Court File No. CV-16-11290-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF MAPLE BANK GmbH

AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED

AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

MAPLE BANK GmbH

Respondent

BOOK OF AUTHORITIES

April 18, 2024

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide St. W.
Toronto, ON M5H 4E3
Tel: (416) 367-6000
Fax: (416) 367-6749

Alex MacFarlane (LSO No. 28133Q)
Tel: 416-367-6305
Email: amacfarlane@blg.com

Nick Hollard (LSO No. 83170O)
Tel: 416-367-6545
Email: nhollard@blg.com

Lawyers for KPMG Inc., in its capacity as Liquidator of the business in Canada of Maple Bank GmbH

Index

Court File No. CV-16-11290-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF MAPLE BANK GmbH

AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED

AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

MAPLE BANK GmbH

Respondent

I N D E X

Tab	Document
1.	*Confectionately Yours, Inc. (Re Bakemates International Inc.),* 2002 CanLII 45059 (Ont. C.A.)
2.	*Federal Business Development Bank v. Belyea and Fowler*, 1983 CanLII 4086 (N.B. C.A.)
3.	*Bank of Nova Scotia v. Diemer*, 2014 ONSC 365
4.	*David v. TransAmerica Life Canada*, 2016 ONSC 1777
5.	*Prairie Palace Motel v. Carlson*, 1980 CarswellSask 25 (Q.B.)
6.	*MNP Ltée. v. Armorer*, 2017 ONSC 6268

Tab 1

DATE: 20020919
DOCKET: C36486

COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY AND BORINS JJ.A.

IN THE MATTER OF THE PROPOSALS OF

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

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

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

BORINS J.A.:

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

2002 CanLII 45059 (ON CA)

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

Introduction

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

(1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;

(2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and

(3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

2002 CanLII 45059 (ON CA)

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

Reasons of the motion judge

[10] [10] The reasons of the motion judge are reported as *Re Bakemates International Inc.* (2001), 25 C.B.R. (4th) 24.
[11] [11] In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

(1) (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.

(2) (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.

(3) (3) The receivership was difficult and "rather unique".

(4) (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".

(5) (5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.

(6) (6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.

(7) (7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

Issues and Analysis

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

2002 CanLII 45059 (ON CA)

(1) Bias

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

2002 CanLII 45059 (ON CA)

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

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

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

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

[37] [37] As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, *e.g.*, *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (S.C.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[38] [38] Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).[1] [1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Limited v. Fabulous Lobster Trap Cabaret Limited* (1983), 46 C.B.R. (N.S.) 117 (N.S.S.C.), adopted the following statement from *Kerr on Receivers,* 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."[2] [2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Director of Laboratories Services (Ont.)*, [1991] O.J. No. 210 (Div. Ct.) Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit

---

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

2002 CanLII 45059 (ON CA)

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

2002 CanLII 45059 (ON CA)

(3) Fair and reasonable remuneration

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

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

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

> 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.

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

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

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

Conclusion

(1) Bias

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

(2) Cross-examination of the receiver

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

2002 CanLII 45059 (ON CA)

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

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

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

2002 CanLII 45059 (ON CA)

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

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

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

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

Result

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

Released: September 19, 2002

“S. Borins J.A.”

2002 CanLII 45059 (ON CA)

"I agree M. A. Catzman J.A."

"I agree Doherty J.A."

2002 CanLII 45059 (ON CA)

Tab 2

FEDERAL BUSINESS DEVELOPMENT BANK v.
BELYEA and FOWLER
(No. 31/82/CA)

New Brunswick Court of Appeal
Hughes, C.J.N.B., Ryan and Stratton, JJ.A.
January 18, 1983.

1983 CanLII 4086 (NB CA)

1983 CanLII 4086 (NB CA)

COUNSEL:
BARRY R. MORRISON, for the appellant;
G.B. LJUNGSTROM, for the respondent.

This appeal was heard before HUGHES, C.J.N.B., RYAN and STRATTON, JJ.A., of the New Brunswick Court of Appeal, on April 27, 1982. The decision of the Court of Appeal was delivered on January 18, 1983, when the following opinions were filed:

STRATTON, J.A. - see paragraphs 1 to 17;
RYAN, J.A., dissenting in part - see paragraphs 18 to 27.

HUGHES, C.J.N.B., concurred with STRATTON, J.A.

Please note that a French translation appears below the

English language judgment.

[1] STRATTON, J.A.: I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal.

[2] In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for $40,000.00, and the reasonableness of the Receiver's account of $11,730.00. I agree with Mr. Justice Ryan that the refusal by the Bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the Receiver satisfactorily established that its account for services was fair and reasonable.

[3] 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.

[4] The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 24 D.L.R. 699 (Sask. S.C.), it was pointed out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2% to 5% in proportion to the care and trouble involved. The court in that case concluded that although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and accordingly he was awarded as a fair remuneration a commission of 5% of the funds coming into his hands.

[5] A lump sum was awarded to receivers by the Nova Scotia

1983 CanLII 4086 (NB CA)

Court of Appeal in *Eastern Trust Co. v. Nova Scotia Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237. In making their award, the court said at p. 240:

> As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

[6] A lump sum was also awarded a receiver as fair compensation for his services in *Industrial Development Bank v. Garden Tractor and Equipment Co. Ltd.*, [1951] O.W.N. 47. In that case, Marriott, Master, said at p. 48:

> In fixing the compensation of a receiver, the court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no prima facie right to any fixed rate as a trustee in bankruptcy has under The *Bankruptcy Act*. In *Kerr on Receivers*, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent. on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1885), 11 P.R. 426, Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

[7] In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Developments Ltd. v. Mount Citadel Ltd. et al.* (1978), 26 C.B.R. (N.S.) 17, Saunders, Master, concluded that remuneration on a 5% basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

[8] It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the

1983 CanLII 4086 (NB CA)

fund is a more appropriate method of compensation than that based on a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5% is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see *75 Corpus Juris Secondum*, p. 1067.

[9] 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.

[10] Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

[11] One of the compelling factors referred to in *Williston on Contracts* (3rd Ed.), Vol. 10, pp. 928-929 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved

1983 CanLII 4086 (NB CA)

in the particular case: see *J.W. Cowie Engineering Ltd. v. James K. Allen et al.* (1982), 52 N.S.R.(2d) 321; 106 A.P.R. 321 (C.A.).

[12] Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalgamated Syndicate*, [1901] 2 Ch. 181. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker, J., on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37:

> . . . while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this court to protect.
>
> . . .
>
> . . . while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.
>
> . . .
>
> It is evidence, if the necessary expenses of administering estates in this court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the court's officers at the expense of the suitors. In my opinion, however, the practice of the court warrants no such result; and I think it only right to point out that it is a mistake to suppose that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading

1983 CanLII 4086 (NB CA)

counsel.

[13] In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35% of the amount realized on the sale of the assets.

[14] The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for $30,075.00 and that the total receipts from all sources were $36,566.00. The receiver charged a fee for its services of $11,730.00 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the Bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

[15] Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence, it is difficult to see how s. 49 of the *Evidence Act* can be of any assistance to the receiver in establishing its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the Bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately $5,000.00, say in the range of $4,000.00 to $6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be $6,000.00.

1983 CanLII 4086 (NB CA)

[16] As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the Bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the Bank as entitling it to crystallize its debenture. Therefore these matters were not considered on this appeal.

[17] I would allow the appeal and reduce the judgment at trial to $4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of $750.00.

[18] RYAN, J.A. [dissenting in part]: This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of $10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of $40,000.00 advanced by the plaintiff to Chase Camera & Supply Ltd.

[19] The following facts are set out in the decision of the trial judge reported in (1982), 38 N.B.R.(2d) 162; 100 A.P.R. 162, at pp. 163-4:

> In the summer of 1978 the plaintiff lent $40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.
>
> Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, who accompanied Mr. Belyea to the meeting, was prepared to pay $40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately $34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.

1983 CanLII 4086 (NB CA)

> By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd., as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.
>
> Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for $30,000.00. In addition the plaintiff realized $4,925.24 apart from the receiver's efforts. A balance of $7,749.03 remained owing on the $34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of $8,279.30 as of November 10, 1981 but gave no details of this higher figure.

1983 CanLII 4086 (NB CA)

[20] At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

> a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and
>
> b) Was the receiver's fee of $11,730.00 reasonable?

[21] The same issues were raised on this appeal.

[22] As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of $40,000.00 for the inventory of Chase Camera & Supply Ltd., because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

[23] In his submission counsel for the defendants contended that not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had

spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

[24] In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of s. 49 of the *Evidence Act*, R.S.N.B. 1973, c. E-11, which provides that:

> A record or entry of an act, condition or event made in the regular course of a business is, in so far as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

[25] Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

[26] This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Limited, Lister and Lister v. Dunlop Canada Limited* (1982), 42 N.R. 181 delivered May 31, 1982 after the present appeal had been argued. The question whether

1983 CanLII 4086 (NB CA)

or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

[27] In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

Appeal allowed.

1983 CanLII 4086 (NB CA)

[1] M. LE JUGE STRATTON: J'ai eu l'avantage de lire le jugement rédigé par mon collègue Ryan et je regrette de ne pouvoir souscrire en tout point à la décision qu'il propose pour le règlement du présent appel.

[2] Dans son mémoire, l'avocat de MM. Belyea et Fowler soulève deux moyens d'appel, à savoir le bien-fondé du refus de la Banque fédérale de développement d'accepter l'offre faite par M. Sam Gamblin d'acheter le stock de Chase Camera & Supply Limited pour la somme de 40 000 $ et la légitimité du compte de 11 730 $ soumis par le séquestre. Je suis d'accord avec le juge Ryan que le refus de la banque d'accepter l'offre de M. Gamblin était raisonnable, compte tenu des circonstances. Cependant, je ne partage pas son opinion selon laquelle le séquestre aurait établi de façon satisfaisante le caractère juste et raisonnable du compte qu'il a soumis pour services rendus.

[3] Il n'existe aucun taux fixe ni aucune échelle déterminée pour calculer le montant de la rémunération à accorder au séquestre. Il reçoit habituellement, soit un pourcentage des recettes réalisées, soit une somme forfaitaire calculée d'après le temps, le travail et le degré de responsabilité en cause. Il semble que le principe qui régit la rémunération accordée au séquestre est que le calcul de la rémunération est établi d'après la valeur juste et raisonnable des services du séquestre et, bien qu'elle doive être assez importante pour inciter les personnes compétentes à assumer ce rôle, la mise sous séquestre doit être administrée le plus économiquement possible, compte tenu des circonstances. Par conséquent, la rémunération accordée pour services rendus doit être juste, mais doit néanmoins être plutôt modérée que généreuse.

[4] Les principes applicables au calcul de la rémunération à accorder au séquestre ont été discutés dans un certain nombre d'arrêts. Dans l'arrêt *Campbell v. Arndt* (1915), 24 D.L.R. 699 (C.s. Sask.), fréquemment cité, il a été sig-

nalé que, d'ordinaire, le séquestre est rémunéré au moyen d'une commission sur le montant brut de ses recettes, à un taux variant de 2% à 5% en proportion du travail effectué et des difficultés rencontrées. Dans cette cause, la Cour a conclu que, bien que le séquestre avait dû consacrer un temps considérable à son travail et avait fait face à bien des difficultés, celles-ci n'étaient pas d'une nature assez exceptionnelle pour qu'il ait droit à une rémunération beaucoup plus élevée que celle ordinairement accordée; et il a donc ontenu, à titre de juste rémunération, une commission de 5% sur les fonds qu'il avait réalisés.

[5] La Cour d'appel de la Nouvelle-Ecosse a accordé une somme forfaitaire aux séquestres dans l'arrêt *Eastern Trust Co. v. Nova Scotia Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237. En rendant sa décision, la Cour a déclaré à la p. 240:

> Afin de déterminer la rémunération due aux séquestres et aux liquidateurs, nous sommes autorisés, à notre avis, à examiner toutes les opérations dont ils ont été responsables depuis leur nomination, à tenir compte du temps que chacun a consacré à ses fonctions et de la nature des responsabilités qui leur incombaient en tant que séquestres et liquidateurs, et à déterminer quel aurait été le coût du travail nécessaire, s'il avait été effectué de façon prudente et économique.

[6] Un séquestre s'est également vu accorder une somme forfaitaire à titre de juste indemnité pour services rendus dans l'arrêt *Industrial Development Bank v. Garden Tractor and Equipment Co. Ltd.*, [1951] O.W.N. 47. Dans cet arrêt, le conseiller-maître Marriott a déclaré à la p. 48:

> Dans sa détermination de la rémunération à accorder à un séquestre, la Cour a toujours eu plein pouvoir d'accorder la somme jugée juste et raisonnable, compte tenu de toutes les circonstances, mais un séquestre n'a de prime abord aucun droit à un taux fixe comme c'est le cas pour un syndic agissant en matière de faillite en vertu de la *Loi sur la faillite*. Dans l'ouvrage *Kerr on Receivers*, 11e éd. 1946, on énonce à la p. 279: "Dans le cas de séquestres ou de gérants, il n'y a pas d'échelle fixe. Ils obtiennent parfois 5 pour cent des recettes; dans d'autres cas, leur rémunération est fixée à une somme forfaitaire ou déterminée par le temps mis par le séquestre, ses associés

1983 CanLII 4086 (NB CA)

> et ses préposés". Le chancelier Boyd a déclaré dans l'arrêt *Re Fleming* (1885), 11 P.R. 426: "Une commission de cinq pour cent peut être raisonnable dans bien des cas; cependant, si le patrimoine est important et les services rendus sont de courte durée et ne comportent pas de lourdes responsabilités, un tel taux pourrait être excessif".

[7] En accordant à un séquestre une somme forfaitaire plutôt qu'une commission basée sur un certain pourcentage dans l'arrêt *Ibar Developments Ltd. v. Mount Citadel Ltd. et al.* (1978), 26 C.B.R. (N.S.) 17, le conseiller-maître Saunders a conclu qu'une commission de 5% était trop élevée. Il a statué que le séquestre avait droit à une juste rémunération fondée sur le quantum meruit, compte tenu du temps consacré, du travail effectué et du degré de responsabilité assumé.

[8] In conviendrait peut-être de signaler que des arrêts américains viennent appuyer la proposition voulant que, dans le cas où les fonctions d'un séquestre consistent à liquider l'actif, le prélèvement d'une commission sur la somme réalisée constitue un mode de rémunération plus approprié que le versement d'un juste prix pour le travail effectué et le temps consacré; et ce mode de rémunération est le plus souvent utilisé. Lorsque la rémunération est ainsi calculée, un taux de 5% est habituellement employé dans des cas ordinaires. Ce taux varie cependant, compte tenu du degré de difficulté éprouvé par le séquestre dans la réalisation de ses recettes: voir *75 Corpus Juris Secondum* p. 1067.

[9] A mon avis, les points à considérer dans la détermination de la juste rémunération à accorder au séquestre sont: la nature, la quantité et la valeur de l'actif en question, les complications et les difficultés rencontrées, l'aide apportée par la compagnie, ses dirigeants et ses employés, le temps qu'il a mis a remplir son mandat, les connaissances, l'expérience et la compétence du séquestre, le soin et la minutie dont il a fait preuve, la nature des responsabilités qu'il a assumées, les résultats de ses efforts et le coût de services comparables lorsqu'ils sont rendus de façon prudente et économique.

[10] Les avocats d'expérience savent qu'il peut être difficile de prouver qu'une demande d'honoraires pour services rendus est juste et raisonnable. Ceux-ci entreprennent souvent d'établir ce fait au moyen du témoignage de personnes qui exercent la même profession afin de démontrer que les

1983 CanLII 4086 (NB CA)

honoraires exigés par le demandeur sont ceux ordinairement exigés pour des services analogues rendus par les membres de cette profession dans leur région. En l'espèce, cependant, où le séquestre était un comptable agréé, aucun membre de la profession comptable n'a témoigné relativement aux honoraires habituels demandés pour des services analogues à ceux rendus par le séquestre et, de fait, aucun témoin n'a été appelé, sauf le séquestre lui-même, pour établir la légitimité des honoraires qu'il a exigés unilatéralement pour ses services.

[11] *Williston on Contracts* (3e éd.) vol. 10 mentionne aux p. 928 et 929 le montant en cause comme l'un des facteurs concluants dans la détermination de la valeur raisonnable des services rendus par des avocats. Formulée autrement, cette proposition signifie que, bien qu'un professionnel ait droit à une rémunération juste et raisonnable basée sur la valeur raisonnable des services rendus, les honoraires réclamés doivent constituer une certaine proportion raisonnable du montant en question ou de la valeur des biens faisant l'objet du différend ou desquels le séquestre doit s'occuper. Par conséquent, lorsque le professionnel est au courant de la somme d'argent en question, les tribunaux vont imposer une limite sous-entendue, implicite ou maximum sur les honoraires qu'ils permettront d'exiger, cette limite étant fondée sur ce qu'ils estiment raisonnable, compte tenu de la valeur monétaire en cause dans chaque cas particulier; voir l'arrêt *J.W. Cowie Engineering Ltd. v. James K. Allen et al.* (1982), 52 N.S.R.(2d) 321; 106 A.P.R. 321 (C.A.).

[12] De façon générale, les tribunaux sont peu disposés à accorder une rémunération basée uniquement sur le temps consacré par la personne désignée dans l'exercice de ses fonctions: voir l'arrêt *Re Amalgamated Syndicate*, [1901] 2 Ch. 181. Ils préfèrent accorder, soit une somme forfaitaire, soit une commission sur le montant recouvré ou réalisé par le séquestre. Cependant, qu'il s'agisse d'une commission ou d'une somme forfaitaire, la rémunération accordée à un séquestre doit être juste et raisonnable, compte tenu de tous les faits déterminants de la cause en question. Lorsqu'un tribunal détermine si la rémunération d'un séquestre est juste et raisonnable, il est bon, à mon avis, qu'il se rappelle les commentaires du juge Barker à ce sujet, faits dès 1894 dans l'arrêt *Hall v. Slipp*, 1 N.B. Eq. 37:

> ... alors qu'il importe d'accorder une rémunération

1983 CanLII 4086 (NB CA)

conforme à la responsabilité assumée dans l'exercice des fonctions, il importe également de ne pas permettre que ces fonctions deviennent un simple moyen d'engloutir l'argent des créanciers et d'autres personnes dont il incombe à la présente Cour de protéger les intérêts.

. . .

... bien qu'en règle générale, une commission de cinq pour cent sur les recettes réalisées soit acceptable, des exceptions sont faites dans certains cas particuliers, soit en augmentant la rémunération, si un travail considérable est nécessaire, soit en la diminuant, si les sommes en cause sont importantes ou si peu de travail a été requis.

. . .

Il est évident que si les dépenses nécessaires engagées dans l'administration d'une succession dans la présente Cour constituent une proportion aussi élevée du montant en cause, en pratique le résultat est simplement d'enrichir les auxiliaires de la justice aux dépens des demandeurs. A mon avis, cependant, la pratique de la Cour ne permet pas un pareil résultat; et je crois qu'il est bon de faire remarquer que c'est une erreur de présumer que les personnes qui exercent les fonctions de séquestre ont droit de réclamer ou obtiendront une rémunération fixée conformément à un tarif applicable aux meilleurs avocats.

[13] Nulle preuve n'a été fournie, en l'espèce, d'une convention explicite ayant trait à la rémunération devant être versée au séquestre. Je ne crois pas non plus qu'il convienne, dans la cause qui nous occupe, de limiter la rémunération payable au séquestre à un pourcentage raisonnable de l'actif en question. Par contre, si je confirmais la décision du juge de première instance, je permettrais, de fait, au séquestre d'obtenir une rémunération équivalente à 35% du montant réalisé par la vente de l'actif.

[14] Le dossier révèle que le séquestre a vendu le stock de Chase Camera & Supply Limited pour la somme de 30 075 $ et que les recettes globales provenant de toutes les sources s'élevaient à 36 566 $. Le séquestre a demandé des honoraires de 11 730 $ pour ses services et il a prélevé cette somme des fonds qu'il avait en sa possession, remettant le

1983 CanLII 4086 (NB CA)

solde à la banque. Aucun élément de preuve n'a été fourni pour démontrer que la mise sous séquestre dont il est question avait présenté quelque complication. De fait, la preuve a plutôt démontré que les dirigeants de Chase Camera & Supply Limited ont beaucoup aidé le séquestre dans la liquidation de l'actif. Compte tenu de toutes les circonstances, je suis d'avis que les honoraires déduits par le séquestre, qu'un employé de la banque a qualifiés d'"élevés", étaient déraisonnables par rapport à la somme réalisée sur la vente du stock et que ces droits auraient dû être réduits. Je suis d'avis que le juge de première instance, en omettant d'effecteur cette réduction, a commis une erreur de principe.

[15] L'avocat de la Banque fédérale de développement n'a pas appelé à témoigner les personnes qui ont réellement effectué le travail relatif à la mise sous séquestre en question, à l'exception de M. Fowler qui en était responsable. Il n'a pas non plus présenté en preuve aucun "enregistrement ou inscription d'un acte, d'une condition ou d'un événement dans le cours normal" des affaires du séquestre. Faute d'une telle preuve, il est difficile de voir de quelle façon l'art. 49 de la *Loi sur la preuve* pourrait aider le séquestre à établir la légitimité de son compte. Oui plus est, la seule preuve fournie, à l'exception de celle obtenue de M. Fowler, ayant trait à la légitimité du compte du séquestre, a été le témoignage de l'avocat-maison de la banque qui a déclaré que, dans une cause semblable à celle qui nous occupe, "il se serait attendu à une facture du séquestre de 5 000 $, disons entre 4 000 $ à 6 000 $, ce qui aurait été une somme que nous aurions pu raisonnablement prévoir". Compte tenu de cette preuve, je suis d'avis qu'une rémunération raisonnable à accorder au séquestre, en l'espèce, serait la somme de 6 000 $.

