

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF: The Receivership of Kooshie Cushions of Canada Limited

Between:

Business Development Bank of Canada

Applicant

and

Kooshie Cushions of Canada Limited

Respondent

Receiver's Book of Authorities
Motion: October 2, 2026 at 11:00am

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Index

Authority	Tab
<i>CCM Master Qualified Fund v. blutip Power Technologies</i> , 2012 ONSC 1750 (CanLII)	1
<i>Federal Business Development Bank v. Belyea and Fowler</i> , 1983 CanLII 4086 (NB CA)	2
<i>Confectionately Yours Inc. (Re)</i> , 2002 CanLII 45059 (ON CA)	3

Tab 1

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver’s motion for directions: sales/auction process & priority of receiver’s charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. (“D&P”) was appointed receiver of blutip Power Technologies Ltd. (“Blutip”), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver’s Charge and Receiver’s Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. (“CCM”), is the senior secured lender to Blutip. At present Blutip owes CCM approximately \$3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: \$2.6 million and December 29, 2011: \$800,000), (ii) \$65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) \$47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.¹ Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

¹ (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,² BIA proposals,³ and CCAA proceedings.⁴

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. CCAA proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest CCAA process:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.⁵

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of \$100,000 as compared to the

² *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.

³ *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.

⁴ *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.).

⁵ Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of \$100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately \$3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be \$103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of \$75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.⁶

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the

⁶ *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.⁷

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that

⁷ *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

[21] I should note that the Appointment Order contains a standard “come-back clause” (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

[49] In his recent decision in *Timminco Limited (Re)* (“Timminco I”) Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

In my view, in the absence of the court granting the requested super priority and protection, the objectives of the *CCAA* would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

...

[51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal’s holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor’s property based on provincial legislation.⁸

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a

⁸ 2012 ONSC 1299 (CanLII).

receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)

D. M. Brown J.

Date: March 15, 2012

Tab 2

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

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

COUNSEL:

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

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

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

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

Please note that a French translation appears below the

English language judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . . while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this court to protect.

. . .

. . . while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.

. . .

It is evidence, if the necessary expenses of administering estates in this court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the court's officers at the expense of the suitors. In my opinion, however, the practice of the court warrants no such result; and I think it only right to point out that it is a mistake to suppose that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading

counsel.

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

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

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

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

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

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

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

In the summer of 1978 the plaintiff lent \$40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.

Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, who accompanied Mr. Belyea to the meeting, was prepared to pay \$40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately \$34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.

By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd., as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.

Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for \$30,000.00. In addition the plaintiff realized \$4,925.24 apart from the receiver's efforts. A balance of \$7,749.03 remained owing on the \$34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of \$8,279.30 as of November 10, 1981 but gave no details of this higher figure.

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

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

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

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

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

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

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

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

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

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

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

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

Appeal allowed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

. . .

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

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

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

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

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

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

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

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

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

Au cours de l'été 1978, la demanderesse a prêté 40 000 \$ à la compagnie. Pour garantir ce prêt, la demanderesse a accepté une débenture qui lui donnait le droit de nommer un séquestre. Les défendeurs ont garanti ce prêt. La débenture et la garantie ont été reçues en preuve.

Aucun incident n'est survenu dans les relations entre la compagnie et la demanderesse jusqu'au 27 août 1979 alors qu'une suite d'événements s'est rapidement déroulée. Au cours de la matinée du jour susmentionné, M. Belyea a rendu visite à M. Donald O'Leary, un agent de crédit principal de la demanderesse, et l'a informé que la compagnie se trouvait dans une situation financière précaire et que M. Sam Gamblin, de la firme Gem Photo, était prêt à acheter le stock de la compagnie pour la somme de 40 000 \$. M. Belyea a signalé que ce montant était plus que suffisant pour acquitter la dette de la compagnie envers la demanderesse, qui était alors d'environ 34 000 \$. M. Belyea a demandé à la demanderesse l'autorisation d'effectuer cette opération.

Au cours de l'après-midi du même jour, la demanderesse a conclu qu'elle ne pouvait pas consentir à cette opération et elle a désigné la firme H.R. Doane Ltd. à titre de séquestre et lui a demandé de prendre les mesures nécessaires pour effectuer la liquidation du stock. M. Bev Fowler, un associé de la firme Doane, était le représentant de la firme responsable de cette liquidation.

M. Fowler a décrit les diverses possibilités qui s'-

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

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

- a) La demanderesse a-t-elle agi de façon raisonnable en refusant d'accepter l'offre de M. Gamblin? et
- b) Les honoraires de 11 730 \$ réclamés par le séquestre étaient-ils raisonnables?

[21] Le présent appel soulève les mêmes questions.

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

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

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

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

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

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

la présente Cour ne la modifiera pas.

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

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

Appel accordé.

Tab 3

DATE: 20020919
DOCKET: C36486

COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY AND BORINS J.J.A.

IN THE MATTER OF THE PROPOSALS OF

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

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

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

BORINS J.A.:

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

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

Introduction

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

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

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

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

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

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

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

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

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

[7] [7] The Parravano's 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 Parravano's, 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] [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] [9] For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

[10] [10] The reasons of the motion judge are reported as *Re Bakemates International Inc.* (2001), 25 C.B.R. (4th) 24.

[11] [11] In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

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

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

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

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

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

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

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

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

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

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

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

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

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

- (1) (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies’ assets could be sold as a going concern.
- (2) (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver’s personnel than a liquidation receivership.
- (3) (3) The receivership was difficult and “rather unique”.
- (4) (4) Mr. Morawetz scrutinized the bills before they were finalized “so that inappropriate charges were not included”.
- (5) (5) It was not “surprising” that the receiver was required to use many members of its staff to operate the companies’ businesses given what he perceived to be problems created by the Parravanos.
- (6) (6) It was necessary to use the receiver’s personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies’ assets.
- (7) (7) Mr. Morawetz “had a very good handle on the work and the worth of the legal work”.

[18] [18] The motion judge assessed, or passed, the receiver’s accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he 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] [19] He referred to Spence J.’s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

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

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

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

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

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

Issues and Analysis

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

(1) Bias

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[38] [38] Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).¹

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

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

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

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

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

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

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

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

(3) Fair and reasonable remuneration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

(1) Bias

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

(2) Cross-examination of the receiver

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded 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] [68] Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

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

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

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

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

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

Result

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

Released: September 19, 2002

“S. Borins J.A.”

“I agree M. A. Catzman J.A.”

“I agree Doherty J.A.”