Court File No. 10-8630-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF
NELSON FINANCIAL GROUP LTD.

APPLICANT

FACTUM AND BOOK OF AUTHORITIES OF A. JOHN PAGE & ASSOCIATES INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR

August 25, 2010

ThorntonGroutFinnigan LLP
Barristers and Solicitors
Suite 3200, P.O. Box 329
Canadian Pacific Tower
Toronto-Dominion Centre
Toronto, ON M5K 1K7

James H. Grout (LSUC # 22741H)
Seema Aggarwal (LSUC# 50674J)

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Monitor

INDEX

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TAB **DOCUMENT**

1. Factum

2. Book of Authorities

   (a) *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d), 1995 CarswellOnt 43 (Ont. C.J. (Gen. Div. [Commercial List]) (WL)

   (b) *R. v. 1496956 Ontario Inc.*, [2009] 5 C.T.C. 101, 2009 CarswellOnt 1537 (Ont. Sup. Ct. J.) (WL)

   (c) *Re Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. Sup. Ct. J. [Commercial List]) (WL)

   (d) *Re Bell Canada International Inc.* (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. (Commercial List)) (WL)

   (e) *Re Confectionately Yours Inc.* (2002), 219 D.L.R. (4th) 72, 2002 CarswellOnt 3002 (Ont. C.A.) (WL)

   (f) *Re Pine Valley Mining Corp.* (2008), 2008 BCSC 446, 2008 CarswellBC 712 (WL)

   (g) *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218, 1983 CarswellBC 147 (B.C. Sup. Ct.) (WL)

TAB 1

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PART I - NATURE OF THE MOTION

1. This motion is about the appropriate protections surrounding the disclosure of an opinion rendered by legal counsel to a Court-appointed monitor.

PART II - THE FACTS

2. The facts are as set out in the Sixth Report of A. John Page & Associates Inc., in its capacity as the Court-appointed monitor of the Applicant dated August 23, 2010 (the "**Sixth Report**").

Motion Record of the Monitor dated August 23, 2010, Tab 2.

3. All capitalized terms used herein and not otherwise defined are as defined in the Sixth Report.

4. After consultation with the stakeholders following the delivery of the Sixth Report, the Monitor has clarified the relief it is seeking, which is as follows:

(a) if this Honourable Court orders that the Opinion is to be disclosed, then such disclosure does not constitute a waiver of solicitor-client privilege with respect to all matters pertaining to the Opinion. As the Opinion remains subject to solicitor-client privilege, it is not admissible as evidence; and

(b) the Monitor's report in connection with the Preferred Shareholder Motion is admissible evidence, however, any legal conclusions set out therein or in the Monitor's letter to the Preferred Shareholders do not constitute expert opinion evidence and the Monitor shall not be examined or cross-examined with respect to these documents.

PART III - THE ISSUES

ISSUE 1: Does the involuntary disclosure of the Opinion constitute a waiver of solicitor-client privilege with respect to all matters pertaining to the Opinion?

ISSUE 2: Are the Monitor's legal conclusions, as set out in any reports and the Monitor's letter to the Preferred Shareholders, admissible as evidence in the Preferred Shareholder Motion and, if so, is the Monitor compellable as a witness with respect thereto?

PART IV - THE LAW

(a) An involuntary disclosure of the Opinion does not constitute a waiver of solicitor-client privilege with respect to all matters pertaining to the Opinion.

5. The jurisprudence has recognized that a document that is otherwise subject to solicitor-client privilege is still protected by that privilege if the document was involuntarily disclosed.

> ***S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*** **(1983), 45 B.C.L.R. 218, 1983 CarswellBC 147 at paras. 11-13 (B.C. S.C.) (WL) (*"S&K Processors"*), Tab 2G;**
>
> ***R. v. 1496956 Ontario Inc.*****, [2009] 5 C.T.C. 101, 2009 CarswellOnt 1537 at paras. 14, 16-17 (Ont. Sup. Ct. J.) (WL) (*1496956 Ontario Inc.*), Tab 2B.**

6. In *S&K Processors*, the plaintiffs sought an order compelling the production of documents, including correspondence between the defendants' solicitors and accountants, notes of meetings and drafts and working papers of the defendants, their solicitors and accountants, concerning the preparation of an expert report that had been disclosed pursuant to Section 11 of the *Evidence Act* (Canada). The plaintiffs contended that, by producing the expert report, the defendants had waived privilege not only with respect to that report but to all the documents and communications that were involved in its preparation.

> ***S&K Processors*** **at paras. 1-4, 7, Tab 2G.**

7. McLachlin J., as she then was, for the British Columbia Supreme Court, held that, where a statute compelled production of a report, the attendant loss of privilege was involuntary and, therefore, it could not constitute a waiver of privilege except to the extent that

privilege was expressly abrogated by statute. In the result, McLachlin J. refused to order production of the documentation on the basis that it was protected by privilege that had not been waived and that privilege as to the opinion and facts contained in the report were lost as a result of Section 11 of the *Evidence Act* (Canada), which explicitly abrogated such privilege.

***S&K Processors* at paras. 11-12, Tab 2G.**

8. In *1496956 Ontario Inc.*, a respondent claimed solicitor-client privilege over certain documents seized by Canada Revenue Agency ("**CRA**") pursuant to search warrants obtained in a tax fraud investigation. CRA argued that the respondent had waived privilege by applying for CRA's Voluntary Disclosure process. Although the respondent was denied entry into the Voluntary Disclosure process, the Ontario Superior Court of Justice explained that the disclosure process was not voluntary because it was initiated by the taxpayer who knew that he was the subject of a fraud investigation and, accordingly, privilege was not waived and the Court sealed the privileged documentation.

***1496956 Ontario Inc.*. at paras. 1-2, 14, 16-17, 19, Tab 2B.**

9. Based on the foregoing jurisprudence, it may be argued that where a person is required to disclose privileged documents pursuant to Court Order, the disclosure is involuntary and, therefore, privilege is not waived.

10. If this Honourable Court orders the Monitor to disclose the Opinion, then that disclosure would be involuntary and this Honourable Court should order that solicitor-client privilege is not waived with respect to all matters pertaining to the Opinion.

11. The Monitor is concerned that, if privilege is not expressly preserved, then parties to the Preferred Shareholder Motion may attempt to obtain documentation and information regarding the factual underpinnings and assumptions of the Opinion and the Monitor's neutral position in this proceeding will be impaired.

(b) The Monitor's legal conclusions, as set out in any reports and the Monitor's letter to the Preferred Shareholders, are not admissible as <u>expert opinion</u> evidence in the Preferred Shareholder Motion and the Monitor shall not be compelled as a witness with respect thereto.

12. In *Re Pine Valley Mining Corp.*, the British Columbia Supreme Court considered the admissibility of a Court-appointed monitor's report and the compellability of a monitor as an expert witness at the summary trial of a claim of Pine Valley Mining Corporation ("**PVM**") against a corporation. The Court reviewed the authorities and distilled its findings into four principles guiding its discretion as follows:

(a) a monitor's report is presumptively admissible in evidence at a hearing concerning the subject matter of the report;

(b) the monitor must maintain objectivity as between stakeholders in *Companies' Creditors and Arrangement Act* proceedings;

(c) the Court should ensure that the monitor does not become intimately involved in the adversarial process; and

(d) an officer of the Court may be cross-examined in unusual circumstances.

> ***Re Pine Valley Mining Corp.* (2008), 2008 BCSC 446, 2008 CarswellBC 712. at paras. 12, 17 ("*Pine Valley*"), Tab 2F.**

13. Courts in Ontario have held that officers of the Court should not be examined or cross-examined, but for unusual circumstances. As an officer of the Court, the purpose of the monitor is to be the "eyes and ears of the Court." Allowing the parties to use a monitor's conclusions to decide questions before the Court clashes with the principle that the Monitor must remain neutral between the competing claims of stakeholders.

> ***Re Bell Canada International Inc.* (2003), 2003 CarswellOnt 4537 at para. 9 (Ont. S.C.J. (Commercial List)) (WL) ("*Bell Canada*"), Tab 2D;**
>
> ***Re Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 at para. 3 (Ont. Sup. Ct. J. [Commercial List]) (WL), Tab 2C;**
>
> ***Pine Valley* at paras. 12, 17, Tab 2F.**

14. The Courts have enumerated unusual circumstances where examination or cross-examination of a Court officer may be necessary. One of these circumstances is where the monitor is not co-operative in clarifying or explaining an aspect of the report. The Court in *Bell Canada* noted that, usually, a monitor can accomplish this by answering questions in writing or in an interview. However, these requests must be reasonable, especially since the monitor is a neutral party.

> ***Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d), 1995 CarswellOnt 43 at para. 5 (Ont. C.J. (Gen. Div. [Commercial List])) (WL), Tab 2A;**
>
> ***Bell Canada* at para. 9, Tab 2D.**

15. The passing of accounts by an officer of the Court is another unusual circumstance. The officer may be required to provide an affidavit and be open to cross-examination. The rationale for this circumstance is that the officer has an understandable self-interest in the outcome and so he must show the Court that his compensation is fair and reasonable. However, the provision of an affidavit is not an automatic invitation to cross-examine, especially where the cross-examination is used for the purposes of delay.

> ***Re Confectionately Yours Inc.* (2002), 219 D.L.R. (4th) 72, 2002 CarswellOnt 3002 at para. 31 (Ont. C.A.) (WL), Tab 2E;**
>
> ***Bell Canada* at paras. 9-10, Tab 2D.**

16. The Court in *Pine Valley* stated that an unusual circumstance existed where most of the accounting was no longer at issue and where a detailed Monitor's report could be of great assistance to the parties. The report could provide a fair and summary adjudication of the parties' claim and it was admissible at trial. However, the Monitor's conclusion about the characterization of certain payments as debt or equity was inadmissible as an expert opinion because it would involve the Monitor unnecessarily in the adversarial process.

> ***Pine Valley* at paras. 17-18, Tab 2F.**

17. In *Pine Valley*, the Court queried whether the neutral role of the Monitor would be compromised by permitting the Monitor's conclusions to be used as expert opinion evidence and held as follows:

> I have concluded that the Monitor's 4th Report (and any supplementary reports concerning the inter-company accounting) is admissible for purposes of the trial, but his conclusion as to the characterization of the payments as debt or equity are not

> admissible as an expert opinion. The Monitor is an officer of the Court. He is the eyes and ears of the Court. His role is to assist the Court. To permit a party to use his conclusions on the very question the Court must decide as opinion evidence offends the principle that he must remain entirely neutral as between competing claims of the various stakeholders. The Monitor must be insulated from the adversarial nature of the contested claim; he should not be fearful that, as a result of stating his opinions, he will become embroiled in the litigation in an adversarial way.
>
> . . .
>
> In this case, it is convenient, and perhaps necessary, to use the accounting portion of the Monitor's Report, for a fair and summary adjudication of the inter-company claim, but the same argument for convenience cannot be made out for the Monitor's characterization of the payments; and, in any event, to admit the Monitor's conclusions on that issue would be to expose the Monitor unnecessarily to the adversarial process. This issue differs from one in which the Court relies on the business judgment of the Monitor such as the approval of the sale of assets or a liquidation analysis as in the *Canadian Airlines Corp., Re*, 2001 ABQB 146 (Alta. Q.B.) case.
>
> ***Pine Valley* at paras. 16-17, Tab 2F.**

18. Similar to *Pine Valley*, in the circumstances at bar, the Monitor's legal conclusions with respect to the Opinion, as set out in any reports or in its letter to the Preferred Shareholders, are the very questions this Honourable Court must decide on the Preferred Shareholder Motion. To allow any party to use the Monitor's legal conclusions would offend the principle that the Monitor must remain neutral with respect to competing claims of stakeholders. Accordingly, it is appropriate that this Honourable Court order that, while the Monitor's reports and the Monitor's letter to the Preferred Shareholders may be admissible as evidence in the Preferred Shareholder Motion, the Monitor's legal conclusions should not be admissible as expert opinion evidence and the Monitor should

not be compelled as a witness. The Opinion itself is not admissible as evidence as it remains subject to solicitor-client privilege.

