IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Redcorp Ventures Ltd. (Re),*
2016 BCSC 188

Date: 20160209
Docket: S091670
Registry: Vancouver

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

And

In the matter of the *Canada Business Corporations Act*,
R.S. 1985 c. C-44

And

In the Matter of the *British Columbia Business Corporations Act*,
S.B.C. 2002, c. 57

And

In the Matter of Redcorp Ventures Ltd. and
Redfern Resources Ltd.

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment
(From Chambers)

Counsel for Alvarez & Marsal Canada Inc., Receiver of Redcorp Ventures Ltd. and Redfern Resources Ltd.:	H.L. Williams
Counsel for Secured Noteholders Whitebox Advisors LLC, GMP Investment Management LP, Sandleman Partners LP and VR Global Partners LP:	N. Renner (attendance by telephone)
Place and Date of Hearing:	Vancouver, B.C. December 14, 2015
Place and Date of Judgment:	Vancouver, B.C. February 9, 2016

[1] Alvarez & Marsal Canada Inc. (“Alvarez”) in its capacity as a Court appointed Interim Receiver and Receiver (“Receiver”) of the assets, undertakings and properties of Redcorp Ventures Ltd. (“Redcorp”) and Redfern Resources Ltd. (“Redfern”) applies for a number of Orders including that:

(a) The reports of the Receiver filed in these proceedings, including the Tenth Report of the Receiver dated December 8, 2015 (“Tenth Report”), and the actions and conduct of the Receiver as particularized therein be approved;

(b) The fees and disbursements of the Receiver and its counsel as set out in the Tenth Report, be approved;

(c) The Receiver be authorized to destroy any and all records of the Companies.

(d) Upon the filing of a Receiver's Discharge Certificate, the Receiver shall be discharged as Receiver of the assets, undertaking and property of the Companies, provided that notwithstanding its discharge herein: (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein; and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Alvarez in its capacity as Receiver.

(e) Alvarez be hereby released and discharged from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, Alvarez be hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

(f) Notwithstanding any provision herein, this Order shall not affect any person to whom notice of these proceedings was not delivered as required by the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 and regulations thereto, any other applicable enactment or any other Order of this Court.

BACKGROUND

[2] Redcorp and Redfern made a filing under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *British Columbia Business Corporations Act*, R.S.B.C. 2002, c. 57. An Order was made on March 4, 2009 in response to the filing ("Initial Order").

[3] On May 29, 2009, Alvarez was appointed Receiver, without security, of the current and future personal assets, undertakings and properties of Redcorp and Redfern ("Appointment Order"). Under the Appointment Order, the sum of $1,000,000 (exclusive of any interest earned thereon) as secured by the Administration Charge set out in the Initial Order was to be held and administered by the Receiver. The sum of $5,000,000 (exclusive of any interest earned thereon) as secured by the Directors' Charge set out in the Initial Order was also to be held and administered by the Receiver.

[4] The Appointment Order contained the following provision limiting the liability of Alvarez as Receiver:

> THIS COURT ORDERS that the Receiver shall incur no personal liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the B.I.A. [*Bankruptcy and Insolvency Act*, R.S.C, 1985, c. B-3] or by any other applicable legislation.

DISCUSSION, CASE AUTHORITIES AND DECISION

(a) Approval of the "Actions and Conduct of the Receiver" and the Release and Discharge of the Receiver

[5] What is requested in (a) and (e) above amounts to insurance for the Receiver in addition to any liability insurance that may be available to Alvarez. Not only are the "actions and conduct" of the Receiver as "particularized" in all of the ten Reports of the Receiver approved but also the Receiver is to be released and discharged from "any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions..."whether or not the "actions and

conduct" are particularized in any of the ten Reports filed with the Court by the Receiver.