[16] Ainsi que l'a indiqué mon collègue Ryan, il ne nous incombait pas de trancher la question du bien-fondé d'une mise en demeure de payer effectuée le jour même où la banque avait été avisée de la vente possible du stock de la compagnie. Il n'a pas non plus été indiqué de façon précise sur quel manquement de la compagnie s'était fondée la banque pour réclamer le droit de cristalliser sa débenture. Ces questions n'ont donc pas été considérées dans le présent appel.

[17] Je suis d'avis d'accueillir l'appel et de réduire la somme du jugement rendu en première instance à 4 591,03$. Les défendeurs ont droit aux dépens du présent appel que je fixe à 750 $.

1983 CanLII 4086 (NB CA)

[18] M. LE JUGE RYAN. [dissident]: Le présent appel est formé par les défendeurs contre une décision d'un juge de la Cour du Banc de la Reine qui a rendu jugement en faveur de la demanderesse contre les défendeurs, conjointement et solidairement, pour la somme de 10 249,03$ avec dépens. L'action de la demanderesse contre les défendeurs avait trait à un solde qu'elle prétendait lui être dû aux termes d'une garantie consentie par les défendeurs pour garantir un prêt de 40 000 $ que la demanderesse avait avancé à Chase Camera & Supply Ltd.

1983 CanLII 4086 (NB CA)

[19] Voici les faits tels qu'énoncés aux p. 163 et 164 de la décision du juge de première instance publiée dans (1982), 38 N.B.R.(2d) 162; 100 A.P.R. 162:

> Au cours de l'été 1978, la demanderesse a prêté 40 000 $ à la compagnie. Pour garantir ce prêt, la demanderesse a accepté une débenture qui lui donnait le droit de nommer un séquestre. Les défendeurs ont garanti ce prêt. La débenture et la garantie ont été reçues en preuve.
>
> Aucun incident n'est survenu dans les relations entre la compagnie et la demanderesse jusqu'au 27 août 1979 alors qu'une suite d'événements s'est rapidement déroulée. Au cours de la matinée du jour susmentionné, M. Belyea a rendu visite à M. Donald O'Leary, un agent de crédit principal de la demanderesse, et l'a informé que la compagnie se trouvait dans une situation financière précaire et que M. Sam Gamblin, de la firme Gem Photo, était prêt à acheter le stock de la compagnie pour la somme de 40 000 $. M. Belyea a signalé que ce montant était plus que suffisant pour acquitter la dette de la compagnie envers la demanderesse, qui était alors d'environ 34 000 $. M. Belyea a demandé à la demanderesse l'autorisation d'effectuer cette opération.
>
> Au cours de l'après-midi du même jour, la demanderesse a conclu qu'elle ne pouvait pas consentir à cette opération et elle a désigné la firme H.R. Doane Ltd. à titre de séquestre et lui a demandé de prendre les mesures nécessaires pour effectuer la liquidation du stock. M. Bev Fowler, un associé de la firme Doane, était le représentant de la firme responsable de cette liquidation.
>
> M. Fowler a décrit les diverses possibilités qui s'-

offraient à lui à l'époque de même que ses efforts pour vendre le stock en question à une compagnie de Bridgewater en N.-E. pour la somme de 30 000 $, laquelle a été conclue après un appel d'offres. La demanderesse a également réalisé la somme de 4 925,24$ en plus de la somme réalisée par le séquestre. Un solde de 7 749,03$ restait impayé sur la somme de 34 231,85$ due à la date de la mise en demeure. M. O'Leary a mentionné un solde de 8 279,30$ dû le 10 novembre 1981, mais il n'a pas expliqué davantage la provenance de ce montant plus élevé.

[20] Lors d'une conférence préalable au procès, les parties ont convenu que les questions à être tranchées par le juge de première instance étaient les suivantes:

a) La demanderesse a-t-elle agi de façon raisonnable en refusant d'accepter l'offre de M. Gamblin? et

b) Les honoraires de 11 730 $ réclamés par le séquestre étaient-ils raisonnables?

[21] Le présent appel soulève les mêmes questions.

[22] Pour ce qui est de la première question, le juge de première instance a conclu que la demanderesse était justifiée dans son refus d'accepter l'offre de 40 000 $ faite par M. Gamblin pour le stock de Chase Camera & Supply Ltd., parce qu'une somme d'argent importante était due à la demanderesse, que la valeur du stock sur lequel elle détenait une sûreté lui était inconnue et que le défendeur Belyea avait divulgué à la demanderesse la situation financière précaire de la compagnie. Il ne fait aucun doute que la demanderesse considérait que ces facteurs mettaient en danger sa position de créancier. A mon avis, le refus d'accepter l'offre de Gamblin constituait un jugement d'homme d'affaires que je ne peux qualifier de déraisonnable.

[23] Dans son exposé, l'avocat des défendeurs a soutenu que non seulement la demande d'honoraires du séquestre était déraisonnable, mais que celui-ci n'avait pas prouvé que le travail pour lequel il réclamait une rémunération avait de fait été accompli. M. Fowler, un comptable agréé et syndic autorisé, était un vérificateur associé de la firme H.R. Doane Limited, se spécialisant dans le domaine de l'insolvabilité. Il a expliqué que chaque employé de la firme est tenu d'inscrire sur une fiche de travail les

1983 CanLII 4086 (NB CA)

heures qu'il a consacrées chaque jour aux divers comptes sur lesquels il travaille. M. Fowler a ajouté qu'à la fin de chaque semaine, les heures sur les fiches sont calculées et ces renseignements sont inscrits dans le compte du grand livre de chaque client. Il a produit des photocopies de toutes les fiches de travail et des pages du grand livre relatives au compte de Chase Camera et, du commun accord des avocats, ces photocopies ont servi à déterminer le temps consacré par chaque employé qui avait travaillé sur ce compte.

1983 CanLII 4086 (NB CA)

[24] Dans ses efforts pour prouver la légitimité du compte présenté par le séquestre, l'avocat de la demanderesse n'a pas présenté en preuve les fiches de travail des employés et les pages du grand livre relatives au client et il ne s'est pas prévalu de l'art. 49 de la *Loi sur la preuve*, L.R.N.-B. 1973, c. E-11, dont voici le texte:

> L'enregistrement ou l'inscription d'un acte, d'une condition ou d'un événement dans le cours normal des affaires d'une entreprise sont, dans la mesure où ils sont pertinents, admissibles comme preuve de leur contenu si la cour est convaincue de leur identité et est convaincue que l'enregistrement a été fait ou l'inscription établie au moment ou quasi au moment de l'acte, de la condition ou de l'événement.

[25] Quoique les photocopies des fiches de travail et des feuilles du grand livre relatives au client n'ont pas été présentées en preuve, l'avocat des défendeurs a contre-interrogé longuement M. Fowler sur leur contenu comme si ces photocopies avaient été présentées en preuve. Pour cette raison, et parce que les avocats des parties, lors d'une conférence préalable au procès, avaient convenu que la question à trancher par le juge de première instance, relativement au compte du séquestre, était de savoir si ce compte était raisonnable et juste, je suis convaincu que le juge de première instance avait droit de se fonder sur les inscriptions contenues sur les fiches de même que sur le témoignage verbal de M. Fowler pour décider si le compte en question était raisonnable et juste. La conclusion du juge de première instance selon laquelle le compte du séquestre était juste et raisonnable constitue une conclusion sur les faits qui est appuyée par la preuve. Qui plus est, les défendeurs n'ont fourni aucune preuve pour établir que ce compte était déraisonnable ou que le travail n'avait pas été effectué. Puisque la conclusion du juge de première instance ne contient aucune erreur manifeste ou dominante,

la présente Cour ne la modifiera pas.

[26] Le présent appel n'a pas soulevé la question de la nécessité de donner un avis raisonnable à un débiteur lorsqu'une dette est remboursable à demande. Cette exigence a été illustrée par la décision de la Cour suprême du Canada dans l'arrêt *Ronald Elwyn Lister Limited, Lister and Lister c. Dunlop Canada Limited* (1982), 42 N.R. 181, prononcée le 31 mai 1982 après la clôture des débats sur le présent appel. Il ne nous incombe pas, dans le présent appel, de déterminer si les circonstances en l'espèce donnent lieu à une cause d'action contre la demanderesse.

[27] Pour les raisons précitées, je suis d'avis de rejeter l'appel avec dépens qui seront fixés conformément au tarif en vigueur au moment de l'introduction de l'action.

Appel accordé.

1983 CanLII 4086 (NB CA)

Tab 3

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONSC 365
COURT FILE NO.: 35-1537675T
DATE: 2014/01/22

2014 ONSC 365 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

IN BANKRUPTCY AND INSOLVENCY

RE: Bank of Nova Scotia (Plaintiff)

- and-

Daniel A. Diemer o/a Cornacre Cattle Co. (Debtor)

BEFORE: A. J. GOODMAN J.

COUNSEL: J. Cooke, on behalf of the Debtor

D. Smith, for the Receiver

HEARD: January 3, 2014

ENDORSEMENT

[1] This is a motion to settle counsel's fees in relation to the receivership of Daniel Diemer o/a Cornacre Cattle Co. ("the Debtor"). PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver "(the Receiver") of the debtor seeks an order approving the fees and disbursements of its counsel, Borden Ladner Gervais LLP ("BLG").

[2] On October 23, 2013, I approved the Second Report as well as the activities and fees of the receiver. While BLG's interim fees of $100,000.00 were approved, the parties were directed to return to court on January 3rd for the purposes of a determination with respect to the approval of the balance of BLG's fees and disbursements plus any original estimates to completion.

General Principles

[3] One of the leading authorities dealing with approval of the fees of a receiver is found in the case of *Re Bakemates International Inc.*, [2002] O.J. No. 3659. In *Re Bakemates,* the Ontario Court of Appeal held that when a receiver asks the court to approve its compensation, there is an onus on the receiver to

prove that the compensation for which it seeks the court's approval is fair and reasonable and a court could adjust the fees and charges of the receiver.

[4] In *Re Bakemates* Borins J.A. discussed the purpose in passing the receiver's accounts and opined that the process is established to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. In determining what is fair and reasonable remuneration, Borins J.A. observed that there is no guideline controlling the quantum of fees.

[5] The Court of Appeal outlined principles that a court ought to adopt when passing the accounts of a receiver. They include: the accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer), and the receiver and its solicitor's accounts should be verified by an affidavit.

[6] In *BT-PR Reality Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct.) Farley J. held at paras 22 & 23:

> The issue on a s. 248(2) hearing is whether the fees charged by the receiver are fair and reasonable in the circumstances as they existed - that with the benefit of the receivership going on, not with the benefit of hindsight. I would also note that it would be an unusual receivership and an unusual receiver where a receiver was able to be up to full speed instantaneously upon its appointment. There is a learning curve for the particular case and probably a suspicion equation to solve. The receiver must demonstrate that it acted in good faith and in the best interests of the creditor as opposed to its own interest or some third party's interests. The receiver must also demonstrate that it exercised the reasonable care, supervision and control that an ordinary man would give to the business if it were his own: see *Re Ursel Investments Ltd*. (1992), 10 C.B.R. (3d) 61 (Sask.C.A.). The receiver is not required to act with perfection but it must demonstrate that it acted with a reasonable degree of confidence: see *Ontario Development Corp. v. I.C. Suatac Construction Ltd*. (1978), 26 C.B.R. (N.S.) 55 (Ont. S.C.).
>
> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as

2014 ONSC 365 (CanLII)

> reasonably possible. Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

2014 ONSC 365 (CanLII)

[7] In an authoritative case from New Brunswick, the Court of Appeal in *Federal Business Development Bank v. Belyea* (1983), N.B.J. No. 41, 46 C.B.R. 244 (NB CA), (cited with approval by the Ontario Court of Appeal in *Re Bakemates*), held that the underlying premise for compensation is "usually allowed either as a percentage of receipts or a lump sum based upon time, trouble and degree of responsibility involved". The governing principle is that compensation allowed a receiver should be measured by the fair and reasonable value of his service; and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible.

[8] In *Belyea* Stratton J.A. - in referring to *Williston on Contracts* (3rd ed. Vol. 10) - stated at para. 11:

> …even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case.

[9] The jurisprudence from *Belyea* advances factors that a court ought to consider in assessing the compensation of a receiver, (albeit the discussion in the case was in the context of *quantum meruit*). They 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 and 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.

[11] I note a similar approach in addressing the appropriate principles and factors to be considered is found in the British Columbia Court of Appeal case of *Bank of Montreal v. Nicar Trading Co.*, [1990] B.C.J. No. 340.

Position of the parties

[12] Mr. Smith submits that the Receiver and its counsel played an integral role in maximizing value for the assets by finalizing an agreement of Purchase and Sale for the sale of substantially all of the debtor's assets in respect of a transaction that was entered into prior to the receiver's appointment and which the receiver only found out about after its appointment. The receiver and its counsel took significant steps to ensure that the transaction was closed in short order so that each of the secured creditors would be repaid in order to reduce additional costs and interest in regards to their respective debts.

[13] Mr. Smith submits that the receiver faced many challenges in this proceeding as set out in the Second Report, including: being advised on Labour Day that the debtor had taken it upon himself to have 60 additional cows delivered to the farm the next day; the debtor's delays in providing the receiver with a plan for relocating the livestock and which was required to be removed from the farm by the closing date; the conclusion of an agreement with the purchasers of the farm whereby the equipment that did not form part of the transaction would remain at the farm for a period of 60 days at no cost to the estate; dealing with the debtor's relocation of the excluded assets to two farms owned by different parties and inquiries that had to make as a result of same; the unilateral removal of a piece of equipment by the debtor from the farm (after the close of the transaction) and inquiries that the receiver and its counsel had to make in respect of same; and responding to debtor's counsel in respect of his instructions to bring a motion to seek a change of venue from London to Windsor. The receiver spent considerable time dealing with various steps required to obtain the consent of the Dairy Farmers of Ontario for the transfer of the milk quota to the purchaser.

[14] In addressing the McNevin affidavit, Mr. Smith argues that the affidavit provides information with respect to the rates of partners, associates, students-at-law and law clerks who are practicing in either London or Windsor, Ontario.

2014 ONSC 365 (CanLII)

As such, the McNevin Affidavit does not provide any information with respect to professionals practicing in Toronto, much less professionals practicing in the Toronto market in the area of insolvency and restructuring.

[15] In furtherance of his argument, Mr. Smith provided various affidavits in support of BLG' counsel's fees claimed for this receivership. These included, amongst others, the affidavit of Melaney J. Wagner sworn July 4, 2013, in support of a motion for the approval of the fees and disbursements of Goodmans LLP in connection with the insolvency proceedings commenced by Extreme Fitness, Inc. under the *Companies' Creditors Arrangement Act*. Ms. Wagner's hourly rate is $775.00 per hour. The affidavit of Adam M. Slavens sworn October 12, 2011 in support of a motion for the approval of the fees and disbursements of Torys LLP in connection with the receivership proceedings of Voyageur Maritime Trading Inc. As the Slavens Affidavit discloses, David Bish, a partner at Torys practicing in the area of insolvency and restructuring has an hourly rate of $800.00. The affidavit of Robin B. Schwill sworn December 3, 2012, in support of a motion for the approval of the fees and disbursements of Davies Ward Phillips & Vineberg LLP in connection with proceedings under the *Business Corporations Act* for the winding-up of Coventry Inc. As a partner, Mr. Schwill's hourly rate is $825.00 per hour and he practices in the area of insolvency and restructuring. The affidavit of Derek Powers sworn July 15, 2013 in support of a motion for the approval of fees and disbursements of BLG in respect of a receivership of Interwind Corp. Mr. Power's rate is $750.00 per hour. The affidavit of Mary Arzoumanidis sworn November 13, 2013 in support of a motion for the approval of fees and disbursement of BLG under insolvency proceedings commenced by TBS Acquiereco. Ms. Arzoumanidis' hourly rate is $750.00.

[16] Mr. Jaipargas, BLG's principal counsel on the file submitted an affidavit wherein he states, *inter alia*, "the Original Estimate to Completion needs to be revised such that the estimate to completion is $30,000.00, plus disbursements. He goes on to state that "the last date that I entered a docket on this matter was October 14, 2013. Since that date I have done additional work on this matter including, but not limited to, the following: finalizing the motion materials in respect of the motion heard by the Court on October 23, 2013; (ii) dealing with the issues arising at the hearing on October 23, 2013; (iii) dealing with an issue raised by counsel for the Debtor in respect of the scope of the Approval and Vesting Order dated September 17, 2013 of Madam Justice Leitch made in these proceedings; and (iv) preparing this affidavit in response to the McNevin Affidavit. I have not entered a docket for dealing with all of these matters, nor do I intend to do so. Further, I do not intend to record any further time in connection with this matter, unless there is significant additional work required by BLG in connection with the motion returnable before Mr. Justice Goodman on January 3, 2014."

2014 ONSC 365 (CanLII)

[17] Mr. Cooke submits that receiver and receiver's counsel effectively completed their task without delay or significant problems. While Mr. Cooke does not take issue with the work performed by counsel, he submits that the rates charged by counsel and his firm are excessive and unreasonable. Although Mr. Cooke takes specific issue with BLG counsel's rates, I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension- the hours) submitted for reimbursement.

Analysis

[18] As a general principle, the assessment of fees are in the discretion of the court. There is no fixed rate or tariff for determining the amount of compensation to pay a receiver or receiver's counsel. Similar to the approach in assessing costs, in approving a receiver's accounts, a determination should be made as to whether the remuneration and disbursements incurred in carrying out the receivership were fair and reasonable, rather than an amount fixed by the actual costs charged by receiver's counsel. The court must, first and foremost, be fair when exercising its discretion on awarding fees.

[19] In my view, in an assessment of fees, there must be practical and reasonable limits to the amounts awarded and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated. It is not necessary for me to have to go through the dockets, hours, the explanations or disbursements, line by line, in order to determine what the appropriate fees are. Nor is the court to second-guess the amount of time claimed unless it is clearly excessive or overreaching. The appellate courts have directed that judges should consider all the relevant factors, and should award costs (or fees) in a more holistic manner. However, when appropriate and necessary, a court ought to analyze the Bill of Costs or dockets in order to satisfy itself as to the reasonableness of the fees submitted for consideration.

[20] Indeed, the fixing of costs is not an unusual task for the court. Superior Court judges are expected to fix costs following not only routine motions but also lengthy trials. Although the factors for assessing costs may be different, the type of analysis required for assessing fees is similar in approach. The assessment of counsel's fees should not just be a matter of calculating the number of hours spent times a reasonable hourly rate. There should be some correlation of the costs to the benefits derived from the receivership. This cost-benefit analysis need not be precise or based upon the advice of expert analysis.

[21] When a receiver is appointed, the receiver may find the debtor's business affairs somewhat chaotic and the receiver may have to spend considerable time,

2014 ONSC 365 (CanLII)

organizing the affairs of the business in order to be in a position to administer the receivership properly. Accordingly, the time spent must be viewed in the context of the receiver's duty to preserve the assets of the debtor and realize on those assets and administer the estate and the rreceiver's ability to retain the services of legal counsel to assist in those duties as required. However, as I will discuss momentarily, that is not the case here.

2014 ONSC 365 (CanLII)

[22] The relevant clauses in Carey J.'s order of August 20, 2013 include:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

[23] The Order is clear and unambiguous. The Order contemplates standard rates, namely the hours expended times the lawyer's rate.

[24] As outlined in the discussion in both *Belyea* or *Nicar*, the factors in play for my consideration include, a) the nature, extent and value of the assets handled; b) the complications and difficulties encountered; c) the degree of assistance provided by the company, its officers or its employees, and d) the cost of comparable services when performed in a prudent and economical manner.

[25] In this receivership we are talking about a family farm of an approximate value of $8.3 million. The secured creditors have been paid out in full and there are excess funds remaining from the receivership. Unsecured creditors have filed claims and that process is now engaged and ongoing.[1]

[26] Mr. Smith argues that Mr. Cooke did not employ the "come-back" provision to vary the terms of the rates. In response, Mr. Cooke submits that he placed

---

[1] In my October 23, 2013 order I substituted BDO Canada Limited as receiver.

BLG on notice about his concerns about the escalation of fees very early on in the receivership. Mr. Smith takes no issue with that assertion and I am satisfied that BLG was put on notice about this issue. In any event, It seems to me that the very limited duration of this receivership nullifies the impact of this submission.

[27] In a similar vein, Mr. Cooke complains that the quantum of the fees of receiver's counsel has caught his client by surprise, as no accounts were rendered. The same limited duration of this receivership also addresses, to a degree, this argument. However, while there is no obligation on receiver's counsel to come to the court often in order to seek approval of fees, when counsel waits for several months to do so, particularly in a case like this where significant costs are running up relative to the size of the estate, counsel for the receiver is at risk that when they do come to court, the fees incurred may legitimately be criticized. This is true especially in a case such as this where the tenure of the receivership is limited and the involvement of the receiver and counsel had a 'shelf-life' of approximately two months.

[28] In my view, it is not enough in these circumstances to rely on the fact that the work done was approved in a general way by an order of the court with the acknowledgment that the term "standard rates" is included. When counsel wait to bring their accounts to the court for approval, they do so at their own risk.

[29] Turning to the various affidavits filed in support of BLG's fees, I find the rates charged by other counsel as outlined in the materials referring to other insolvency work conducted by Toronto firms to be unhelpful in my assessment. For example, in the Extreme Fitness case Mr. Cooke advised that this case involved an estate of a value of $57 million and the business had 900 employees. In the winding-up of Coventry Inc. there were $73 million in assets and the fees were $139,000.00. In the Commercial list matter of Interwind Corp the assets were $311 million and there was over 6 months of involvement in the receivership with fees of $131,000.00. In the TBS Acquireco matter, the estate was valued at $147 million with 8 months of work required and the fees were $556,000.00. Interestingly, I am advised by counsel that the Voyager Maritime case is very similar in nature to the one before me with legal fees assessed at $73,000.00. Mr. Smith did not dispute any of Mr. Cooke's assertions about these accounts. As mentioned, this particular case deals with $8.3 million in assets. The quantum and scale of effort required in the other cases presented for comparative purposes pale significantly in comparison to this receivership.

