REW ent

COURT FILE NUMBER	2103-02132
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	In the Matter of the Receivership of P7 CONSTRUCTION LTD. et al
APPLICANT	**BUSINESS DEVELOPMENT BANK OF CANADA**
RESPONDENTS	**P7 CONSTRUCTION LTD., 1619904 ALBERTA LTD., HYOUNG JOON YOON aka JASON YOON, SUNG SOO CHOI aka RICHARD CHOI AND EUNG CHANG KIM**
FILING PARTY	BDO CANADA LIMITED in its capacity as the Court-appointed Receiver and Manager of P7 CONSTRUCTION LTD. and 1619904 ALBERTA LTD (and not in its personal capacity)
DOCUMENT	**BENCH BRIEF of the RECEIVER-MANAGER** **(for an Application on October 24, 2022 at 2:00 PM Before Mr. Justice M. J. Lema, Commercial List)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Caron & Partners LLP 2120, 237 – 4th Avenue SW Calgary, AB T2P 4K3 Tel: (403) 262-3000 Fax: (403) 237-0111 **Attention: R.J. Daniel Gilborn / Lucinda A. Wong** Solicitors for BDO Canada Limited Email: dgilborn@caronpartners.com / lwong@caronpartners.com File No. 60899-000

TABLE OF CONTENTS

I. INTRODUCTION

1. This Bench Brief is filed on behalf of BDO Canada Limited in its capacity as the Court-appointed receiver and manager (the "**Receiver**") over all of the current and future assets, undertakings and properties of P7 Construction Ltd. ("**P7**") and 1619904 Alberta Ltd. ("**161**") (collectively, the "**Companies**") in support of an Application for various relief as is more particularly set out in the draft Orders scheduled to the Application filed concurrently with this Brief.

2. The Application for is supported by, among other things, the Receiver's Second Report, filed concurrently with this Brief (the "**Second Report**") and the Affidavit of Kevin Meyler, sworn on October 17, 2022 and filed concurrently with tis Brief (the "**Meyler Affidavit**").

3. This Bench Brief is filed to provide a succinct overview of the relevant authorities governing the relief sought in the Approval Application.

II. FACTS

4. The fulsome facts may be found in the Second Report and the Meyler Affidavit. No attempt will be made here to detail the facts set out in the foregoing. The Applicant's counsel will instead address the facts, to the extent required, at the hearing of the Application.

III. APPLICATION FOR ORDER RETURNING PROPERTY TO THE RECEIVER

5. This Court has the authority to grant an Order directing an individual who took funds, post-receivership, from the account of the entity that was subject to the Receivership Order, to return those funds to the Receiver.

ATB Financial v Coredent Partnership, 2019 ABQB 383 [**TAB 1**] ["***Coredent***"],

6. This proceedings in *Coredent* eventually progressed to contempt.

See the Order of Justice K.G. Nielsen (as he then was) [**TAB 2**]
granted on June 19, 2019 and filed on June 26, 2019

7. The Receiver is not asking for contempt relief at this point. Rather the Receiver is asking for leave to bring an Application in the future akin to an Application under Rule 10.51, which states that: "The Court may grant an order … that requires a person to appear before it, … to show cause why that person should not be declared to be in civil contempt of Court."

8. The process contemplated by the Receiver aligns with the two-stage process this Court has set out for contempt. First the Applicant for contempt will make the case for contempt. If apparent or ostensible contempt is shown, a "show cause" hearing can be conducted.

Wade v Wade, 2021 ABQB 865 at para. 19 **[TAB 3]**

9. There is *prima facie* a breach of the Receivership Order in this matter by the Respondent Sung Soo Choi (aka Richard Choi) by his taking of the Post Receivership Payment (as that term is defined in the Second Report). Moreover, as further disclosed in the Second Report, his counsel has admitted this to be the case.

10. The process initiated by the Receiver aligns with the authorities and gives Mr. Choi a chance to purge his contempt before those proceedings are formally brought by returning the Post Receivership Payment.

IV. APPROVAL OF THE ACCOUNTS OF THE RECEIVER

11. This Court unquestioningly has the power and authority to scrutinize and approve the accounts of a Court-Appointed receiver-manager and its legal counsel. The Court can consider multiple factors regarding whether to allow the professional fees and disbursements as requested.

