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

[2] In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the ***CCAA*** distribution.

Facts

[3] Blue Range sought and received court protection from its creditors under the ***CCAA*** on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

[4] The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

[5] The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

[6] The chambers judge found that the applicable section of the ***CCAA***, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the ***CCAA*** process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a ***CCAA*** proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

[7] Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the ***United States Bankruptcy Code***, ***Federal Rules of Bankruptcy Procedure***, for Chapter 11 Reorganization Cases, ("***U.S. Bankruptcy Rules***") the chambers judge chose to incorporate the test in place under the ***Bankruptcy and Insolvency Act*** R.S.C. 1985 c. B-3 ("***BIA***"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the ***BIA*** was appropriate. Under the ***BIA***, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the ***BIA*** may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

[8] It has been recently held by this court that decisions of a ***CCAA*** supervising judge should only be interfered with in clear cases. Deference to a ***CCAA*** supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in ***Pacific National Lease Holding Corp.*** (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) (cited with approval by Hunt, J.A. in ***Luscar Ltd. v. Smoky River Coal Ltd.***, [1999] A.J. No. 676 (C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
> ...
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the ***CCAA*** in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

[9] As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be <u>forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.</u>
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the ***CCAA*** has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

[10] It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

[11] The appellants advocated the adoption of the criteria under the ***U.S. Bankruptcy Rules***, Chapter 11, while the respondents favoured either the application of the tests under the ***BIA*** or some blending of the two standards.

[12] Rule 9006 of the ***U.S. Bankruptcy Rules*** deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In ***Pioneer Investment Services Company v. Brunswick Associates v. Brunswick Associates Limited Partnership et al.*** 507 U.S. 380, 113 S.Ct. 1489 (1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In ***Pioneer***, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. ***In re Specialty Equipment Companies Inc.***, 159 B.R. 236 (1993).

[13] The Canadian approach under the ***BIA*** has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the ***BIA*** when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: ***Re Mount Jamie Mines (Quebec) Ltd.*** (1980),

110 D.L.R. (3rd) 80 (Ont. S.C.). The Canadian standard under the ***BIA*** is, therefore, less arduous than that applied under the ***U.S. Bankruptcy Rules***.

[14] I accept that some guidance can be gained from the ***BIA*** approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in ***CCAA*** proceedings. But I also take some guidance from the ***U.S. Bankruptcy Rules*** standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the ***BIA*** and ***U.S. Bankruptcy Rules*** approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

[15] In ***Lindsay v. Transtec Canada Ltd.*** (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the ***CCAA***. Through oversight, the applicant Lindsay was not sent the relevant ***CCAA*** materials by APCL and was not included in the ***CCAA*** proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the ***CCAA*** proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the ***CCAA*** process.

[16] After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the ***CCAA*** process and chose to take his chances later on.

[17] In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the ***CCAA*** and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the ***CCAA*** proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

[18] While ***Lindsay*** is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the ***CCAA*** proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

[19] There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

[20] In ***Lethbridge Motors Co. v. American Motors (Can.) Ltd.*** (1987), 53 Alta. L.R. (2d) 326 (C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in ***Allen v. Sir Alfred McAlpine & Sons Ltd.*** [1968] 1 All E.R. 543 where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the Alberta Rules of Court in 1994. Rule 244(4) now states that proof of inordinate and inexcusable

delay constitutes ***prima facie*** evidence of serious prejudice: ***Kuziw v. Kucheran Estate***, 2000 ABCA 226 (Online: Alberta Courts).

[21] Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the ***Insurance Act*** R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

[22] Similar wording is also found in ss. 211 and 385 of the ***Insurance Act*** and similar legislation exists throughout the common law provinces.

[23] When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: ***Hogan v. Kolisnyk*** (1983), 25 Alta L.R. (2d) 17 (Q.B.). In ***Hogan*** the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

[24] Considering whether the insurer has suffered any prejudice, the court in ***Hogan*** quoted from a decision of Stevenson, D.C.J. in ***Schoeler (W.) Trucking Ltd. v. Market Ins. Co. of Can***. (1980), 9 Alta L.R. (2d) 232 at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In ***312630 British Columbia Ltd.*** **v.** ***Alta. Surety Co.*** (1995), 10 B.C.L.R. (3d) 84 (C.A) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

[25] These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

[26] Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

[28] National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

[29] Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

[30] TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the ***CCAA*** process. On the contrary, as soon as the

appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

[31] PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

[32] Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

[33] The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

[34] Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the ***CCAA*** proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the ***CCAA*** proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

[35] Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

[36] The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 ***CCAA***.

[37] Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

[38] Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

[39] Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds

waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

[40] In a ***CCAA*** context, as in a ***BIA*** context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the ***CCAA*** involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: ***Re Cohen*** (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in ***312630 British Columbia Ltd***. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

[41] In considering claims filed or amended after a claims bar date in a claims bar order, a ***CCAA*** supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

[42] Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the ***CCAA*** proceedings. The appeal is dismissed.

APPEAL HEARD on June 15, 2000

REASONS FILED at Calgary, Alberta,
this 24th day of October, 2000

WITTMANN J.A.

I concur:

RUSSELL J.A.

I concur:

SULATYCKY J.A.