[30] In my view, the assumption that the court will automatically approve a "usual" hourly rate for Receiver's counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312, the court, with the

2014 ONSC 365 (CanLII)

assistance of opposing counsel, has to play the role of what a client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.

[31] It is also important to note that the receiver and its counsel have been assisted by the fact that the debtor has cooperated. In fact, in this receivership, the debtor continued to operate the farm pursuant to an agreement made on August 30, 2013. There was little involvement expended by the receiver or counsel requiring the day-today management of the business or seeking out a potential purchaser. The agreement of Purchase and Sale had already been completed and was substantially finalized prior to the receiver's involvement.

[32] I find that the entire scope of the receivership here was modest. All of the secured claimants have recovered and early on in the receivership receiver's counsel should have considered whether or not the firm's usual hourly rates were suitable for this receivership. In fact, the usual rates, (which Mr. Cooke argues are at the extreme "high end" of the scale), are in my view, not even warranted from the outset. As Farley J. opined in *BT-PR Realty*, an agreement or order respecting a receivership "is not a licence to let the taxi meter run without check".

[33] With this background in mind, I have considered both the hourly rates charged by the Receiver's counsel, the time spent and the work done, in assessing the reasonableness and fairness of the accounts. Clearly, the size of the receivership estate should have some bearing on the hourly rates of counsel.

[34] In this matter, I am persuaded that the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership. I am of the view that an adjustment ought to be made to reflect the fact that, particularly after the size of the estate became known, the "usual" or "standard" rates of counsel were too high relative to the size of the estate.

[35] Many of the matters listed such as the sale and disposition of the property, and communication with various Boards or interested parties and matters of that sort is work that I would have expected the receiver's junior lawyers or staff to take care of at a lower cost. I query why a senior partner had to travel from Toronto to attend court in London when the motions were unopposed by all interested parties. The only dispute in this case was whether Windsor or London was the appropriate venue, an issue that was quickly addressed and resolved.

[36] Mr. Prince on behalf of the receiver deposed that he had reviewed the fees, and he relied on his knowledge that the rates charged by the receiver and BLG are comparable to the rates charged for the provision of similar services by

2014 ONSC 365 (CanLII)

other accounting and law firms. I do not fully accept Mr. Prince's opinion endorsing the fees rendered by BLG as outlined in para 10 and 12 of his affidavit.

[37] While, an assessment of the fees in this matter is a difficult task given the information that I have to consider and the breadth of materials filed, it is not impossible. It would have been preferable, if time and expense would permit, to have opposing counsel cross-examine Mr. Jaipargas on his affidavit with respect to the accounts.

[38] I do not accept the assertions raised in Mr. Jaipargas' affidavits. In my review of the fees found in Appendix "X" of the October 23rd Motion Record, there appears to be excessive work done by senior counsel on routine matters. I also have concerns about the amount of hours expended for matters that on the face of the dockets appear to be administrative and not requiring the amount of hours docketed. I also note that senior real estate partner was engaged to conduct what appears to be relatively modest or routine work on this file.

[39] The fact work was done by lawyers at higher hourly rates exacerbates the problem of the fees, as the rates claimed for senior lawyers involved in this case are as high as $750.00 and $760.00 per hour. In my view, other lawyers should have done much of this work at significantly lower rates.

[40] Mr. Smith qualified his submission by claiming that while this receivership was not complex, there were "challenges raised by the debtor". I reject his assertions about any difficulties or complexities which arose in this receivership. In my view, the materials filed and counsel's submissions were an attempt to exaggerate and justify the fees by asserting a degree of complexity or difficulty that clearly did not arise in this case. This receivership was unlike a case where the receiver steps in as an administrator or manager and runs the business. We have the divestment of the farm and assets with some modest ancillary work.

[41] Bills for legal fees have been submitted to the date of the hearing. I reject Mr. Jaipargas' contention that there was a substantial write-down or reduction of fees. BLG claims approximately $30,000.00 for matters as yet unascertained or contingent. Frankly, this position is not only conflicting to Mr. Jaipargas' assertion that he had foregone additional work post October 2013, but in view, the entire submission is somewhat disingenuous.

[42] Consideration must be given to the number of hours docketed to accomplish particular tasks. Nonetheless, in considering the number of hours and the nature of the work done on this matter, I am of the view that the sheer number of hours put in, given the nature and scope of this receivership, reflects a significant degree of inefficiency when I consider what work has been done. Part

2014 ONSC 365 (CanLII)

of my concerns about the inefficiencies and whether all of the work done was warranted, can be explained by the fact that 11 different lawyers charged time to the file. Although some of that can be justified on the basis that different expertise was needed (particularly insolvency versus real estate), this always raises a concern about duplication of effort. In that regard, I reviewed and considered the dockets of M.B. Shopiro, M. Arzoumanidis and R. Jaipargas found in Appendix "X" of the motion materials filed for the October 23rd hearing. In my view, some of the work could have been done at a lower hourly rate and with due regard to the hours being expended on various tasks.

[43] To illuminate his point, Mr. Cooke calculated the average fee rate for counsel juxtaposed with the total amounts charged by BLG. He submits that the entire quantum sought by BLG as reflected in the dockets would translate to 5.76 hours of work a day for each and every single day of the 69 day receivership; or $3,700.00 per day for an $8.3 million estate with $500,000.00 in assets remaining to be distributed.

[44] As mentioned, in this case, I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable.

[45] Although I could have easily reduced the entire amount of hours charged to arrive at a just result, I accept Mr. Cooke's analysis and approach to the quantum of fees to be assessed in relation to counsel's activities for this receivership. As there are several methods to achieve what I believe is a reasonable amount for receiver's counsel's fees, in arriving at such an approach, I accept the affidavit of Tanya McNevin. I find that comparable rates charged by counsel and law clerks in London and environs, as illustrated in the affidavit, to be applicable in arriving at a just compensation. Frankly, in this case, it matters little whether I reduce the fees based on the rates charged or cut the overall number of hours expended. The net result is the same, which is to address the lack of proportionality and reasonableness of BLG's fees in this case.

[46] Hence, I adopt the average London rate of $475.00 for lawyers of similar experience and expertise as proffered by Mr. Cooke and apply it to reduce the amounts claimed accordingly. Indeed, the application of these rates to my overall assessment is not an exact science. I pause to add that had Mr. Cooke not provided an approach to the quantum, I may have been persuaded to further reduce counsel's fees to reflect what I find are just and reasonable.

[47] My decision is not be construed in any fashion to express that the rates charged by lawyers in Toronto have no applicability in matters arising in the

2014 ONSC 365 (CanLII)

Southwest Region. Nor am I discounting the sage and instructive principles that are provided by authorities arising out of the Commercial List in Toronto on the subject of appropriate remuneration for counsel involved in insolvency matters. However, I have not lost sight of the importance that the position of the receiver and its counsel and their correlative responsibilities should not be made into a means of absorbing money of creditors, debtors and others whose interest this court must protect. This case is fact specific and I am considering the overall reasonableness of the fees presented here.

2014 ONSC 365 (CanLII)

Conclusion

[48] This receivership deals with the life savings of a farmer. All secured creditors have been fully reimbursed. No doubt, the debtor will be impacted by the legal fees charged and, at the end, there will be very little left for him. In considering the ambit of Carey J.'s order and having conducted a review of the scope of BLG's fees in the context of this receivership, it seems to me that BLG had not assessed their reasonableness of their fees and had failed to minimize duplication or effect efficiencies.

[49] In my opinion, BLG's claim of $255,955.00 for its fees in this relatively straightforward receivership with the actual amount of work involved here is nothing short of excessive. A significant reduction of receiver's counsel's fees is warranted. Fees claimed for any revised estimates to completion are denied.

[50] In the exercise of my discretion, BLG's fees are assessed in the total amount of $157,500.00 (all inclusive). From this total, the amount of $100,000.00 is to be deducted as provided in the October 23rd Order approving BLG's interim payment. BLG is entitled to its disbursements of $4,434.92 plus applicable HST.

[51] Given the nature of this hearing, and my reticence to have any costs extracted out of the remainder of the estate, it is my view that each party shall bear their own costs of this motion.

"A. J. Goodman J."
A. J. Goodman J.

Date: January 22, 2014

Tab 4

L. David, Personally, and as Estate Trustee of the Estate of H. David v. Transamerica Life Canada et al.
[Indexed as: David v. Transamerica Life Canada]

Ontario Reports

Ontario Superior Court of Justice,

Price J.

March 11, 2016

131 O.R. (3d) 314 | 2016 ONSC 1777

2016 ONSC 1777 (CanLII)

Case Summary

Civil procedure — Costs — Entitlement to costs — Applicant applying unsuccessfully for declaration that change of beneficiary of life insurance policy in her favour was invalid — Court finding that applicant had prepared change of beneficiary form and that form had been altered after insured signed it and did not reflect insured's wishes — Applicant's conduct combined with insurer's unnecessary delay and its own unreasonable conduct in failing to apply for interpleader order and pay insurance proceeds into court or to participate in mediation being principal cause of litigation — Applicant's claim for costs against insurer and insurer's claim for costs against applicant denied — Both applicant and insurer ordered to pay individual respondents' costs.

D designated the individual respondents, the applicant's half-siblings, as the beneficiaries of his life insurance policy with the respondent insurer. The insurer subsequently received a change of beneficiary form with D's signature, the effect of which would have been to transfer 75 per cent of the insurance proceeds to the applicant. Because there were errors in the change of beneficiary form, the insurer did not act on it, but failed to notify D. After D's death, the applicant claimed 75 per cent of the insurance proceeds. When the insurer refused her claim, she applied for a declaration that the change of beneficiary form was valid and that she was entitled to 75 per cent of the proceeds. Her application was dismissed. The court found that the applicant and her brother had likely collaborated in the preparation of the form, that the form had been altered after D signed it, if he did, in fact, sign it, and that D did not want or intend to change the beneficiaries. The applicant sought her costs against the insurer alone on the ground that its negligent administration of the insurance policy gave rise to the litigation and that its approach to the litigation was unreasonable and caused the parties to incur unnecessary costs. The insurer claimed its costs against the applicant on the ground that she unreasonably insisted on it remaining a party to the proceeding after it paid the balance of the disputed proceeds into court. [page315]

Held, the applicant and the insurer should pay their own costs and should pay the individual respondents' costs.

The insurer was not liable to pay the applicant's costs because it failed to send a notice of

incomplete information to D and thereby precipitated the litigation. It was, in fact, the applicant's contrivance of the change of beneficiary form and her attempt to secure 75 per cent of the proceeds for herself that were the principal causes of the litigation. The application was utterly without merit. The insurer acted reasonably in refusing to produce its complete file to the applicant before she brought her application because she was not in fact a beneficiary and because she had not produced a probated copy of D's will naming her as estate trustee. However, the insurer acted unreasonably in not applying in a timely manner for an interpleader order and paying the insurance proceeds into court after the application was commenced. Had it applied for an interpleader order, its file would have been produced to the other parties, who would have been in a better position to assess their respective positions and to resolve their dispute. The insurer also acted unreasonably in refusing to participate in mediation. While the *Insurance Act*, R.S.O. 1990, c. I.8 did not impose a statutory obligation on the insurer to mediate in the circumstances of this case, the insurer's unwillingness to do so was a factor that could be considered as evidence of unreasonable conduct which contributed to the bringing of the application and caused the parties to incur unnecessary costs. Where it not for the suspicious circumstances in which the change of beneficiary form was prepared, the insurer would have been ordered to pay the applicant's costs also. The applicant was ordered to pay a portion of the individual respondents' costs fixed at $33,500, and the insurer was ordered to pay a portion of the individual respondents' costs fixed at $15,500.

Carter v. Junkin (1984), 47 O.R. (2d) 427, [1984] O.J. No. 3293, 11 D.L.R. (4th) 545, 6 O.A.C. 310, 7 C.C.L.I. 217, [1984] I.L.R. Â1-1815 at 6982, 27 A.C.W.S. (2d) 64, 1984 CanLII 1821 (Div. Ct.); *Muirhead v. York (Regional) Police Services Board*, [2015] O.J. No. 1674, 2015 ONSC 2142, 19 C.C.L.T. (4th) 164, 251 A.C.W.S. (3d) 399 (S.C.J.); *White v. Gicas*, [2014] O.J. No. 3036, 2014 ONCA 490, 98 E.T.R. (3d) 197, 323 O.A.C. 79, 242 A.C.W.S. (3d) 500, **consd**

Other cases referred to

394 Lakeshore Oakville Holdings Inc. v. Misek, [2010] O.J. No. 5692, 2010 ONSC 7238, 195 A.C.W.S. (3d) 959 (S.C.J.); *Adams v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 2269, 136 D.L.R. (4th) 12, 91 O.A.C. 367, 69 C.P.R. (3d) 364, 64 A.C.W.S. (3d) 6 (Div. Ct.); *Baldwin v. Daubney*, [2006] O.J. No. 3919, [2005] O.T.C. 1047, 21 B.L.R. (4th) 232, 152 A.C.W.S. (3d) 32, 2006 CanLII 33317 (S.C.J.); *Beasley v. Barrand* (2010), 101 O.R. (3d) 452, [2010] O.J. No. 1466, 2010 ONSC 2095, 94 C.P.C. (6th) 331, 186 A.C.W.S. (3d) 1018 (S.C.J.); *Bell Canada v. Olympia & York Developments Ltd*. (1994), 17 O.R. (3d) 135, [1994] O.J. No. 343, 111 D.L.R. (4th) 589, 70 O.A.C. 101, 26 C.P.C. (3d) 368, 1994 CanLII 239, 46 A.C.W.S. (3d) 14 (C.A.); *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 2004 CanLII 14579, 132 A.C.W.S. (3d) 15 (C.A.); *Cohen v. Brin*, [2013] O.J. No. 905, 2013 ONSC 1302, 12 B.L.R. (5th) 277 (S.C.J.); *Dallaway (Re)*, [1982] 3 All E.R. 118, [1982] 1 W.L.R. 756 (Ch. Div.); *David v. Transamerica Life Canada*, [2015] O.J. No. 4390, 2015 ONSC 5192, 11 E.T.R. (4th) 128, 53 C.C.L.I. (5th) 107, 256 A.C.W.S. (3d) 926 (S.C.J.); *Dervisholli v. Cervenak*, [2015] O.J. No. 2076, 2015 ONSC 2286, 333 O.A.C. 367, 79 M.V.R. (6th) 15, 48 C.C.L.I. (5th) 286, 72 C.P.C. (7th) 64, 253 A.C.W.S. (3d) 695 (Div. Ct.); *Droit de la famille -- 07714*, [2007] J.Q. no 2771, 2007 QCCS 1466, EYB 2007-117754; *Droit de la famille -- 102878*, [2010] Q.J. No. 11291, 2010

2016 ONSC 1777 (CanLII)

QCCS 5241, EYB 2010-181642, 195 A.C.W.S. (3d) 514; [page316] *Fazio v. Cusumano*, [2005] O.J. No. 4021, 142 A.C.W.S. (3d) 572, 2005 CarswellOnt 4518 (S.C.J.); *First Capital (Canholdings) Corp. v. North American Property Group*, [2012] O.J. No. 885, 2012 ONSC 1359, 40 C.P.C. (7th) 46, 214 A.C.W.S. (3d) 45 (S.C.J.); *G. (C.) v. M. (F.)*, [2002] J.Q. no 10490, EYB 2002-36422 (S.C.); *G. (M.) v. G. (G.)*, [2010] O.J. No. 523, 2010 ONSC 792, 83 R.F.L. (6th) 421, 185 A.C.W.S. (3d) 386 (S.C.J.); *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53, 1991 CanLII 69; *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, [2013] O.J. No. 717, 2013 ONSC 1041 (Div. Ct.); *Gratton-Masuy Environmental Technologies Inc. (c.o.b. Ecoflo Ontario) v. Building Materials Evaluation Commission*, [2003] O.J. No. 1658, 170 O.A.C. 388, 122 A.C.W.S. (3d) 645, 2003 CanLII 8279 (Div. Ct.); *Hanis v. University of Western Ontario*, [2006] O.J. No. 2763, 53 C.C.E.L. (3d) 86, 42 C.C.L.I. (4th) 65, 149 A.C.W.S. (3d) 761, 2006 CanLII 23155 (S.C.J.); *IPC Order Po-2354*, 2004 ON IPC 56471; *Jimenez v. Romeo*, [2009] O.J. No. 5248, 2009 CanLII 68472, 183 A.C.W.S. (3d) 386 (S.C.J.); *Jones v. Tsige* (2012), 108 O.R. (3d) 241, [2012] O.J. No. 148, 2012 ONCA 32, 251 C.R.R. (2d) 124, 287 O.A.C. 56, 346 D.L.R. (4th) 34, [2012] CLLC Â210-012, 89 C.C.L.T. (3d) 221, 6 R.F.L. (7th) 247, 96 B.L.R. (4th) 1; *Keam v. Caddey* (2010), 103 O.R. (3d) 626, [2010] O.J. No. 3650, 2010 ONCA 565, 267 O.A.C. 296, [2010] I.L.R. I-5032, 88 C.C.L.I. (4th) 177, 322 D.L.R. (4th) 659, 98 M.V.R. (5th) 195; *Lewis v. Stoddard*, [2006] O.J. No. 3273, 2006 CanLII 27112 (S.C.J.); *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432, 255 D.L.R. (4th) 435, 199 O.A.C. 203, 17 E.T.R. (3d) 36, 2005 CanLII 21091, 140 A.C.W.S. (3d) 220 (C.A.); *Moon v. Sher*, [2004] O.J. No. 4651, 246 D.L.R. (4th) 440, 192 O.A.C. 222, 2004 CanLII 39005, 135 A.C.W.S. (3d) 202 (C.A.); *Patene Building Supplies Ltd. v. Niagara Home Builders Inc. (c.o.b. Niagara Heritage Homes)*, [2010] O.J. No. 535, 2010 ONSC 468, 96 C.L.R. (3d) 209 (S.C.J.); *Penney Estate v. Resetar*, [2011] O.J. No. 490, 2011 ONSC 575, 64 E.T.R. (3d) 316, 197 A.C.W.S. (3d) 362 (S.C.J.); *R. (C.C.) v. R. (T.A.)*, [2014] B.C.J. No. 2035, 2014 BCSC 1480, 49 R.F.L. (7th) 415, 243 A.C.W.S. (3d) 383; *Reid Estate v. Reid*, [2010] O.J. No. 3076, 2010 ONSC 3800, 59 E.T.R. (3d) 312, 191 A.C.W.S. (3d) 342 (S.C.J.); *Richardson Estate (Re)* (2008), 93 O.R. (3d) 537, [2008] O.J. No. 4892, 300 D.L.R. (4th) 503, 69 C.C.L.I. (4th) 189, 64 R.F.L. (6th) 97, 2008 CanLII 63218, 171 A.C.W.S. (3d) 934 (S.C.J.); *Ross v. Bacchus*, [2013] O.J. No. 5793, 2013 ONSC 7773, [2014] I.L.R. I-5536 (S.C.J.); *Salter v. Salter Estate*, [2009] O.J. No. 2328, 50 E.T.R. (3d) 227, 2009 CanLII 28403, 178 A.C.W.S. (3d) 54 (S.C.J.); *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada* (2014), 119 O.R. (3d) 81, [2014] O.J. No. 573, 2014 ONCA 101, 370 D.L.R. (4th) 686, 93 E.T.R. (3d) 247, 315 O.A.C. 129, 39 R.F.L. (7th) 6, 237 A.C.W.S. (3d) 560; *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221, [2007] O.J. No. 2031, 50 C.C.L.I. (4th) 288, 157 A.C.W.S. (3d) 494, 2007 CanLII 18579 (S.C.J.); *Williston v. Hamilton (City)* (2013), 115 O.R. (3d) 144, [2013] O.J. No. 2038, 2013 ONCA 296, 306 O.A.C. 364, [2013] I.L.R. I-5429, revg [2011] O.J. No. 4103, 2011 ONSC 5400 (S.C.J.); *Young v. Arthur*, [2012] O.J. No. 1833, 2012 ONCJ 237

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131 [as am.]

Estates Administration Act, R.S.O. 1990, c. E.22, s. 2(1)

2016 ONSC 1777 (CanLII)

2016 ONSC 1777 (CanLII)

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 [as am.], ss. 21(1), 66(*a*)

Insurance Act, R.S.O. 1990, c. I.8 [as am.], ss. 203 [as am.], 214, 258.5(1), (5) [as am.], 258.6(1), (2) [as am.]

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 54(*a*)

Strong Action for Ontario Act (Budget Measures), 2012, S.O. 2012, c. 8, Sch. 23, s. 29(2)

Trustee Act, R.S.O. 1990, c. T.23, s. 47 [as am.] [page317]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1, 1.04(1.1), 24.1, 24.1.04(1)(i), 24.1.09(2), 30.04(1), (3), (4), (7), 43, 43.02(1)(b)(i), 43.04(1)(c), 57, 57.01, (1), 75.1.02, 75.2, 77, 78, 78.04

RULING on costs.

Wade Morris, for applicants.

Alwyn Phillips, for respondent Transamerica Life Canada.

Osborne Barnwell, for respondents Rhinda David and Randolph David.

Costs endorsement of **PRICE J.**: —

Nature of Proceeding

[1] This endorsement addresses the costs incurred in relation to Lystra David's application to compel her late father, Hollis David's, life insurer, Transamerica Life Canada ("Transamerica"), to produce its file relating to a $100,000 life insurance policy that he held with Transamerica; for a declaration that a designation of beneficiary that Transamerica received in 2011, signed by Mr. David, and naming Lystra as beneficiary of 75 per cent of the proceeds of the policy, was valid; and for payment into court of the disputed insurance proceeds.

[2] Lystra David claims her costs of $21,346.74, on a partial indemnity scale, against Transamerica alone, on the ground that its negligent administration of Hollis' life insurance policy gave rise to the litigation, and that its approach to the litigation was unreasonable and caused the parties to incur unnecessary costs.