Piikani Nation v. Piikani Energy Corporation, 2011 ABQB 450 **[TAB 4]**

12. As there are some authorities suggesting that the Receiver should swear to its fees, it has provided the Meyler Affidavit along with the Second Report. The fulsome accounts of the Receiver sought to be approved are included as exhibits to the Meyler Affidavit.

13. Regarding the Receiver's independent legal counsel, Caron & Partners, LLP ("**C&P**"), while the amounts and dates of those accounts has been provided in evidence, the accounts themselves contained privileged information. Accordingly, the fulsome C&P accounts sought to be approved have been provided separately to the judge hearing this Application so he may review them.

IV. APPROVAL OF ACTIVITIES OF THE RECEIVER

14. This Court possesses the jurisdiction under common law to issue an interim approval of a receiver's activities. In *Target Canada Co. (Re),* (citation below), Justice Morawetz discussed the process for approval of the reports of a court officer. In that case, the court dealt with a Monitor under the CCAA. The same principles have been held to apply to a receivership, however.

Hanfeng Evergreen Inc., (Re), 2017 ONSC 7161 at para 15 ["***Hangfeng***"] [**TAB 5**]

15. In *Target Canada Co. (Re)*, the Court recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, such as a sale transaction, express findings of fact may be required to support the relief being sought. The task of the court is to address squarely specific facts and to make specific findings that will be binding in future.

Target Canada Co (Re), 2015 ONSC 7574 at para 18 ["***Target***"] [**TAB 6**]

16. Court approval serves a number of important purposes for the receiver:

(a) allows the receiver to move forward with the next steps in the proceedings;

(b) brings the receiver's activities before the Court;

(c) allows and opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;

(d) enables the Court to satisfy itself that the receiver's activities have been conducted in prudent and diligent manners;

(e) provides protection for the receiver not otherwise provided by the *Bankruptcy and Insolvency Act*; and

(f) protects creditors from the delay and distribution that would be caused by:

i. re-litigation of steps taken to date, and

ii. potential indemnity claims by the receiver.

Target at para 23 [**TAB 6**], and cited in *Hangfeng* at para 17 [**TAB 5**]

V. CONCLUSION AND RELIEF SOUGHT

17. The Applicants seek the relief as substantially set out in the Orders appended to the concurrently filed Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th day of October, 2022

CARON & PARTNERS, LLP

R.J. Daniel Gilborn of counsel for
the Applicant, BDO Canada Limited

TABLE OF AUTHORITIES

1. *ATB Financial v Coredent Partnership,* 2019 ABQB 383

2. Order of Justice K.G. Nielsen (as he then was) granted on June 19, 2019 and filed on June 26, 2019

3. *Wade v Wade*, 2021 ABQB 865

4. *Piikani Nation v. Piikani Energy Corporation*, 2011 ABQB 450

5. *Hanfeng Evergreen Inc., (Re),* 2017 ONSC 7161

6. *Target Canada Co (Re),* 2015 ONSC 7574

Court of Queen's Bench of Alberta

Citation: ATB Financial v Coredent Partnership, 2019 ABQB 383

Date: 20190523
Docket: 1803 23827
Registry: Edmonton

Between:

ATB Financial

Plaintiff

- and -

**Coredent Partnership, A.J. Seehra Professional Corporation,
A.S. Lotey Professional Corporation,
Amarjit Seehra Professional Corporation,
Amandeep Lotey, Amarjit Singh Seehra**

Defendants

**Endorsement
of the
Honourable Mr. Justice Robert A. Graesser**

Introduction

[1] ATB Financial applies for various relief against the Defendants A.J. Seehra Professional Corporation and Amarjit Singh Seehra arising out of the Receivership of Coredent Partnership, A.J. Seehra Professional Corporation and A.S. Lotey Professional Corporation.

[2] Those corporate entities were put into receivership by order of the Honourable Mr. Justice K.G. Nielsen on December 31, 2018. The order appointed PricewaterhouseCoopers Inc., LIT ("PWC") as the Receiver. The Receivership Order has been extended to June 10, 2019.

[3] The Defendants Seehra and Lotey are dentists. They carried on their dental practices through their respective professional corporations and through the Coredent Partnership.

[4] The application before me on May 16, 2019 focused on a series of transactions in January 2018 and February 2019 that involved monies held in an investment account owned by A.J. Seehra Professional Corporation (the "PC") that were transferred to a personal account owned by A.J. Seehra ("Dr. Seehra") and then transferred out of Dr. Seehra's personal account (the "personal account") to various recipients.

