

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

EMMANUEL VILLAGE RESIDENCE INC.

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Applicant

-and-

1250 WEBER STREET EAST, KITCHENER, ONTARIO OF THE PROCEEDS OF
THE SALE THEREOF (IN REM)

Respondent

**BOOK OF AUTHORITIES OF THE RECEIVER
(Motion returnable February 8, 2017)**

February 2, 2017

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Lawyers for BDO Canada Limited,
in its capacity as Court-appointed Receiver

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1.	<i>Bank of Nova Scotia v. Diemer</i> , 2014 ONCA 851
2.	<i>Confectionately Yours Inc. (Re)</i> , 2002 CarswellOnt 3002

Tab 1

2014 ONCA 851
Ontario Court of Appeal

Bank of Nova Scotia v. Diemer

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

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

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

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

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

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

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers

VII.8 Remuneration of receiver

VII.8.b Remuneration

VII.8.b.iii Miscellaneous

Headnote

Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — Miscellaneous

Counsel fees — Bank held security over debtor's cattle farm operations, and was owed approximately \$2,000,000 — On application by bank, receiver was appointed — Receiver requested legal fees of \$255,955 on behalf of its counsel — Motion judge found legal fees were excessive, given size of receivership, and refused to approve them — Motion judge assessed fees at \$157,500, plus disbursements of \$4,434.92 — Receiver appealed — Appeal dismissed — Motion judge did not err in disallowing counsel's fees — Initial appointment order stating that counsel was to be compensated at "standard rates", and subsequent approval of receiver's reports, did not oust need for court to consider whether fees claimed were fair and reasonable — Motion judge made no palpable and overriding error in concluding that counsel's fees were not fair and reasonable — It was inappropriate for motion judge to simply apply rates of London counsel, but this was not fatal — Motion judge was informed by correct principles, which led him to conclude fees lacked proportionality and reasonableness — Certain comments made by motion judge were not justified, but different result should not ensue.

Table of Authorities

Cases considered by *Sarah E. Pepall J.A.*:

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 29 O.T.C. 354, 1997 CarswellOnt 1246 (Ont. Gen. Div. [Commercial List]) — referred to

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 312 N.R. 195 (note), 41 C.B.R. (4th) 28, 181 O.A.C. 197 (note) (S.C.C.) — referred to

HSBC Bank Canada v. Lechier-Kimel (2014), 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — pursuant to

s. 248(2) — considered

s. 243(6) — pursuant to

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

s. 101 — considered

APPEAL by receiver from judgment reported at *Bank of Nova Scotia v. Diemer* (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.), refusing to approve counsel fees in amount sought by receiver.

Sarah E. Pepall J.A.:

1 The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

2 This appeal involves a motion judge's refusal to approve legal fees of \$255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

3 For the reasons that follow, I would dismiss the appeal.

Facts

(a) *Appointment of Receiver*

4 The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium

Financial Services Inc. were owed approximately \$4.9 million (approximately \$2 million and \$2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

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

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

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

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

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

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

(b) Receiver's Activities

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

9 The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of \$8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

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

(c) Application to Approve Fees

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

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

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

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

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

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

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

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

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;

- \$100,000 of BLG's fees be approved; and
- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

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

Motion Judge's Decision

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

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

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

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

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

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

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

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

Grounds of Appeal

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

Burden of Proof

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

Analysis

(a) Appointment of a Receiver

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

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

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

(b) Passing of a Receiver's Accounts

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

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

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

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

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

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

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

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

(c) The Rise and Dominance of the Billable Hour

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

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

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

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

(d) Fees in Context of Court Appointed Receiver

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

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

43 In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

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

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

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

(e) Application to This Case

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

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

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

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

51 In this regard, the appellant makes numerous complaints.

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

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

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

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

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

considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

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

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

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

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

Disposition

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

Alexandra Hoy A.C.J.O.:

I agree

E.A. Cronk J.A.:

I agree

Appeal dismissed.

Tab 2

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164
O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

**IN THE MATTER OF THE PROPOSALS OF CONFECTIONATELY YOURS,
INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC.,
CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.**

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

VII Receivers

VII.8 Remuneration of receiver

VII.8.a Accounts

Headnote

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with

procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

Table of Authorities

Cases considered by *Borins J.A.*:

Anvil Range Mining Corp., Re, 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Atkinson Estate, Re (1951), [1952] O.R. 685, [1952] 3 D.L.R. 609 (Ont. C.A.) — considered

Atkinson Estate, Re, (sub nom. *National Trust Co. v. Public Trustee*) [1953] 2 S.C.R. 41, [1953] 3 D.L.R. 497, 1953 CarswellOnt 136 (S.C.C.) — referred to