[3] Transamerica claims its costs, amounting to $15,554.98 on a substantial indemnity scale, against Lystra David, on the ground that she unreasonably insisted on Transamerica remaining a party to the proceeding after it paid the balance of the disputed life insurance proceeds into court.

[4] Rhinda and Randolph David claim their costs, amounting to $65,971.75 on a substantial indemnity scale, inclusive of HST and disbursements, on the ground that they were successful in opposing Lystra David's request for a declaration that the 2011 change of beneficiary was valid and that most of the insurance proceeds belonged to her, and in their own cross-application for a declaration that the change of beneficiary was null and void and that 100 per cent of the proceeds belonged to them.

2016 ONSC 1777 (CanLII)

Facts Relevent to Costs

[5] The applicant Lystra David was 18 years old when her father, Hollis David, married his second wife, Cassandra David, [page318] in 1990. In 1996, when Hollis' and Cassandra's children, Rhinda and Randolph David, were two and one year old, respectively, Hollis designated them as the beneficiaries of his $100,000 life insurance policy with Transamerica.

[6] In 2011, Hollis informed Cassandra that he was "in trouble" with his children from his first marriage (Lystra and her brother Sean), who had learned of his life insurance policy and the fact that he had designated Rhinda and Randolph as beneficiaries of the policy. That year, Transamerica received a change of beneficiary form with Hollis David's signature, the effect of which would have been to transfer $75,000 of the insurance proceeds from Rhinda and Randolph, who were about to enter university, to Lystra, who was, by then, economically self-sufficient.

[7] Because there were obvious errors in the 2011 change of beneficiary form, Transamerica did not act on it. Instead, it prepared a "notice of incomplete information" to notify Hollis David of the deficiencies in the form, but failed to send the notice either to Mr. David or his then-insurance broker, Henry Foradori. Although Hollis had previously been employed by Transamerica, and knew that its practice was to confirm a change of beneficiaries if it accepted the insured's change of beneficiary form, he did not follow up with Transamerica when he did not receive a confirmation from them.

[8] After Hollis David died, Lystra claimed 75 per cent of the life insurance proceeds from Transamerica and, when she was refused, she applied to the court for a declaration that the 2011 change of beneficiary form was valid, and that she was entitled to 75 per cent of the proceeds. Rhinda and Randolph David applied for a declaration that the form was not valid and that they were entitled to the full amount of the policy. In a decision dated August 21, 2015 [*David v. Transamerica Life Canada*, [2015] O.J. No. 4390, 2015 ONSC 5192 (S.C.J.)], the court dismissed Lystra's application and granted Rhinda and Randolph's application. The court found that the 2011 form was not a valid declaration pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8 because the distribution of proceeds set out in it had been altered and because Lystra David had not proved that the change was made before Mr. David signed the form.

[9] The court additionally found that the 2011 change of beneficiaries form was not a valid testamentary instrument, capable of effecting the distribution of Mr. David's insurance proceeds,

because there were suspicious circumstances surrounding its preparation, and Lystra David did not prove that Hollis David had approved its contents. [page319]

[10] The parties were unable to agree on the costs of the applications. The court has reviewed their submissions and will now address that issue.

Issues

[11] The court must determine the parties' respective entitlement to costs and the amount of costs, if any, to be paid.

[12] When the court has determined the main issues in an action, based on the parties' legal rights and obligations, and turns its attention to a determination of costs, it must consider the objectives of a costs order, which include not only indemnifying the litigant whose legal rights have been vindicated, but sanctioning either party's unreasonable conduct. Reasonable conduct, in this context, extends beyond what the conduct the parties' legal obligations required, to what their legal rights permitted, and what would have contributed to the just determination of the issues in the most expeditious and least costly manner.

[13] In the present case, the determination of costs requires the court to consider whether Transamerica's delay in paying the proceeds of Hollis David's life insurance policy into court when it was faced of the competing claims by his chidren, its delay in producing its complete file to the children, and its refusal to participate in a mediation of their dispute was unreasonable and contributed to the parties incurring unnecessary costs.

Positions of the Parties

[14] Lystra David claims costs of $21,346.74 against Transamerica, on the following grounds:

(a) Transamerica failed to administer Hollis David's life insurance policy properly and, in particular, failed to send Hollis a notice of incomplete information, informing him that the 2011 change of beneficiary form it had received was incomplete and would not be acted upon unless corrected. Lystra says that this caused the ensuring dispute between herself and her step-siblings, Rhinda and Randolph David, after their father died; and

(b) Transamerica unreasonably failed to produce its complete file in a timely manner, and refused to participate in mediation, which increased the costs of the proceeding and is conduct deserving of sanction.

[15] Rhinda and Randolph David claim costs of $65,971.75 on a substantial indemnity scale, including HST and disbursements, from Lystra David and Transamerica. They agree with [page320] Lystra that Transamerica's negligent failure to deal with the 2011 change of beneficiary form precipitated the litigation over who the beneficiaries of the policy were, and that Transamerica's delay in producing its complete file and its refusal to participate in a mediation of the dispute caused unnecessary costs to be incurred.

[16] Transamerica opposes the claims of Lystra David and Rhinda and Randolph David for costs against it, and claims its own costs of $15,554.98 on a substantial indemnity scale,

2016 ONSC 1777 (CanLII)

inclusive of HST and disbursements, against Lystra David. It argues that its actions, in paying out the initial $20,000 of the life insurance proceeds to Rhinda and Randolph David, who were eventually found to be the true beneficiaries of their father's policy, and in paying the balance of the insurance proceeds into court, was fully vindicated. It further submits that the allegation that it failed to send the notice of incomplete information form to Hollis David in 2011 is not supported by the evidence and, in any event, was not determinative of the ultimate issue of whether the 2011 change of beneficiary form was valid. Finally, Transamerica argues that public policy requires that it not be ordered to pay the costs of what was, in essence, a dispute between competing claimants over their entitlement to the proceeds of the life insurance policy that Transamerica was simply administering.

2016 ONSC 1777 (CanLII)

Analysis and Law

General principles

[17] The court's determination of costs is governed by s. 131 of the *Courts of Justice Act*[1] and rule 57.01 of the Rules of Civil Procedure (the "Rules").[2] Section 131 provides for the general discretion to fix costs. Rule 57.01 provides guidance as to the exercise of that discretion by enumerating certain factors that the court may consider when assessing costs.

[18] Among the factors set out in rule 57.01(1) are the following:

(i) the complexity of the proceeding;

(ii) the importance of the issues;

(iii) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(iv) any offers to settle; [page321]

(v) the principle of indemnity;

(vi) the concept of proportionality, which includes at least two factors:

(a) the amount claimed and the amount recovered in the proceeding; and

(b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(vii) any other matter relevant to the question of costs.

[19] Justice Perell summarized the purposes that costs orders serve in *394 Lakeshore Oakville Holdings Inc. v. Misek* in 2010. He stated:

> Modern costs rules are designed to advance five purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage the sanctioning of inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements.[3]

2016 ONSC 1777 (CanLII)

(Internal citations omitted)

[20] Ultimately, in determining the costs to be awarded, the court applies fairness and reasonableness as overriding principles.[4] In assessing what is fair and reasonable, it does not engage in a mechanical exercise but, rather, takes a contextual approach, applying the principles and factors discussed above, and sets a figure that is fair and reasonable in all the circumstances.[5] Rule 1.04(1.1) requires the court to consider proportionality; that is, the amount of costs ordered should be proportional to the amount of money and other interests at stake in the proceeding.[6] [page322]

[21] The court's role in assessing costs is not necessarily to reimburse a litigant for every dollar spent on legal fees. As the Court of Appeal pointed out in *Boucher v. Public Accountants Council for the Province of Ontario* in 2004, the award of costs must be fixed in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings rather than an exact measure of actual costs to the successful litigant.[7]

[22] In reviewing a claim for costs, the court does not undertake a line by line analysis of the hours claimed, and should not second-guess the amount claimed, unless it is clearly excessive or overreaching. It considers what is reasonable in the circumstances and, taking into account all the relevant factors, awards costs in a global fashion.[8]

[23] The general rule is that costs follow the event and will be awarded on a partial indemnity scale.[9] In special circumstances, costs may be withheld from the successful party or be ordered to be paid to the unsuccessful party -- and the scale of costs may be higher -- but those cases are exceptional and generally involve circumstances where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit and/or has unnecessarily run up the costs of litigation.[10]

Entitlement to costs

[24] Lystra David bases her claim for costs against Transamerica on two grounds, namely, that Transamerica caused the litigation by mismanaging Hollis David's life insurance file, by failing to send him a notice of incomplete information in 2011, and that Transamerica conducted itself unreasonably, both before and during the proceeding, by failing to produce its complete file in a timely manner and by refusing the beneficiaries' request that it engage in a mediation of the dispute.

Did Transamerica cause the litigation?

[25] Lystra David, in her costs submission, states: [page323]

The central issue for all claimants in this case was: what was the intent of Hollis David at the time of, and after the making of the Declaration on January 26, 2011? *If Transamerica had properly handled the Declaration and its communication with Mr. David, and ascertained Mr. David's intentions after Transamerica had prepared (but not sent) the Notice of Incomplete Information, these proceedings would have never arisen.* Transamerica, as an insurer, knew or ought to have known that its negligent handling of the Declaration and its failure to

communicate with Mr. David regarding the Notice would create the ambiguity that led to this litigation. Transamerica should be sanctioned by way of costs on that basis alone.

(Emphasis added)

[26] Rhinda and Randolph David adopt Lystra's position in this regard. They state:

> [T]he Respondents submit that what seemed to have given rise to the litigation itself include the following: (i) The maladministration by Transamerica in terms of its failure to deal with the request of the deceased Mr. David regarding the purported change in beneficiary [see paragraphs 74-79 of His Honor's Reasons]. Indeed, it is submitted that had there been responsible conduct by Transamerica to deal with this purported change in 2011, this issue would have never arisen. This seems reasonable when one considers that it was a result of the inability of the parties after Mr. David's death to ascertain his true intentions which then led to the instant litigation.

2016 ONSC 1777 (CanLII)

[27] For the following reasons, I reject the argument that Transamerica should pay Lystra David's costs because it failed to send the notice of incomplete information to Mr. David in 2011 and thereby precipitated the litigation between them and Lystra.

(1) The initial cause of the litigation was the 2011 change of beneficiary form, which this court found to be invalid. As noted in para. 83 of the court's reasons dated August 21, 2015, the validity of the change of beneficiary form did not depend on it being filed with Transamerica or Transamerica consenting to it.

(2) The 2011 change of beneficiary form was invalid, not because it failed to name contingent beneficiaries for 20 per cent of the proceeds, which was the reason Transamerica rejected it, but because there was an alteration in the percentages assigned to the primary beneficiaries that was not initialed by both Mr. David and the witness. In the absence of their initials, the court was not prepared to find that Mr. David had approved the alteration.

(3) The parties disagree as to whether Transamerica ever sent the notice of incomplete information that it prepared in 2011 to Mr. David. The court found that it did not, but held that this was immaterial to the outcome. The parties continue to raise this issue in their costs submissions. Transamerica [page324] asserts that it sent the notice, Lystra David and Rhindra and Randolph David assert that it did not. Lystra served a request to admit on Transamerica, asking it to admit that it did not send the notice, and Transamerica was three and a half months late in serving its response, in which it denied that it did not send the notice. The court did not reject Transamerica's response outright on the ground of delay, but said that it would consider the delay in deciding what weight to give the response. Lystra David tendered an affidavit of Mr. Morris' law clerk, Ms. Dayoe, with information Mr. Morris had obtained by telephone from Mr. David's insurance broker, Henry Foradori, to the effect that he had not received the notice of incomplete information. The court relied, in part, on the notice of incomplete information itself, whose authenticity Transamerica admitted, and which disclosed a fax number that Transamerica admitted belonged to Simon Jackson

brokerage. Transamerica offered no evidence that the notice was, in fact, sent to Mr. Hollis, or to Mr. Foradori, or that Mr. Foradori was employed by Simon Jackson brokerage at the time Transamerica prepared the form. The court concluded, apart from the assertions in Ms. Dayoe's affidavit, that Transamerica had not sent the notice to either Mr. Hollis or Mr. Foradori.

(4) The court rejected Lystra David's evidence concerning the 2011 change of beneficiary form. It concluded that she and her brother, Sean David, had likely collaborated in the preparation of the form, and that the form had been altered after Hollis David had signed it if, in fact, he did sign it. The court found that Hollis did not approve the contents of the form, and did not want or intend to change the beneficiaries of the policy from Rhinda and Randolph David alone, who needed the proceeds, as they were about to enter university.

(5) Regardless of whether the notice of incomplete information was sent to Mr. David or not, he knew that Transamerica had not confirmed the change of beneficiaries, and did not take the steps, which he was aware were necessary, to ensure that Transamerica accepted the changes. In the face of these findings, neither Lystra nor Rhinda and Randolph David can reasonably argue that Transamerica alone caused the litigation.

(6) Rhinda and Randolph David initially agreed, at the family meeting that followed their father's death, to divide the [page325] proceeds of their father's policy equally among the children, but later withdrew their consent when they learned that Lystra had tried to claim 75 per cent of the proceeds for herself, based on the 2011 change of beneficiary form, which they could readily see was suspicious and did not reflect their father's wishes. It was, in fact, Lystra David's contrivance of the 2011 change of beneficiary form, and her attempt to secure 75 per cent of the insurance proceeds for herself, that were the principal cause of the litigation, not Transamerica's failure to notify Hollis David of something he already knew, which was that the change of beneficiary form was deficient and that Transamerica would not act on it in the condition it was in.

Public policy issues applicable to life insurance litigation

[28] In my reasons dated August 21, 2015, I noted [at para. 60]:

> *An insurance policy occupies a special place among the documents that the court is called upon to interpret, owing to its dual nature as a contract and as a testamentary instrument*. As a contract between an insurance company and its policy holder, a Change of Beneficiary form is governed by the *Insurance Act* and, in particular, by Part V of the Act, which deals with life insurance.[11] As a testamentary instrument, its validity is governed by the jurisprudence governing the interpretation of any document intended to take effect upon a person's death.[12]

(Emphasis added)

2016 ONSC 1777 (CanLII)

[29] In my August 21 reasons, I cited [at para. 85] Justice Strathy's decision in *Richardson Estate*, later affirmed by the Court of Appeal, where he stated:

> *The designation of a beneficiary in a life insurance policy is "normally unassailable"*: *Rainsford v. Gregoire* [2008] B.C.J. No. 448 (B.C.S.C.) at para. 27. *It is a solemn act, frequently done privately and sometimes without the knowledge of the beneficiary. It does not require the consent of the insurer. It is akin to a testamentary disposition*: see *Fontana v. Fontana* (1987), 28 C.C.L.I. 232, [1987] B.C.J. No. 452 (B.C.S.C.)[13] [Emphasis added]

[30] I later noted the similarity of public policy concerns underlying both estate and life insurance litigation:

> The law has developed special rules to determine the validity of testamentary instruments. *These rules are designed to preserve the ability of people, who may be vulnerable at the time when they make a will or purchase or [page326] change a life insurance policy, to direct how their assets will be disposed of upon their death, when they are no longer able to speak for themselves.*[14]

(Emphasis added)

[31] Life insurance companies are often entitled to be indemnified for their reasonably incurred costs of responding to litigation among competing beneficiaries in much the same way, and for similar reasons, that estate trustees are indemnified for their costs in estate litigation. Justice Wilson, writing for herself and Justice Cory in the Supreme Court of Canada in *Geffen v. Goodman Estate*, in 1991, re-stated this principle, citing the following statement from *Dallaway (Re)*, [1982] 3 All E.R. 118, [1982] 1 W.L.R. 756 (Ch. Div.), at p. 122 All E.R.:

> In so far as [an estate trustee] does not recover his costs from any other person, *he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.*[15]

(Emphasis added)

[32] Historically, the courts ordered the estates of deceased testators to bear the costs of competing beneficiaries in estate litigation, and ordered the costs of competing beneficiaries in life insurance litigation to be paid from the proceeds of the policy. This approach entailed a risk that estates and insurance proceeds would be unreasonably depleted by unwarranted or needlessly protracted litigation. It therefore gave way, in the case of estate litigation, to a modified approach, by which the court exercises its discretion regarding costs pursuant to s. 131 of the *Courts of Justice Act*[16] by applying the factors set out in Rule 57 of the Rules, except in those limited circumstances where public policy considerations apply and mandate a different result.

[33] The court in *Salter v. Salter Estate*, in 2009, held that the blended approach (that is, requiring the estate or life insurance company to pay the costs of the litigation from the estate, in the case of estate litigation, or life insurance proceeds in the case of life insurance litigation) was

2016 ONSC 1777 (CanLII)

appropriate, unless the litigants acted unreasonably, in which case the litigants themselves should bear the costs caused by their unreasonable conduct. This approach helps ensure that estates, and the proceeds of life [page327] insurance policies, are not depleted through the costs of unnecessary litigation. Justice D.M. Brown stated, in his decision in that case:

> Given the charged emotional dynamics of most pieces of estate litigation, *an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes*.[17]

(Emphasis added)

[34] Jurisprudence in the past suggested that costs in estate litigation must either be ordered to be paid by the estate or from the life insurance proceeds, or be determined according to the costs regime applying to civil litigation generally, based on Rule 57 of the Rules of Civil Procedure, but not both.[18] However, the Court of Appeal in *Sawdon Estate*, in 2014, supported a "blended approach", by which the court determines costs in the conventional manner, by applying the factors set out in Rule 57, unless public policy considerations require otherwise.

[35] The Court of Appeal set out the current approach to costs in estate litigation in *McDougald Estate v. Gooderham* in 2005.[19] In that case, Gillese J.A., speaking for the court, explained:

> *The modern approach to awarding costs*, at first instance, *in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation*. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.[20]

(Emphasis added)

[36] These same principles are equally apt in the context of life insurance litigation in cases where competing beneficiaries assert claims to the proceeds of a life insurance policy. The public policy considerations that pertain to both types of litigation are, primarily [page328]

(a) the need to give effect to valid wills/insurance policies that reflect the intention of competent testators/life insured; and

(b) the need to ensure that estates/life insurance policies are properly administered.

[37] In estate and life insurance cases, where the litigants have acted reasonably, these policy considerations may require that a litigant be relieved of the costs consequences of an adverse outcome. Where the litigation was unavoidable, but the losing party's unreasonable conduct has unnecessarily increased its cost, the court may order that party to pay part of the estate trustee's, or life insurer's, costs, and the remainder to be paid by the estate or from the policy proceeds.[21]

2016 ONSC 1777 (CanLII)

[38] Where the litigants have acted unreasonably, and their conduct has resulted in litigation costs being incurred or increased unnecessarily, the court may deprive all the parties of their costs, and decline to order any of the costs to be paid by the estate or life insurance proceeds. Such was the result in the case of an estate, in *Jimenez v. Romeo*, in 2009, where Master Short ordered no costs in order to avoid depleting a modest estate of the legal costs caused by unnecessary delays, reminiscent, he said, of those in the interminable case of *Jarndyce v. Jarndyce* depicted by Charles Dickens in the opening chapter of *Bleak House*.[22]

2016 ONSC 1777 (CanLII)

[39] By contrast, in *Mcdougald* and in *Sawdon Estate*, the court held that even according to the modern approach to estate (and, I would add, life insurance litigation) costs, the court may order the estate (or the beneficiary of the life insurance policy) to bear the costs of all parties from the estate or policy proceeds. This may be appropriate in the case of estate litigation, where the will is deficient, or contains ambiguities, or where the testator executed it in a problematic fashion, or under suspicious circumstances. In the case of life insurance litigation, such an order may be appropriate where the designation or change of beneficiary is deficient, or contains ambiguities, or where the insured executed the form in a problematic way or under suspicious circumstances. In *White v. Gicas*, in 2014, the Ontario Court of Appeal stated, at paras. 70-72: [page329]

> The modern approach to the award of costs in estate litigation is exemplified by the decision of this court in *McDougald Estate v. Gooderham* (2005), 2005 CanLII 21091 (ON CA), 255 D.L.R. (4th) 435 (Ont. C.A.), at paras. 78-80. The approach begins from a premise that estate litigation operates subject to the general civil litigation costs regime except in those limited cases in which public policy considerations mandate a different result: *Sawdon Estate*, at para. 84.
>
> *In estate litigation, there are two predominant public policy considerations at play:*
>
> (i) *The need to give effect to valid wills that reflect the intention of competent testators; and*
>
> (ii) *The need to ensure that estates are properly administered*.
>
> *In practical terms, the demise of the testator leaves recourse to the courts as the only viable method of rectifying any difficulties or ambiguities created by the testator and of ensuring that the estate is properly administered*: *Sawdon Estate*, at para. 85.
> *It logically follows that where the problems giving rise to the litigation were caused by the testator, it is appropriate that the testator, through his or her estate, bear reasonable costs associated with their resolution*. Indeed, to saddle the estate trustees personally with legal costs in such situations might well discourage them from initiating reasonably necessary legal proceedings to ensure due administration of the estate: *Sawdon Estate*, at para. 86.[23]

(Emphasis added)

[40] I interpret the above passage to mean that an unsuccessful estate trustee (and, I would add, life insurance company) should not be ordered to pay, personally, the costs of litigants who have successfully challenged the validity of the will, or designation of beneficiary of a life insurance policy, when the trustee, or life insurance company, has acted reasonably in the

litigation. Such litigation is sometimes necessary to ensure that estates and insurance policies are properly administered, because the testator/life insured is no longer alive to rectify the ambiguities arising from her actions, and thereby resolve the disputes among his/her beneficiaries.

[41] In such cases, where the testator or insured caused the dispute, it is appropriate that the testator or insured, through his estate or life insurance proceeds, bear the costs of resolving it, and that the estate trustee or life insurance company not be required to pay the costs of the litigation personally. Otherwise, estate trustees might decline to accept appointment, or they or life insurers might avoid legal proceedings that are needed to ensure that the estate or life insurance policy is properly administered.[24] [page330]

[42] In the present case, Hollis David's death left recourse to mediation or the courts as the only viable way to rectify the difficulties that arose from the defects of the 2011 change of beneficiary form, and to ensure that his insurance policy was properly administered. However, for the reasons that follow, it was Lystra David's conduct, combined with Transamerica's delay and its own unreasonable conduct, that gave rise to unnecessary litigation among Mr. David's children.