19. As is customary, the Monitor will respond to any reasonable questions posed by the parties with respect to the remaining portions of its report (that are not legal conclusions) and deliver a supplementary report responsive to those questions.

PART V - RELIEF REQUESTED

20. The Monitor respectfully requests the relief set out in paragraph 4 herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2010.

August 25, 2010

Seema Aggarwal

ThorntonGroutFinnigan LLP
Barristers and Solicitors
Suite 3200, P.O. Box 329
Canadian Pacific Tower
Toronto-Dominion Centre
Toronto, ON M5K 1K7

James H. Grout (LSUC # 22741H)
Seema Aggarwal (LSUC# 50674J)

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Monitor

SCHEDULE "A"

LIST OF AUTHORITIES

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1995), 30 C.B.R. (3d), 1995 CarswellOnt 43 (Ont. C.J. (Gen. Div. [Commercial List]) (WL);

R. v. 1496956 Ontario Inc., [2009] 5 C.T.C. 101, 2009 CarswellOnt 1537 (Ont. Sup. Ct. J.) (WL);

Re Anvil Range Mining Corp. (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. Sup. Ct. J. [Commercial List])(WL);

Re Bell Canada International Inc. (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. (Commercial List)) (WL);

Re Confectionately Yours Inc. (2002), 219 D.L.R. (4th) 72, 2002 CarswellOnt 3002 (Ont. C.A.) (WL);

Re Pine Valley Mining Corp. (2008), 2008 BCSC 446, 2008 CarswellBC 712 (WL);

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 45 B.C.L.R. 218, 1983 CarswellBC 147 (B.C. Sup. Ct.) (WL).

SCHEDULE "B"

RELEVANT STATUTES

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

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ThorntonGroutFinnigan LLP
Barristers and Solicitors
Suite 3200, P.O. Box 329
Canadian Pacific Tower
Toronto-Dominion Centre
Toronto, ON M5K 1K7

James H. Grout (LSUC # 22741H)
Seema Aggarwal (LSUC# 50674J)

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Monitor

TAB 2

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ThorntonGroutFinnigan LLP
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Suite 3200, P.O. Box 329
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James H. Grout (LSUC # 22741H)
Seema Aggarwal (LSUC# 50674J)

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Monitor

TAB A

C

1995 CarswellOnt 43, 30 C.B.R. (3d) 100, 3 O.T.C. 23

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.

MORTGAGE INSURANCE COMPANY OF CANADA v. INNISFIL LANDFILL CORPORATION

Ontario Court of Justice (General Division — Commercial List)

Farley J.

Heard: November 16, 1994
Judgment: January 12, 1995
Docket: Docs. 52941/90, B38/92

Counsel: *J.L. McDougall, Q.C.*, and *N.J. Emblem*, for Price Waterhouse Limited, receiver and manager of Innisfil Landfill Corporation.

R. Lindgren, for Hodgsons.

Linda McCaffrey, Q.C., for Attorney General.

M. Green, for County of Simcoe.

C. Findlay, for Town of Innisfil.

K. Thomson, for Mortgage Insurance Company of Canada.

J. Coop, for Ministry of Environment and Energy.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — Duties.

Receivers — Powers — Court-appointed receiver entitled to give report and not required to swear affidavit.

A court-appointed receiver-manager, as an officer of the court, is not required to provide a sworn affidavit with its report. Only in unusual circumstances will other parties be allowed to examine the receiver-manager on any report.

Statutes considered:

Environmental Protection Act, R.S.O. 1990, c. E.19.

Ontario Water Resources Act, R.S.O. 1990, c. O.40 —

s. 53

Planning Act, R.S.O. 1990, c. P.13.

Motion by receiver-manager for directions and advice; Cross-motion by Attorney General to quash report.

***Farley J.*:**

Endorsement on Cross-motion and Motion

Endorsement on Cross-motion by Ministry of the Attorney General

1 Ms. McCaffrey says that she does not know the nature of the relief being sought — and that, in failing to specify, the Receiver has breached the Rules and the Practice Direction. Over and above that she complains that there is no sworn affidavit from the Receiver.

2 Mr. Thomson, for Mortgage Insurance Company of Canada, ("MICC"), characterized the relief sought as being as plain as the nose on one's face. I agree — but then perhaps the difficulty with that metaphor is that it requires one to take a look in the mirror. The objecting parties would have a difficult time in attempting to peer into the looking glass when they are doing an imitation of an ostrich. Alice in Wonderland in comparison looks like a normal regime.

3 The question in issue was put squarely and fairly in Mr. McDougall's letter of September 23, 1994 to Ms. McCaffrey, a copy of which other counsel have in the Compendium relating to Price Waterhouse Limited's ("PWL") obligations as Receiver and Manager ("R/M") relating to the forcemain and pumping station required by the Director's (Wilfred Ng) letter of September 16, 1994 in light of PWL's lack of funds in this receivership and what the Ministry of Environment and Energy's ("MOEE") position was towards that problem.

4 As to the Practice Direction, I am puzzled by counsel's reluctance to sign the Request Form since the time was cleared for what they understood would be a directions question. I am afraid that the litigation system would be badly served if, as a regular matter, opposing parties had to be served with a complete record before agreeing to dates.

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

6 Motion by the Ministry of the Attorney General ("AG") to quash is dismissed.

Motion of Receiver ("PWL") for Directions

7 As Mr. McDougall said this morning, he put the R/M's request for advice and directions into as plain English as he was capable. This is as follows:

> (a) Whether, having in mind the settlement reached on July 26, 1994, it is sufficient for Price Waterhouse Limited, ("PWL"), to install the Leachate Collection System alone before applying to the Court for a discharge and termination of the receivership;
>
> (b) If it is the Court's view that PWL is obliged to install a pumping station and forcemain system, how is such an installation to be financed?

8 I do not think that I had any difficulty in understanding this request for directions (of course the proof of that pudding will be in the eating and how the R/M reacts to my advice and directions herein). I must say, however, that I was more than somewhat dismayed to hear the reaction of those truly opposing the R/M since either they did not understand the request or they refused to try to understand it. The "answers" they came back with did not fit or even resemble the "questions". Perhaps it is that these parties have been fighting each other for too long. In this regard, I must reiterate my concern for the sake of public health and safety. People like the Hodgsons should not have become pawns in this game of chess. I share the Joint Board's concern (see Joint Board's May 14, 1994 clarification):

> Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation.

9 Allow me to note several items:

10 (a) The Settlement Agreement of July 26, 1994 provides:

> 1. PWL will remain as Receiver and Manager until the Leachate Collection System as described in the Development and Operations Report dated September, 1991 by Henderson, Paddon & Associates Limited is installed and operational.
>
> 2. PWL will cause the Leachate Collection System to be installed as soon as possible, the cost of such installation to be billed to the MOEE for payment out of the balance of the security fund established for the site.
>
> 3. [PWL also agreed to do capping measures as agreed on April 25, 1994 meeting.]

11 Thus the Settlement Agreement requires PWL to complete the Leachate Collection System and the capping. Not to do so would be a breach of the settlement by PWL (unless it had just legal cause). During the period of installing the Leachate Collection System to the stage of it being operational, PWL has also agreed to remain as Receiver and Manager. One however could see PWL as the operational phase neared reality obtaining a court date for a discharge and termination of the receivership. Under the wording of the Settlement Agreement it would appear that this motion would be heard at the same time as the adjourned MOEE motion and the Hodgsons' motion given the reference in para. 5 of the Settlement Agreement to a (singular) date to be agreed upon and fixed by the Registrar of this List.

12 (b) I was also referred to the Joint Board's decision of April 5, 1994 [reported at 13 C.E.L.R. (N.S.) 170 (Ont. Joint Bd.)], its clarification of May 13, 1994 and the Director's decision of September 16, 1994 (and attachments). I understand the draft decision of July 4, 1994 circulated amongst the parties to have been materially the same for all intents. I thought it quite helpful for Mr. Coop to give me a "précis" of the immediate history and jurisdiction.

13 I further understand that PWL's position is that there are no "funds" in the receivership, at least monies of the magnitude needed to carry out the subject work — neither the Leachate Collection System which I recall is in the neighbourhood of $800,000 nor a fortiori the forcemain and pumping station, estimated at some $2.5 million. While apparently the AG and the MOEE dispute this impecuniosity of the receivership and reserve under the settlement the right to inspect the R/M's accounts on reasonable notice, it is also clear that the MOEE agreed because of the alleged impecuniosity that the Leachate Collection System would be billed to the security fund (but subject to a motion for reimbursement). Thus, it would appear to be reasonable to assume that the same funding problem still exists in the receivership absent any new information which has thus far not been forthcoming.

April 5, 1994 Order

14 (a) p. 36 — If [PWL as R/M] cannot or will not comply with such an order then it can approach the Court and seek a termination of the receivership.

15 (b) p. 48 (i) Given the proximity of private property and significant natural features, [PWL as R/M] and/or the Ministry should implement proper leachate mitigation immediately. (ii) Duplicate of p. 36 cited above.

16 (c) p. 49 — The Director has a legislated mandate to uphold the purpose and provisions of the EPA (*Environmental Protection Act*) and the OWRA (*Ontario Water Resources Act*). If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed.

17 (d) p. 50 — The Joint Board "deferred" (this apparently means "delegated") the obligation to the Director to determine detailed requirements for a leachate collection and management system. Under 1d [PWL as R/M] and the MOEE were to report back to the Joint Board within 90 days as to progress on condition 1a, b and c. [This would imply that this report should have been by early July which would in turn imply that the Director would have given his decision prior to that time.]

May 13, 1994 Clarification

18 (e) The Board's [April 4, 1994] Order requires the implementation of a leachate management system and creates responsibility on the part of the Receiver and Manager of the Innisfil Landfill (Price Waterhouse Limited) to comply with this Order. The Board draws the attention of the parties to the following passage of s. A(4) of its April 5, 1994 Reasons for Rulings and Order [at pp. 220-221]:

> A(4) The [PWL as R/M] responsibility to comply with the relevant regulatory environment and legislation is confirmed by the cited authorities and paragraph 19 of the Court Order. Given the context of the receivership and the Certificates regulating the operation of the site, other responsibilities also exist. These responsibilities involve the development, approval and timely introduction of proper leachate management and the prompt pursuit of an EPA hearing for the expanded use of the site. In the Board's opinion, the proponent's responsibilities should be viewed within this context. After considering paragraphs 3 and 19 of the Court

> Order, the Board believes it is reasonable and appropriate to issue an Order that is consistent with the goals and provisions of the relevant legislation and regulatory regime (eg. EPA ss. 2 and 39, OWRA s. 26(1)). If the proponent cannot or will not comply with such an order then it can approach the Court and seek the termination of the receivership.

Price Waterhouse Limited, in its role as Receiver and Manager of the Innisfil Landfill, is required to implement the Board's April 5, 1994 Order. However, the Board believes that better leachate management should be promptly implemented even if Price Waterhouse Limited discontinues its involvement with the site. The Board's Reasons for Rulings contained the following relevant comment [at p. 221]:

> If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed. Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation ....

Director's Decision September 16, 1994

19 (f) p. 7 — PWL will require a s. 53 OWRA approval to construct the forcemain. It should apply to receive that approval and whatever further and other approvals may be required (e.g. *Planning Act*, etc.). In the interim, there may be a need to dispose of the collected leachate through alternative means [trucked leachate to the Barrie WPCP agreed as acceptable interim solution].

20 (g) [Regarding PWL's counsel's inquiry of July 5, 1994 concerning the Ministry's responsibilities in this matter and the effect of the receivership order], the Director repeats his July 15, 1994 letter. This includes:

> again, as to the extent of, and reasons for, PWL's alleged financial inability to perform the work ordered by the Joint Board, those allegations did not prevent the Board from imposing liability upon PWL. Nor do I have a discretion to change the Board's Order based on these allegations. I suggest that the issue of financial liability is one which will be addressed on the motion to Commercial Court, and you should make your submissions there.

21 [The reference to this motion would appear to be the (adjourned by settlement of July 26, 1994) motion of PWL.]