[6] While the personal liability and obligation of the Receiver is protected in the Initial Order save and except for gross negligence or wilful misconduct, the effect of the release and discharge sought in (e) above goes beyond what is set out in the Initial Order and does not make it clear that "gross negligence or wilful misconduct" are not released or discharged. The effect of (e) is that the Receiver is to be released from personal liability or obligations arising as a result of its appointment including any liability for gross negligence or wilful misconduct. Pepall J. in *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, [2009] O.J. No. 4265 (Ont. S.C.J. Commercial List) made this statement in that regard:

> It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions.
>
> (at para. 14)

[7] The combined effect of what is sought in (a) and in (e) above is so broad as to attempt to protect the Receiver from any and all liability. There is no obvious inherent jurisdiction to exempt even its own officer from the general operation of statutes or to excuse liability for negligence or willful misconduct. That is why the standard appointment order excludes "gross negligence or wilful misconduct" from the exclusion given to a receiver for any "personal liability or obligation."

[8] The position of a court appointed Receiver was set out in *Ed Mirvish, supra*, where Pepall J. stated:

> A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish

> additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.
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> Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act* provides that the discharge of a trustee discharges him [or her] from all liability in respect of any act done or default made by him [or her] in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.
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> (at paras. 8 and 9)

[9] Counsel for the Receiver indicated that the shortfall to creditors is in the neighbourhood of $110 million and those creditors who will already suffer a shortfall had agreed to the passing of accounts of the Receiver, the passing of accounts of counsel for the Receiver, and for the releases sought by the Receiver.

[10] I am satisfied that this is not a sufficient answer to the questions raised by the applications of the Receiver. The Receiver is a Court appointed officer and the Court retains and must exercise a reasonable review of the actions taken by the Receiver and of the seriousness of any omissions relating to actions not taken by the Receiver. The Court cannot be bound by the corporate "monetary" decision taken by a creditor or by creditors who will have to bear the cost of an appropriate review by the Court.

[11] An order following the format of the "Model Discharge Order" does not automatically include such a broad release and discharge as is contemplated in (e) above. Rather, if such a broad release and discharge is to be included, that inclusion must be drawn to the attention of the Court. The B.C. Model Insolvency Order Committee provided this comment in this regard:

> The BCMIOC was divided as to whether a general release might be appropriate. On the one hand, the Receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the Receiver

> likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity and as the Court's officer, so the Court may be of the view that it is appropriate to insulate the Receiver from liability by way of a general release. Some members of the BCMIOC felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership.
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> Without intending to express an opinion as to whether a general release is appropriate, the BCMIOC has decided not to include the general release language in the body of the model order. Whether such language is appropriate is a matter to be considered by the presiding Judge based on the specific circumstances of the case. If this relief is being sought, stakeholders should be specifically advised and given ample notice.
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> If a general release is ordered, the language approved by the BCMIOC is as follows:
>
> [RECEIVER'S NAME] is hereby released and discharged from any and all liability that [RECEIVER'S NAME] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME] while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, [RECEIVER'S NAME] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

[12] In requesting this provision, counsel could not confirm that all “stakeholders” had been “specifically advised and given ample notice”. Rather, notice was only provided to “Secured Noteholders” who will suffer a shortfall as a result of the receivership. Even if all stakeholders had been notified, I cannot be satisfied that the breadth of the release sought is appropriate even though it is the wording that is set out in the Model Discharge Order. Despite the suggested wording, it could not have been contemplated by the drafters that “any and all liability relating to matters that were raised, or which could have been raised” would include a release and discharge of liability for gross negligence or wilful misconduct. First, it would be contrary to what was set out in the Appointment Order. Second, the Court should not countenance the release and discharge of any gross negligence or wilful misconduct of its own officer.

[13] Regarding the request that the Receiver be released and discharged from any liability it “may hereafter have”, I am satisfied that it is inappropriate for the Receiver to make such a request. First, such a request would include a release and

discharge of claims for gross negligence or wilful misconduct. Second, what is contemplated is that the Receiver will be discharged upon filing a “Receiver’s Discharge Certificate” so that the Court will not necessarily have the benefit of a further Report from the Receiver about future activities.