Avery v. Avery, [1954] O.W.N. 364, 1954 CarswellOnt 200 (Ont. H.C.) — referred to

Bank of Montreal v. Nican Trading Co., 43 B.C.L.R. (2d) 315, 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397 (B.C. C.A.) — referred to

Belyea v. Federal Business Development Bank, 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

BT-PR Realty Holdings Inc. v. Coopers & Lybrand, 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190, 1996 CarswellBC 1083 (B.C. C.A.) — referred to

Chartrand v. De la Ronde, 1999 CarswellMan 248, 9 C.B.R. (4th) 20, [1999] 9 W.W.R. 631, 139 Man. R. (2d) 36 (Man. Q.B.) — considered

Cohen v. Kealey & Blaney, 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 376 (Ont. C.A.) — referred to

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — considered

Ferguson v. Imax Systems Corp., 44 C.P.C. 17, 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188, 1984 CarswellOnt 155 (Ont. Div. Ct.) — referred to

Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd., 46 C.B.R. (N.S.) 117, 1983 CarswellNS 44 (N.S. T.D.) — referred to

Hermanns v. Ingle, 68 C.B.R. (N.S.) 15, 1988 CarswellOnt 138 (Ont. Assess. O.) — referred to

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In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch), 45 O.A.C. 241 at 247, 1991 CarswellOnt 830 (Ont. Div. Ct.) — referred to

MacPherson (Trustee of) v. Ritz Management Inc., 1992 CarswellOnt 3213 (Ont. Gen. Div.) — referred to

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp., 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered

Murano v. Bank of Montreal, 111 O.A.C. 242, 163 D.L.R. (4th) 21, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) — considered

Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc., 40 C.P.C. (2d) 280, 1989 CarswellOnt 464 (Ont. H.C.) — referred to

Prairie Palace Motel Ltd. v. Carlson, 35 C.B.R. (N.S.) 312, 1980 CarswellSask 25 (Sask. Q.B.) — considered

R. v. S. (R.D.), 1997 CarswellNS 301, 1997 CarswellNS 302, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — followed

Silver v. Kalen, 52 C.B.R. (N.S.) 320, 1984 CarswellOnt 165 (Ont. H.C.) — referred to

Toronto Dominion Bank v. Park Foods Ltd., 13 C.P.C. (2d) 302, 62 C.B.R. (N.S.) 68, 77 N.S.R. (2d) 202, 191 A.P.R. 202, 1986 CarswellNS 49 (N.S. T.D.) — referred to

Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd., 19 C.B.R. (N.S.) 252, 1974 CarswellOnt 73 (Ont. S.C.) — referred to

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Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

s. 21(2) — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 39(2) — referred to

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

s. 61(1) — referred to

s. 61(3) — referred to

Rules considered:

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

R. 39.02(1) — considered

R. 57.01(3) — referred to

R. 74.17(1)(i) [en. O. Reg. 484/94] — considered

R. 74.18(1)(a) [en. O. Reg. 484/94] — considered

R. 74.18(9) [en. O. Reg. 484/94] — considered

APPEAL by shareholders of debtor companies from judgment reported at [2001 CarswellOnt 1784](#), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

Borins J.A.:

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 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 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 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 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 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:

- 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 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 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.

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.

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 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

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 — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — 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.

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 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 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). 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 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 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 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver 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 In assessing the receiver's accounts, the motion judge made the following findings:

- (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) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.
- (3) The receivership was difficult and "rather unique".
- (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".
- (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) 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) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

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 emphasized 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 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 × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

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 (Ont. Gen. Div. [Commercial List]) 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 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.

(1) Bias

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 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 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 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), 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 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 (S.C.C.). 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 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 arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

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 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 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 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 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 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 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 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 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.

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 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 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. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). 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 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).¹ I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), 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 In *Holmsted 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. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . 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 (Ont. C.A.), at 52-53, 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 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 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 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*, supra; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 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".

(3) Fair and reasonable remuneration

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 *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), 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 *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* 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 Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). 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 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* 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 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 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 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bkcty.) 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.

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

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 (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

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 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 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:

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.

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

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 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 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.

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 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 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 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 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 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 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., *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. 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 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 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 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 from 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 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 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 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 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 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 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 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.

Catzman J.A.:

I agree.

Doherty J.A.:

I agree.

Appeal allowed in part.

Footnotes

- 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 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.

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EMMANUEL VILLAGE RESIDENCE INC.
Applicant

-and- **ATTORNEY GENERAL OF
ONTARIO**
Applicant

-and- **1250 WEBER STREET EAST, KITCHENER,
ONTARIO OR THE PROCEEDS OF THE SALE
THEREOF (IN REM)**

Respondent
Court File No.: CV-16-11424-00CL

ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF THE RECEIVER
(Motion returnable February 8, 2017)

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