Comments

22 In discussing this advice and direction I would wish to stress that I do not consider this to be an appeal of the Board's Order (including the deferred portion to the Director which apparently forms part of the Board's Order) nor a judicial review thereof. Nothing which I say herein should be taken or interpreted as such. I wish merely to provide PWL with its requested advice and directions as it is entitled to receive from this Court. To the extent that PWL has inside or outside the receivership incurred liability by virtue of operation of the environmental legislation or a decision of the Joint Board, I make no comment save the following. Some of the Board's language in its Order is so clear that it would be difficult to imagine that there could be other than a straightforward ordinary interpretation; in certain other areas there may be some question of precise intent (in this I mean no disrespect to the Board, as I am sympathetic enough as to the question of how to interpret [court] decisions including my own).

23 Given the various "invitations" contained in the foregoing, it would not appear that the Board was advan-

cing the proposition that PWL could not apply to the Court for a discharge and termination of the receivership until any fixed time (either calendar of fulfilment of condition — e.g. completion and operation of the collection system or of the forcemain and pumping station). Thus, it would appear that the Settlement Agreement obligations are the only barriers to such a court application. This would appear to answer Mr. McDougall's question(a).

24 As to (b), as I have answered (a) in the way which I have I do not see that if PWL were successful in its discharge and termination motion that it would be obliged to install the forcemain and pumping station in the direct physical or physical supervisory sense. The Board would appear to have concluded that if PWL cannot or will not comply with the Board's Order, it should approach the Court and seek a termination of the receivership. It would seem a necessary implication of a successful motion in Court that PWL after termination of the receivership would not be required to directly or supervisorily physically install the forcemain and pumping station.

25 Rather if PWL does not so install the system (apparently with or without a termination of the receivership) the Board expects the MOEE to install (directly or supervisorily physical) the system.

26 That leaves the question of funding to be answered. We have seen the funding arrangement for the collection system under the Settlement Agreement. What of the rest? It would seem that if PWL continues as R/M it would be obliged to not only physically install but also to fund the work because of the Order of the Board. If the MOEE installed physically the work, then one would assume that the MOEE would initially fund it but it may well pursue PWL for reimbursement (either because it feels there are "excess" receivership funds which should have been available or because PWL has a continuing obligation under the environmental legislation or the Board Order notwithstanding the termination of the receivership).

27 That last aspect would appear to be a somewhat open question. There are parts of the Board's Order which impose an obligation on PWL but it is to me at least somewhat unclear as to whether this liability affixes to PWL (i) in its general entity capacity (and is thereby ongoing no matter what happens to the receivership) or (ii) in its R/M capacity. In this latter position, there also seem to be two paths — (A) that a termination of the receivership and a discharge of PWL as R/M would relieve it from any ongoing responsibility not then accrued or (B) responsibility is to be fixed upon it as a result of it having been R/M at the time of the Board Order, which responsibility is not in the Board's view (and within what it sees as its jurisdiction) terminated by a Court termination of the receivership and a discharge of PWL as R/M.

28 While it appears clear that the Court Order appointing PWL as R/M contemplated in para. 11 that PWL's liability as R/M would be limited to net cash proceeds of the receivership, it may be that the Board in the proper exercise of its jurisdiction or the environmental (or other) legislation affecting the situation may impose a greater liability upon PWL. It would seem to me that PWL may find it helpful to ask for a further clarification from the Joint Board. It may be that once my endorsement has been typed up it would be of some assistance in pinpointing the areas of concern.

29 As discussed in the hearing one should clearly differentiate between the liability to do something and the liability to provide funding for it. Then there is the difference between a primary responsibility and a secondary one which comes into play if the person with the primary fails to do something on a timely basis. This later aspect also carries with it the principle of reimbursement.

30 I believe the Board is as concerned as I am that the squabbling between the MOEE/AG and PWL continues at a faster and greater rate than the physical implementation of the required systems needed for public health and safety. Cooperative efforts are far more productive; non-cooperative efforts merely raise the suspicions of

the innocent party as to all future dealings (but then some always claim to be innocent and the other side non-innocent notwithstanding the overwhelming objective evidence to the contrary). I am, however, delighted to hear that notwithstanding this blowup both the MOEE/AG and PWL report that implementation of the Settlement Agreement is proceeding in a bona fide way with due dispatch.

31 In conclusion, I would merely observe that it is most helpful if the obligations of receiver/managers are spelled out (so that they can be easily known by the receiver/manager) in order that there be no unpleasant surprises of unexpected liabilities, especially if there is no realistic way to fund same. While that may be the hard result in a particular case, no doubt the law of economics (as well as fair play) will take over and there will be an absence of willing potential receiver/managers available to go into situations where they are needed. Who then will be available? Who then will be appropriately qualified? It is, of course, one thing to have a system or regime which works well — but only on paper and another which works well in practice.

32 It should be remembered that "once bitten, infinitely shy".

33 Costs: PWL awarded $1,500 payable forthwith by MOEE/AG. I see no reason why Ms. McCaffrey could not have more cooperativelyattempted to discuss and answer to the extent feasible and reasonable the aspects of Mr. McDougall's letter of September 23, 1994.

34 Postscript: The Board referred to paras. 3 and 19 of the Court Order. I presume this is the Order of Granger J. dated August 13, 1990. If so, I have some difficulty in relating para. 3 which appears to deal with PWL being able to examine persons under oath to be linked with PWL's responsibility under the Board's Order but I may be missing something quite obvious. As to para. 19, at first blush this would appear to relate directly to the Court Order being a *non-impedance* of the MOEE in carrying out its duties and not directly impose liability or responsibility upon PWL although I note that of course PWL as Receiver and Manager may well have some liability by virtue of its activities and the legislation referred to of the EPA and the OWRA. Again, I note that I may be missing something obvious.

Order accordingly.

END OF DOCUMENT

TAB B

2009 CarswellOnt 1537, [2009] 5 C.T.C. 101

R. v. 1496956 Ontario Inc.

HER MAJESTY THE QUEEN (Applicant) and 1496956 ONTARIO INC. o/a STONERIDGE INC., GLD HOLDINGS INC., GRAHAM WORSFOLD, LYN WORSFOLD, LARRY BURTON, JAMES BURTON, GAIL BURTON and JOHN IRELAND (Respondents)

Ontario Superior Court of Justice

D. Gunsolus J.

Heard: January 15, 2008; July 10, 2008
Judgment: January 19, 2009
Docket: Peterborough 2397/07

Counsel: D. Mann for Applicant

R. Auger for Respondent, Graham Worsfold

Subject: Income Tax (Federal); Evidence; Civil Practice and Procedure

Tax --- Income tax — Administration and enforcement — Solicitor-client privilege

Canada Revenue Agency ("CRA") initiated tax fraud investigation relating to named defendants — On September 27, 2007, ten search warrants were executed by CRA covering five locations — On that day, search warrant was executed by CRA at accountant's office and documents in relation to personal defendant GW were seized — Documents relating to GW were also seized at other locations named in application — Only GW claimed solicitor-client privilege with respect to certain of seized documents — Crown brought application to determine whether or not solicitor-client privilege attached to any of seized documents referred to, and for order to release to CRA any documents not protected by privilege — Application granted — Rulings were made with respect to each of disputed documents — That documentation found to be subject to solicitor-client privilege was ordered sealed and only releasable upon written agreement of parties or by further order of court — Interpretation of case relied upon by Minister of National Revenue as standing for principle that taxpayer who avails himself of voluntary disclosure process ("VDP") in effect waives privilege in relation to any documentation relevant thereto was rejected — In that case, it was solicitor acting for taxpayer who attempted to claim privilege in face of voluntary disclosure undertaking by his client — Court in that case found that: solicitor-client privilege belonged to taxpayer client, not lawyer; client had already waived solicitor-client privilege during hearing; and lawyer was trying to protect certain sensitive matters between himself and his client — In case at bar, taxpayer had not entered into VDP other than to make inquiries as to whether or not Minister would allow him to enter into VDP, which he was denied — Review of CRA's voluntary disclosure policy indicated such disclosure cannot be considered voluntary where it is initiated based upon knowledge of current enforcement activities — GW clearly was aware, as result of exercise of

numerous search warrants, that he was subject of fraud investigation — Based upon CRA's voluntary disclosure policy, VDP cannot apply to circumstances that GW faced — As result, Minister could not rely upon policy or other case to suggest that GW waived solicitor-client privilege in relation to documentation found to be subject to **solicitor-client privilege** — However, any documentation that GW had **already disclosed**, either directly or through his counsel or accountants, had lost protection of solicitor-client privilege.

Tax --- Income tax — Administration and enforcement — Voluntary disclosure

Canada Revenue Agency ("CRA") initiated tax fraud investigation relating to named defendants — On September 27, 2007, ten search warrants were executed by CRA covering five locations — On that day, search warrant was executed by CRA at accountant's office and documents in relation to personal defendant GW were seized — Documents relating to GW were also seized at other locations named in application — Only GW claimed solicitor-client privilege with respect to certain of seized documents — Crown brought application to determine whether or not solicitor-client privilege attached to any of seized documents referred to, and for order to release to CRA any documents not protected by privilege — Application granted — Rulings were made with respect to each of disputed documents — That documentation found to be subject to solicitor-client privilege was ordered sealed and only releasable upon written agreement of parties or by further order of court — Interpretation of case relied upon by Minister of National Revenue as standing for principle that taxpayer who avails himself of voluntary disclosure process ("VDP") in effect waives privilege in relation to any documentation relevant thereto was rejected — In that case, it was solicitor acting for taxpayer who attempted to claim privilege in face of voluntary disclosure undertaking by his client — Court in that case found that: solicitor-client privilege belonged to taxpayer client, not lawyer; client had already waived solicitor-client privilege during hearing; and lawyer was trying to protect certain sensitive matters between himself and his client — In case at bar, taxpayer had not entered into VDP other than to make inquiries as to whether or not Minister would allow him to enter into VDP, which he was denied — Review of CRA's voluntary disclosure policy indicated such disclosure cannot be considered voluntary where it is initiated based upon knowledge of current enforcement activities — GW clearly was aware, as result of exercise of numerous search warrants, that he was subject of fraud investigation — Based upon CRA's voluntary disclosure policy, VDP cannot apply to circumstances that GW faced — As result, Minister could not rely upon policy or other case to suggest that GW waived solicitor-client privilege in relation to documentation found to be subject to **solicitor-client privilege** — However, any documentation that GW had **already disclosed**, either directly or through his counsel or accountants, had lost protection of solicitor-client privilege.

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — Waiver

Canada Revenue Agency ("CRA") initiated tax fraud investigation relating to named defendants — On September 27, 2007, ten search warrants were executed by CRA covering five locations — On that day, search warrant was executed by CRA at accountant's office and documents in relation to personal defendant GW were seized — Documents relating to GW were also seized at other locations named in application — Only GW claimed solicitor-client privilege with respect to certain of seized documents — Crown brought application to determine whether or not solicitor-client privilege attached to any of seized documents referred to, and for order to release to CRA any documents not protected by privilege — Application granted — Rulings were made with respect to each of disputed documents — That documentation found to be subject to solicitor-client privilege was ordered sealed and only releasable upon written agreement of parties or by further order of court — Interpretation of case relied upon by Minister of National Revenue as standing for principle that taxpayer who avails himself of voluntary disclosure process ("VDP") in effect waives privilege in relation to any documentation relevant thereto was rejected — In that case, it was solicitor acting for taxpayer who attempted to claim privilege in face of voluntary disclosure undertaking by his client — Court in that case found that: solicitor-client privilege belonged to taxpayer client, not lawyer; client had already waived solicitor-client privilege during hearing; and lawyer

was trying to protect certain sensitive matters between himself and his client — In case at bar, taxpayer had not entered into VDP other than to make inquiries as to whether or not Minister would allow him to enter into VDP, which he was denied — Review of CRA's voluntary disclosure policy indicated such disclosure cannot be considered voluntary where it is initiated based upon knowledge of current enforcement activities — GW clearly was aware, as result of exercise of numerous search warrants, that he was subject of fraud investigation — Based upon CRA's voluntary disclosure policy, VDP cannot apply to circumstances that GW faced — As result, Minister could not rely upon policy or other case to suggest that GW waived solicitor-client privilege in relation to documentation found to be subject to **solicitor-client privilege** — However, any documentation that GW had **already disclosed**, either directly or through his counsel or accountants, had lost protection of solicitor-client privilege.