[14] The Tenth Report of the Receiver sets out a number of matters that remain unresolved and which will require further action by the Receiver. It is inappropriate to request that any future “acts or omissions” be released and discharged in view of this ongoing activity of the Receiver. Once all outstanding matters have been completed, the Receiver can re-apply for its discharge. At that time, the Court can take into account all activities of the Receiver and whether a claims bar process has been undertaken.

[15] Once the further actions contemplated in the Tenth Report are completed by the Receiver, the Receiver will be in a position to apply for what is requested in (d) above. In this regard, the Explanatory Notes attached to the Model Discharge Order note the following regarding what is requested by the Receiver in (d) above: “Counsel should consider including this provision only if the Receiver’s Report identifies any outstanding matters that should be completed before the Receiver’s discharge. “As well, what is requested in (d) above does not include the necessary phrase: “...upon the Receiver filing a certificate certifying that it has completed the remaining outstanding activities described in the Report”. Here, it is not clear whether all “outstanding matters that should be completed before the Receivers’ discharge” are specifically set out in the Tenth Report.

[16] So that the Court is in a position to confirm that all creditors and interested parties are aware of the effect of any release and discharge requested by the Receiver, the Receiver is in the position to establish “claims bar process” whereby all creditors and interested parties are notified that they will lose any rights to claim against the Receiver after a suitable period of time has elapsed and no application has been made to the Court to seek leave to proceed against the Receiver. In this regard, the Initial Order provided the following protection:

> THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of the Court.
>
> (para. 7)

[17] Receiver will be at liberty to reapply for its release and discharge.

THE ACCOUNTS OF THE RECEIVER AND ITS COUNSEL

[18] The Appointment Order provided the following regarding the accounts of the Receiver and its counsel:

> THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property (the "Receiver's Charge") in priority to all security interests, trusts, liens, charges and encumbrances, statutory of otherwise, in favour of any Person, but excluding the charge on the ERIP Monies, the Administration Charge and the Directors' Charge.
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> THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.

[19] Regarding the question of the duty of a Court appointed receiver to report to the Court and to pass its accounts, the following statements were made in *Re Confectionately Yours, Inc. et al* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.) by Borins J.A. on behalf of the Court:

> 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:
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> > ...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.

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.

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.* [Emphasis added.]

(at paras. 34-36)

(a) Receiver's Accounts

[20] Attached as an appendix to the Tenth Report of Receiver is a "summary of the receiver's professional fees and disbursements for the period May 26, 2009 to September 27, 2014...." Those accounts total $2,244,414.45 including out-of-pocket disbursements of $123,408.26 and applicable taxes of $153,611.29. What was attached in the appendix set out the following information relating to the 43 invoices issued by Alvarez: (a) invoice number; (b) invoice date; (c) invoice period/description; (d) total hours; (e) fees; (f) disbursements; (g) HST; and (h) invoice total. Despite the inclusion of the word "description", no description of the services was included. As well, there is no detail regarding the date when services were rendered and no breakdown of the "total charges for each of the categories of services rendered".

[21] Also attached as an appendix to the Tenth Report is a list of the seven "Staff Members" who had worked on the receivership with the following included in that appendix: (a) staff member names; (b) title of the staff member; (c) the total hours spent by the staff member; (d) the billing rate of the staff member; and (e) the amount billed. The total of hours billed is 3,705.8. The average of the rates charged is $530.90, and the total billed is $1,967,394.90. There is no indication whether the billing rates changed during the period of May 26, 2009 through September 27, 2014. As well, there is no indication of the seniority of the staff members who worked on the matter.