[43] Where, as in the present case, the problems giving rise to the litigation were caused by the unreasonable conduct of both the insurer and one of the insurance beneficiaries, it is appropriate, notwithstanding the policy reasons for extending a measure of protection to insurers generally, to deprive Transamerica of its costs, and to order that the costs of Rhinda and Randolph David, who were innocent beneficiaries, be indemnified by both Lystra and Transamerica for their reasonable costs and not to have their father's insurance proceeds depleted by the costs they were required to incur in establishing their entitlement to the funds.[25]

Was Transamerica's Conduct Unreasonable?

Transamerica's initial refusal to produce its file

[44] Lystra submits that Transamerica's conduct was unreasonable in refusing to produce its complete file to her before the application was commenced, and that she (Lystra) was successful in securing its production in the proceeding. She states,

> *Transamerica's conduct before* and during the litigation *was marked by a pattern of unhelpfulness and intransigence. Before any litigation was underway, Lystra requested Transamerica's file. Transamerica refused to produce its file*.

(Emphasis added)

[45] There is no dispute that Transamerica refused to produce its complete file to Lystra David before she commenced her proceeding. On March 8, 2013, more than eight months before Lystra issued her application, her lawyer, Wade Morris, asked Transamerica to produce its file to him. He made the request on the basis that Ms. David was a beneficiary of the insurance policy, pursuant to the 2011 change of beneficiary form, and that she was the named estate trustee for Hollis David's estate in his will dated November 9, 2010, a copy of which Transamerica held.

2016 ONSC 1777 (CanLII)

[46] Transamerica refused Mr. Morris' request, based on its position that Ms. David was not a beneficiary of the insurance [page331] policy, and because she had not produced a probated copy of the will which named her as the estate trustee for her father's estate. Transamerica's reply to Mr. Morris dated March 11, 2013, stated:

> This life insurance policy contract was issued in 1992. Hence, our file goes back for over 20 years. *Our practice is not to release a copy of any file to opposing counsel until the Affidavit of Documents stage of a proceeding, after our counsel has had an opportunity to extract anything deemed privileged*. We have already provided copies to you of the relevant documents; these are again attached herewith for your convenience.
>
> *Usually, we only get into Affidavits of Documents and Discoveries on claims where we deny liability. In this particular case, we admit liability. The policy proceeds are indeed now payable. However, it is our opinion that your client has no claim to these proceeds*.
>
> A life insurance policy is a contract. As you know, any contract is a "meeting of the minds". That occurred in 1992, when the deceased and our Company agreed to issue this policy. That occurred again in 1996, when the deceased proposed an amendment to the policy contract, changing the designated beneficiary in favour of Rhinda Erica David and Randolph Hollis David, a proposal then agreed to by the Company. However, that did not occur in 2011, when the deceased again proposed another amendment again changing the designated beneficiary. His proposal was rejected by the Company and the policy contract was not amended in 2011.
> *If the family cannot sort this matter out, we reserve the right to discharge our liability by paying the Accountant of the Superior Court of Justice*. To advise the Court why we are doing this, we will prepare a sworn affidavit outlining the facts as we see them. The judge can then take it from there, assigning costs as he sees fit.

(Emphasis added)

[47] Transamerica produced to Mr. Morris a copy of the 1996 change of beneficiary, which it had accepted, and of the 2011 change of beneficiary, which it had rejected. It did not produce the notice of incomplete information that it had prepared in 2011, and which it now says it sent to Hollis David at the time, which Ms. David denies, and which I found, based on the evidence in the proceeding, was never sent to Mr. David.

[48] In the correspondence that ensued between Mr. Morris and Transamerica between March 11, 2013 and November 27, 2013, when Lystra David issued her application, Transamerica maintained its refusal to produce the remainder of its file to Ms. David. In an e-mail dated March 12, 2013, it stated:

> Thank you for your fax of March 11th, 2013.
>
> We note we do not consider a request for a copy of a file extending over 20 years to be routine. *As noted previously, we have an established procedure re the release of such files following the review by our own counsel and removal of anything deemed privileged*. [page332]

2016 ONSC 1777 (CanLII)

> You state Lystra David is a beneficiary of this life insurance policy contract. We disagree, for the reasons stated previously.
> We confirm we are in possession of a notarized copy of a Will dated November 9th, 2010, drawn up in the Republic of Trinidad and Tobago. *We are unaware if there are any subsequent Wills. We are also unaware if this Will has been probated* in Ontario, in the Republic of Trinidad and Tobago, or in the United States of America where we understand Lystra David resides. In any event, we confirm *the Estate is not now nor has it ever been the designated beneficiary under the terms of this life insurance policy contract. We note there is nothing in this Will dealing with this policy*.

(Emphasis added)

[49] In a further e-mail dated March 15, 2013, Transamerica stated:

> As noted in our previous email of March 12, 2013, we too are in possession of a notarized copy of a Will dated November 9, 2010, drawn up in the Republic of Trinidad and Tobago. We again note we are unaware if there are any subsequent Wills, a point we consider important in view of the dynamics of this family situation. Also, *we are unaware if Lystra David has applied for a Certificate of Appointment of Estate Trustee with a Will*.
> As you know, this Certificate is a document issued by the Court that proves the authority of an Estate Trustee (formerly called an Executor) to administer the provisions of the deceased's Will. An application for this Certificate is filed at the Superior Court of Justice in the county or district where the deceased had his permanent residence. If the deceased had no permanent residence in Ontario, the application is filed at the Superior Court of Justice where the deceased property is located.

(Emphasis added)

[50] It is reasonable for insurance companies to require probate to protect themselves from liability in the event they distribute under a false or invalid will. Section 47 of the *Trustee Act* gives the insurance companies a form of protection in requiring probate.[26] Therefore, Transamerica cannot be faulted for requiring probate.

[51] Section 47 of the *Trustee Act* states:

> 47(1) *Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, even though the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate or appointment*, including all payments made in good faith to or by the personal representative, *are as valid and effectual as if the same had been rightly granted or made*, but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to subsections (2) and (3), recover from the person who acted under the revoked grant or appointment any part of the estate remaining in the person's hands undistributed and, [page333] subject to the *Limitations Act, 2002*, from any person who erroneously

2016 ONSC 1777 (CanLII)

received any part of the estate as a devisee, legatee or one of the next of kin, or as a spouse of the decedent or supposed decedent, the part so received or the value thereof.

(Emphasis added)

[52] Additionally, the *Estates Administration Act* states:

> 2(1) *All* real and *personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto*, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.[27]

[53] Transamerica was entitled to refuse to produce its file to Lystra based on its position that she was not, in fact, a beneficiary of Hollis David's life insurance policy, and because she had not produced a probated copy of Mr. David's will, naming her as estate trustee. Lystra has not tendered any authority supporting her entitlement to the file, in the absence of a probated will, documenting her authority to act on behalf of her father's estate, before she acquired rights to production of the file as a party to the present proceeding.

[54] In its capacity as Hollis David's life insurer, Transamerica owed Mr. David, even following his death, a duty of good faith arising out of its fiduciary obligations to its insured.[28] Apart from its fiduciary obligation, Transamerica also had an obligation to ensure that the information supplied by its insured was kept private. Justice Marlys Edwards, speaking for the Divisional Court, made this point in *Dervisholli v. Cervenak*, in 2015, in the context of the duty of an automobile insurer for its insured's tort liability to keep its insured's information confidential, even from defence counsel whom the insurer had retained to represent itself in relation to the plaintiff's claim for accident benefits.[29] The court relied, in this regard, on the decision of the Court of Appeal in *Jones v. Tsige*, in 2012, involving unauthorized access by a bank employee to the banking records of a customer.[30] [page334]

[55] In *Jones v. Tsige*, the Court of Appeal recognized the existence of a tort of breach of privacy, or "intrusion upon seclusion". Justice Sharpe, after reviewing the elements of breach of privacy cause of action, stated:

> These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded; *it is only intrusions into matters such as one's financial or health records*, sexual practices and orientation, employment, diary *or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive*.[31]

(Emphasis added)

2016 ONSC 1777 (CanLII)

[56] On this basis, the Divisional Court in *Dervisholli* concluded:

> *The only basis upon which State Farm [tort liability department] was entitled to access the plaintiff's accident benefit file contents was with the consent of the plaintiff or by court order*. That consent was never sought, nor was it ever provided. By disclosing this information to Reisler [the lawyer it had retained to examine the insured under oath pursuant to the Statutory Accident Benefits Schedule] without the consent of the plaintiff, State Farm placed Reisler in an irreconcilable position of conflict, and the only appropriate remedy is to remove Reisler as the solicitor of record for State Farm in these proceedings.[32]

(Emphasis added)

[57] Hollis David's life insurance file was private, containing financial and health information, and private correspondence. Transamerica therefore required the consent of his estate trustee or an order of the court to disclose them. It refused access to Lystra on the basis that she had not provided a probated will, since renamed a certificate of appointment of estate trustee with a will, pursuant to recent amendments to the Rules of Civil Procedure.

[58] The issue of whether a certificate of appointment of estate trustee is necessary to establish the authority of a person who applies for the release of confidential information was addressed by Steven Faughnan, as adjudicator for the Ontario Privacy Commissioner in the context of an appeal from a refusal of information under Ontario's *Freedom of Information and Protection of Privacy Act*.[33] Although the Act does not govern requests to life insurance companies for information, its reasoning is instructive regarding the approach that the court can be [page335] expected to take to an insurer's common law obligation to maintain the privacy of a deceased insured's information in the face of a request by a person, such as Lystra David, who relies on a copy of the deceased's will naming her as estate trustee.

[59] The adjudicator in PO-2354 under the *Freedom of Information and Protection of Privacy Act*,[34] dealt with an appeal by the beneficiary of an estate from a refusal by the Ministry of Health and Long-Term Care to provide a summary of health care providers who had rendered care to the deceased testator before his death.[35] The beneficiary submitted an authorization signed by the person named as estate trustee in the deceased's will. The beneficiary's lawyer stated if the request was denied, his client would have to go to court and a judge would most certainly release the records, but that the application would result in an unnecessary expense to the estate.

[60] The ministry had denied the beneficiary's request on the basis of the mandatory exemption in s. 21(1) of the Act (personal privacy). It took the position that the request failed to satisfy the requirements of s. 66(*a*) of the Act (exercise of rights of deceased), which grants to the "personal representative" of a deceased person certain rights to access information about the deceased person under the Act so long as the exercise of these rights "relates to the administration of the individual's estate".

[61] The ministry argued that the beneficiary's lawyer had not established that the person who had signed the authorization was the "personal representative" of the estate. Relying on the ruling of the Ontario Divisional Court in *Adams v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 2269, 136 D.L.R. (4th) 12 (Div. Ct.) ("*Adams*"), it argued [at

2016 ONSC 1777 (CanLII)

para. 11] that the term had been interpreted restrictively to mean ". . . an executor, an administrator or an administrator with the will annexed", and that the beneficiary, even with the authorization of the person named as estate trustee in the will did not fall into any of those categories. The ministry pointed to *Order MO-1365* as an example of where a notarized will was held to be insufficient to establish that an individual was a deceased's "personal representative".

2016 ONSC 1777 (CanLII)

[62] The adjudicator upheld the ministry's refusal. Relying on the Divisional Court's decision in *Adams*, which dealt with the [page336] equivalent s. 54(*a*) of the *Municipal Freedom of Information and Protection of Privacy Act*,[36] the commissioner stated, in part:

> The rights of a personal representative under section 66(a) are narrower than the rights of the deceased person. That is, the deceased person retains the right to personal privacy except insofar as the administration of his or her estate is concerned.
> In Order M-1075, it was established that in order to give effect to the rights established by section 54(a), the phrase "relates to the administration of the individual's estate" should be interpreted narrowly to include only records that the personal representative requires in order to wind up the estate. Therefore, *the appellant in this case must establish not only that he is the deceased's personal representative for the purposes of section 66(a), but also that he requires access to the records for the purposes of exercising his duties as a personal representative. To do this, the appellant must first provide evidence of his authority to deal with the estate of the deceased. The production by the appellant of letters probate, certificate of appointment of estate trustee, letters of administration or ancillary letters probate under the seal of the proper court would be necessary to establish that he has the requisite authoritiy. As set out in Order MO-1365, an order that also dealt with the equivalent provision in the municipal counterpart to the Act, a notarial copy of the will is simply not sufficient*.

[63] Although Transamerica was entitled to refuse to produce its insured's life insurance file, and indeed was likely obliged to withhold it, the file would have become accessible to Lystra David and Rhinda and Randolph David, had Transamerica applied in a timely manner for an interpleader order and paid the insurance proceeds into court. For reasons set out more fully below, Transamerica should have done this. Had it done so, both Lystra David and Rhinda and Randolph David would have been in a better position to assess their respective positions and to resolve their dispute on terms that reflected the facts that ultimately formed the basis for the court's determination of the dispute, but at substantially less cost.

[64] Transamerica eventually produced its file to Lystra on January 7 and 13, 2014. It presumably did so then on the basis that following the issuance of her application on November 27, 2013, she was entitled to demand its production by a request to inspect it pursuant to rule 30.04(1) and (3) of the Rules of Civil Procedure, or to have it produced at an examination for discovery pursuant to rule 30.04(4), and was entitled to copies pursuant to rule 30.04(7).

[65] Lystra's legal entitlement to production of the file derived from her status as a party to the proceeding. Her entitlement to [page337] costs, including the costs of securing production of the file, depends on her success in her claims for substantive relief, by a declaration that the 2011 change of beneficiary was valid and that she was entitled to 75 per cent of her father's life insurance proceeds. She was not successful in those claims, and is therefore not entitled to recover her costs of the proceeding from Transamerica. She cannot succeed in a claim for costs

based solely on the fact that she secured production of Transamerica's file during the proceeding.

(b) *Transamerica's refusal to engage in mediation*

[66] Lystra David argues that she is entitled to her costs from Transamerica, in part, because it refused to participate in mediation. She states:

> Transamerica's conduct before and during the litigation was marked by a pattern of unhelpfulness and intransigence . . . before there was any litigation under way, *Lystra requested a mediation with all parties including Transamerica. Transamerica refused to mediate with the parties*.

(Emphasis added)

[67] Transamerica gave the following response to Lystra's lawyer's proposal of mediation, in an e-mail dated July 2, 2013:

> Our legal counsel has provided us with the following advice:
>
> "If the family is in agreement to pursue mediation, as a matter of good will, I would recommend we hold off on paying into Court to allow them to mediate. You may decide to provide them a period of time after which we will pay the money into Court. *TransAmerica is not required to attend the mediation. As Transamerica would only be speaking to what's in our file, I would communicate this to counsel and ask what gap they believe is in the file that they would be expecting us to speak to*."
>
> At this point in time, although we are anxious to close our file, we not inclined to impose a specific time deadline on you, as mediation can be a lengthy process. The parties must agree on a mutually-agreeable mediator, the costs of the mediation must be agreed to, a mutually-agreeable date must be set, etc. And, of course, there is no guarantee the mediation will be a success; *at the end of the day, the parties may continue to disagree. We will then have no alternative but to discharge our liability by paying our proceeds to the Accountant of the Superior Court of Justice, after which a Judge can sort the matter out*. If, however, the parties are able to come to an agreement on their own, enabling us to quickly make a payment as per said agreement, please advise.

[68] In response to Mr. Morris' request for clarification, Transamerica confirmed, on July 5, 2013, that it would not attend a mediation. In claiming its costs, Transamerica presents itself as a disinterested stakeholder, even before it paid the [page338] balance of the life insurance proceeds into court. It implied that the only role it could play was in disclosing the contents of its file.

[69] Transamerica, as a respondent to Lystra David's application, became a party to the proceeding. Pursuant to Rule 43 of the Rules of Civil Procedure, a person may interplead if he or she claims no beneficial interest in property that is in dispute. Rule 43 provides, in part:

> 43.02(1) *A person may seek an interpleader order* (Form 43A) *in respect of property if*,

2016 ONSC 1777 (CanLII)

08,1200(a) *two or more other persons have made adverse claims in respect of the property; and*

(b) *the first-named person*,

(i) *claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and*

(ii) *is willing to deposit the property with the court* or dispose of it as the court directs.

. . . . .

43.04(1) *On the hearing of an application or motion for an interpleader order, the court may,*

(a) *order that the applicant or moving party deposit the property with an officer of the court*, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;

(b) *declare that, on compliance with an order* under clause (a), *the liability of the applicant* or moving party *in respect of the property* or its proceeds *is extinguished*; and

(c) *order that the costs of the applicant* or moving party *be paid out of the property* or its proceeds.

(Emphasis added)

[70] The costs referred to in rules 43.02(1)(b)(i) and 43.04(1)(c) are the costs the person incurred, in effect, as a custodian or bailee, and which it is entitled to claim for holding the property. It is not the costs of a proceeding which could have been avoided by a timely application for interpleader.

[71] It was Lystra David, in the present proceeding, and not Transamerica, who applied for an order directing the payment of the net proceeds of the insurance policy into court. Ms. David's counsel alone attended at the initial appearance before Justice Edwards on February 7, 2014, when the order was made. Transamerica simply consented to the order requested. [page339]

[72] Transamerica did not apply in a timely manner for an interpleader order. The *Insurance Act*[37] contains a specific timetable for an insurer to apply for interpleader. It provides:

203(1) *Where an insurer receives sufficient evidence of*,

(a) *the happening of the event upon which insurance money becomes payable*;

(*b*) the age of the person whose life is insured;

(c) *the right of the claimant to receive payment*; and

(d) the name and age of the beneficiary, if there is a beneficiary,

2016 ONSC 1777 (CanLII)

it shall, within thirty days after receiving the evidence, pay the insurance money to the person entitled thereto.

. . . . .

204(5) *Where insurance money is payable under a contract to a deceased person who was not resident in Ontario at the date of the person's death or to that person's personal representative, the insurer may pay the insurance money to the deceased person's personal representative* as appointed under the law of the jurisdiction in which the person was resident at the date of the person's death, *and the payment discharges the insurer to the extent of the amount of the payment.*

2016 ONSC 1777 (CanLII)

[73] Section 214 of the *Insurance Act* provides for the situation, such as in the present case, where there were adverse claimants to the insurance proceeds. It provides:

214. *Where an insurer admits liability for insurance money and it appears to the insurer that*,

(*a*) *there are adverse claimants*;

(*b*) the whereabouts of a person entitled is unknown; or

(c) there is no person capable of giving and authorized to give a valid discharge therefor, who is willing to do so,

the insurer may, at any time after thirty days from the date of the happening of the event upon which the insurance money becomes payable, apply to the court without notice for an order for payment of the money into court, and the court may upon such notice, if any, as it thinks necessary make an order accordingly.

(Emphasis added)

[74] Section 29(2) of Schedule 23 of the *Strong Action for Ontario Act (Budget Measures), 2012* provided that s. 214 of the *Insurance Act* was to be amended by a proclamation of the Lieutenant-Governor on July 1, 2016 by providing that the costs of an application for interpleader be paid from the insurance [page340] proceeds or by the insurer. The subsection that was to be added provided:

(2) *The court* may fix, without assessment, the costs incurred on or in connection with an application or order made under subsection (1) and *may order the costs to be paid out of the insurance money or by the insurer or otherwise, as it considers just*.

(3) A payment made by an insurer under an order made under subsection (1) discharges the insurer to the extent of the amount of the payment.

[75] A 2013 amendment repealed the change before it was proclaimed (see S.O. 2013, c. 2, Sch. 8, ss. 11, 40). Nevertheless, the court still has a discretion, pursuant to s. 131 of the *Courts of Justice Act*, to order the costs of Lystra's application for, among other relief, payment of the

proceeds into court, to be paid by Transamerica, or to be paid from the insurance proceeds, or otherwise.

[76] Section 214 of the *Insurance Act* entitled Transamerica to apply to court, at any time after January 8, 2013, to pay Hollis' life insurance proceeds into court, and thereby be discharged from liability to the extent of the amount of the payment. That was the date 30 days after Hollis David's death on December 8, 2012. Transamerica did not make such an application. Had it done so, the David children would [have] been entitled, pursuant to the Rules of Civil Procedure, to production of Transamerica's file on Mr. David's policy, which would have better enabled them to resolve their dispute rather than becoming further entrenched in their positions through litigation. It was not until over a year later, on February 7, 2014, that Lystra David, two months after commencing her own application, obtained an order requiring Transamerica to make the payment into court.

[77] It was Transamerica's delay in applying to make the payment into court that delayed Hollis David's children from gaining access to the facts concerning their father's insurance policy. That delay, combined with Transamerica's refusal to participate in mediation, when asked to do so in July 2013, caused Lystra David to use the 2011 change of beneficiary form that she had contrived to obtain from her father to apply to the court in November 2013 for payment of 75 per cent of his insurance proceeds to her.

[78] When faced with the competing claims for the policy proceeds, and Lystra David's request for its file, it was incumbent upon Transamerica to apply without delay for leave to pay the proceeds into court, and then to agree to Mr. Morris' proposal that it participate in a mediation with Hollis David's children over how the insurance proceeds were to be distributed. Had it done so, after disclosing the contents of its file pursuant to an [page341] order made in the proceeding, and made judicious use of the information in its file, there is a reasonable prospect that it could have facilitated an agreement among the Hollis children, as they had reached in February 2013, for a mutually agreeable distribution of the life insurance proceeds among them. As it was, the steps that Lystra David was prompted to take, in the face of Transamerica's continued retention of the proceeds and of the information Lystra needed to assess her entitlement to it, and without a facilitator of a mediation with her siblings, made a later agreement among the children difficult or impossible.