Cases considered by *D. Gunsolus J.*:

Canada v. Drummie (2007), 2007 CarswellNB 337, 2007 NBQB 241, (sub nom. *R. v. H & H Trucking Ltd.)* 322 N.B.R. (2d) 100, (sub nom. *R. v. H & H Trucking Ltd.)* 829 A.P.R. 100, (sub nom. *R. v. Drummie)* 159 C.R.R. (2d) 281 (N.B. Q.B.) — referred to

Descôteaux c. Mierzwinski (1982), 1982 CarswellQue 13, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 1982 CarswellQue 291 (S.C.C.) — referred to

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — referred to

Karia v. Minister of National Revenue (2005), 2005 FC 639, 2005 CarswellNat 1172, 2005 G.T.C. 1415, 2005 CF 639, 2005 CarswellNat 3788, [2006] 1 F.C.R. 172, 272 F.T.R. 190 (Eng.), [2005] G.S.T.C. 94, [2005] 3 C.T.C. 98, 2005 D.T.C. 5282 (Eng.) (F.C.) — referred to

Long Tractor Inc. v. Canada (Deputy Attorney General) (1997), (sub nom. *Long Tractor Inc. v. Canada (Attorney General))* 162 Sask. R. 161, 1997 CarswellSask 728, [1998] 8 W.W.R. 641, 155 D.L.R. (4th) 747, [1998] 3 C.T.C. 1, 23 C.P.C. (4th) 99 (Sask. Q.B.) — referred to

R. v. Shirose (1999), (sub nom. *R. v. Campbell)* 237 N.R. 86, 1999 CarswellOnt 948, 1999 CarswellOnt 949, 133 C.C.C. (3d) 257, (sub nom. *R. v. Campbell)* 42 O.R. (3d) 800 (note), 171 D.L.R. (4th) 193, (sub nom. *R. v. Campbell)* 119 O.A.C. 201, (sub nom. *R. v. Campbell)* 43 O.R. (3d) 256 (note), (sub nom. *R. v. Campbell)* [1999] 1 S.C.R. 565, 24 C.R. (5th) 365 (S.C.C.) — referred to

R. v. Trang (2001), 2001 ABQB 825, 46 C.R. (5th) 274, 298 A.R. 387, 2001 CarswellAlta 1248, [2002] 2 W.W.R. 317, 97 Alta. L.R. (3d) 321 (Alta. Q.B.) — referred to

Solosky v. Canada (1979), 1979 CarswellNat 4, (sub nom. *Solosky v. R.)* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 1979 CarswellNat 630 (S.C.C.) — referred to

Southern Railway of British Columbia v. Deputy Minister of National Revenue (1990), 1991 CarswellBC 877, 91 D.T.C. 5081, (sub nom. *Southern Railway of British Columbia Ltd. v. Canada)* [1991] 1 C.T.C. 432 (B.C. S.C.) — referred to

Susan Hosiery Ltd. v. Minister of National Revenue (1969), [1969] C.T.C. 353, 69 D.T.C. 5278, 1969 CarswellNat 296, [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.) — referred to

Visser v. Minister of National Revenue (1988), [1989] 1 C.T.C. 192, 72 Nfld. & P.E.I.R. 355, 223 A.P.R. 355, 89 D.T.C. 5172, 1988 CarswellPEI 35 (P.E.I. T.D.) — distinguished

APPLICATION by Crown to determine whether or not solicitor-client privilege attached to any of documents seized as part of fraud investigation, and for order to release to Canada Revenue Agency any documents not protected by privilege.

D. Gunsolus J.:

Background Facts

1 Canada Revenue Agency ("CRA") initiated a tax fraud investigation relating to the named respondents. On September 27, 2007, ten search warrants were executed by the CRA covering five locations. On that day, a search warrant was executed by the CRA at the office of Ginsburg et al, Chartered Accountants. Documents in relation to Graham Worsfold were seized from that office. Documents relating to Graham Worsfold were also seized at other locations named in the application.

2 Graham Worsfold, and only Graham Worsfold, has claimed a solicitor and client privilege with respect to certain of the seized documents. The Crown applies to this court to determine whether or not solicitor and client privilege attaches to any of the seized documents referred to. The Crown seeks an order to release to CRA any documents which are not protected by solicitor and client privilege or litigation privilege.

3 Teleconferences were held on June 30, 2008 and July 7, 2008, with counsel for the Crown and the respondent Graham Worsfold. On July 9, 2008, pursuant to the agreement of counsel, I read all of the documents in question and the parties' respective briefs and factums of law.

4 On July10, 2008, counsel agreed to a process whereby, in chambers, counsel and I reviewed the general nature of each document in order to determine the parties' respective positions in relation to the solicitor and client privilege claim.

5 On January 15, 2009, the process as set out in paragraph four above was completed in relation to the balance of the documents that were held under seal in the court file. Further, counsel presented me with legal argument in relation to the concept of solicitor/client privilege relating it specifically to documentation that was still at issue. This was undertaken prior to the court providing a final ruling in relation to the documentation as set out below.

6 For the purposes of the review, counsel agreed that the law to be applied was as follows:

> (a) Solicitor and client privilege applies to all oral and written communication, made in the context of that relationship for the purpose of obtaining legal advice.
>
> (b) An original document that is not clothed with solicitor and client privilege does not acquire privilege simply because it gets into the hands of a solicitor.
>
> (c) The burden of proving solicitor and client privilege is upon the party asserting the privilege. (See: *Susan Hosiery Limited v. Minister of National Revenue*, 69 D.T.C. 5278 (E.C.C.)

7 *Susan Hosiery Ltd. v. Minister of National Revenue* (1969), 69 D.T.C. 5278 (Can. Ex. Ct.) Solicitor and client privilege may extend to an accountant's work and advice where that accountant works as an agent or representative of the client for the purpose of seeking, receiving or implementing legal advice in conjunction with a lawyer. (See: *Long Tractor Inc. v. Canada (Deputy Attorney General)*, [1997] S.J. No. 841 (Sask. Q.B.))

8 Solicitor and client privilege may attach to a lawyer's legal account where that legal account reflects a description of services rendered. (See: *Southern Railway of British Columbia v. Deputy Minister of National Revenue* (1990), [1991] B.C.J. No. 49 (B.C. S.C.))

9 Privilege can only be claimed document by document, with each document being examined to determine if it meets the criteria for the privilege. (See: *Solosky v. Canada* (1979), 50 C.C.C. (2d) 495 (S.C.C.))

10 In order for the solicitor and client privilege to attach to a document, the following four conditions must be established:

1. There must be a communication, whether written or oral.

2. The communication must be of a confidential nature.

3. The communication must be between a client (or his agent, such as an accountant) and a legal advisor.

4. The communication must be directly related to the seeking, formulating or giving of legal advice. (See: *Solosky v. Canada*, *supra*; *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.); *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.) and *R. v. Trang*, [2001] A.J. No. 1270 (Alta. Q.B.))

11 A pre-existing document does not become privileged merely by depositing a copy of it with a party's solicitor. (See: *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.)

12 I make the following rulings in relation to whether or not solicitor and client privilege attaches to the documentation set out herein, as follows:

Document description	Privilege Does Attach	Privilege Does Not Attach
Box No. 33		
1. Envelope #1. Letter April 24/04 Solicitor to Graham Worsfold, 4 pages	X — 3 of 4 pages	X — lawyer's trust statement
2. Envelope #2. Encrypted memory stick — counsel agreed same had been transcribed and would be dealt with as part of the documentation below. Counsel agreed that the CRA may cause copies of Mr. Worsfold's income tax returns to be transcribed from the encrypted memory stick.		
3. Envelope #3. Executive summary of advice to Graham Worsfold and real estate notes and agreement of purchase and sale dated April 24/2004		X — in full
4. Envelope #4. Feb. 19/03 — Lawyer's letter Addressed to two other lawyers		X
5. Envelope #5. Lawyer's letter dated Aug. 5/03 to Worsfold	X (lawyer's letter only)	X (shareholders' agreement)

6. BDO accounts dated Dec. 31/02 and Dec. 30/02		X
7. Jan. 22/03 lawyer's reporting letter to Worsfold		X
8. Envelope #6. June 7/04 — lawyer's reporting letter re Worsfold purchase from French	X — first 4 pages, including reporting letter & lawyer's account	X — balance of documentation attached to letter
9. Dec. 1/04 — lawyer's letter to Worsfold (at Blake Cassels)	X	
10. Sep. 3/03, Feb. 1/04, Mar. 4/04 — reporting letters Cole to Worsfold	X	
11. Envelope #7. Oct. 3/03 — letter Stevens & Bolton to Worsfold	X	
12. Oct. 24/03 — lawyer's account re tax advice	X	
13. Oct. 23/03 — lawyer's reporting letter	X	
14. Stoneridge Trust document		X
15. Letter of wishes	X	
16. Envelope #8. Dec. 6/03 — e-mail with Attached minutes of meeting re Turk		X
17. Envelope #9. Oct. 6/03 — reporting letter Whittington to 1496956 Ontario Limited		X
18. Jan. 15/03 — reporting letter and documents Cole to Worsfold		X
19. Jan. 5/03 — lawyer's Account	X	
20. Lawyer's letter — Holoboff to Cole		X
21. Feb. 17/03 — Copy letter Whittington to Cole et al		X
22. May 6/03 — letter from C. Holoboff		X
23. Jan. 27/01 — letter Cole to Graham with no advice		X
24. Envelope #10. Dioguardi letter to Worsfold with attachments	X	
25. Letter Worsfold to Cole & releases dated Oct. 22/05 and Oct. 25/05	X	
26. e-mail Lockington to Worsfold	X	
27. Attached agreement re Stoneridge Inc. and Graham Worsfold		X
28. Apr. 30/01 — reporting letter and account from Corkery to Worsfold (4 pages)	X	
29. Attached documentation		X

30. Envelope #11. Sep. 16/03 — Walker reporting letter to Graham Worsfold	X		
31. Attached documentations			X
32. Lockington reporting letter to GL Holdings Inc. and account	X		
33. Attached documentation Deed to Life House Development			X— X
34. Envelope #12. Jun. 18/04 — letter Lockington to Worsfold with 6 shareholder agreements			X
Box No. 1			
35. Envelope #13. CD sealed Sep. 27/07 — counsel agreed the documents on this disc had been transcribed and would be dealt with below — counsel agree that the CRA may cause Mr. Worsfold's income tax returns to be transcribed.			
This disc and the memory stick referred to above at paragraph two are to be treated privileged. Documentation contained on them has been addressed in this endorsement.			
36. Aug. 28/07 — letter Ginsburg to DioGuardi	X		
37. Mar. 3/06 — letter Ginsburg to DioGuardi	X		
38. Sep. 11/06 — letter Ginsburg to DioGuardi	X		
39. Nov. 7/05 — Worsfold memo to Diogardi	X		
40. Apr. 14/06 — Ginsburg memo to DioGuardi	X		
41. Apr. 14/06 — Ginsburg to DioGuardi	X		
42. Nov. 28/05 — Ginsburg to DioGuardi	X		
43. Nov. 28/05 — Ginsburg To DioGuardi	X		
44. May 9/06 — letter Faloon to CRA			X
45. Jun. 15/06 — letter Faloon to DioGuardi	X		
46. Memo Faloon to DioGuardi	X		
47. Aug. 29/06 — letter to CRA from undisclosed author			X
48. Oct. 19/06 — Ginsburg to DioGuardi	X		
49. Accounts' review and advice	X		
50. Series of investment accounts reference July 14			X