[5] ATB seeks orders to aid it and the Receiver to recover the monies paid out of the PC account to the personal account, as well as information concerning the ultimate recipients of the funds paid out of the personal account.

[6] Relief was sought in the context of a contempt application, with ATB and the Receiver seeking relief including fines and costs from Dr. Seehra.

[7] The Receiver sought an order requiring Dr. Seehra to answer various questions objected to at a cross-examination and questioning held on May 8, 2019.

Background

[8] Dr. Seehra and the PC have a banking relationship with the Bank of Montreal ("BMO") and they have or had investment accounts with BMO Nesbitt Burns. On February 1, 2019 (after the Receivership Order of which Dr. Seehra was aware) a transfer of $721,032.16 went from the PC investment account into Dr. Seehra's personal account. The same day $177,968.78 was transferred from the personal account to pay down a personal loan with BMO.

[9] The same day, February 1, 2019, a Canadian dollar draft was purchased from the personal account for $100,000. There was a cash withdrawal of $3,000. On February 1, there were also two ATM withdrawals for $800 each. On February 4, there were six $800 ATM withdrawals and two $600 ATM withdrawals. As well, there were Canadian dollar drafts purchased totaling $210,000.

[10] On February 7, 2019, there was a transfer of $30,892.41 into the personal account which I am told came from Dr. Seehra's personal investment account with BMO Nesbitt Burns. Also on that date, there were $13,000 of cash withdrawals, $6,000 of money orders and ATM withdrawals totaling $3,000.

[11] On February 8, there were $2,400 of ATM withdrawals and a Canadian dollar draft purchased for $100,000. The balance remaining in the account on February 8 was $118,336.59

[12] The Receiver has been seeking information and documentation concerning these transactions since before February 20, 2019 when I issued my first order in this matter: directing Dr. Seehra to provide information concerning banking records and the location of various physical assets. Obtaining information has been difficult for the Receiver; hence the contempt portion of the application before me.

[13] I issued orders on March 29 and April 25 dealing with disclosure of documents and records. Those orders included directions that both the Canadian Imperial Bank of Commerce ("CIBC") and BMO provide relevant banking information. The April 25 order addressed difficulties the Receiver was having with the banks in getting records as previously ordered. Neither bank appealed these orders. I was informed at the application on May 16 that CIBC has been fully cooperative since the April 25 order; BMO less so.

[14] It appears from the records provided by CIBC and from answers given by Dr. Seehra on cross-examination and questioning held on May 8 that the PC had an investment account with CIBC. On January 11, 2019 (after the Receivership Order of which Dr. Seehra was aware) a draft was issued in favour of Dr. Seehra's wife in the amount of $16,660.92, and he had CIBC issue him cheques totaling $6,611.60 and US $18,416.28.

[15] Dr. Seehra apparently paid the $6,611.60 amount to the Receiver before the May 16 application. The whereabouts of the US $18,416.28 is unknown, and his wife's entitlement to the $16,660.92 has not been determined.

[16] Dr. Seehra previously explained the BMO transactions as having been discussed with BMO in the month or so before the receivership. BMO had a charge over the PC investment account funds as security for personal loans. Dr. Seehra authorized BMO to use the PC investment account funds to pay down or off his personal loans. He said that process was under the timing and control of BMO and he played no direct part in it.

[17] Records obtained from BMO reference a telephone call with Dr. Seehra on February 1 in which he authorized BMO to take the PC investment account funds and apply them against his personal loans.

[18] According to the banking records provided to the Receiver, there had been a transfer of $714,812.78 into the personal account, of which $614,555.19 was transferred to the same personal loan account referenced in paragraph 7 above.

[19] I was shown (briefly) an agreement amongst Dr. Seehra, the PC, BMO and BMO Nesbitt Burns that BMO says gives them security over the PC investment account in favour of Dr. Seehra's personal loans. I make no comment on the validity of any claimed security, or whether BMO followed the necessary steps to perfect its security. Those are issues between BMO and the Receiver to be resolved at a later date.

[20] At the May 8 cross-examination, Dr. Seehra refused to answer a number of questions relating to transfers and cheques out of his personal account. Time for the application on May 16 was limited, and Dr. Seehra's counsel had no opportunity to respond to the application to compel answers.

