COURT FILE NUMBER:	2103 10970
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
PLAINTIFF:	CANADIAN WESTERN BANK
DEFENDANT:	SHAMROCK VALLEY ENTERPRISES LTD.
DOCUMENT:	**BENCH BRIEF OF THE BOWRA GROUP INC. - MAY 3, 2022, APPLICATION BEFORE THE HONOURABLE JUSTICE S.D. HILLER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

PARLEE McLAWS LLP
Barristers & Solicitors
Patent & Trade-Mark Agents
1700 Enbridge Centre
10175 – 101 Street NW
Edmonton, Alberta T5J 0H3
Attention: Jeremy H. Hockin, Q.C.
Phone: 780-423-8532
Fax: 780-423-2870
File No: 75782-12/JHH

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 two of those items; specifically, the approval of the interim fees of the Receiver and those of its counsel, and the approval of the claims process proposed by the Receiver. The facts relevant to this Application are set forth in the Fifth Report of the Receiver (the "**Fifth Report**") as well as the Fee Affidavit of Kristin Gray (the "**Fee Affidavit**").

PART 2 THE LAW

The Approval of Interim Fees

3. 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**].[1]
- *Business Corporations Act*, RSA 2000, c B-9, s. 99 [**TAB 2**].

4. 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

[1] Hyperlinks to all authorities referenced in this Brief can be found in the Table of Authorities.

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 "A" to the Fifth Report.

5. 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**].

6. 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**].

7. 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).

8. The Fifth Report broadly outlines the activities of the Receiver since the date of its appointment, 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 Proposed Claims Process Order

9. Under the *BIA*, claims are determined by the trustee in bankruptcy under a rules based and procedurally detailed regime, the cost of which is borne by the estate as a whole since it is intended to benefit the body of creditors. A claims process is a relatively rare phenomenon in receivership proceeding, since it is itself rare that the Receiver's activities produce, as they have in this case, sufficient proceeds to permit recovery on the part of unsecured creditors and equity claimants. Absent the company being assigned into bankruptcy, which may not be appropriate in every case, it becomes necessary to establish an independently run, and Court supervised, claims process.

10. Insolvency professionals and the Court are often faced with the need to establish such a process for the determination of claims in the context of proceedings under the *Companies' Creditors Arrangement Act*. In doing so it is helpful to bear in mind the words of Topolniski J. in *Winalta* that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".

- *Winalta* at para 82 [**TAB 3**].

11. The procedure that is ultimately ordered is, in the Receiver's submission, ultimately in the Court's discretion. In *Steels Industrial Products Ltd. (Re)* the Court held that the exercise of that discretion will be guided, albeit in the *CCAA* context, by the timely and

inexpensive resolution of claims, while also ensuring that the determination of claims is made in a manner that is just, fair, and reasonable to all stakeholders, including the company and those who will be directly affected by the acceptance of claims.

- *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 at para 38 [**TAB 6**].

12. The process employed in each case must also be responsive to its facts and circumstances. Courts have held that, in all cases, it is appropriate to make efforts to ensure an efficient, affordable, and certain process with the overriding concern being to ensure, again, that the process is both fair and reasonable. This includes, as is proposed by the Receiver on this application, allowing for a negative claims process which allows contested claims to be dealt with consensually and provides the possibility for undisputed claims to be determined without the need for the submission of a proof of claim, and for the time and associated professional fees that are required to undertake their detailed review.

- *Re TOYS "R" US (CANADA) LTD.*, 2018 ONSC 609 [**TAB 7**].

13. The Receiver respectfully submits that the proposed Claims Process Order represents a method of determining claims that is fair and reasonable to all stakeholders, including the company.

PART 3 CONCLUSION

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2 day of May, 2022.

PARLEE MCLAWS LLP

Per: _____

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

Solicitors for The Bowra Group Inc.

TABLE OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243
2. *Business Corporations Act*, RSA 2000, c B-9, s. 99
3. *Winalta Inc. (Re)*, 2011 ABQB 399
4. *Piikani Nation v. Piikani Energy Corporation*, 2011 ABQB 450
5. *Servus Credit Union Ltd v Trimove Inc*, 2015 ABQB 745
6. *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501
7. *Re TOYS "R" US (CANADA) LTD.*, 2018 ONSC 609

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 April 18, 2022

Last amended on November 1, 2019

À jour au 18 avril 2022

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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.

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.

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

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.

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 June 17, 2021

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

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 administration as far as is practicable in the form required by section 155, and, subject to any order of the Court, file a copy of them with the Registrar within 60 days after the end of each 6-month period, and

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

[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

[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:

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

Editor's Note: Corrigendum released on December 3, 2012. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re),* 2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

And

In the Matter of a Plan of Compromise or Arrangement of

0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.

Petitioner

Corrected Judgment: The text of the judgment was corrected at paragraph 28 where changes were made on December 3, 2012.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. October 11, 2012

provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

[35] To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying "trust the auditors" and "trust me". Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

[36] We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors' position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

[37] Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

[38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".

[39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356.

TAB 7

CITATION: Re TOYS "R" US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen,* counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017