51. Series of investment accounts, bank statements sent by Worsfold to Faloon		X
52. Series of e-mails H.U.W. Williams to Faloon and Summaries	X	
53. Related bank statements		X
54. Lockington letter to Burton and Worsfold re sale of shares GL Holdings Inc.		X
55. Memo Williams to Ginsburg et al	X	
56. Lyn Worsfold authorizing Ginsburg as agent to CRA		X
57. List of deposit transfers To "Mr. Cole for purchase of 3 properties from National Bank account"		X
58. Oct. 17/03 — agreement Between Worsfold and Oliver and Ratrace Limited		X
59. Handwriting re entry into Canada and date applied for landed immigrant status		X
60. Application for landed immigrant status by Worsfold		X
61. 06/08/01 — Memo from PC-POS Inc. offering Graham Worsfold CEO's position		X
62. GrahamWorsfold authorization Ginsburg re CRA on government form		X
63. Dentists' accounts, Dr. Wong to Worsfold		X
64. Opinion Summary from accountant of taxes owing re Graham Worsfold	X	
65. Analysis of taxation — Faloon to DioGuardi	X	
66. Stephens and Bolton US dollar account		X
67. Worsfold purchase of yacht		X
68. Power Yacht management agreement		X
69. Power Yacht management agreement		X
70. Income summary — Graham Worsfold 2001 to 2005 from accountant	X	
71. Series of bank statements sent to Hugh Faloon		X
72. Accountant Review and Advice prepared by Faloon	X	
73. Report of directors of International Retail Solutions Group Limited		X

74. Faloon to Rosianu — e-mails	X	
75. Faloon to Rosianu — enclosures from Brain Chase and Coles		X
76. Graham and Lyn Worsfold Trust agreement		X
77. Inland Revenue letter warning of legal proceedings		X
78. Aug. 24/06 — memo HUW Williams to Faloon	X	
79. Enclosures re PC-POS Inc. financial statements		X
80. Ratrace reports and accounts 03, 04 & 05		X
81. Memo Hugh Williams to Faloon	X	
82. Ratrace Motorsport sale		X
83. GL Holdings sale		X
84. Report from directors Rat Race years ending Dec. 31/02 and 03		X
85. CCH reports		X
86. IT-120R6		X
87. Stoneridge Management Services Inc. income statement for years ended Dec. 31/03, 04, 05		X
88. Memos Rosianu to Faloon	X	
89. Certificate Virgin Islands incorporation of Stoneridge Management Services Inc.		X
90. Stoneridge balance sheet for 03, 04, 05		X
91. Draft "The Stoneridge Trust" financial statements Oct. 17/03 to Dec. 31/04		X
92. Stoneridge Trust Agreement Oct. 17/03 — Worsfold and JTC Trustees Limited		X
93. Oct. 14/05 — Stephens And Bolton letter to Inland Revenue		X
94. Oct. 14 — letter Stephens and Bolton with attached memo of wishes by Worsfold	X	
95. Memos Faloon re Stoneridge Trust with draft trust statements		X
96. Handwritten notes re Stoneridge — origin unknown		X
97. Narrative 04 admin fees, Distributions to Worsfold- origin unknown		X

98. Draft Stoneridge Trust statements 17/03 to 31 Oct 04		X
99. Graham Worsfold estimated value PC-POS Inc. 2001-03, origin Unknown		X
100. Aug. 24/06 — HUW Williams to Faloon re South African account for opinion/advice	X	
101. Envelope #14. GR and LS Worsfold Life interest settlement Trust 2002-2005	X	
102. Yacht rental and purchase agreement		X
103. Accountants' Review and Advice	X	
104. Faloon to DioGuardi tax analysis	X	
105. Opinion Analysis from accountant of income and assets re Worsfold	X	
106. Envelope #15. Correspondence between CRA and DioGuardi		X
107. Memo Worsfold to DioGuardi	X	
108. Envelope #16. Correspondence Faloon to Worsfold	X	
109. Envelope #17. Correspondence Faloon to Worsfold	X	
110. Envelope #18. Notes prepared by Worsfold for Hugh Faloon	X	
111. Envelope #19. Financials re PC-POS Ltd.		X
112. Three pages handwritten notes	X	
113. Envelope #20. Jul. 5/02 Cole reporting letter to Worsfold	X	
114. Attached documents		X
115. Copy of purchase of right-of-way from Bolton		X
116. Envelope JM1 Series of e-mails between accountant Coles and Worsfold		X
117. Envelope JM6 Three page memorandum From HUW Williams		X
118. Envelope JM7 Dated Aug. 25/06 e-mail and handwritten notes		X
119. Envelope JM8 Dated Aug. 24/06 Page 1 Pages 2, 3, 4, and 5 — Accountant's advice in relation to Canadian tax issues	X	X

13 All of the foregoing was determined by applying the law of solicitor and client privilege as outlined above to each of

the documents in question. As previously stated, each document was examined by the court and by counsel for Mr. Worsfold and generally described to counsel for the Minister of National Revenue.

14 Counsel for the Minister further argued that by applying for a Voluntary Disclosure process, Mr. Worsfold, in effect, waived solicitor/client privilege in relation to the disputed documentation. The Minister's position was that the policy applicable to Voluntary Disclosure required a full and frank disclosure of all supporting documentation in relation to the Voluntary Disclosure. Further, the Minister relies upon the case of *Visser v. Minister of National Revenue* (1988), 89 D.T.C. 5172 (P.E.I. T.D.) Nov. 1, 1988. He took the position that *Visser* stands for the principle that a taxpayer who avails himself of the Voluntary Disclosure process, in effect waives privilege in relation to any documentation relevant thereto.

15 I do not share counsel's interpretation in relation to the *Visser* case. In that case, it was the solicitor acting for the taxpayer who attempted to claim the privilege in face of a Voluntary Disclosure undertaking by his client, the taxpayer. The court in that case found that:

(a) Solicitor/client privilege belonged to the taxpayer client, not the lawyer;

(b) During a hearing the client had already waived solicitor/client privilege;

(c) The lawyer was trying to protect certain sensitive matters between himself and his client. Again, the court found that privilege had already been waived by the client taxpayer.

16 In the case before me, the taxpayer had not entered into the Voluntary Disclosure process other than to make inquiries as to whether or not the Minister would allow him to enter into the Voluntary Disclosure process. The court was advised that this was denied by the Minister. A review of the CRA's Voluntary Disclosure policy indicated such disclosure cannot be considered voluntary where it is initiated based upon the knowledge of current enforcement activities. (See: *Karia v. Minister of National Revenue*, 2005 FC 639 (F.C.). and Canada Revenue Agency Income Tax Information Circular IC78-10R4, June 2005.)

17 In the case before me, Mr. Worsfold clearly was aware, as a result of the exercise of numerous search warrants, that he was the subject of a fraud investigation. Based upon the CRA's Voluntary Disclosure policy, a Voluntary Disclosure procedure cannot apply to the circumstances that Mr. Worsfold now faces. In the result, the Minister cannot rely upon the policy or the *Visser* case to suggest that Mr. Worsfold waived solicitor/client privilege in relation to the documentation that I have found to be subject to solicitor/client privilege.

18 I do, however, agree with counsel for the Minister, that any documentation that Mr. Worsfold has already disclosed, either directly or through his counsel or accountants, has lost the protection of solicitor/client privilege. As the court is not aware of the nature of the documentation disclosed by Mr. Worsfold in this way, if in my findings I have attributed solicitor/client privilege to any documentation which, it is subsequently discovered, Mr. Worsfold has disclosed to the Minister, then the solicitor/client protection shall be deemed to have been waived and my findings herein will not apply to that documentation.

19 At the request of and upon the agreement of counsel, I caused the documentation which I found to be subject to solicitor/client privilege to be sealed by the court. The documentation shall remain sealed in the court file and may be released only upon the written agreement of the parties through their counsel, or by further order of this court.

20 I would like to take this opportunity to thank counsel for the thorough and co-operative way in which they ap-

proached this matter. The review of such voluminous and detailed documentation was made easier as a result of counsels' professional approach to these issues.

21 Should counsel find it necessary, and in order to assist them, I would entertain a further teleconference and/or motion in order to give effect to this judgment. An issue that was raised but not strenuously pursued by counsel related to whether or not the Superior Court of Justice had jurisdiction to hear this matter insofar as it was a proceeding instituted by the Ministry of National Revenue and, as such, should have been dealt with by the Federal Court. I am satisfied that the Superior Court of Ontario has original and plenary jurisdiction unless its jurisdiction is expressly ousted by statute. The Superior Court of Ontario has jurisdiction to consider matters in relation to search warrants obtained and exercised by the Canada Revenue Agency. (See: *Canada v. Drummie*, [2007] N.B.J. No. 253 (N.B. Q.B.).)

22 Judgment shall issue accordingly.

Application granted.

END OF DOCUMENT

TAB C

C

2001 CarswellOnt 908, 21 C.B.R. (4th) 194

Anvil Range Mining Corp., Re

In the Matter of Anvil Range Mining Corporation

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

In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as Amended

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C.B-3, as Amended

In the Matter of a Plan of Compromise or Arrangement of Anvil Range Mining Corporation, Applicants

Ontario Superior Court of Justice [Commercial List]

Farley J.

Judgment: February 21, 2001
Docket: 98-BK-001208

Counsel: *George Karayannides*, *Kenneth Kraft*, for Moving Party, Deloitte & Touche Inc. in its capacity as Interim Receiver

John Porter, for Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development

Derek T. Ground, for Ross River Dena Council, Ross River Development Corporation

Geoff Morawetz, for Yukon Energy Corporation

James Grout, for certain Yukon lien holders

Fred Myers, for Government of Yukon

David Hager, for Cominco Ltd.

Tony Reyes, for Golden Hills Ventures Ltd., MacMillan Mining Contractors Ltd., Vortex Mining Inc.

Kevin R. Aalto, for Cumberland Asset Management, Berner Company Inc., Global Securities Corporation, Peel Brouke Inc., Robert N. Granger, Adrian M.S. White

Richard Jones, for Rose Creek Vangorda Mines, Pelly River Mines Limited (NPL)

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

Bankruptcy --- Interim receiver — Miscellaneous issues

Creditors brought motion requesting adjournment of interim receiver's motion for sanction of plan under Companies' Creditors Arrangement Act — Motion granted — Material provided by interim receiver did not constitute valuation — Assets in question were unlikely to have significant value — Short form valuation could be prepared without significant cost — Interim receiver was officer of court and did not become adversarial party in contentious matter by virtue of bringing motion — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Creditors brought motion requesting adjournment of interim receiver's motion for sanction of plan under Companies' Creditors Arrangement Act — Motion granted — Material provided by interim receiver did not constitute valuation — Assets in question were unlikely to have significant value — Short form valuation could be prepared without significant cost — Interim receiver was officer of court and did not become adversarial party in contentious matter by virtue of bringing motion — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Farley J.*:

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

Canadian Airlines Corp., Re, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — referred to

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

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]) — considered

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

Rules considered:

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

R. 39.03 — referred to

R. 39.03(3) — referred to

MOTION by creditors for adjournment of motion of interim receiver to sanction plan under *Companies' Creditors Arrangement Act*.

Endorsement. ***Farley J.*:**

1 Both Mr. Aalto (for Cumberland et al) and Mr. Jones (for Vangorda and Pelly River) request an adjournment of the motion of the Interim Receiver, Deloitte & Touche Inc., for the sanction of a CCAA plan approved by certain classes of creditors (the other classes not participating because of the view that they were so far under water they could not even see the Plimsoll line, let alone be in contact with it).

2 The first ground for the adjournment was that the Interim Receiver's report was not in affidavit form and that those parties opposing the sanctioning of the Plan required that the Interim Receiver be cross-examined. There had been no previous request to obtain any clarification or amplification on the Interim Receiver's 22nd and 23rd reports, which are germane to the sanctioning motion. Nor would it seem that over the years has there been any such requests with respect to previous reports which dealt with values, since I note that Mr. Farquharson's January 16, 2001 letter refers to his views not having changed from such previous times. The Interim Receiver indicated that he would be available to discuss the reports yesterday in response to the demand for cross-examination. Mr. Aalto relies on his summons to witness and did not attend; Mr. Jones did attend. Mr. Aalto raises the point of what would the record be of such a discussion. I would think in most situations there would be no record if the enquirer were satisfied. If not, then perhaps a transcript or a series of written questions and answers or merely a summary agreed by counsel would be appropriate, i.e. whatever the circumstances require.