Analysis

[21] It is not clear if BMO had the right to transfer funds from the PC investment account and use some or all of those funds to pay towards Dr. Seehra's personal loans to BMO. Whether they did or did not is not before me.

[22] In any event, PC funds totaling $721,032.16 went into Dr. Seehra's personal account. $177,968.78 was immediately transferred to BMO to pay against Dr. Seehra's personal loans. $543,063.38 of PC funds remained in the personal account, albeit briefly. Within a week, $445,000 was removed. The recipients and whereabouts of those funds are unknown. The balance remaining in the personal account on February 8, 2019 ($118,336.59), most of which came from the PC investment account, has not been accounted for.

[23] Dr. Seehra explained that he may have misunderstood the sequence of transfers to and from his personal and the PC's various accounts with BMO and BMO Nesbitt Burns. Counsel offered no argument as to why Dr. Seehra should not have to pay the monies taken from the PC

investment account and put into his personal account, apart from the monies taken by BMO on account of their claimed security. He referenced the huge financial losses suffered by Dr. Seehra as a result of the failure of the Coredent Partnership.

[24] Counsel for ATB urged me to find Dr. Seehra in contempt of both the initial Receivership Order and my orders of February 20 and April 25. Citing an unreported decision of Romaine J in ***Alberta Treasury Branches v Chocolatrie Bernard Callebaut Partnership et al***, Court File No. 1101-11456, March 24, 2011, Mr. Zahara suggested a fine of $721,032.16 representing the amount he says was misappropriated by Dr. Seehra.

Decision

[25] I recognize that I have very broad powers in the event of a finding of contempt. I have not yet found Dr. Seehra in contempt of the initial Receivership Order or any of my subsequent orders. I do not do so now, not because the application has no merit, but because there was insufficient time for Dr. Seehra's counsel to be able to respond to the contempt issues. The brief May 16 hearing focused on what had been learned of the CIBC account and the BMO accounts (to date) and mainly the $721,032.16. The contempt proceedings must be scheduled for a later date, with sufficient time to allow Dr. Seehra to fully respond. The question of remedies, fines and costs must be determined later.

[26] There is, however, no good reason why the Receiver should not be able to take active collection steps to recover the missing $543,063.38 of PC funds that went into Dr. Seehra's personal account on February 1, 2019 and have been withdrawn from that account. As a result, the Receiver should have judgment in that amount against Dr. Seehra.

[27] There is also no good reason why the Receiver should not be able to take active collection steps to recover the remaining monies transferred from the CIBC PC accounts. Dr. Seehra has yet to advise the Receiver as to any legal entitlement his wife may have had to the $16,660.92 transferred to her on January 16, 2019.

[28] Dr. Seehra is to provide any documentation supporting a security or priority claim in favour of his wife to the Receiver within 10 days from the date of this Endorsement. He may also use that time to make arrangements for payment to the Receiver of the amounts transferred from the CIBC PC account. Failing agreement, the parties may contact me through the Trial Coordinator's office to provide written submissions on these issues, rather than arrange for an in-person hearing.

[29] With respect to compelling answers to objected-to questions, I make no specific order as there was insufficient time to argue the matter. That will have to be re-scheduled, if necessary. I hope that counsel, acting reasonably, will be able to agree on a timeline for providing answers to obviously relevant questions, saving only disagreement on relevant questions for determination by me.

[30] In the meantime, however, I do direct that Dr. Seehra, within 10 days from the date of this Endorsement, provide details of recipients of the various cheques, drafts and money orders drawn on his BMO personal account between February 1 and February 8, 2019. He should similarly account for the fate of the $118,334.59 which remained in that account on February 8.

Heard on the 16th day of May, 2019.
Dated at the City of Edmonton, Alberta, this 23rd day of May, 2019.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

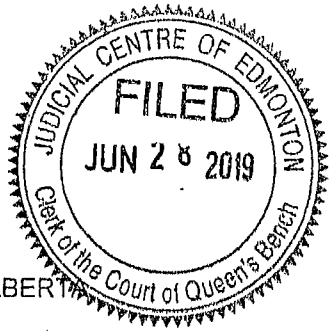
Ryan Zahara
Blake, Cassels & Graydon LLP
for the Plaintiff

T.M. Warner and Spencer Norris
Miller Thomson LLP
for the Receiver PricewaterhouseCoopers Inc.