[79] The jurisprudence distinguishes between a voluntary payment into court, with leave, as a form of offer to settle the payor's potential liability, and a payment into court by order of the court, as was done in the present case, on the application of Lystra David, and on the consent of Transamerica. In *Carter v. Junkin*, in 1984, Justice Barr granted an insurer leave to pay insurance proceeds into court in respect of an infant claim on a motor vehicle liability policy, on terms that required the insurer to undertake to pay any additional sum to make up to the infant any difference between prejudgment interest at the rate set in the trial judgment and the interest actually earned on the advance payment into court, the statutory prejudgment interest rate being 17 per cent and the interest that would be earned on the amount paid into court being only 9 per cent.[38] The insurer appealed from the order on the ground that it should have been permitted to make the payment into court without the term imposed. The Divisional Court dismissed the appeal, holding that because the insurer was applying for leave to make the payment into court,

2016 ONSC 1777 (CanLII)

rather than being ordered to do so, the motion judge was entitled to impose terms that protected the infant's claim to additional interest.

[80] The court in *Carter* noted that the infant's parents were entitled to receive the payment of the funds only if they accepted them in satisfaction of the infant's claim, and waived their claim for additional interest. Additionally, the judge could have refused to permit the payment into court, in which case the insurer would have continued to be liable for the interest accruing on the infant's damages to the date of judgment at the statutory prejudgment interest rate. The voluntary payment into court by the insurer was, in effect, an offer to settle the infant's claim by the amount of the payment, and an application for payment of [page342] the funds to the infant would have amounted to acceptance of the offer.

[81] The significance of the *Carter* decision, for the present case, is that the court's order requiring Transamerica to pay the balance of the insurance proceeds into court limited Transamerica's substantive liability for the policy proceeds, to the extent of its payment, but left it liable to the costs that it could have avoided by making an earlier voluntary payment by way of settlement.

[82] Transamerica never abandoned its refusal to participate in a mediation of the dispute or, following the issuance of the application, of the proceeding. It can either be regarded as an interpleader, in which it should neither seek, nor be liable for, the subsequent costs of the proceeding, or be regarded as a party, in which case its entitlement to, or liability for, costs must be determined based, in part, on its refusal to participate in a mediation at which its own interests, including costs, would have been subject to negotiation. It cannot have it both ways.

[83] As noted above, the objectives of a costs order include encouraging settlement and punishing litigants whose unreasonable conduct caused other litigants to incur unnecessary costs. A party's willingness to participate in mediation is a key factor to be considered in this regard.

Costs consequences of a statutory obligation to mediate

(i) *Mandatory mediation and the Toronto practice direction*

[84] The legislature and Rules Committee of the court have enacted multiple provisions in recent years which encourage or require litigants to engage in mediation as a means of settling civil proceedings. Rules 24.1.09(2) and 78 of the Rules of Civil Procedure,[39] which implemented the Toronto Civil Case Management Pilot Project, gave a judge or case management master a wide discretion to order mediation. Rule 78.04 provided that a case management master may "make orders, impose terms, give directions . . . as necessary to carry out the purpose of this Rule."[40] [page343]

[85] Under rule 24.1.09(2), the timing of mediation was varied, but completion of mediation was required, in all cases, regardless of the applicability of rule 24.1. The rule provides:

> Despite subrules 24.1.09(1) and (5), in the case of any other action, *a mediation shall take place at the stage at which the parties agree that mediation is most likely to be effective*[.]

(Emphasis added)

2016 ONSC 1777 (CanLII)

[86] The Toronto practice direction, published in December 2004, applied to pending and new proceedings in Toronto. It provided, in para. 4, that the mandatory mediation rule (rule 24.1) was applicable to actions governed by rule 77 (*i.e.*, case managed actions). Paragraph 4 provided:

> Mediation will continue to be mandatory. *Parties are expected to conduct mediation at the earliest stage in the proceeding at which it is likely to be effective*, and in any event, no later than 90 days after the action is set down for trial by any party.

(Emphasis added)

[87] Paragraph 5 of the practice direction provided for sanctions for the refusal of any party to schedule or attend a timely mediation, as follows:

> *The refusal by any party to co-operate in the scheduling or the refusal to attend in a timely mediation may result in* an order at the pre-trial that the case be assigned to Rules 77 and 24.1, and *an adverse costs order, pursuant to Rules 50.02(1)(b) and 77.11(l.l).*

(Emphasis added)

[88] Rule 24.1 of the Rules of Civil Procedure[41] applies to civil actions commenced in the City of Toronto and Ottawa on or after January 4, 1999,[42] and to actions commenced in Windsor on or after December 31, 2002. Ontario Regulation 193/15, proclaimed in effect on January 1, 2016, introduced rule 75.1.02, which extends mandatory mediation in those three cities to cases involving estates, trusts and substitute decisions. It also introduced rule 75.2, which applies throughout the province, and authorizes a court to order mediation in an estates proceeding.

ii. *The Insurance Act*

[89] The *Insurance Act* of Ontario imposes an obligation on automobile insurers to attempt to settle claims by insured [page344] motorists as expeditiously as possible,[43] and to engage in mediation upon request.[44] Where an insurer fails to comply, the Act requires the judge to "ascertain the appropriate remedial costs penalty".[45] In *Keam v. Caddey*, in 2010, the Court of Appeal held that the trial judge had erred in failing to impose a costs penalty on an automobile insurer that had refused to mediate in breach of its statutory obligation.[46] The court stated [at para. 29], "where an insurer breaches s. 258.6(1), s. 258.6(2) requires the trial judge to ascertain the appropriate remedial costs penalty in the circumstances".

[90] Justice Ramsay applied s. 258.6(2) in *Ross v. Bacchus*, in 2013, augmenting the defendants' costs by $60,000 based on its refusal to mediate,[47] but declined to do so in *Williston v. City of Hamilton*, in 2011, because the city was not an insurer and therefore did not have a statutory duty to mediate. Nevertheless, Justice Ramsay, in the latter case, still augmented the costs that the city was required to pay, based on its refusal to make reasonable efforts to settle.[48]

[91] In *Williston v. Hamilton (Police Service)*, in 2013, the Court of Appeal held that the plaintiff/appellant was justified in dealing with the legal services division of the City of Hamilton, as representing both the city and its insurer. It held that s. 258.6(2) of the *Insurance Act* applied

2016 ONSC 1777 (CanLII)

in the circumstances because the insurer had failed to respond to a request to mediate, as required by s. 258.6(1).[49]

[92] The *Insurance Act* did not impose a statutory obligation on Transamerica to mediate in the present case. However, Transamerica's unwillingness to mediate is a factor that the court can consider as evidence of unreasonable conduct, which contributed to the present proceeding and caused the parties to incur unnecessary costs. [page345]

2016 ONSC 1777 (CanLII)

Absence of statutory obligation to mediate

[93] Absent a statutory obligation to attend a mediation, a successful party's refusal to participate in mediation will not automatically result in an order depriving him of costs to which he would otherwise be entitled. Justice Spence, in *Baldwin v. Daubney*, in 2006, declined to deprive the successful defendant financial institutions of their costs, amounting to $440,000, apportioned among the 22 plaintiffs, on the ground that they had refused to engage in mediation with the plaintiffs. He stated:

> The plaintiffs say that the defendants refused the request of the plaintiffs to mediate and thereby caused the motion to proceed with its attendant costs, which a successful mediation would have avoided. The defendants say they considered they had a good defence and were not obliged to mediate. *Mediation is most likely to be successful where each party considers it has something material to gain from a settlement and appreciates that to achieve a settlement it will need to accept a compromise of its position. Where one litigant is confident that its position will succeed in court, it has little reason to take part in a process that would yield it a lesser result and it is not bound to do so. Indeed, to take part in a mediation in such circumstances could simply prolong the process and add to the cost*.[50]

(Emphasis added)

[94] Master Albert similarly declined to deprive a successful construction lien defendant of his costs based on his refusal to mediate in *Cohen v. Brin*, in 2013. She stated: "As to the first ground, mediation in construction lien references is not mandatory. Failure to mediate is not a reason to refuse a claim for costs."[51]

[95] Justice Perell, in *Muirhead v. York Regional Police Services Board*, in 2015, refused to deprive the successful defendants of their costs of a motion to strike the plaintiffs' claim based on the defendants' refusal to mediate, but gave no reasons. It is unclear whether Jutice Perell based his exercise of discretion on the fact the plaintiffs had brought their action in the wrong forum, as the Superior Court did not have jurisdiction to deal with what was, essentially, a labour relations matter governed by the *Police Services Act* and by the collective agreement between the defendant and the police association, of which the plaintiffs were members.[52] [page346]

[96] The B.C. Supreme Court, in *R. (C.C.) v. R. (T.A.)*, in 2014, refused to deprive a husband of his costs of successfully opposing his wife's motion to enforce a settlement reached at mediation, subject to the approval of counsel, where counsel's approval was never given, on the ground that his lawyer had refused to attend the mediation. In rejecting the wife's argument, in her costs submissions, that the lawyer had not approved the settlement because he had refused

to attend the mediation, Justice Punnett stated:

> In this instance it is not the failed mediation itself that raises the issue of costs but rather the application to enforce the mediated agreement. The conduct of the plaintiff's counsel regarding the mediation cannot be said to be conduct that "manifestly warrants rebuke".[53]

Refusal to mediate as evidence of unreasonable conduct

[97] In cases where each of the parties has an arguable case, and each faces a risk of loss in the proceeding, mediation can offer a reasonable prospect of settlement. In such cases, a refusal to participate in mediation is a factor that the court can properly consider in determining whether the party has engaged in unreasonable conduct that has caused unnecessary costs to be incurred and that warrants rebuke by means of a costs sanction. This determination requires a case-by-case analysis.

[98] Justice O'Connell considered a husband's refusal to participate in mediation of family law issues to be a factor in awarding $5,000 costs against him in *Young v. Arthur*, in 2012. Justice O'Connell stated:

> The applicant ("Ms Young") seeks costs of $5,000.00 in this matter. *She submits that the respondent and his counsel were unreasonable in refusing mediation*, failed to make timely financial disclosure and made unreasonable offers to settle prior to the first case conference. She submits that the respondent's refusal to provide financial disclosure and to take reasonable positions forced the applicant to incur the expense of commencing her application even though she sought to avoid litigation.
>
> . . . . .
>
> *It is also clear from reviewing the correspondence between counsel prior to the commencement of proceedings that Ms Young sought to avoid litigation altogether and repeatedly asked Mr. Arthur to consider mediation* and/or arbitration *to address the issues between them. Given the obvious economic disparity between the parties, it was unfair to force Ms Young to incur the cost of litigation to achieve child support in accordance with the Child Support Guidelines for Ontario*.[54] [page347]

[99] Justice MacKinnon, in *G. (M.) v. G. (G.)*, in 2010, similarly regarded the husband's refusal to participate in mediation as evidence of his unreasonable conduct in making an award of costs against him. She stated:

> The conclusion I have reached is that *some of the Respondent's conduct was unreasonable litigation conduct which did serve to increase the costs of the process, but did not amount to bad faith. I include in this category* his extensive letter writing, *his* delays or *refusals to agree to mediation*, counselling or assessment, and his inflexible offers to settle.[55]

[100] The Quebec Superior Court declined to award costs to a wife who successfully opposed her husband's motion to vary spousal support in *Droit de la famille -- 102878*, in 2010, where the wife had refused to mediate. Justice Riordan stated [at paras. 21-22]:

2016 ONSC 1777 (CanLII)

> Finally, concerning the conduct of the parties, D. complained mightily that C. refused all attempts at negotiation and mediation of this matter, including a refusal to attend at a Settlement Conference presided by a judge of the Superior Court. He is right in this regard. *An attitude such as the one C. adopted, barring particular circumstances, is unacceptable in today's world where negotiation and mediation are seen as being essential and vital elements for effective and cost-efficient justice. Along this line, there is precedent for denying a provision for costs to a party who refuses to participate in mediation without reasonable justification*.[56]

(Emphasis added)

[101] In the present case, I find that Transamerica's delay in applying for leave to pay the insurance proceeds into court, combined with its failure to disclose the full contents of its file, and to participate in a mediation with the Hollis children, precipitated Lystra David's application and caused the parties to incur unnecessary costs in relation to it. In these circumstances, Transamerica should be deprived of its costs, and should be required to pay the costs of Rhinda and Randolph David. Were it not for the suspicious circumstances in which the 2011 change of beneficiaries was prepared, which I found was contrived by Lystra David in an effort to secure the majority of her father's insurance proceeds for herself, this court would require Transamerica to pay her costs also. However, having regard to my findings in that regard, Lystra will be responsible for her own costs. [page348]

(c) *The amount of Rhinda's and Randolph's costs*

Importance and complexity of the issues

[102] The application involved a $100,000 insurance policy. The importance of the issues was not limited to the litigants; it involved the test to be applied when determining the validity of a change of beneficiary form, both pursuant to the *Insurance Act* and pursuant to the principles applying to testamentary instruments. There has been controversy in the jurisprudence concerning this issue.

[103] The application involved issues of moderate factual complexity. The historical context involved the relationships among family members over a number of years. The argument involved numerous affidavits and a detailed analysis of the transcript of the cross-examination of the affiants.

Reasonableness and offers to settle

[104] As noted above, the general rule is that costs follow the event and will be awarded on a partial indemnity scale.[57] In special circumstances, costs may be awarded on a higher scale, but those cases are exceptional and generally involve circumstances where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and/or unnecessarily run up the costs of the litigation.[58]

[105] In the present case, for the reasons set out above, I find that Lystra's application was wholly devoid of merit, but was also precipitated by Transamerica's unreasonable delay, its refusal to produce its complete file in a timely manner, and its refusal to participate in a

2016 ONSC 1777 (CanLII)

mediation of the Hollis children's claims. I find that Transamerica's approach resulted, in part, from its effort to protect itself from potential liability for failing to send the notice of incomplete information to Hollis David in 2011. For these reasons, as noted above, Transamerica should pay its own costs, and should compensate Rhinda and Randolph David for their costs. In the special circumstances of the case, it should do so on a substantial indemnity scale.

2016 ONSC 1777 (CanLII)

Indemnification -- The amounts claimed

[106] At the beginning of the hearing, Lystra David's counsel stated that his client's costs at that point, which included the [page349] cross-examination on affidavits and an anticipated three-hour hearing of the application, were approximately $20,000 on a partial indemnity scale, including HST and disbursements. Rhinda and Randolph David's counsel stated that their costs were approximately $42,000, inclusive of HST and disbursements.

[107] Lystra David now claims costs of $21,346.74 against Transamerica on a partial indemnity scale. Rhinda and Randolph David claim costs of $54,968.75, plus HST and disbursements, on a substantial indemnity scale, against Lystra David and Transamerica.

Indemnification -- The hourly rates charged and the time spent

[108] In determining the appropriate hourly rates to be assigned to the lawyers involved in the motion, the court follows the approach taken by Aitkin J. in *Geographic Resources*.[59] That is, the starting point is the successor of the costs grid, namely, the "Information for the Profession" bulletin from the Costs Sub-committee of the Rules Committee (the "costs bulletin"), which can be found immediately before Rule 57 in the Carthy or Watson and McGowan edition of the Rules, which sets out maximum partial indemnity hourly rates for counsel of various levels of experience.

[109] The costs bulletin suggests maximum hourly rates (on a partial indemnity scale) of $80 for law clerks, $225 for lawyers of less than ten years' experience, $300 for lawyers of between ten and 20 years' experience, and $350 for lawyers with 20 years' experience or more.[60] The upper limits in the costs bulletin are generally intended for the most complex and important of cases.

[110] The costs bulletin, published in 2005, is now dated. Aitkin J. considered adjusting the Costs Subcommittee's hourly rates for inflation, as Smith J. did in *First Capital (Canholdings) Corp. v. North American Property Group*,[61] but the unadjusted rates of the lawyers in her case were only slightly less than the [page350] actual fees they charged, so she elected to use their unadjusted rates. Normally, however, it is appropriate to adjust the hourly rates in the costs bulletin to account for inflation since 2005.

[111] Based on the Bank of Canada inflation calculator, available online at http://www.bankofcanada.ca/rates/related/inflation-calculator/, the 2015 equivalent of the hourly rates in the costs bulletin are $94.43 for law clerks, $265.60 for lawyers of under ten years' experience, $354.13 for lawyers of between ten and 20 years' experience, and $413.15 for lawyers of over 20 years' experience.

[112] The court is guided by the rates in the costs bulletin, not the actual hourly rates charged. The actual rates charged are relevant only as a limiting factor, in preventing the costs awarded

from exceeding the actual fees charged. The Costs Subcommittee's rates apply to all lawyers and all cases, so everyone of the same level of experience starts at the same rate.

[113] The court adjusts the hourly rate, or the resulting fees, to reflect unique features of the case, including the complexity of the proceeding, the importance of the issues, and the other factors set out in rule 57.01(1). If an excessive amount of time was spent, or too many lawyers worked on the file, the court reduces the resulting amount of fees accordingly. As long as the resulting amount does not exceed the amount actually charged to the client, the actual fee that the client agreed to pay is irrelevant.

[114] Mr. Barnwell, the lawyer for Rhinda and Randolph David, was called to the bar in Ontario in 1993. He practiced law for over 20 years when this proceeding was tried. Based on the costs bulletin, adjusted for inflation, Mr. Barnwell is entitled to claim an hourly rate of $416, on a partial indemnity scale, for the time he spent on the case in 2015. He claims $400. I find this to be reasonable.

[115] Rule 1 of the Rules of Civil Procedure defines substantial indemnity costs as meaning "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A" -- *i.e.*, 1.5 times the partial indemnity rate.[62] Costs calculated on a substantial indemnity scale, obviously, represent something less than full indemnity. Mr. Barnwell's substantial hourly rate, on that basis, is $624. He claims a substantial indemnity rate of $500, which I also find to be reasonable.

[116] Neither Mr. Barnwell nor Lystra David's lawyer, Mr. Morris, provides a detailed breakdown or dockets to support the [page351] time they claim, but each provides a summary of the time they spent on different tasks. Mr. Barnwell spent 10.5 hours drafting Rhinda and Randolph's counter-application, including reviewing previous documentation and discussing it with his clients and their mother. Mr. Morris spent 5.5 hours drafting Lystra David's application, and his assistant, Donna Theodorou, spent an additional two hours preparing her application record and a further two hours preparing her first and supplementary application records, for a total of 9.5 hours. Thus, Mr. Barnwell spent one hour more on this task than Mr. Morris and his assistant spent.

[117] Mr. Barnwell spent 4.75 hours in various meetings with his clients and their mother and 22.5 hours preparing their affidavits. Mr. Morris spent 12.5 hours preparing Lystra David's initial affidavit, 4.3 hours preparing her affidavit for the first supplementary application record, .2 hours preparing Ms. Theodorou's affidavit for the second supplementary application record, and 3.8 hours preparing her affidavit for her second supplementary application record, for a total of 20.8 hours. Thus, Mr. Barnwell spent 2.3 more hours than Mr. Morris on this task.

[118] Mr. Barnwell spent two hours preparing for cross-examinations, 6.5 hours attending at the cross-examinations, and 3.5 hours reviewing Lystra David's materials and communicating with other counsel, for a total of 12 hours. Mr. Morris spent 7.5 hours preparing and 4.8 hours attending at the cross-examinations, for a total of 12.3 hours. Mr. Powrie's associate, Alwyn Phillips, for Transamerica, spent 9.9 hours preparing and attending cross-examinations.

[119] Mr. Barnwell spent 4.5 hours reviewing transcripts, 25.5 hours in research, 17.5 hours drafting the respondents' factum, three hours preparing for argument, and ten hours for attendance at the hearing, for a total of 60.5 hours. Mr. Morris spent 1.3 hours reviewing the

2016 ONSC 1777 (CanLII)

respondents' factum, two hours reviewing the cases referred to in the factum, 5.8 hours preparing submissions, one hour in attending on February 7, and five hours on April 25, 2015, for a total of 15.1 hours. Mr. Powrie and Ms. Phillips, combined, spent 24.1 hours preparing and attending for the hearing of the applications. Mr. Barnwell therefore spent 45.4 more hours on these tasks than Mr. Morris, and 36.4 hours more than Mr. Powrie and Mr. Phillips.

[120] While the absence of dockets from either Mr. Morris or Mr. Barnwell does not permit a detailed analysis of the reasonableness of time they spent, the onus is on Rhinda and Randolph David to establish their entitlement to costs in the amount claimed, or in any amount. I find the time Mr. Bramwell spent in the preparation and attendance at the hearing to be [page352] excessive, and reduce his time by 30 hours. This amounts to a reduction of $15,000 and $1,950 for HST, to $49,021.75, which I am rounding down to $49,000.

Other factors -- Disbursements

[121] The disbursements claimed by Mr. Bramwell are not disputed, and I find them to be reasonable. They will be allowed at the amount claimed.

Proportionality and the reasonable expectation of the unsuccessful parties

[122] I find that the costs claimed by Rhinda and Randolph David, at the reduced amount of $49,000, to be proportional to the costs incurred by the other parties, having regard to their respective claims and the evidence they relied on, and within the range of amounts of costs that they reasonably should have expected to pay if unsuccessful. Although high, it is not disproportional to the amount at stake in the proceeding. Transamerica incurred costs of its own, which it claims in the amount of $15,554.98.

[123] While Lystra David was the primary cause of the litigation, Transamerica, by acting in a reasonable manner in its capacity as insurer, could have avoided its own costs by paying the balance of the proceeds into court at the outset, and thereby making full disclosure of its complete file. It also could likely have saved the David children from having to incur the costs they did by agreeing to participate in a mediation of the dispute. It is reasonable, in these circumstances, that they should bear a portion of Rhinda's and Randolph's costs, in an amount equal to the costs that they incurred themselves.

Conclusion and Order

[124] For the foregoing reasons, it is ordered that

(1) Lystra David shall bear her own costs;

(2) Transamerica shall bear its own costs;

(3) Lystra David shall pay Rhinda David's and Randolph David's costs, fixed at $33,500, inclusive of fees, HST and disbursements;

(4) Transamerica shall pay Rhinda David's and Randolph David's costs, fixed at $15,500, inclusive of fees, HST and disbursements.

2016 ONSC 1777 (CanLII)

Order accordingly.

Notes

1 *Courts of Justice Act*, R.S.O. 1990, c. C.43.