3 The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.

4 See *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List])) at pp. 101-2 where I stated:

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

The jurisprudence which I referred to included *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.) and *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) at p.30. See also paper "Canadian Airlines - The Last Tango in Calgary" by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

5 With respect to Mr. Jones' submissions concerning R.39.03, it would not seem to me that, in any event, there has been reasonable diligence in asking for an examination (see R.39.03 (3)).

6 Mr. Aalto raises as a second prong of his attack for an adjournment that the Interim Receiver has not, in its monitor capacity, lived up to its obligations required in Cameron J.'s order of January 16 [December 19] 2001, to have its "report to include an updated valuation of assets." The complaint here is that there is no such "valuation". The Interim Receiver relies on paragraphs 44-45 of its 22nd report together with Tab L, the aforesaid Farquharson letter and paragraphs 35-40 of its 23rd report as being the "valuation". Mr. Aalto proffers an affidavit of Paul A. Carroll, Q.C., sworn February 20, 2001 (yesterday and therefore somewhat late in coming if anyone wished to cross-examine). Mr. Carroll swears at paragraph 7:

> 7. No updated valuation of the assets has been undertaken by the Interim Receiver as ordered by this Court. Indeed, so far as I can ascertain, no full and complete valuation of the assets has ever been obtained by the Interim Receiver. The only information provided by the Interim Receiver in its report number 22 was a letter signed by Graham Farquharson from Strathcona Minerals which letter is not a valuation. Indeed, Mr. Farquharson, in response to a question posed to him by James Spence, a corporate partner with Gowlings, advised that he was not retained to give a valuation of the assets of Anvil Range, but was only asked to provide information in respect of base metal prices. This conversation took place in my presence.

7 I am not able to agree that what the Interim Receiver has provided is a "valuation". Certainly, the cited paragraphs and Farquharson's letter would point to it being unlikely that there was any significant value for the assets in question. Certainly Mr. Farquharson's letter is a *gloomy one* as to the prospects for the mining operations. For example:

> We are responding to your request for an updated opinion on the potential for resumption of mining operations for Anvil Range ... (p.1).
>
> As we have consistently stated in our previous opinions on the economics of Anvil Range, the property was a high cost producer and always will be such and, therefore, needs a zinc price above US$1,200 per ton to result in reasonable operating margins. (p.3)
>
> There is not much expectation that there will be a shortage of zinc concentrates in the next few years which is not a positive factor if Anvil Range was considering resuming production with its less than premium quality zinc concentrate. (p.3)
>
> Lead prices have been in a steady decline since 1996 and again we have not heard of any reason to expect a substantial improvement in prices in the near term. (p.3)
>
> We also understand from your reports that there has been continued deterioration of the process plant with time and this would not facilitate any resumption of operations. (p.5)
>
> Consequently we see no reason to consider resuming mining operations at Anvil Range at this time. With only three to five years of potential reserves remaining and a substantial investment required to resume mining such an investment cannot be justified until metal prices increase substantially and have prospects of remaining at higher levels for at least a period of three years while the remaining reserves at Grum are mined. (p.5)

8 However, he only indicates a salvage operation as an alternative once a decision was made to eliminate any possibility of ever resuming mining operations.

> Given that we do not expect metal prices to improve significantly in the next few years, and Cominco should be consulted in case they have a contrary opinion as they do have much closer contact with metal markets than we do, perhaps one of the options that should now be given increased consideration by the current creditors would be to realize whatever salvage value may remain with the existing assets including the process plant and equipment and apply those proceeds to the continuation of the program for permenant reclamation. Before making that decision, which would eliminate any possibility of ever resuming mining operations at Anvil Range, a final critical review of the economic possibilities for the resources at the Grum pit should be made and be done by those with experience to make that last review. (p.6)

In conclusion he says:

> We trust this meets your requirements at this time and regret that we are not able to offer any more encouragement than we have expressed in previous comments on this matter. (p.6)

9 I doubt very much that Mr. Farquharson has changed from being a very cautious understated and excellent expert as I found him to be in *New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]). It does not surprise me then that he would not assert that his letter was a "valuation".

10 I would be of the view that a valuation could be prepared in short order without a significant cost. In other words, in these circumstances and for the procedural purpose of establishing on a *very broad band basis* where the Plimsoll line is, it seems to me that Mr. Farquharson (or some other valuator) could give such a valuation in point form and without elaboration. Certainly, one would have to conclude from Mr. Farquharson's letter that for the foreseeable future the property would be uneconomic and therefore of very limited value. Lead / zinc prices for this troubled ore body likely would have to soar.

11 The Interim Receiver's motion is therefore adjourned to provide this valuation or obtain a further order of the Court. The Interim Receiver and its supporting parties will have to consider whether this turn of events will require a new vote to be taken.

12 In any event, I do not think that this matter of Anvil Range should meander about. I would be of the view that even if a new vote were required that the parties would be back before me within two months at the outside. In the meantime, all should attend to their knitting.

Motion granted.

END OF DOCUMENT

TAB D

C

2003 CarswellOnt 4537

Bell Canada International Inc., Re

IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THECANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, as amended (the "CBCA")

Ont. S.C.J. [Commercial List]

Farley J.

Heard: October 29, 2003
Judgment: October 30, 2003
Docket: 02-CL-4553

Counsel: John T. Porter, Derrick C. Tay, Alan B. Merskey for BCI

Christine Snow for Directors of BCI

James H. Grout for Monitor

W. Grant Worden for BCE

J.L. McDougall, Q.C., Michael D. Schafler for Peter Legault

Frederick L. Myers for Horizon

Robert Staley for Hicks, Muse, Tate & Furst Inc., Davivo International Ltd.

Subject: Corporate and Commercial; Insolvency

Business associations --- Changes to corporate status — Amalgamations and takeovers — Takeovers — Miscellaneous issues

C Ltd. considered two bids for its shares — C Ltd. elected to accept bid by corporation H — Monitor scrutinizing bid process wrote report stating sale process conducted fairly and openly — Minority shareholder told monitor he had party interested in submitted higher bid, but no offer was received — BCI Inc. brought motion for order authorizing BCI Inc. to enter into voting agreement with H to vote its 75.6 per cent interest in common

shares of C Ltd. in favour of sale agreement between C Ltd. and H — Order issued that BCI Inc., if authorized by its board, could enter into voting agreement with H, which obligated it to vote in favour of sale agreement — Report of monitor in proceedings of this nature is evidence — Monitor, as officer of court, not necessarily barred from being cross-examined — Court officers may be examined or cross-examined in unusual circumstances — Motion would have been better supported by affidavit, but given limited nature of relief sought, it was not fatal that only monitor's report provided — Motion granted subject to determination by board and management of whether it was in best interests of BCI Inc. to vote in favour of sale agreement.

Cases considered by *Farley J.*:

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

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

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — referred to

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

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 189 — referred to

s. 189(3) — referred to

s. 190 — referred to

s. 192(1) "arrangement" — referred to

s. 192(3) — referred to

MOTION by corporation for order authorizing it to enter into voting agreement with another corporation to vote its interest in common shares in third corporation in favour of sale agreement.

***Farley J.*:**

1 [1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

(b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the

"Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

2 [2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early June 2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

3 [3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

4 [4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process - which it appears it was not - and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

5 [5] At paragraph 28 of its report, the Monitor stated:

28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

6 [6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term cus-

tomarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.

Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

7 [7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 [8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) at para. 5; *Anvil Range Mining Corp., Re*, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil Range Mining Corp.* including the cite from *Innisfil*:

(3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.

(4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:

As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs

of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont.

H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines - The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

9 As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to co-operate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 [9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

11 [10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion - and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

12 [11] At para. 30 of its report, the Monitor has advised the Court and the parties:

30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution to the BCI Stakeholders. (emphasis added)

13 As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

14 [12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

15 [13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

16 [14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

Order accordingly.

END OF DOCUMENT

TAB E

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2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72

Confectionately Yours Inc., Re

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

Ontario Court of Appeal

Catzman, Doherty, Borins JJ.A.

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

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

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano

Benjamin Zarnett, David Lederman, for Respondent, KPMG Inc.

Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Receivers --- Remuneration of receiver — Accounts

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

available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

Cases considered by *Borins J.A.*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hoskinson, Re, 22 C.B.R. (N.S.) 127, 1976 CarswellOnt 53 (Ont. S.C.) — referred to

Ibar Developments Ltd. v. Mount Citadel Ltd., 26 C.B.R. (N.S.) 17, 1978 CarswellOnt 150 (Ont. H.C.) —

referred to

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

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

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

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

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

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

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

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

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

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

West Toronto Stereo Centre Ltd., Re, 19 C.B.R. (N.S.) 306, 1975 CarswellOnt 73 (Ont. Bktcy.) — considered

Statutes considered:

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

s. 21(2) — referred to

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

s. 39(2) — referred to

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

s. 61(1) — referred to

s. 61(3) — referred to

Rules considered:

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

R. 39.02(1) — considered

R. 57.01(3) — referred to

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

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

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

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

***Borins J.A.*:**

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

Introduction

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

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

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

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December

21, 2000, to complete the sale of substantially all of the assets of the companies for approximately $6,500,000. The transaction closed on December 28, 2000.

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

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

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

6 In summary, KPMG sought approval of the following:

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

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

8 The appellants appeal on the following grounds:

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

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

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

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

Reasons of the motion judge

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

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

> Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

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

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

> As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves avail-

able for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

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

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

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

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Issues and Analysis

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

(1) Bias

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

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

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.

- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.

- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.

- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".

- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.

- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

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

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

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

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

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

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

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

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

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

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

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items

such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

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

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

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

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

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether

those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

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

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

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, *e.g.*, *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).[FN1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."[FN2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule

74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

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

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

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, *e.g.*, *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, *e.g.*, *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

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

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

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

> Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot

equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

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

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

Conclusion

(1) Bias

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

(2) Cross-examination of the receiver

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

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

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with

curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

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

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

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

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

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

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

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

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

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

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

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.

• The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded form any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.

• Mr. Pape was given a full opportunity to make submissions.

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

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

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

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

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

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

Result

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

***Catzman J.A.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal allowed in part.

FN1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.

FN2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

END OF DOCUMENT

TAB F

2008 CarswellBC 712, 2008 BCSC 446, 41 C.B.R. (5th) 49, [2008] B.C.W.L.D. 3192

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2008 CarswellBC 712, **2008** BCSC 446, 41 C.B.R. (5th) 49, [**2008**] B.C.W.L.D. 3192

Pine Valley Mining Corp., Re

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

And In the Matter of the Business Corporations Act, R.S.B.C. 2002, c. 57, as amended

In the Matter of Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Global-tex Gold Mining Corporation (Petitioners)

British Columbia Supreme Court

N. Garson J.

Heard: April 9, 2008
Judgment: April 14, 2008
Docket: Vancouver S066791

Proceedings: additional reasons to *Pine Valley Mining Corp., Re* (2008), 2008 CarswellBC 579, 2008 BCSC 356 (B.C. S.C.)

Counsel: J.R. Sandrelli, O. Jones for Pine Valley Mining Corporation

B.G. McLean, C. Armstrong for Tercon Mining PV Ltd.

W. Kaplan, Q.C. for Monitor

D.A. Garner for Petro-Canada

J.D. Bergman for CN Rail

Subject: Insolvency; Evidence

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

F Inc. was wholly-owned subsidiary of P Corp. — P Corp. and F Inc. successfully petitioned for general stay of proceedings under Companies' Creditors Arrangement Act ("CCAA") — Petition did not disclose inter-company debt as between petitioners — Inter-company debt was revealed when Monitor appointed by Court in CCAA proceeding requested unconsolidated financial statements for each of petitioners — P Corp. filed claim with Monitor stating that F Inc. was indebted to P Corp. in amount of $42 million — Fourth report issued by Monitor to Court contained detailed view of transactions underlying P Corp. claim — Monitor proposed to allow revised

claim against F Inc. in amount of $27 million — Some creditors objected to claim — Application was brought for directions respecting process for determination of amount of P Corp.'s claim against F Inc. within proceeding under CCAA — Function of Monitor was to determine validity and amount of claim on basis of evidence submitted — Monitor's process in doing so was in no way akin to adversarial process — Monitor was not entitled to deference in sense that would alter burden of proof ordinarily imposed on claimant — P Corp. had burden of proving its claim — Either party was at liberty to use Monitor's report or part of report at trial of matter as expert report provided necessary notice was given to other — Section 12 of CCAA requires summary trial — Section 12 of CCAA informed any decision court must make as to format of trial and that trial must be as section dictated unless to do otherwise would be unjust, or there was some other compelling reason against summary trial — Claim could be tried summarily on reserved date — Parties made additional submissions regarding admissibility of monitor's report — Report entered as evidence, but conclusions were not admissible as expert opinion — Monitor was court officer and neutrality should not be compromised.