Arman M. Chak
ForensicLaw
for A.J. Seehra Professional Corporation,
Amarjit Seehra Professional Corporation, and
Amarjit Singh Seehra

I hereby certify this to be a true copy of the original.

for Clerk of the Court



Clerk's stamp:

COURT FILE NUMBER	1803 23827
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ATB FINANCIAL
DEFENDANTS	COREDENT PARTNERSHIP, A.J. SEEHRA PROFESSIONAL CORPORATION, A.S. LOTEY PROFESSIONAL CORPORATION, AMARJIT SEEHRA PROFESSIONAL CORPORATION, AMANDEEP LOTEY, and AMARJIT SINGH SEEHRA
DOCUMENT	**CONTEMPT ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MILLER THOMSON LLP
Barristers and Solicitors
2700, 10155 - 102 Street
Edmonton, AB, Canada T5J 4G8
Phone: 780.429.9746 Fax: 780.424.5866

Lawyer's Name: Terrence M. Warner / Spencer Norris
Lawyer's Email: twarner@millerthomson.com / snorris@millerthomson.com
File No.: 74806.32

DATE ON WHICH ORDER WAS PRONOUNCED: **June 19, 2019**

LOCATION WHERE ORDER WAS PRONOUNCED: **Edmonton, Alberta**

NAME OF JUSTICE WHO MADE THIS ORDER: **Justice K.G. Nielsen**

UPON THE APPLICATION by PricewaterhouseCoopers Inc. in its capacity as the Court-appointed interim receiver (the "**Interim Receiver**") of A.J. Seehra Professional Corporation ("**AJ Seehra PC**"), A.S. Lotey Professional Corporation, and Amarjit Seehra Professional Corporation (collectively, with AJ Seehra PC, the "**PCs**"), and not in its personal capacity pursuant to the Interim Receivership Order of Mr. Justice K.G. Nielsen granted December 21, 2018 (the "**Interim Receivership Order**") for, *inter alia*, an Order finding Amarjit Seehra ("**Seehra**") in civil contempt (the "**Contempt Application**");

AND UPON the Application of the Interim Receiver to have Seehra provide his answers to undertakings and questions taken under advisement at his questioning of May 8, 2019;

AND UPON reviewing the Fourth Report of the Interim Receiver dated March 25, 2019; the Supplemental Report to the Fourth Report of the Interim Receiver dated March 28, 2019; the

Fifth Report of the Interim Receiver dated April 18, 2019; and the Sixth Report of the Interim Receiver dated May 13, 2019; and the Eighth Report of the Interim Receiver dated June 10, 2019; the Affidavit of Seehra sworn March 28, 2019; the Affidavit of Seehra sworn May 14, 2019; the Brief of ATB Financial filed May 15, 2019; the Brief of Argument of the Interim Receiver filed June 10, 2019; the Brief of Respondent filed June 17, 2019.

AND UPON hearing from counsel for the Interim Receiver, counsel for Amarjit Seehra, and counsel for the Plaintiff, ATB Financial:

IT IS HEREBY ORDERED THAT:

Contempt

1. The Respondent, Amarjit Seehra, is hereby declared to be in civil contempt of this Court as a result of breaches of various Orders issued by this Honourable Court without reasonable excuse, including the Interim Receivership Order of Justice K.G. Nielsen as granted and filed on December 21, 2018 (the "**Interim Receivership Order**").

2. As a result of being in civil contempt, Amarjit Seehra is ordered to pay the estate of A.J. Seehra Professional Corporation (the "**A.J. Seehra Professional Corporation**") a fine in the amount of $573,955.79 (the "**Fine**").

3. Amarjit Seehra may purge his contempt by payment of the Fine assessed by this Honourable Court.

4. Any amount recovered paid by Amarjit Seehra in respect of the Fine shall reduce the Fine and the Judgment previously granted by the Honourable Justice R.A. Graesser on May 16, 2019 in favour of A.J. Seehra Professional Corporation against Seehra (the "**Judgment**"), each in the amount equal to the amount recovered from Seehra. For greater certainty, with respect to the Judgment and the Fine, A.J. Seehra Professional Corporation will not recover from Seehra an amount greater than $573,955.79.

5. Seehra shall submit to the Receiver a proposed payment plan to pay the Fine by no later than July 31, 2019, and if acceptable to the Receiver, the payment plan shall be incorporated into a further Order of this Court.