[22] The purpose of a Receiver passing its accounts is to afford all interested parties the opportunity to question the Receiver's activities and conduct. In order to be in a position to ascertain whether the fees and disbursements of the Receiver were "properly made or incurred" and are "fair and reasonable" what was done should be set out. In *Re Bakemates International Inc.*, (2002) 36 C.B.R. (4th) 200 (Ont. C.A.), Borins J.A. on behalf of the Court, dealt with the accounts of a Court appointed receiver and manager and made the following statement in that regard:

> The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended

> each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., Hermanns v. Ingle (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); Toronto Dominion Bank v. Park Foods Ltd. (1986), 77 N.S.R. (2d) 202 (S.C.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.
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> Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). I agree.
>
> (at paras. 37 and 38)

[23] In addressing the appropriate principles and factors to be considered in assessing the appropriate compensation for a receiver, Taggart J.A. on behalf of the Court in *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (2d) 315 (C.A.), made the following statements:

> The principles which guided the Registrar were those set out in the Belyea [*Belyea and Fowler v. Federal Business Development Bank* (1983), 46 C.B.R. (n.s.) 244 (N.B.C.A.) case to which he referred. He applied the relevant considerations listing them at the end of his recommendations. They included: (a) the value of the assets; (b) complications and difficulties encountered by the Receiver; (c) degree of assistance provided by Nican; (d) time spent by the Receiver; (e) Receiver's knowledge, experience and skill; (f) diligence and thoroughness; (g) responsibilities assumed; (h) results; (i) cost of comparable services
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> In addition to those factors the Registrar took into the account the estimates made by the Receiver as to the cost of the receivership with particular reference to the various fee estimates provided from time to time.
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> (at pp. 320-321)

[24] In *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]), further "relevant considerations" were added including the existence of an indemnity agreement, the secured position for priority for payment, the demanding of efficiency by a debtor, and with special emphasis on the parties agreeing to a charged based on the number of hours times an hourly rate of the persons involved.

[25] In *Bakemates, supra*, Borins J.A. made the statement regarding what information should be available to the Court in the passing of accounts of a receiver.

> 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.
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> (at para. 31)

[26] Here, the accounts of the Receiver were not verified by Affidavit. Such an Affidavit should include what is set out in *Nican, BT-PR Realty*, both *supra*. As well, there is no description of what was done by each of the personnel who worked on the file and whose time is reflected in the 43 invoices which were issued. There is no information regarding the "standard rates and charges" of each of the personnel. There is no ability to ascertain whether what was charged was at the "standard rates and charges" of the Receiver. It is not possible to ascertain whether the liability for the fees of the Receiver were expenditures or liabilities which were "...properly be made or incurred...." I adopt the statement made by Borins J.A. in *Bakemates, supra* regarding what should have been available:

> 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.
>
> (at para. 38)

[27] Because any accounts actually rendered by the Receiver were not attached, because there was no actual description available to the Court about what the Receiver had accomplished, and because very few of the "relevant considerations" were provided to the Court, what was presented on behalf of the Receiver does not meet the requirements set out in *Nican, BT-PR Realty*, or *Re Confectionately Yours*, *all supra*. What should be presented must include copies of any invoices issued, information regarding the standard rates and charges of each of the personnel who had worked on the receivership, and an indication of seniority within the profession, a narrative description about what was done, statement of affairs setting out the assets and liabilities of the debtor, statement of receipts and disbursements, and time that the Receiver took to perform its duties. This information would allow the Court to determine the appropriateness of any standard rates and charges imposed. If there is any information in the invoices which is confidential, such information

could be redacted or sealed in the records of the Court. The reference to a "summary basis" does not relate to reduced information that should be before the Court. Rather, the phrase relates to the basis to have the Court rather than the Registrar consider the materials that would ordinarily be before the Registrar.