Cases considered by *N. Garson J.*:

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — considered

Canadian Airlines Corp., Re (2001), [2001] 7 W.W.R. 383, 14 B.L.R. (3d) 258, 92 Alta. L.R. (3d) 140, 2001 ABQB 146, 2001 CarswellAlta 240, 294 A.R. 253 (Alta. Q.B.) — distinguished

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

ADDITIONAL REASONS to judgment reported at *Pine Valley Mining Corp., Re* (2008), 2008 CarswellBC 579, 2008 BCSC 356, 41 C.B.R. (5th) 43 (B.C. S.C.), regarding admissibility of monitor's report in bankruptcy proceedings.

***N. Garson J.*:**

1 These supplementary Reasons for Judgment concern the admissibility of a court appointed monitor's report, and the compellability of a monitor as an expert witness, at the summary trial of a contested application in this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended ("CCAA").

2 I issued Reasons for Judgment on March 14, 2008 (2008 BCSC 356 (B.C. S.C.)) concerning the procedure that would govern the summary trial of the claim of Pine Valley Mining Corporation ("PVM") against Falls Mountain Coal Inc. ("FMC"). Following delivery of those Reasons for Judgment, the Monitor applied for leave to make further submissions with respect to para. 15 of the Judgment. No party opposed the application to reopen the hearing. The order emanating from the Reasons for Judgment not having been entered, I granted leave to all parties to make further submissions concerning the admissibility of the Monitor's Report and the compellability of the Monitor at the summary trial.

3 This dispute concerns a claim, by PVM against its previously wholly-owned-subsidiary FMC, for approximately $42 million. The dispute centers on the question of whether payments made by PVM to FMC were in whole, or in part, loans or investments. If the latter, then PVM would rank after the general creditors in the

CCAA proceeding. The facts which form the background to this inter-company claim are set out in my Reasons for Judgment at 2008 BCSC 356 (B.C. S.C.).

4 At para. 15 of those Reasons for Judgment I stated:

> The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

5 At the subsequent hearing the parties made further submissions concerning the use to which the Monitor's Report could be put at the trial of the inter-company claim and whether the Monitor's conclusion as to the characterization of the payments made by PVM to FMC could be used as an expert opinion at the trial.

6 I am now satisfied that, for the most part, the parties have been able, with the assistance of the Monitor, to satisfy themselves as to the proper accounting of the inter-company claim. The remaining issue between the parties is whether the amounts so paid are properly characterized as debt or equity. No party is opposed to the admissibility, at the summary trial, of those portions of the Monitor's Report which detail the numerous transactions between PVM and FMC. What is now at issue is the question as to whether the Monitor's conclusions, that about $27 million dollars of the payments is properly characterized as debt owed to PVM and not as an equity investment by PVM in FMC, is admissible evidence at the summary trial and if so whether and under what terms the Monitor is compellable as a witness. In my earlier Reasons for Judgment, I did not differentiate between what I shall for convenience call the accounting portions of the Monitor's Report and his conclusions or opinion on the proper characterization of the payments.

7 Mr. Sandrelli, for PVM, wishes to rely on the Monitor's conclusions as contained in his Report. Mr. McLean, for Tercon on behalf of the general creditors, contends that if I permit PVM to use the entirety of the Monitor's Report as evidence, PVM will be obtaining "a leg up", and, in effect, reversing the burden of proof, notwithstanding that in my earlier Reasons for Judgment, I held that PVM carried the burden of proving its whole claim regardless of the Monitor's conclusions.

8 Mr. Kaplan, counsel for the Monitor, suggested the following directions, which he says take into account the special role of the Monitor as an impartial officer of the Court:

> 1. Either party may file with the Court the Monitor's 4th Report concerning the inter-company claim ("Monitor's Report") or the Notice of Revision concerning the PVM inter-company claim ("Notice of Revision"), at the hearing concerning the inter-company claim presently scheduled to commence May 28, 2008 (the "Hearing").
>
> 2. The Monitor's Report may be received into evidence at the Hearing as evidence of the following matters:
>
> (a) that the transactions referenced therein occurred on or about the date referenced in the Monitor's Report, and in the amounts referenced in the Monitor's Reports;

(b) that the summaries of the Petitioners' accounting of dollar values of transactions over a given time period referenced in the Monitor's Report are accurate summaries of the dollar values of such transactions over such period of time as referenced in the Monitor's Report;

(c) the Monitor's conclusions concerning whether a particular transaction was in the nature of a debt transaction or equity transaction can be received into evidence by the Court but such conclusions are not binding upon the Court; and

(d) that the Monitor's conclusion that a particular payment or receipt was a payment or receipt on behalf of either PVM or FMC, as the case may be, may be received into evidence at the hearing but that such conclusion is not binding upon the Court.

3. On or before_____, 2008, either party may deliver questions or inquiries to the Monitor in respect to the Monitor's Report, including, without limiting the foregoing, questions or inquiries concerning the following matters:

(a) details of the Monitor's accounting of the various transactions, including details of the Monitor's tracing of transactions through any bank accounts or accounting records of the Petitioners;

(b) documents relied upon by the Monitor in respect to the accounting of a particular transaction or transactions;

(c) the content of management input in respect to the accounting of any transaction or transactions; and

(d) details concerning the information or document requested from the companies by the Monitor in respect to any transaction, whether or not such information or documentation was provided to the Monitor and, if not, why not.

4. The Monitor shall deliver a supplementary report (the "Monitor's Supplementary Report") responsive to the questions posed to the Monitor by the parties within 10 days of receipt of the questions and circulate the Monitor's Supplementary Report to the parties and the Court. In the event the Monitor is unable to respond to a question the Monitor shall provide the reasons for such inability in the Monitor's Supplementary Report.

5. Any party is at liberty to deliver follow-up questions to the Monitor upon receipt of the Monitor's Supplementary Report and the Monitor shall make every effort to respond to such follow-up questions at the earliest reasonable time.

6. Either party may file the Monitor's Supplementary Report at the Hearing and the Monitor's Supplementary Report may be received into evidence at the Hearing on the same terms and conditions as described in paragraph 2 herein in respect of the Monitor's Report.

7. Either party may apply to the Court for further directions concerning examination of the Monitor at the hearing on the Monitor's Report or the Monitor's Supplementary Report.

8. The Monitor may be subject to examination at the Hearing of this matter, by the Court, at the Court's discretion or on the application of either party, in respect to any matter contained in the Monitor's Re-

port or the supplementary Monitor's Report.

9 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]), Mr. Justice Farley discussed the question of the admissibility of a monitor's report, and the role of the monitor. He stated, at paras. 6, 7 and 8:

> 6 L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:
>
> > A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement — "inquisition" or "inquest" — suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
> >
> > Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).
>
> 7 Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."
>
> > Officers of the court [such as court appointed receivers (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.
>
> 8 L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Re Bakemates International Inc.*, [2002] O.J. No. 3569 (C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 5; *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1125 (Ont. S.C.J. [Comm. List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil* including the cite from *Innisfil*:
>
> > (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.

(4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1985), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 103-2 where I stated:

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

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines — The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 In *Rescue! Companies' Creditors Arrangement Act*, (Toronto: Carswell, 2007) Janis P. Sarra, wrote at p. 269:

7. Monitor's Reports and the Issue of Compellability

As an officer of the court, the monitor has been found not to be compellable to give evidence in a proceeding, although the monitor reports to the court on a regular basis. The monitor's reports have been found to be "not evidence" and hence not generally subject to cross-examination; rather, as an officer of the court, the

monitor is to act "lawfully, fairly and honourably". In Ontario, the court has held that insolvency officers will not generally be subject to cross-examination of their reports, while acknowledging that these court-appointed officers do occasionally make themselves available for examination in the spirit of co-operation and common sense.

The Ontario Supreme Court of Justice in *Bell Canada International Inc.* held that although the situation did not warrant it in the instant case, an officer of the court may be cross-examined on a report in exceptional or unusual circumstances. Such circumstances could include situations where the monitor refused to co-operate in clarifying a part of its report or in not expanding on any element in the report as may be reasonably requested. The Court held that the reasonability of a request must take into account the objectivity and neutrality of the officer of the court; specifying that: "woe betide any officer of the court who did not observe his duty to be neutral and objective". This judgment indicates that one of the monitor's duties is to clarify information to stakeholders based on a reasonableness test. Failing this, the court may in exceptional circumstances compel the monitor to be examined. It also indicates that the court's deference will depend on the monitor complying with its duty to be impartial, objective and fulsome in its report.

The monitor's report offers an opinion to the court as to the accuracy of the information or the wisdom of particular proposed actions. This is not problematic if the monitor is not acting as an advocate for the debtor corporation. However, where it is, it is unclear that the courts have yet generally recognized that this may be problematic for creditors and other stakeholders seeking to challenge the monitor's conclusions. This has implications for interim decisions during the course of *CCAA* proceedings, such as a sale of assets during the proceeding and the court's reliance on the monitor for its business judgment. Rarely has the court preferred the evidence of creditors or disregarded the opinion of the monitor.

In the *Canadian Airlines* proceeding, the noteholders sought to cross-examine the monitor on its liquidation analysis. It was the first time that such an issue had come before the court. Madam Justice Paperny of the Alberta Court of Queen's Bench concluded that cross-examination might not be necessary if the monitor provided further information. It directed the noteholders and dissenting shareholders to send written questions to the monitor, finding that if the need arose, the court would put questions to the monitor in the courtroom. The monitor subsequently answered almost 70 questions in two Special Reports and the issue became moot.

The Court's approach in *Canadian Airlines* reflected the public interest in full disclosure of the monitor's reasoning while protecting the monitor as an officer of the court. Monitors would generally be far less effective if they were at risk of being compelled to be cross-examined on each of their reports or opinions to the court.

However, the courts have cautioned that monitors' reports should not include information that really should be led as evidence by the debtor corporation in a *CCAA* proceeding. The use of the monitor's report to insulate the debtor from cross-examination may have implications for the dispute resolution process under the *CCAA* as the debtor may have a tactical advantage in the bargaining process where the monitor acts as advocate.

The Ontario Superior Court of Justice in *Bell Canada International* commented on this risk of the debtor shirking its disclosure obligations through the use of the monitor's report. It observed that there have been problems with motions supported by nothing other that [*sic*] the monitor's report. The Court held that if a

matter is reasonably expected to be contentious or turns contentious, it is important to have an affidavit from the moving party and time to allow cross-examination. This represents recognition by the court that the monitor may risk its impartiality or the perception of impartiality if its reporting role is used inappropriately to insulate parties from cross-examination.

11 Kevin P. McElcheran in *Commercial Insolvency in Canada* (Markham: Lexis Nexis 2005) states on p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

12 From these authorities and commentaries, I conclude that my discretion should be guided by the following principles:

> 1. Presumptively a monitor's report, such as the one here, is admissible in evidence at a hearing concerning the subject matter of the report.
>
> 2. In unusual circumstances an officer of the court, such as a monitor, may be cross-examined on his report.
>
> 3. The monitor must remain neutral as between the various stakeholders in a *CCAA* proceeding.
>
> 4. The court should strive to protect the monitor from close involvement in the adversarial process between the claimants.