2 Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

3 *394 Lakeshore Oakville Holdings Inc. v. Misek*, [2010] O.J. No. 5692, 2010 ONSC 7238 (S.C.J.), para. 10.

4 *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 2004 CanLII 14579 (C.A.); and *Moon v. Sher*, [2004] O.J. No. 4651, 246 D.L.R. (4th) 440, 2004 CanLII 39005 (C.A.).

5 *Gratton-Masuy Environmental Technologies Inc. (c.o.b. Ecoflow Ontario) v. Building Materials Evaluation Commission*, [2003] O.J. No. 1658, 2003 CanLII 8279 (Div. Ct.), at para. 17.

6 *Patene Building Supplies Ltd. v. Niagara Home Builders Inc. (c.o.b. Niagara Heritage Homes)*, [2010] O.J. No. 535, 2010 ONSC 468 (S.C.J.).

7 *Boucher v. Public Accountants Council for the Province of Ontario*, *supra*.

8 See the cases referenced in *Fazio v. Cusumano*, [2005] O.J. No. 4021, 2005 CarswellOnt 4518 (S.C.J.), at para. 8.

9 *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135, [1994] O.J. No. 343, 1994 CanLII 239 (C.A.).

10 *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221, [2007] O.J. No. 2031, 2007 CanLII 18579 (S.C.J.).

11 *Insurance Act*, R.S.O.1990, c. I.8.

12 *David v. TransAmerica*, [2015] O.J. No. 4390,2015 ONSC 5192, para. 60.

13 *Richardson Estate (Re)* (2008), 93 O.R. (3d) 537, [2008] O.J. No. 4892, 2008 CanLII 63218 (S.C.J.), at para. 27.

14 *David v. TransAmerica*, para. 94.

15 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53, 1991 CanLII 69.

16 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131.

17 *Salter v. Salter Estate*, [2009] O.J. No. 2328, 2009 CanLII 28403, 50 E.T.R. (3d) 227 (S.C.J.), at para. 6.

18 *Reid Estate v. Reid*, [2010] O.J. No. 3076, 2010 ONSC 3800, 59 E.T.R. (3d) 312 (S.C.J.), para. 3.

19 *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432, 2005 CanLII 21091, 255 D.L.R. (4th) 435 (C.A.), at paras. 78-80. See, also, *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada* (2014), 119 O.R. (3d) 81, [2014] O.J. No. 573, 2014 ONCA 101, at paras. 82-107, and particularly para. 84.

20 *McDougald Estate v. Gooderham*, para. 85.

21 *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, *supra*, paras. 95 to 99.

22 *Jimenez v. Romeo*, [2009] O.J. No. 5248, 2009 CanLII 68472 (S.C.J.), paras. 62 to 64.

23 *White v. Gicas*, [2014] O.J. No. 3036, 2014 ONCA 490, paras. 70 to 72.

24 *Penney Estate v. Resetar*, [2011] O.J. No. 490, 2011 ONSC 575, 64 E.T.R. (3d) 316 (S.C.J.), Kruzick J., para. 19.

25 *Sawdon Estate*, at para. 85.

26 *Trustee Act*, R.S.O. 1990, c. T.23.

2016 ONSC 1777 (CanLII)

27 *Estates Administration Act*, R.S.O. 1990, c. E.22.

28 *Beasley v. Barrand* (2010), 101 O.R. (3d) 452, [2010] O.J. No. 1466 (S.C.J.), at para. 34.

29 *Dervisholli v. Cervenak*, [2015] O.J. No. 2076, 2015 ONSC 2286 (Div. Ct.), at para. 41.

30 *Jones v. Tsige* (2012), 108 O.R. (3d) 241, [2012] O.J. No. 148 (C.A.).

31 *Jones v. Tsige*, *per* Sharpe J.A., at para. 72.

32 *Dervisholli*, at para. 61.

33 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

34 *Freedom of Information and Protection of Privacy Act*, *supra*.

35 *IPC Order Po-2354*, 2004 ON IPC 56471.

36 *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

37 *Insurance Act*.

38 *Carter v. Junkin* (1984), 47 O.R. (2d) 427, [1984] O.J. No. 3293, 1984 CanLII 1821 (Div. Ct.).

39 Rules of Civil Procedure.

40 *Lewis v. Stoddard*, [2006] O.J. No. 3273, 2006 CanLII 27112 (S.C.J.), *per* Master Sproat.

41 Rules of Civil Procedure.

42 Rule 24.1.04(1)(i).

43 *Insurance Act*, s. 258.5(1).

44 *Insurance Act*, s. 258.6(1).

45 *Insurance Act*, ss. 258.5(5) and 258.6(2).

46 *Keam v. Caddey* (2010), 103 O.R. (3d) 626, [2010] O.J. No. 3650, 2010 ONCA 565, paras. 30-31.

47 *Ross v. Bacchus*, [2013] O.J. No. 5793, 2013 ONSC 7773 (S.C.J.), para. 9.

48 *Williston v. Hamilton (City)*, [2011] O.J. No. 4103, 2011 ONSC 5400 (S.C.J.), paras. 3 and 4.

49 *Williston v. Hamilton (Police Service)* (2013), 115 O.R. (3d) 144, [2013] O.J. No. 2038, 2013 ONCA 296, para. 24.

50 *Baldwin v. Daubney*, [2006] O.J. No. 3919, 2006 CanLII 33317 (S.C.J.), para. 12.

51 *Cohen v. Brin*, [2013] O.J. No. 905, 2013 ONSC 1302 (S.C.J.), para. 71.

52 *Muirhead v. York (Regional) Police Services Board*, [2015] O.J. No. 1674, 2015 ONSC 2142 (S.C.J.), paras. 5 and 6.

53 *R. (C.C.) v. R. (T.A.)*, [2014] B.C.J. No. 2035, 2014 BCSC 1480, paras. 13 and 14.

54 *Young v. Arthur*, [2012] O.J. No. 1833, 2012 ONCJ 237, paras. 2 and 43.

55 *G. (M.) v. G. (G.)*, [2010] O.J. No. 523, 2010 ONSC 792 (S.C.J.), para. 10.

56 *Droit de la famille -- 102878*, [2010] Q.J. No. 11291, 2010 QCCS 5241, citing *Ibidem*, *Développements récents en droit familial* (2009), which, in turn, cites: *Droit de la famille-07714*, [2007] J.Q. no 2771, EYB 2007-117754 (S.C.) and *G. (C.) v. M. (F.)*, [2002] J.Q. no 10490, EYB 2002-36422 (S.C.).

57 *Bell Canada v. Olympia & York Developments Ltd.*, *supra*.

58 *Standard Life Assurance Co. v. Elliott*, *supra*.

59 *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, [2013] O.J. No. 717, 2013 ONSC 1041 (Div. Ct.), paras. 7 and 11 to 16.

60 "Information for the Profession" bulletin from the Costs Subcommittee of the Rules Committee (that the Costs Subcommittee of the Rules Committee issued to replace the costs grid, which it repealed in 2005). The costs bulletin has advisory status only and not statutory authority, as it was not included in the Regulation that repealed the costs grid.

2016 ONSC 1777 (CanLII)

61 *First Capital (Canholdings) Corp. v. North American Property Group*, [2012] O.J. No. 885, 2012 ONSC 1359 (S.C.J.).

62 See *Hanis v. University of Western Ontario,* [2006] O.J. No. 2763, 2006 CanLII 23155 (S.C.J.), *per* Power J.

End of Document

2016 ONSC 1777 (CanLII)

Tab 5

1980 CarswellSask 25
Saskatchewan Court of Queen's Bench

Prairie Palace Motel Ltd. v. Carlson

1980 CarswellSask 25, 35 C.B.R. (N.S.) 312, 4 A.C.W.S. (2d) 350

PRAIRIE PALACE MOTEL LTD. v. CARLSON; ESTON DODGE-CHRYSLER LTD. v. CARLSON et al.; CARLSON et al. v. BIG BUD TRACTOR OF CANADA LTD.

Noble J.

Judgment: June 23, 1980
Docket: Saskatoon No. 1034 Q.B.

Counsel: *R.R. Surgeson*, for receiver-manager.
J.L. Robertson, Q.C., for Hamilton Enterprises Ltd.
D.A. Shapiro, for B. Carlson, W. Carlson and R. Hettrick.

Headnote
Receivers --- Remuneration of receiver — Remuneration
Receivers — Remuneration of receiver — Chartered accountants — Not restricted to five per cent — No fixed rate applicable — Entitled to be paid at going rate all clients charged for services rendered.
The receiver-manager applied for approval of its account for services rendered. It was argued that the account was too high and that it should be restricted to five per cent of a specific figure related to the value of the assets.
Held:
Account approved.
The remuneration of the receiver-manager, a firm of chartered accountants, should be based upon the going rate charged all its clients for services rendered. There was no fixed rate at which a receiver-manager should be paid.

***Noble J.*:**

1 This fiat relates to item 3 in the notice of motion dated 15th May 1980 and returnable before me on 16th May 1980. At that time, I dealt with other matters but adjourned this portion of the motion which relates to an application by the receiver-manager for approval of its account for services rendered and disbursements in the sum of $38,272 calculated to 31st March 1980.

2 This portion of the motion was initially adjourned to 6th June 1980 but did not come on before me until 13th June 1980 by reason of the fact that I was unavailable to hear it.

3 When the matter came before me, I had had an opportunity of reviewing the report of the receiver-manager to the court dated 15th March 1979 and the more recent report of 1st May 1980 along with the letter from the receiver-manager outlining the basis upon which the remuneration and disbursements were arrived at.

4 Mr. Shapiro objected to my making an order with respect to the remuneration of the receiver-manager at this time by reason of the fact that a lawsuit, involving claims by his clients as to ownership of the shares in Prairie Palace Motel Ltd., with Big Bud Tractor of Canada Ltd. has just recently been concluded in favour of his clients. He therefore felt that in view of the fact that his clients would soon be taking over the motel and the need for the receiver-manager would be ended the payment of its account could wait until that had been done and everything dealt with at once.

5 I reject this view because it was not clear at the time that Big Bud Tractor of Canada Ltd. will not appeal the recent decision in favour of Mr. Shapiro's clients, and in any event, it is not certain as to how long it will take to adequately wind up the receivership

and to pass the assets back into the hands of whoever is entitled to them. Indeed, the receiver-manager expressed the view that it is very likely that an application will be made to arrange a sale of the assets in the not-too-distant future. In any event, I am not convinced that the receiver-manager should wait for its remuneration while all of those unresolved matters are dealt with.

6 Mr. J.L. Robertson, Q.C., appeared on behalf of Hamilton Enterprises Ltd., a company which holds the second mortgage on the motel property which is the major asset of the receivership. He argued that the account was far too large and should be restricted to five per cent of a figure which remained obscure to me. Perhaps he was talking about the value of the assets of the receivership which appear, by the balance sheet contained in the report of the receiver and manager dated 1st May 1980, to amount to $471,507.97. In support of this argument, Mr. Robertson relied on *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (Q.B.), and also on *lndust. Dev. Bank v. Gdn. Tractor & Equipment Co.*, [1951] O.W.N. 47 (H.C.). I have now read these cases, and I am not satisfied that they restrict the fee of a receiver to five per cent. Indeed, if one looks at the remarks of the court in *Campbell v. Arndt*, supra, the learned judge indicated that there does not appear to be any fixed rate at which a receiver and manager should be paid. In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd. Accordingly, I reject the argument that the court is limited to five per cent of the value of the assets, and I direct that the receiver-manager shall be entitled to pay itself out of the of the assets of the receivership the sum of $38,272 on the understanding that none of the assets will be sold to accomplish this without approval of the court.

Account approved.

Tab 6

2017 ONSC 6268
Ontario Superior Court of Justice

MNP Ltée. v. Armorer

2017 CarswellOnt 16280, 2017 ONSC 6268, 284 A.C.W.S. (3d) 640

MNP LTÉE (Applicant) and AUDIE ARMORER and MARCEL VILLENEUVE (Respondents)

Robert N. Beaudoin J.

Heard: June 8, 2017
Judgment: October 19, 2017
Docket: 16-68482

Counsel: Karen Perron, for Applicant
Benoit Duchesne, for Royal Bank and Bank of Montreal
Kurt Anders, for Marcel Villeneuve
Courtney West, for Attorney General of Canada
Francis Donovan, for MNP, and Mr. Villeneuve

Headnote
Business associations --- Changes to corporate status — Winding-up — Under Dominion Act — Liquidator — Remuneration and expenses
Applicant was court-appointed liquidator with respect to partnership assets of respondent partners — Liquidation judgment rendered by default in Quebec dissolved partnership, provided that partner V would be entitled to 50 percent of proceeds from liquidation plus $67,691.50, liquidator was directed to distribute proceeds of liquidation pursuant to terms of judgment, and partner A was liable to pay costs and fees of liquidation — Liquidator encountered numerous obstacles in completing its mandate, and net proceeds of liquidation were not sufficient to satisfy claims of stakeholders — Liquidator brought motion seeking relief, including approval of fees and disbursements — Motion granted — What was fair and reasonable for fees and expenses was contextual — Assets consisted of bank account and rental property, and liquidation of assets should have been simple matter but it was not, as liquidator encountered unexpected difficulties at every turn given longstanding dispute between partners — Degree of assistance provided by company, officers or employees, time spent, liquidator's knowledge, experience and skill, diligence and thoroughness displayed, responsibilities assumed, results of liquidator's efforts and cost of comparable services were all taken into account — Liquidator was critical of services provided by first law firm and retained other counsel, and legal fees paid to first law firm were not allowed — Other legal fees claimed were reasonable and were allowed — Total fees and expenses were $218,043.72, which was higher than 2:1 ratio of net receivables, but was less than one-half of gross value of partnership assets — Having regard to disproportionate number of difficulties liquidator encountered, fees and expenses were not reduced further.
Business associations --- Changes to corporate status — Winding-up — Under Dominion Act — Liquidator — Distribution of assets
Applicant was court-appointed liquidator with respect to partnership assets of respondent partners — Liquidation judgment rendered by default in Quebec dissolved partnership, provided that partner V would be entitled to 50 percent of proceeds from liquidation plus $67,691.50, liquidator was directed to distribute proceeds of liquidation pursuant to terms of judgment, and partner A was liable to pay costs and fees of liquidation — Liquidator encountered numerous obstacles in completing its mandate, and net proceeds of liquidation were not sufficient to satisfy claims of stakeholders — Liquidator brought motion seeking relief, including directions with respect to distribution of net proceeds of liquidation among various stakeholders — Motion granted — Judgment declared that value of V's share of partnership equalled 50 percent of liquidated assets, increased by $67,691 — Judgment made it clear that A's share was to bear costs of liquidation but it did not otherwise direct liquidator to effect unequal distribution of assets of liquidation or to pay $67,691 from liquidation — There was clear finding that A owed

$67,691 to V, which would be payable even if net liquidation of assets was reduced to $0 — Amount of $67,691 could only be considered damages award obtained in foreign judgment, but V did not seek recognition of his damages award in Ontario, he did not have any priority for damages award and he was treated as any other judgment creditor with rights in distribution of A's share of remaining proceeds — After deducting liquidator's fees and expenses, amount for distribution was $91,632.89 from which $26,284.44 must be paid to V for balance of bank account — Remaining amount was to be distributed pro rata amongst A's creditors — After distribution liquidator was to be discharged.

***Robert N. Beaudoin J.*:**

Introduction

1 This is a motion by the Liquidator, MNP LTÉE (MNP), to update the court as to the Liquidator's activities since the issuance of the Approval and Vesting Order and to seek approval of the Liquidator's fees and disbursements, including fees and costs of its counsel. In addition, the Liquidator seeks direction with respect to the distribution of the net proceeds of the liquidation amongst the various stakeholders and seeks to be discharged following the completion of the said distribution.

Background

2 On March 4, 2014, pursuant to the oral judgment of Justice Catherine Mandeville of the Quebec Superior Court, MNP was appointed as court-appointed Liquidator with respect to the partnership assets of Marcel Villeneuve and Audie Armorer. The judgment was rendered by default following a lengthy court proceeding between Villeneuve and Armorer which commenced in or about 2002. The Liquidation Judgment dissolved the partnership and provided that Villeneuve would be entitled to receive 50% of the proceeds from the liquidation plus the amount of $67,691.50 plus interest from March 7, 2001. MNP was directed to distribute the proceeds of the liquidation pursuant to the terms of the said judgment. The judgment further provided that Armorer would be liable to pay the costs and fees of the liquidation.

3 Following its appointment, the Liquidator obtained an appraisal of the property and, prior to listing the property for sale on the open market, it concluded that it would be more cost effective to first inquire if either partner wished to purchase the other's half interest in the property. Each partner was notified of the proposed sale process and asked to submit an Offer to Purchase by August 14, 2014. The only partner that delivered an offer was Villeneuve. Armorer did not object. The Liquidator accepted Villeneuve's revised offer on January 9, 2015.

4 The Liquidator subsequently incurred numerous obstacles completing its mandate effectively as extensively set out in the affidavits of Sheri Aberback, Senior Vice-President of MNP. The Liquidator was required to re-attend at the Quebec Superior Court on December 5, 2014 to modify and clarify the Liquidation Judgment due to Royal Bank of Canada (RBC)'s request for clarification and Armorer's contestation of the terms of the Liquidation Judgment.

5 The Court declared that the RBC account was part of the partnership assets to be liquidated by MNP. After receiving the modified judgment, RBC agreed to release the funds in the partnership account to the Liquidator.

6 The Liquidator was then required to attend court in Ontario in 2015 to have the Liquidation Judgment recognized in Ontario in order to complete the transaction. The Liquidator attempted to do so with the consent of the partners but Armorer withdrew his consent and renewed his objections to the sale process. The Liquidation Judgments were recognized (ultimately on consent) on January 20, 2016.

7 In early February 2016, the Liquidator's counsel communicated with Villeneuve and Armorer's solicitors and proposed a process for completing the transfer of the property to Villeneuve. Armorer, via his counsel, renewed his objections to the process, objected to the Liquidator's fees and challenged Liquidator's entitlement to recover its legal fees.

8 By the end of March, 2016, the Liquidator's counsel was attempting to close the transaction when it discovered that the Ministry of National Revenue (CRA) had registered a tax lien against Armorer. In addition, it discovered that two executions had been previously registered against Armorer by RBC and by the Bank of Montréal (BMO). As a result, the Liquidator was

required to bring an application for an Approval and Vesting Order. By this time, Armorer was acting as a self-represented litigant.

9 The Liquidator first reported to the Court by way of affidavit sworn April 29, 2016. The hearing in support of the Approval and Vesting Order was returnable on May 13, 2016, however, the matter was adjourned at the request of the other stakeholders and the Liquidator was directed to obtain an updated appraisal of the property.

10 The updated appraisal was obtained on June 9, 2016. BMO and RBC also obtained an appraisal of the property. Following receipt of these appraisals, the Liquidator provided a fresh opportunity to each partner to submit an offer to purchase the other partner's half-interest in the property. Villeneuve submitted a revised (increased) offer. Armorer did not submit an offer nor did he object to the renewed sale process.

11 The return of the Application was scheduled for October 25, 2016. The Liquidator provided the court with further reports but the Application had to be adjourned to February 3, 2016. On that date, I issued two orders: a) the Approval and Vesting Order approving the transaction; and b) the Order granting a first charge to the Liquidator for its fees and disbursements, including fees incurred by its counsel.

12 The Liquidator prepared a third supplementary affidavit and report for the purpose of updating the court on the Liquidator's activities; seeking approval of the Liquidator's fees and disbursements including the fees and costs of its counsel; seeking direction from the court with respect to the distribution of the net proceeds and obtaining final approval of the Liquidator's activities, and confirming its discharge following the distribution of the net proceeds.

13 In accordance with the Approval and Vesting Order, the Liquidator completed the transaction pursuant to which Villeneuve purchased Armorer's half interest in the property for the sum of $210,000. The transaction closed on March 1, 2017.

14 In accordance with the Approval Vesting Order, the Liquidator delivered its Liquidator's certificate to Villeneuve and filed it with the court the same day, May 23, 2017.

Statement of Receipts and Disbursements

15 The Liquidator prepared a detailed statement of receipts and disbursements and is currently holding $218,699.87 in trust, however, it has unpaid fees and costs in the amount of $134,029.39 which sum includes estimated fees and legal fees to closing of the file. Subject to the approval of the Liquidator's total fees and costs, including fees and costs of its legal counsel, the net proceeds of liquidation total approximately $84,670.08. The Statement of Receipts and Disbursements is attached as Schedule "A" to these Reasons.

Liquidator's Fees and Disbursements

16 The Liquidator has prepared a detailed statement of account for the period April 1, 2014 to May 18, 2017 which includes a summary of the time charges and applicable hourly rates. The Liquidator has applied the sum of $46,604.83 towards its fees from the proceeds held in trust. The outstanding amount that remains unpaid is $48,404.96 (inclusive of the Liquidator's estimated fees to closing of the file $13,500 plus taxes).

Fees and Disbursements of the Liquidator's Counsel

17 The Liquidator states that in order to affect its mandate and to respond to the oppositions met by the Liquidator, it was necessary to retain legal counsel. The Liquidator retained three different counsel throughout the course of its mandate. For the period March 27, 2014 to May 21, 2017, the fees and disbursements of the Liquidator's counsel total $126,305 (inclusive of estimated fees to closing of the file.)

18 The breakdown of these fees and disbursements is as follows:

a) The sum of $17,797.27 was paid to the firm of Ravinsky, Ryan Lemoine (Ravinsky, Ryan) or the primary purpose of bringing the motion to modify and clarify the Liquidation Judgment.

b) As the partnership assets were located in Ontario, and as a matter became litigious, the Liquidator subsequently retained the firm of Low Murchison Radnoff LLP (Low Murchison).They delivered three accounts in the total amount of $8336. The Liquidator was not satisfied that Low Murchison was moving the file along quickly and terminated their services in the early October 2015. The liquidator ultimately paid $6,962.81 to settle Low Murchison's accounts.

c) The Liquidator then received another invoice from Ravinsky Ryan on October 21, 2015 in the amount of $10,431.81 on account of services rendered at the request of Low Murchison in support of the recognition of the Liquidation Judgment in Ontario. The Liquidator has not yet paid this account as it was not aware that Ravinsky, Ryan would render an invoice in connection with the services. It seeks direction from the court regarding the approval of these fees.

d) The Liquidator subsequently retained Borden Ladner Gervais LLP (BLG) in October 2015. BLG has issued a total of five invoices in the total aggregate amount of $78,465.86. BLG estimates the cost to complete all work relating to the liquidation will not exceed $11,500 plus taxes.