[28] I cannot interpret the phrase "pass their accounts from time to time" as meaning only once in the six years since the Receiver was appointed and close to the time when the activities of the Receiver have come to an end. Where total receipts of Redcorp and Redfern amount to in excess of $39,500,000, an appropriate passing of accounts cannot be interpreted as being once in six years. The same goes for the total fees and disbursements of the Receiver of in excess of $2,200,000. It is not unreasonable to expect that the passing of accounts "from time to time" would at least every two years. In this regard, s. 99(1) of the *Trustee Act, R.S.B.C. 1996 c. 464* provides for an "executor, administrator, trustee under a will" to pass his or her accounts every two years unless the accounts are approved and consented to in writing by all beneficiaries, or "the court otherwise orders". While the Receiver is not an executor, administrator, or trustee, I see no reason why it would not be appropriate for a Receiver to pass his or her accounts at least every two years. If necessary, a Court application could be made to extend that period if the circumstances justify such an extension.

[29] If a lengthier time goes by, a Receiver will not have the benefit of any comments about the form of the accounts which can then be incorporated into later passing of accounts. By waiting six years, the Receiver has run the risk that what was presented was in a format which was unacceptable and lacking in the required detail.

[30] The Receiver will be at liberty to re-apply for the passing of its accounts.

(b) The Accounts of Counsel for the Receiver

[31] Attached as a further appendix to the Tenth Report is a "summary of the professional fees and disbursements for the Receiver's legal counsel" for the period of May 30, 2009 through November 9, 2015. The total fees are $1,065,788.24

including out-of-pocket disbursements of $18,545.43 and applicable taxes of $113,492.71. Also attached is a break-down of the 57 invoices rendered by counsel which include information under the following headings: (a) invoice number; (b) invoice date; (c) fees; (d) disbursements; (e) HST; and (f) invoice total. There was a breakdown of the personnel by “Staff Member” which included the following categories: students, associates, paralegals, partners, tax advisors, associate counsel, and “Word Processing”. There was also a break-down under the following headings: (a) name of staff member; (b) their title; (c) their total hours; (d) their billing rate which included varying rates depending on the year that the services were rendered; and (e) amount billed attributable to each of them. There is no indication as to what services were rendered by any of those listed.

[32] Regarding the “fees and disbursements” of legal counsel for the Receiver, the same comments can be made relating to what was presented. First, the accounts should have been verified by Affidavit. Second, there is nothing which would allow me to conclude that what was incurred for legal services was at the “standard rates and charges” of counsel. Third, because there is no description of the services rendered, it is not possible to ascertain whether this liability for legal fees was “properly...made or incurred”. Fourth, the assessment of fees should not be just a matter of calculating the number of hours spent times an hourly rate. There should be some correlation of the cost to the benefits derived by the receivership: *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para. 20. Fifth, counsel should keep in mind Rule 14-1(31) of the *Supreme Court Civil Rules* which provides: “A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a Registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.” Sixth, the Court should not automatically approve the “usual” hourly rates for counsel. In this regard, see *Diemer, supra*, where Goodman J. made the following statement:

> In my view, the assumption that the court will automatically approve a “usual” hourly rate for Receiver’s counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312, the court, with the assistance of opposing counsel [if there is one], has to play the role of what a

> client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.
>
> (at para. 30)

[33] Regarding the fees and disbursements of counsel, I adopt the statement in *Bennett On Receiverships*, *supra*, where the learned author states:

> The court must scrutinize the accounts carefully to assure that the appropriate lawyers are performing services to the receiver on the same basis and factors as the receivers. Where legal accounts have no relevance to the receivership, the court will reduce the fees. Similar factors are considered on the taxation or assessment of the legal accounts, namely:
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> (1) the time expended;
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> (2) the complexity of the receivership;
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> (3) the degree of responsibility assumed by the lawyers;
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> (4) the amount of money involved, including reference to the debt, amount of proceeds after realization, payments to the creditors;
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> (5) the degree and skill of the lawyers involved;
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> (6) the results achieved;
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> (7) the ability of the client to pay; and
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> (8) the client's expectations as to the fee.