13 In my previous Reasons for Judgment, I ordered that the Monitor's Report be admissible primarily in order that the Monitor's accounting work be before the Court, and so that the parties not be put to the time consuming and expensive process of duplicating the Monitor's work. Now that the parties have reached almost complete agreement as to the accounting, the question remains as to whether those portions of the Report containing the Monitor's conclusions should also be available to PVM as expert or opinion evidence.

14 It is open to either party to obtain an outside opinion, on the character of these payments, such opinion being based on the extensive accounting and investigation already done by the Monitor. Because the Monitor has done the "heavy lifting" so to speak, I do not think it would be particularly burdensome for either party, if they choose to do so, to obtain expert opinions on the characterization of the payments.

15 Nothing in these Reasons for Judgment should be taken as determining whether such an opinion would be considered an opinion on a question of law or mixed fact and law or is one on which the Court requires expert evidence. I would not wish these Reasons to be considered as in any way tying the hands of the trial judge to rule on the question of the admissibility of such a report. However it is necessary for me to rule on the question of the use that may be made of the Monitor's Report now, so as to enable the parties to adequately prepare for the summary trial.

16 Would the neutral role of the Monitor be compromised by permitting PVM to use his conclusions as expert

opinion evidence?

17 I have concluded that the Monitor's 4th Report (and any supplementary reports concerning the inter-company accounting) is admissible for purposes of the trial, but his conclusion as to the characterization of the payments as debt or equity are not admissible as an expert opinion. In reaching this conclusion I have considered the fact that the Monitor is an officer of the Court. He is the eyes and ears of the Court. His role is to assist the Court. To permit either party to use his conclusions on the very question the Court must decide as opinion evidence offends the principle that he must remain entirely neutral as between competing claims of the various stakeholders. The Monitor must be insulated from the adversarial nature of the contested claim; he should not be fearful that, as a result of stating his opinions, he will become embroiled in the litigation in an adversarial way. I have already decided that the summary trial is a trial *de novo*. It is not an "appeal" from the Monitor's findings. I have already decided that PVM carries the burden of proving its whole claim. In this case, it is convenient, and perhaps necessary, to use the accounting portion of the Monitor's Report, for a fair and summary adjudication of the inter-company claim, but the same argument for convenience cannot be made out for the Monitor's characterization of the payments; and, in any event, to admit the Monitor's conclusions on that issue would be to expose the Monitor unnecessarily to the adversarial process. This issue differs from one in which the Court relies on the business judgment of the Monitor such as the approval of the sale of assets or a liquidation analysis as in the *Canadian Airlines Corp., Re*, 2001 ABQB 146 (Alta. Q.B.) case.

18 In the exceptional circumstances of this case, and particularly given that most of the accounting is no longer at issue, I remain of the view that those portions of the Monitor's Report in which he had painstakingly reviewed the accounts of the company are of great assistance to the parties and the Court and ought to be admissible. As to those findings, the directions suggested by the Monitor apply if the parties are unable, on an informal basis, to obtain any additional information that they need from the Monitor. However, paras. 2(c) and (d) as proposed by the Monitor will be removed from the directions. The parties should set a date for inclusion in para. 3 of the directions.

19 If further applications for pre-trial directions are necessary, they should be made to the trial judge assigned to this matter.

Order accordingly.

END OF DOCUMENT

TAB G

1983 CarswellBC 147, 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146

1983 CarswellBC 147, 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.

S. & K. PROCESSORS LTD., STRANG and SILVERKING PROCESSORS LTD. v. CAMPBELL AVE. HERRING PRODUCERS LTD., OCEAN FISHERIES LIMITED and J.S. McMILLAN FISHERIES LTD.

British Columbia Supreme Court

McLachlin J.

Heard: March 30, 1983
Judgment: May 13, 1983
Docket: Vancouver No. C800876

Counsel: *S. J. Mulhall*, for plaintiffs.

J. K. Lowes, for defendants.

Subject: Civil Practice and Procedure; Evidence

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — Waiver.

Evidence — Documentary evidence — Privilege as to documents — Defendant producing accountant's report pursuant to s. 11 of Evidence Act — Plaintiffs requesting further documents concerning preparation of report — Documents covered by solicitor-client privilege unless waived — Defendants not waiving privilege as expert report produced pursuant to s. 11 — Only opinions and facts in report losing privilege.

An accountant's report particularizing a claim for expenses, raised in the statement of defence, was delivered to the plaintiffs, pursuant to s. 11 of the Evidence Act. The plaintiffs brought an application for an order compelling production of further documents, including correspondence between the defendants' solicitors and the accountants, notes of meetings and drafts and working papers of the defendants, their solicitors and accountants concerning the preparation of the report.

Held:

Application dismissed.

The documents requested by the plaintiff were made solely for the purpose of giving advice and preparing evidence under the direction of the defendants' solicitors. As such, they originated in confidence and were protected by solicitor-client privilege unless that privilege was waived. The defendants were compelled to produce the ex-

pert's report pursuant to s. 11 of the Evidence Act. Being involuntary, its production did not constitute waiver, although under s. 11 privilege was lost as to the opinion and facts upon which the report was based. The defendants were ordered to furnish those facts by way of particulars.

Cases considered:

Bestway Lath & Plastering Co. v. McDonald Const. Ltd. (1972), 31 D.L.R. (3d) 47, 4 N.S.R. (2d) 1 (C.A.) — *distinguished*

Dir. of Investigation & Research v. Can. Safeway Ltd., [1972] 3 W.W.R. 547, 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 (B.C.S.C.) — *referred to*

Harich v. Stamp (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.) — *considered*

Rogers v. Hunter, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.) — *considered*

Statutes considered:

Evidence Act, R.S.B.C. 1979, c. 116, s. 11 [re-en. 1981, c. 10, s. 21].

Authorities considered:

Wigmore on Evidence, McNaughton revision (1961), vol. 8, pp. 635-36.
Application for order compelling production of documents.

***McLachlin J.*:**

1 This is an application, brought by way of pre-trial conference, in which the plaintiff seeks an order compelling production of certain documents. The defendants oppose, claiming solicitor-client privilege.

2 The action is a complex one. One of the matters raised in the statement of defence concerns expenses alleged to have been incurred by the defendants on behalf of the plaintiff S. & K. Processors Ltd. but not charged to it. On 17th July 1980 this court ordered that the defendants deliver further and better particulars of these expenses. Complete particulars have not been delivered to date. However, on 23rd December 1982 an accountants' report (the Laventhol & Horwath report), particularizing the claim of the defendants Ocean and McMillan for administration expenses, was delivered to the plaintiffs.

3 The defendants do not object to producing their financial records and statements to the plaintiffs. They do object to producing: (1) correspondence between their solicitors and Laventhol & Horwath for the purpose of preparing the accounting report; (2) notes of meetings between Laventhol & Horwath and representatives of the defendants and the defendants' solicitors; (3) drafts and working papers of representatives of the defendants; and (4) drafts and working papers of Laventhol & Horwath. All these documents, the defendants assert, are confidential in nature, and were made solely for the purpose of giving advice and organizing and preparing evidence under the direction of the defendants' solicitors.

4 The plaintiffs submit: (1) that the documents in question were not privileged; and (2) that if they were privileged, the privilege has been waived by disclosure to the defendants of the Laventhol & Horwath report.

Privilege

5 The defendants' assertion that the documents originated in confidence and were prepared solely for the purposes of litigation has not been negated. It would seem, therefore, that all elements necessary to establish solicitor-client privilege are met. However, the plaintiffs assert that facts observed or noted by experts consulted by a litigant — as distinguished from his inferences, opinions or conclusions — are not privileged: *Bestway Lath & Plastering Co. v. McDonald Const. Ltd.* (1972), 31 D.L.R. (3d) 47, 4 N.S.R. (2d) 1 (C.A.). In my view, that submission is not of assistance in this case. In Bestway, the issue was whether an expert retained by a litigant was required to answer questions under the Nova Scotia rule permitting any person to be examined for discovery. It was held that the expert could be examined on facts observed by him that were patent to the senses, these not being privileged. But in the case at bar, it is not facts which are sought to be produced, but communications which may refer to such facts. Those communications have arisen in circumstances where solicitor-client privilege attaches. The fact that the communications may refer to facts does not deprive them of their privileged character. I conclude that the documents are privileged and need not be produced, unless that privilege has been waived by the defendants.

Waiver

6 Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

7 The plaintiffs contend that by producing the Laventhol & Horwath report, the defendants waived privilege not only with respect to that report but to all the documents and communications which were involved in its preparation. Fairness, they submit, leaves no alternative; if a litigant is to properly evaluate the expert report produced by his opponent, he must have access to the instructions and information upon which it is based.

8 The report in question was produced pursuant to the Evidence Act, R.S.B.C. 1979, c. 116, s. 11 [re-en. 1981, c. 10, s. 21], shortly before the trial of this action (subsequently adjourned) was to commence. The Evidence Act, s. 11, abrogates the privilege attaching to such reports by requiring that they be produced 14 days before the expert gives his evidence. The Act sets out the extent to which the privilege is abrogated by specifying what must be disclosed — the expert's opinion and the facts upon which it is based. Analyzed in this light, the plaintiffs may be said to be seeking an extension of the inroad on privilege legislated by the Evidence Act, s. 11.

9 It is settled that legislation is to be taken as abrogating privilege only if it does so in clear and unambiguous terms: *Dir. of Investigation & Research v. Can. Safeway Ltd.*, [1972] 3 W.W.R. 547, 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 (B.C.S.C.). It is also apparent that had the legislature wished to abrogate privilege, not only with respect to an expert's opinion and the facts upon which it is based, but as to the communications between the expert, the instructing solicitor and the client in the course of preparation of the report, it could have drafted s. 11 to so provide. These considerations weigh against requiring production of the documents here in issue.

10 Notwithstanding the fact that the Evidence Act, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their dis-

closure? As pointed out in Wigmore on Evidence, McNaughton revision (1961), vol. 8, pp. 635-36 relied on by Meredith J. in *Rogers v. Hunter*, supra, double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.), it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

11 In the case of production of an expert's report under the Evidence Act, s. 11, it can be contended that the pre-trial production of the report and the attendant loss of privilege at that stage is involuntary, being compelled by statute. Being involuntary, it cannot constitute waiver, although it is clear that under s. 11 privilege will be lost as to the opinion and the facts upon which it is based. Moreover, even if production of the report pursuant to the Act could be said to constitute waiver, in these circumstances it cannot be said to be unfair or inconsistent that the party producing it retain such privilege as is left to him by the Act.

12 In the result, I conclude that the privilege attaching to these documents has not been waived. The plaintiffs are not entitled to production. They are, however, entitled to disclosure of all the facts upon which the inferences and conclusions contained in the Laventhol & Horwath report are based, to be furnished by way of particulars as well as by supplementation of the report insofar as it fails to precisely set forth those facts.

13 I may add that the foregoing comments are confined to what must be disclosed upon the pre-trial production of an expert's report pursuant to s. 11 of the Evidence Act — an expert who may or may not be called as a witness. In the event that the expert takes the stand at trial, the situation respecting waiver may well be different.

14 I have not found it necessary to look at the actual documents, being able to dispose of the application on the basis of the general description of the documents contained in the material. Should particular questions arise of which these reasons do not dispose, counsel have leave to apply.

Application dismissed.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF
NELSON FINANCIAL GROUP LTD.

APPLICANT

Court File No.: 10-8630-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at **Toronto**

BOOK OF AUTHORITIES OF A. JOHN PAGE & ASSOCIATES INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR

ThorntonGroutFinnigan LLP
Barristers and Solicitors
Suite 3200, P.O. Box 329
Canadian Pacific Tower
Toronto-Dominion Centre
Toronto, ON M5K 1K7

James H. Grout (LSUC # 22741H)
Seema Aggarwal (LSUC# 50674J)

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Monitor

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FACTUM AND BOOK OF AUTHORITIES OF A. JOHN PAGE & ASSOCIATES INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR

ThorntonGroutFinnigan LLP
Barristers and Solicitors
Suite 3200, P.O. Box 329
Canadian Pacific Tower
Toronto-Dominion Centre
Toronto, ON M5K 1K7

James H. Grout (LSUC# 22741H)
Seema Aggarwal (LSUC# 50674J)

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Monitor