The Claims of other Stakeholders

19 The following are the claims of other stakeholders:

a) The Liquidation Judgment dated March 4, 2014 granted judgment to Villeneuve in the amount of $67,691.50 plus interest from 2001. The judgment also provides that Villeneuve is entitled to 50% of the proceeds of the liquidation.

b) CRA registered a tax lien against Armorer on March 3, 2016 in the amount of $116,949.65 plus interest.

c) RBC registered in execution against Armorer on August 13, 2013 in the amount of $34,832.17 plus interest and costs.

d) The BMO registered in execution against Armorer on December 7, 2015 in the amount of $31,387.46 plus interest and costs.

20 The net proceeds of the liquidation, namely $84,670.08 are not sufficient to satisfy the totality of the above-noted claims. In addition, the Liquidator received an irrevocable direction from Ravinsky, Ryan directing the Liquidator to remit to them up to $42,744.64 from any sums that may be come due to Villeneuve in the liquidation.

21 An issue arose as to whether the Liquidator's Final Report should be delivered to the Superior Court in Quebec or here in Ontario. Since the judgment had been recognized in Ontario and the liquidation of the assets occurred in Ontario, I concluded that this Court could receive the Liquidator's Final Report and make the final determination of the Liquidator's accounts having regard to the provisions of the Civil Code of Quebec. (CcQ)

The Position of the Parties

The Liquidator

22 The Liquidator maintains that its accounts accurately reflect the time spent by MNP professionals, along with the hourly rates as well as the disbursements incurred. Additional time was also incurred by MNP in respect of administrative and other tasks but those fees have been internally written off. Hourly rates are comparable to the rates charged for the provision of similar services by other firms in the Montréal and Ottawa area markets.

23 The Liquidator maintains that the fees charged by its counsel are fair, reasonable and justified in the circumstances and accurately reflect the work done on behalf of the Liquidator's mandate.

Mr. Villeneuve

24 Mr. Villeneuve takes the position that he is first entitled to receive $67,691. 50 + interest calculated at $55, 577.94 for a total of $123,269.44 He claims that the Quebec judgment granted him an unequal division of the proceeds of the liquidation. He further claims that the Liquidator's fees in the total amount of $221,183.35 are excessive having regard to the $218,699 it now holds in trust.

BMO and RBC

25 BMO and RBC rely on article 1300 of the CcQ which provides that a liquidator is entitled to remuneration which, if not specifically fixed otherwise is to be determined according to the value of the services rendered. Expenses incurred by the Liquidator must be determined in accordance with the same standard. BMO and RBC submit that the Liquidators' fees are neither fair nor reasonable and should be reduced to $118,225.33 after applying a 2:1 ratio where the value of the gain for the estate to be liquidated is twice as much as the remuneration and the expenses charged.

26 BMO and RBC rely on the fact that the expenses incurred by MNP were as a result of its efforts to realize against assets located in Ontario, one of which was the bank account for which there was no opposition. It submits that while MNP had issues when seeking to have the judgments from the Court of Quebec recognized and made enforceable in Ontario, it then incurred unreasonable expenses and retained three law firms for the recovery of a single remaining asset.

27 BMO and RBC propose that the net liquidation proceeds be paid in accordance with the original judgment by Justice Mandeville, specifically that the liquidation costs are to be paid alone by Armorer and that 50% of the remainder distributed to Villeneuve and the other creditors on a *pro rata* basis.

CRA

28 CRA takes a similar position to RBC and BMO, and although the Crown could claim a priority under various statutory provisions, it is prepared to accept a *pro rata* distribution of the net proceeds to bring the litigation to a close and minimize further waste of the parties' and the court's time.

Interpretation of the Oral Judgment of March, 4 2012

29 At the close of the hearing on June 8, Mr. Donovan made representations with regard to the March 4, 2014 oral judgment delivered in the Quebec proceedings. According to Mr. Donovan, the operative part of the judgment pertaining to the division of the partnership assets is not an equal distribution plus damages award, but in fact a judgment ordering the unequal distribution of partnership assets following the court-ordered liquidation of an undeclared partnership governed by the Civil Code of Quebec. As such, he supports Mr. Villeneuve's view that he has priority claim over the liquidation receipts of $123,269.44.

30 Counsel for the Liquidator then requested an opportunity for the parties to make additional written submissions on this issue. I gave further directions to the parties to make additional written submissions in the matter which submissions were not to exceed two pages and with no right of reply by June 20, 2017.

Discussion

31 The relevant part of the judgment reads as follows:

> Déclare que la valeur de la part (50%) de Monsieur Villeneuve dans ladite société équivaut à la moitié d'un produit de la liquidation des actifs de la <u>société majorée d'une somme de 67, 691, 50 $</u> à laquelle s'ajoutent l'intérêt et l'indemnité additionnelle depuis le 7 mars 2001.

32 Mr. Villeneuve takes the position that the judgment stated that the value of his partnership is the equivalent to one half of the proceeds of the liquidation of the assets of the partnership increased by the sum of $67,691.50 to which are added interest and the additional indemnity from March 7, 2001. In support of this, he has enclosed a letter from Mr. Donovan who was his counsel in the Quebec proceedings.

33 Mr. Donovan points out that, in the Quebec proceedings, Villeneuve had alleged that Armorer had made unauthorized withdrawals of substantial sums of money from an account belonging to the partnership. Villeneuve therefore asked not only that the partnership be liquidated and that he receive a 50% share of the proceeds, but also that he be paid his 50% share of the amount of the partnership funds misappropriated by Armorer. At trial, the judge determined that Armorer had indeed made unauthorized withdrawals of the partnership funds, half of which, or $67,791.50 belonged to Villeneuve. Donovan submits that the judge effected an unequal partition of the then existing partnerships assets in order to arrive at a true 50-50 partition of the assets between the former partners. He submits that Villeneuve is not a judgment creditor of Armorer; that he is simply entitled to a greater share of the liquidated partnership assets.

34 Not surprisingly, the Liquidator does not agree with this interpretation and maintains that it is inconsistent with the actual terms of Liquidation Judgment. In the alternative, if the court accepts Mr. Donovan's submissions, the Liquidator argues that this does not change the first ranking priority charge of the Liquidator for its fees and costs for the whole of the liquidated property of the partnership as ordered by this Court on February 3, 2017.

35 The Liquidator submits that the comments made by Mr. Donovan ought not to be considered as he has not provided any affidavit evidence before the court. The parties had no notice of this evidence nor did they have an opportunity to challenge it or reply to it. In addition, the Liquidator states that Mr. Donovan did not have standing to make submissions on this issue given that Villeneuve had counsel present. In addition, the Liquidator notes that Villeneuve owes significant fees to Mr. Donovan arising out of the Quebec proceedings and that Mr. Donovan's arguments favouring an unequal division of the partnership assets in favour of his former client suggest the appearance of a conflict of interest.

36 Moreover, the Liquidator notes that Mr. Donovan's comments are incompatible with and contrary to the evidence filed by Villeneuve. In his affidavit sworn June 2, 2017, Villeneuve himself characterized the Liquidation Judgment as providing him with an entitlement to "receive 50% of the proceeds of the liquidation of the partnership assets, *plus damages* in the amount of $67,691.02 plus interest from 7 March, 2001."

37 The Liquidator submits that the characterization of the sum as an award of damages is consistent with the relief sought in the Quebec proceedings where Villeneuve made a distinction between a claim for damages and the liquidation/division of the partnership assets.

38 Finally, the Liquidator maintains that the creditor and all parties and stakeholders to these proceedings have consistently taken the position that Liquidation Judgment entitled Villeneuve to up to 50% of the proceeds of the liquidated assets plus damages in the sum of $67,691 and interest from 2001. Neither Villeneuve nor any of the other stakeholders has ever characterized that sum as forming part of Villeneuve share of the liquidated partnership assets. The Liquidator has consistently treated that amount as an award of damages that would be paid from any proceeds remaining after the payment of the Liquidator's costs and fees and Villeneuve never disputed or challenged this position until the hearing on June 8, 2017.

39 Counsel for RBC and BMO make similar submissions with respect to Mr. Donovan's unsworn statements. In addition, he submits that these constitute inadmissible opinion evidence regarding foreign law and a foreign judgment made without any prior qualification as an expert in foreign law and without any executed acknowledgement of an expert's duty.

40 He repeats that the position taken by Villeneuve and Mr. Donovan is inconsistent with the affidavits sworn by Villeneuve. He also refers and relies on the allegations in the relief sought by Mr. Villeneuve in the Quebec proceedings.

41 Counsel for CRA submits that the comments made by Mr. Donovan at the conclusion of the hearing must be disregarded as they constitute unsworn opinion, were outside the scope of Mr. Donovan's affidavit evidence, were not given by a properly qualified expert and were inconsistent with the evidence before the court.

Conclusion

42 While steps were to taken to have the original Quebec judgment modified in order to clarify that the partnership assets included the RBC account, no one sought a further interpretation of the judgment since all of the parties (including Villeneuve) considered the sum of $67,691 to be damages. They were justified in doing so. The Quebec judgment declared that value of Villeneuve's share in the partnership equalled 50% of the liquidated assets increased (majorée) by the sum of $67, 691. While the judgment makes it clear that Armorer's share is to bear the costs of the liquidation it does not otherwise direct the Liquidator to effect an unequal distribution of the assets of the liquidation or to pay the $67, 691 and interest from the liquidation. There is a clear finding that Armorer owes that sum to Villeneuve. That amount would be payable to Villeneuve even if the net liquidation of the assets was reduced to $0. Moreover, the judgement has to be interpreted in accordance with the relief sought by Villeneuve.

43 In his Quebec Declaration, Villeneuve alleged that:

A) Messrs. Armorer and Villeneuve functioned as an undeclared partnership in Quebec for more than 20 years;

B) The amounts claimed in the proceeding from Armorer "represent appropriations by the defendant of partnership funds *and damages* consequential thereto."

44 Villeneuve had demanded that Armorer pay him, "*a sum representing the plaintiff's share of the sums illegally appropriated by Armourer* from the partnership *and damages caused to the partnership by such illegal appropriations* as well as compensation for the moral damages suffered by Villeneuve." He sought that Armourer pay to him "the sum of $489,919 and together with interest at the legal rate.

45 In this proceeding, Villeneuve has delivered two affidavits; on September 29, 2016 and June 2, 2017. Villeneuve deposed that the March 2014 Quebec judgment "declared that I was entitled to 50% of the proceeds of the liquidation of the partnership assets *plus* damages in the amount of $67,691.08."

46 Mr. Donovan has offered unsworn expert opinion without being qualified as an expert. Villeneuve owes significant fees to Mr. Donovan arising out of the Quebec proceedings and Ravinsky, Ryan seeks a charging order on any amount payable to Villeneuve. For this reason, his arguments favouring an unequal division of the partnership assets in favour of his former client, suggest the appearance of a conflict of interest. I can give little weight to his submissions.

47 As such, the amount in issue can only be considered a damages award obtained in a foreign judgment. The amount awarded was payable at that time. Nothing prevented Villeneuve from enforcing that judgment. He did not seek to a recognition of his damages award in Ontario. Villeneuve does not have any right of priority in this matter for his damages award and he should be treated as any other judgment creditor with rights in the distribution of Armorer's share of the remaining proceeds.

Liquidator's Fees and Disbursements, Including Fees and Costs of its Counsel and Necessary Directions

48 The relevant provisions of the Civil Code of Quebec are as follows:

1300. Unless the administration is gratuitous according to law, the act or the circumstances, the administrator is entitled to the remuneration fixed in the act, by usage or by law, or to the remuneration determined according to the value of the services rendered.

A person acting without right or authorization is not entitled to any remuneration.

2134. The remuneration, if any, is determined by the contract, usage or law, or on the basis of the value of the services rendered.

2651. The following are the prior claims and, notwithstanding any agreement to the contrary, they are in all cases collocated in the order here set out:

(1) legal costs and all expenses incurred in the common interest;

. . .

49 While this is a liquidation and not a receivership or an insolvency, the case law in those areas provides some useful guidelines. Quebec courts will approve the costs incurred by an administrator that are fair and reasonable in the circumstances. In *Québec (Autorité des marchés financiers) v. 9095-0049 Québec inc.*, 2010 QCCS 5804 (Que. Bktcy.) (CanLII), a Receiver sought approval of fees and disbursements pursuant to section 19.5 of the *Loi sur L 'Autorité des marches financers* (LAMF) which contains language that similar to the provisions of the CcQ. Justice Fraiberg referred to Ontario law and said this at paras. 24 - 26.

> 24 The standard for the appropriateness of professional fees recognized both in law and in jurisprudence is that they be fair and reasonable. What is fair and reasonable is always contextual, a function of what is being done, who are doing it, how they are doing it and in what circumstances.
>
> 25 There have been many iterations of the principle. A succinct one was repeated by Borins J. of the Ontario Court of Appeal in *Confectionately Yours Inc. (Re*) citing Stratton J. in *Belyea v. Federal Business Development Bank:*
>
>> In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:
>>
>>> The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.
>
> 26 The worth of services is therefore always relative. Time spent charged at usual rates, ideally known in advance, is not the entire answer but it is a good start.

50 He added later at paras. 31 and 62:

> 31 Receivership mandates under the LAMF are not invitations to an all you can eat buffet for the professionals lucky enough to get them.
>
> . . .
>
> 62 The Court believes that absent special circumstances that may justify a receiver applying for directions, he should generally not expend more on professional services than the lesser of the funds available to him or one half of the expected gain, conservatively estimated.

51 The Respondents rely on his conclusion at para. 85 to 87:

> 85 Given the absence of specific direction from the legislator, the foregoing considerations incite the Court to adopt the above-described 2:1 ratio as a guideline to apply after the fact in judging the fairness and reasonableness of professional fees charged by the receiver when no gain has resulted.
>
> 86 As noted above, after approval of his first statement of account, the Receiver had $892,389.20 left to spend in order to reach the now reduced expected realization of $1,777,770.20. The expected gain over what was already realized was $885,381.
>
> 87 Applying the 2:1 test to the above amounts means that an acceptable level of resources to risk in continuing the receivership was the lesser of $892,389.20 or <u>half</u> the expected gain, $442,690.05.

52 In *Confectionately Yours Inc., Re* [2002 CarswellOnt 3002 (Ont. C.A.)], 2002 CanLII 45059, the decision cited by Justice Fraiberg, Justice Borins concluded at para. 51:

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

53 There is no dispute that the Liquidator's total receipts are $354,676.51. That amount understates the total gross value of the partnership assets since it only includes the $210,000 that Villeneuve paid to purchase Armorer's 1/2 interest in the real property at 19 Pinhey. The gross value of the partnership assets is $564,676. The Liquidator's fees and expenses total $225,006.43.

54 Armorer's share is of the receipts is $282,383.26. Pursuant to the Quebec Judgment, all fees and costs associated with the liquidation are to be borne by Armorer.

55 Villeneuve's net share of the RBC account is $71,283.44 Villeneuve has already received $45,000 by way of interim distribution.

56 If I were to apply the 2:1 test set out by Justice Fraiberg, the Liquidator's fees and expenses are less than one half of the gross value of the partnership assets. If that ratio were applied to the net receivables, the Liquidator's fees and expenses would be limited to $177, 338.25 and not $118,225.33. In my view, the Respondents have not properly calculated the 2:1 ratio.

57 What is fair and reasonable is always contextual. Both Ontario and Quebec Courts have concluded that the following considerations are applicable in determining the reasonable remuneration to be paid to a receiver on a *quantum meruit* basis:

The Nature, Extent and Value of the Assets Handled

58 There is no doubt the value of the assets of our modest consist of two items; a bank account and the rental property. The liquidation of these assets should have been a simple matter.

The Complications and Difficulties Encountered

59 The liquidator has encountered unexpected difficulties at every turn. The dispute between Armorer and Villeneuve has dragged on for fifteen years. Armorer was represented from time to time, objected to reasonable proposals and delayed matters. RBC insisted on the clarification of the Quebec judgment so that its account would be clearly identified as the partnership asset. The Quebec judgment had to be recognized in Ontario. Execution judgments against Armorer were subsequently discovered. Due to the lapse of time and the presence of these new creditors, updated appraisals of the property had to be obtained. Nothing in this liquidation was as straightforward as it should have been. A final example of this is the dispute that arose at the conclusion of the hearing on June 6, 2017 when a new issue arose with respect to the meaning of the Quebec judgment and additional submissions were required.

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

60 The reasonableness of the fees incurred by the Liquidator is set out in the affidavits of Ms. Aberback. Her evidence with respect to the market rates charged is not contradicted. In terms of legal fees, counsel have submitted affidavits with respect to their rates in the reasonableness of their fees. For the most part, this evidence is not contradicted. The Respondents have not set out their own rates but simply make bald statements that these are too high.

61 There are two sets of legal fees that are in issue. With regard to the fees of Low Murchison, the Liquidator was critical of their services and then retained other counsel. Moreover, it appears that this firm engaged the services of Ravinsky, Ryan to

do work without the Liquidator's knowledge. While the Liquidator may have been able to settle their accounts, I do not allow the Liquidator any amount they paid to Low Murchison. The Liquidator's fees are reduced by that sum.

62 As for the additional Ravinsky, Ryan account delivered for services requested by Low Murchison, the Liquidator is bound by the actions of its agent and I direct the Liquidator to pay the amount claimed, namely $10,431.81.

63 This results in total fees and expenses of $218, 043.72. While this may be higher than a 2:1 ratio of the net receivables, this sum is less than one half of the value of the gross partnership assets. I am unwilling to reduce them any further having regard to the disproportionate number of difficulties encountered by the Liquidator in this case. As Justice Fraiberg concluded at para. 82:

> 82 A fee may therefore be fair and reasonable even when little or nothing is left for the stakeholders if the services were honestly rendered at usual rates in the reasonable expectation of benefit.

64 This results in a revised amount for distribution of $91,632.89 from which $26,284.44 must be paid to Villeneuve for the balance of his share of the RBC account. The remaining amount is to be distributed *pro rata* amongst Armorer's creditors. Having regard to the irrevocable designation executed by Villeneuve in favour of Ravinsky, Ryan, Villeneuve's share shall be paid to that firm.

65 The Liquidator is to be discharged after that distribution.

Schedule"A"

Liquidation of the Partnership of Marcel Villeneuve and Audie Armorer Estimated Realization and Distribution as per Quebec Judgment

As at May 18, 2017

Amount to be Retained from A. Armorer's share

Indemnity at May 18, 2017			
Judgment	67,691.50		
—			
Interest	75,791.30		
Total indemnity	143,482.80		
Total Receipts			
	To Date Total	*To Date Villeneuve*	*To Date Armorer*
Building - 19 Pinhey (50% interest sold to M. Villeneuve) at $420,000			
Deposit received	$ 10,500.00		
Balance received at closing	199,500.00		
RBC account	143,779.78		
Interest	896.73		
Total Realisation	*354,676.51*		
Estimated Distribution of Assets & Expenses Paid			
Building - 19 Pinhey (50% interest) ($420,000) payout to Armorer	210,000.00	-	210,000.00
Funds from RBC account	143,779.78	71,889.89	71,889.89
Interest on funds	896.73	448.37	448.37
	354,676.51	72,338.26	282,338.26
Expenses incurred to date (Liquidation costs are to be paid by Armorer):			
(Expenses include taxes, where applicable)			
Liquidator fees - paid	(46,604.83)	-	(46,604.83)
Liquidator fees - unpaid	(48,404.96)		(48,404.96)
Legal fees - Low Murchison Radnoff - paid	(6,962.81)		(6,962.81)
Legal fees - Ravinsky Ryan Lemoine - paid	(17,797.27)	-	(17,797.27)
Legal fees - Ravinsky Ryan Lemoine - unpaid	(10,431.81)		(10,431.81)

Legal fees -Borden Ladner Gervais- paid	(15,920.49)		(15,920.49)
Legal fees -Borden Ladner Gervais- unpaid	(75,192.62)		(75,192.62)
Property appraiser fees	(1,582.00)	-	(1,582.00)
Property taxes	(2,109.64)	(1,054.82)	(1,054.82)
	(225,006.43)	(1,054.82)	(223,951.61)
Sub-total - proceeds/realization	129,670.08	71,283.44	58,386.64
Interim Distribution	(45,000.00)	(45,000.00)	-
Total - Before Indemnity	84,670.08	26,283.44	58,386.64
Indemnity	-	58,386.64	(58,386.64)
Estimated Distribution Based on Court Judgment	*$ 84,670.08*	*$ 84,670.08*	*$ -*

Notes

1. MNP was appointed as liquidator on March 4, 2014.

2. As per the Quebec Judgment, all fees and costs associated with the liquidation are to be borne by A. Armorer.

3. There are various stakeholders (BMO, RBC, CRA) who have issued either statement of claims or liens on the property of A. Armorer.

Court File No. CV-16-11290-00CL

IN THE MATTER OF THE MAPLE BANK GMBH
AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT,*R.S.C. 1985, C.W-11, AS AMENDED
AND IN THE MATTER OF THE *BANK ACT,* S.C. 1991, C.46, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3
Tel: (416) 367-6000
Fax: (416) 367-6749

Alex MacFarlane – LSO No.: 28133Q
Tel: (416) 367-6305
amacfarlane@blg.com

Nick Hollard – LSO No. 83170O
Tel: (416) 367-6545
nhollard@blg.com

Lawyers for KPMG Inc., in its capacity as Liquidator of the business in Canada of Maple Bank GmbH