

Financial Services Flash

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Court of Appeal for Ontario Upholds Reduction of Legal Fees in Insolvency Matter

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On December 1, 2014, the Court of Appeal for Ontario (the “**Court of Appeal**”) released its decision, written for the Court of Appeal by Madam Justice Pepall, in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (“**Diemer**”). The Court of Appeal dismissed the court-appointed receiver’s (the “**Receiver**”) appeal of the order of Justice Goodman, which, among other things, reduced the fees of counsel (“**Counsel**”) to the Receiver. In its decision, the Court of Appeal found that the motion judge (Justice Goodman) made findings of fact based on the record and is owed deference in this respect. The Court of Appeal also found that the motion judge considered the correct factors in coming to a decision on fees and that the appellant failed to establish any palpable and overriding error made by the motion judge.

As discussed in greater detail in “Did You Get What You Paid For? The Exercise of Judicial Discretion when Assessing Professional Fees in a Bankruptcy and Insolvency Context,” an article in our September 2014 edition of *Collateral Matters*, the Receiver’s motion at first instance sought approval of Counsel’s legal fees in the amount of \$255,955. Justice Goodman determined that, notwithstanding language contained in the initial receivership order permitting counsel to charge its standard rates, Counsel’s fees were not fair and reasonable when considering the modest nature, extent and value of the receivership. In reducing the fees of Counsel to \$157,500, Justice Goodman considered

and applied the principles set out in, among others: *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*) (“**Bakemates**”) and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.) (“**Belyea**”).

The Receiver, as appellant, advanced three grounds of appeal and submitted that the motion judge erred (at para. 28):

1. by failing to apply the clear provisions of the appointment order, which entitled [Counsel] to charge fees at its standard rates;
2. by reducing [Counsel]’s fees in the absence of evidence that the fees were not fair and reasonable; and
3. by making unfair and unsupported criticisms of counsel.

The Court of Appeal dismissed the appeal, finding that the motion judge did not err in his reduction of Counsel’s fees. The Court of Appeal found that certain facts were open to interpretation, but deferred to Justice Goodman’s analysis, as it found that the motion judge had drawn conclusions based on evidence from the record to conclude that Counsel’s fees were not fair and reasonable. The Court of Appeal found that the relevant

Bakemates principles and *Belyea* factors had been identified and applied in the motion judge's analysis. Finally, while the Court of Appeal found there were some unfair criticisms made of Counsel, it held that the motion judge's analysis resulting in the reduction of fees was appropriate.

Some practical takeaways from the Court of Appeal's decision are:

- *Bakemates* enunciates appropriate principles to be applied when passing accounts and *Belyea* identifies relevant factors to be considered, but this list of factors is not exhaustive;
- *Bakemates* states that the onus is on the receiver to prove that the compensation for which it seeks approval (including on behalf of its counsel) is fair and reasonable and that an analysis of such fees will focus on issues of fairness and reasonableness;
- the Court of Appeal noted at para. 45 of its decision that "value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation";
- value appears to drive the Court of Appeal's analysis of fairness and reasonableness: "the focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took" (para. 45); and
- the Court of Appeal specifically noted that it is inappropriate to adopt a mathematical approach and apply representative rates in place of those of Counsel, but concluded that this approach applied by Justice Goodman was not fatal to upholding his decision in *Diemer*, as the motion judge's decision was informed by the correct factors and he would have arrived at the same result in any event.

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