[34] What should have been presented on behalf of legal counsel would be that which would have been presented to the Registrar on the assessment of an account being rendered to a client. As it was not, the Receiver will be in a position to reapply to have the fees and disbursements of the counsel for the Receiver approved.

(c) Should there be a Reference to the Registrar?

[35] The question which arises is whether it is appropriate to refer the question of the passing of accounts of the Receiver and the passing of accounts of the counsel for the Receiver to the Registrar or whether it is appropriate to assess costs summarily as is provided in the Appointment Order. In this regard, Rule 14-1(15) of the *Supreme Court Civil Rules* provides that a Court may award costs "of a proceeding" and "...in ordering those costs the court may fix the amount of costs, including the amount of disbursements". In the context of a trial and an order made

for costs, Donald J.A. made these statements on behalf of the Court in *Graham v. Moore Estate*, 2003 BCCA 497 :

> There remains the issue whether the Plaintiffs' costs should have been assessed before the Registrar rather than by the trial judge. It is said that Mr. Campa was denied the procedural protections of a Registrar's hearing, and he did not have an adequate opportunity to challenge items in the solicitor's bill. The Registrar's hearing would have involved more litigation in a losing cause; a problem that underlies all of Mr. Campa's process arguments.
>
> It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington was Royal Inland Hospital* (1995) 131 D.L.R. (4th) 15 [B.C.C.A.]. As in *Harrington*, the trial judge in the present case did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.
>
> Mr. Campa was unable to demonstrate any denial of the opportunity to address the reasonableness of the bill. (at paras. 45-47)

[36] In view of the Appointment Order and in view of the desire to provide appropriate expediency to the procedures adopted by the Court, I am satisfied that the present Rule allows a summary determination by the Court rather than a reference to the Registrar on the question of costs. Such a summary determination by the Court is contemplated by the Appointment Order. This view is confirmed in the decision in *Gichuru v. Smith* (2014), 65 B.C.L.R. (5th) 72 (C.A.) where Harris and Goepel JJ.A. made these statements regarding the principles under which an assessment before a judge should take place:

> The principle governing cost assessments under the Rules is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the Rules and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily. (at para 101)
>
> The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by

> that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs. (at para. 154)

[37] In protracted proceedings dealing with the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 proceedings or a receivership, where a judge has heard each of the applications that have come before the Court, and has received regular reports, the assigned Judge can ascertain whether the accounts should be approved summarily without a reference to the Registrar. That is the most expeditious way of determining that question and is consistent with the Appointment Order. However, this decision should be made by the assigned Judge after the form and the completeness of the materials filed in support of the application can be reviewed so that, if the materials do not meet the criteria set out above, the matter can be referred to the Registrar with directions regarding the materials that must be produced. It would also depend on the question of whether notice has been provided to all, not some, stakeholders and whether a claims bar process has been undertaken and completed.

(d) Destruction of Records

[38] The application contained the following request: "The Receiver is authorized to destroy any and all records of the Company in its possession." I am satisfied that this request runs contrary to the requirements set out in Provincial and Federal legislation regarding retention of records including the requirements of the Superintendent of Bankruptcy, of the Canada Revenue Agency, and of Provincial Legislation dealing with corporations. There is also an important reason "any and all records" of Redcorp and Redfern should not be destroyed. If, in the future, a party obtains the consent of the Receiver or the approval of the Court to proceed against the Receiver, the destruction of records means that the discovery process available pursuant to the *Supreme Court Civil Rules* would be meaningless. In the absence of

the expiry of a limitation period, a claims bar process or a Court Order, the records of Redcorp and Redfern should be retained in accordance with Provincial and Federal legislation.

COSTS

[39] Receiver will be at liberty to speak to the question whether the costs of this application should be born by the creditors of Redfern Resources Ltd. and Redcorp Ventures Ltd.

“Burnyeat J.”