Questioning of Seehra

6. Seehra shall respond to his undertakings and questions taken under advisement given at his May 8, 2019 questioning by no later than July 2, 2019.

7. Seehra shall re-attend for questioning, if necessary, at the request of the Interim Receiver, by no later than July 31, 2019 at a time and place to be mutually agreed upon by counsel for the Interim Receiver and counsel for Seehra.

Costs

8. The Interim Receiver shall have costs of all steps taken by the Receiver, inclusive of all steps taken in regard to compelling production of information from Seehra, the various Court appearances relating to the Contempt Application against Seehra, the various Interim Receiver Reports related to this issue and the examination of Seehra, on a solicitor and own client basis.

The Honourable Justice K.G. Nielsen of the
Court of Queen's Bench of Alberta

June 27, 2019.

APPROVED AS TO FORM AND CONTENT

MILLER THOMSON LLP

Per:

Terrence M. Warner,
Counsel for the Receiver,
PricewaterhouseCoopers Inc.

APPROVED AS TO FORM AND CONTENT

FORENSIC LAW

Per:

Arman Chak
Counsel for Amarjit Singh Seehra

APPROVED AS TO FORM AND CONTENT

BLAKE, CASSELS & GRAYDON LLP

Per:

Matthew Summers
Counsel for ATB Financial

7. Seehra shall re-attend for questioning, if necessary, at the request of the Interim Receiver, by no later than July 31, 2019 at a time and place to be mutually agreed upon by counsel for the Interim Receiver and counsel for Seehra.

Costs

8. The Interim Receiver shall have costs of all steps taken by the Receiver, inclusive of all steps taken in regard to compelling production of information from Seehra, the various Court appearances relating to the Contempt Application against Seehra, the various Interim Receiver Reports related to this issue and the examination of Seehra, on a solicitor and own client basis.

The Honourable Justice K.G. Nielsen of the
Court of Queen's Bench of Alberta

APPROVED AS TO FORM AND CONTENT

MILLER THOMSON LLP

Per:

Terrence M. Warner,
Counsel for the Receiver,
PricewaterhouseCoopers Inc.

APPROVED AS TO FORM AND CONTENT

FORENSIC LAW

Per:

Arman Chak
Counsel for Amarjit Singh Seehra

APPROVED AS TO FORM AND CONTENT

BLAKE, CASSELS & GRAYDON LLP

Per:

Matthew Summers
Counsel for ATB Financial

Court of Queen's Bench of Alberta

Citation: Wade v Wade, 2021 ABQB 865

Date: 20211101
Docket: 2103 10903
Registry: Edmonton

Between:

Rita Wade

Plaintiff/Applicant

- and -

Darren Wade and Duane Wade

Defendants/Respondents

Endorsement
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] What is the process for obtaining an order finding a party in civil contempt?

[2] The applicant asserts that its application set the stage for a contempt finding. The respondent says that, per the application, the relief sought was limited to a show-cause order, with a contempt finding (if any) necessarily downstream.

[3] I find that we are indeed at the show-cause stage.

B. Background

[4] A surviving spouse is seeking repayment to her deceased spouse's estate or other safe holding place of approximately $250,000 removed from his bank accounts by his two sons, via a freshly granted power of attorney, days before his death.

[5] On September 10, 2021, Macklin J. ordered the repayment of the money:

> 1. The Defendants, Darren Wade and Duane Wade, shall transfer to the trust account of their lawyer, David Ranieri, all the money they removed from Arthur Wade's TD Canada Trust and CIBC bank accounts, from the day the Power of Attorney was signed (January 11, 2021).
> 2. This shall be done by no later than Monday, September 13, 2021.
> 3. This money shall remain in trust until further Order of this Court.

[6] Following non-compliance with that order, the spouse filed an application, styled (in part) under "Form 27 [Rules 6.3 and 10.52(1)]" and returnable October 19, 2021, seeking (as "Remedy claimed or sought"):

> An Order pursuant to rule 10.51 of the Alberta Rules of Court requiring the Defendants, Duane Wade and Darren Wade, to appear before this Court to show cause why they should not be held in civil contempt of Court.

[7] Under "Applicable rules", it stated "Rules 10.51 and 10.52 of the Alberta Rules of Court."

[8] Both applicants were personally served with the application.

[9] The application came before me in civil chambers on October 19, 2021. Present (via Webex) were the spouse's counsel (Mr. Potter), Mr. Ranieri (now acting for the defendants only in their capacity as the estate's personal representatives), and counsel acting for the defendants in their personal capacities (Ms. Jones). (I do not recall if the defendants were observing via Webex. I do not recall either being present in the courtroom.)

[10] At the application, Mr. Potter argued that the Macklin Order was clear, that is was common ground that no monies had been paid as directed or otherwise anted up and that, as a result, a contempt finding should be made.

[11] Ms. Jones stated that the defendants no longer have the monies and that, as a result, compliance with the order is and was not possible. However, on a threshold basis, she also argued that no contempt findings could be made, given the clear (show-cause) nature of the relief sought.

[12] I reserved my decision to review the file materials. I also asked for follow-up submissions (via letter) from Mr. Potter and Ms. Jones on the nature of the application.

[13] Mr. Potter's October 22, 2021 letter focused largely on the test for contempt and whether it was satisfied here. On "process", he wrote:

> The Defendants received notice of the **application for contempt**. They were served personally on October 7th as was their lawyer on October 6 by a process server ... [emphasis added]

[14] In her note dated October 20, 2021, Ms. Jones also focused largely on the test for contempt. She did observe that "[I had] reserved [my] judgment on whether the application before [me] was for an order for a contempt hearing or the contempt hearing itself."

[15] I turn to the applicable Rules.

C. Civil contempt rules

[16] Here are Rules 10.51 ("Order to appear") and 10.52 ("Declaration of civil contempt"):

> **10.51** The Court may grant an **order in Form 47** that **requires a person to appear before it**, or may order a peace officer to take a person into custody and to bring the person before the Court, **to show cause why that person should not be declared to be in civil contempt of Court.**
>
> **10.52(1)** Except when a person is before the Court as described in subrule (3)(a)(ii) or (v), **before an order declaring a person in civil contempt of Court is made, notice of the application in Form 27 for a declaration of civil contempt must be served on the person in the same manner as a commencement document.**
>
> **(2)** If a lawyer accepts service of a notice of an application seeking an order declaring the lawyer's client to be in civil contempt of Court, the lawyer must notify the client of the notice as soon as practicable after being served.
>
> **(3)** A **judge may declare a person to be in civil contempt** of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,
>
> (ii) is before the Court and engages in conduct that warrants a declaration of civil contempt of Court,
>
> (iii) does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the Court to show cause why the person should not be declared to be in civil contempt of Court,
>
> (iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the person is ordered by the Court to answer,
>
> (v) is a witness in an application or at trial and refuses to be sworn or refuses to answer proper questions, or
>
> (vi) does not perform or observe the terms of an undertaking given to the Court,
>
> or

(b) an enactment so provides.

[Rule 10.53 addresses punishment for civil contempt.] [emphasis added]

[17] Rule 6.3 (referenced in the title to the application) and Form 27 (referenced in the application title and in R. 10.52(1)) respectively outline the core requirements, and show the template form, for applications generally.

[18] Form 47 (also referenced in the application title, as well as in Rule 10.51) is as follows:

Form 47
[Rule 10.51]

Clerk's stamp:

COURT FILE NUMBER

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

PLAINTIFF(S)

DEFENDANT(S)

DOCUMENT **ORDER TO APPEAR**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

DATE ON WHICH ORDER WAS PRONOUNCED:
LOCATION OF HEARING OR TRIAL:
NAME OF MASTER/JUDGE WHO MADE THIS ORDER:

□ [Name] is ordered to appear before this Court at _____ on _____.

OR

□ A warrant shall issue in the form attached as Schedule "A" and a Peace Officer shall take into custody [name] and bring that person before the Court to show why that person should not be declared to be in civil contempt of Court.

_____
Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

ACTION NO._____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF _____

WARRANT FOR ARREST

TO THE PEACE OFFICERS IN ALBERTA:

This warrant is issued for the arrest of (Name of person to be arrested) of (Address) (Postal Code)

Date of Birth: (yyyy/mm/dd) (Occupation)

WHEREAS there are reasonable and probable grounds to believe that (name of person to be arrested) should be brought before this Court to show cause why that person should not be declared to be in civil contempt of Court. This therefore is to command you, in Her Majesty's name, forthwith to arrest and detain (name of person to be arrested) and to bring that person before a Justice of the Court of Queen's Bench of Alberta to be dealt with according to law. This warrant is sufficient authority for the keeper of a correctional institution to receive and detain (name of person to be arrested) into custody and to safely keep that person pending appearance before a Justice of the Court of Queen's Bench of Alberta.

DATED _____, 20_____,

at _____, Alberta.

_____

Justice, Master or Clerk of the Court

of Queen's Bench of Alberta

AR 124/2010 Form 47;143/2011

D. Application of those rules here

[19] A interested person perceiving that another or others are in civil contempt faces a two-stage process: (1) an initial application (per R. 10.51) where allegations of contempt are raised and, if apparent or ostensible contempt is shown, a "show cause" order can be issued; and (2) the "show cause" hearing itself, conducted per R. 10.52

[20] In this case, per the express wording of the application (describing the "Remedy" as a R. 10.51 "show cause" order i.e. not a contempt finding) and in any case necessarily (per the two-step process prescribed by Rules 10.51 and 10.52), we are at the upstream stage of determining whether a show-cause order should be issued.

[21] This two-stage process was recognized and applied by Read J. in ***Bilhete v Wong***, 2013 ABQB 514 (para 10) and 2014 ABQB 142 (paras 4-19). See also ***Recycling Worx Solutions Inc v Hunter***, 2018 ABQB 395 (Eamon J.) at paras 181-183 and 185.

[22] Turning to whether a "show cause" order should be issued, Macklin J.'s order clearly outlined what was required of the defendants.

[23] As noted, it is common ground that no monies were repaid as required (or at all) or otherwise put into safekeeping.

[24] At this stage, it is premature to explore the defendant's "compliance not possible" position.

E. Conclusion

[25] Given a clear duty-imposing order and apparent or ostensible non-compliance, the application, as framed, should be granted.

[26] I hereby grant an order (to be prepared in line with Form 47) directing Darren Wade and Duane Wade to appear before me to show cause why they should not be declared to be in civil contempt of Court.

[27] I would ask Mr. Potter and Ms. Jones to contact my assistant (Stacy Adams) to arrange a workable date for the show-cause hearing during the weeks of November 15-19 or November 29-December 3.

[28] Once the date and time are set, if the parties require directions on any lead-up steps to the hearing they can contact me via Ms. Adams.

Heard on the 19th day of October, 2021 in Civil Chambers. Follow-up submissions received on October 20th and October 22nd, 2021.
Dated at Edmonton, Alberta this 1st day of November, 2021.

Justice M. J. Lema
J.C.Q.B.A.

Appearances:

Tor Potter
Kiriak Law Office
for the Plaintiff/Applicant

Victoria A. Jones
de Villars Jones
Barristers & Solicitors
for the Defendants/Respondents in their personal capacities

David Ranieri
Barr LLP
for the Defendants/Respondents in their capacities as personal representatives of the Estate

Court of Queen's Bench of Alberta

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

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

Between:

0901 18791

Piikani Nation

Plaintiff

- and -

Piikani Energy Corporation

Defendant

And Between

0901 15297

Piikani Nation and Chief Crow Shoe

Plaintiff

-and-

Piikani Investment Corporation

Defendant

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

Introduction

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

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

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

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

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

Relevant Law

[5] Counsel for the directors referred me to:

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Appearances:

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

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

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

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

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

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

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

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

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF HANFENG EVERGREEN INC.

Applicant

BEFORE: F.L. Myers J.

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

HEARD: November 20, 2017

ENDORSEMENT

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

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

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

Brief Background

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

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

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

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

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

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

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

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

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

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

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

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

Approval of the Receiver's Activities

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

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

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

> [20] The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.
>
> [21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.
>
> [22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

> [23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:
>
> (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
>
> (b) brings the Monitor's activities before the Court;
>
> (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
>
> (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
>
> (e) provides protection for the Monitor not otherwise provided by the CCAA; and
>
> (f) protects the creditors from the delay and distribution that would be caused by:
>
> (i) re-litigation of steps taken to date, and
>
> (ii) potential indemnity claims by the Monitor.
>
> [24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Receiver's Fees

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

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

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

> [32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:
>
> > The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such

> person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

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

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

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

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

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

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

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

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

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

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

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

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

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

F.L. Myers J.

Date: November 30, 2017

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> … in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "… prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "… prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> …
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > ….
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> …
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.,* 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015