**SUPREME COURT OF NOVA SCOTIA**
**IN BANKRUPTCY AND INSOLVENCY**

**Citation:** *Jarvis (re)*, 2022 NSSC 295

**Date:** 20221017
**Docket:** No. 42489
**Registry:** Halifax
**Estate Number**: 51- 2410492

**In the Matter of:** The Bankruptcy of Ricky Todd Jarvis

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| **Registrar:** | Raffi A. Balmanoukian, Registrar in Bankruptcy |
| **Heard:** | June 10, 2022, in Halifax, Nova Scotia |
| **Final Written Submissions:** | July 8, 2022 |
| **Counsel:** | Mary Ann Marriott, for the Trustee, Allan Marshall & Associates Inc.<br>Ricky Todd Jarvis, not appearing |

**Balmanoukian, Registrar:**

[1] *Re Vonic*, a decision of Associate Justice May Jean of the Ontario Superior Court, is not reported. It should be. By appending it to these reasons, I am making it so. I have also requested the Deputy Registrar to forward it to all Trustees appearing regularly in this Court, as direction and guidance for taxation of accounts, particularly with respect to proposals but also with respect to fees in general. I adopt *Vonic* and its reasoning in its entirety.

[2] The immediate case before me, that of Ricky Todd Jarvis, involves a completed Division I proposal. The Trustee sought to tax its fees ostensibly based on the formula set forth in the proposal, approved by this Court on November 9, 2018. It contained provisions for payment of $209 per month for 60 months (that is, to October 2023), plus the surrender of one property, maintenance of payments on four others (plus a truck), and liquidation of five separate properties for the benefit of the estate. By March 2022 the proposal had been fully performed, in other words about a year and a half ahead of schedule. Total receipts, including an advance from the Trustee of $3,488 (to make up the balance of periodic payments) totalled $104,710.37. If the Trustee's fees are approved as submitted, the net

dividend to creditors would be just over 30%. And, the creditors have it at least in part (there being an interim as well as a final dividend) ahead of schedule.

[3] Paragraph 2 of the proposal, as approved, provides for payment of 100% of the first $1500 collected, plus 20% of the balance "available for distribution to the creditors", plus HST and disbursements. That, says the Trustee, equals $22,142.08 and that is what it has submitted.

[4] When the Trustee's account first came to me for "desktop" taxation under letter dated April 28, 2022, no time sheets (or calculation method) were attached. I requested them. On May 6, 2022, the Trustee responded "This is a Div-I proposal where our fees are based on the proposal and no time is created." I directed the matter be put on the Court docket for consideration.

[5] In Court on June 10, 2022, the Trustee reiterated that it calculated the amount payable in accordance with the proposal, and did not keep time sheets. I indicated that neither the proposal nor its ratification ousted the Court's discretion in taxing fees, and that it did not reduce its functionality to that of a rubber stamp. I permitted the Trustee to submit additional affidavit evidence to justify its fees. It made those submissions on July 8, 2022.

[6] Before moving to those submissions, it is worth highlighting some of *Vonic's* seminal points (quotations are by Associate Justice Jean):

1. The starting point for any taxation that is not governed by Rules 128 or 129 is s. 39(2) of the BIA, namely the "7.5% rule" – however, this will almost never be the amount sought or even appropriate to seek by the Trustee, and has generally been considered to be out of date if not an anachronism. However, it remains good law.[1]

2. The Trustee (and others) have authority to seek an order to increase or reduce the remuneration under s. 39(5) by the Court; this will usually be the case.

3. Associate Justice Jean's prior unreported decision in *Re Boyle* "stands for the proposition <u>that the court was not a 'rubber stamp' obliged to approve the fees claimed by the trustee merely because the fees were set forth in a proposal</u>." (emphasis added)[2]

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[1] I note in passing the persistent and perennial nature of the complaint of the cost of administration and the wasting of assets otherwise distributable among creditors. I am indebted to Mark Taggart at the federal Department of Justice for referring me to an article bemoaning such costs……in 1915: https://archive.org/details/canadianlawtime00unkngoog/page/18/mode/2up

[2] I would add parenthetically that the Court's discretion over fees – subject to "ceilings" in Rules 128 and 129 - extends to other forms of insolvency proceedings, including Division II proposals, ordinary administrations, and summary administrations. For example, in *BDO Canada Ltd. v. Carrigan-Warner*, 2022 NSSC 16, the Trustee argued in its notice of appeal that the Registrar did not have discretion to deviate from Rule 128 in taxing fees in a summary administration estate. That ground of appeal was abandoned at the time of hearing. It follows that the Registrar has the same discretion in Division II proposals which are ordinarily based on Rule 129, and *a fortiori* when fees are required or directed to be taxed. See also *Re Freckelton* 2021 NSSC 144, additional reasons at 2021 NSSC 146.

4. The onus of proving reasonableness of fees is on the Trustee, taking into account relevant principles, including prevention of unjustifiable payments, efficient administration, fair compensation, inspector approval (if any), hourly rate (and by whom incurred), and judgment exercised. To this, I would add "results obtained," in appropriate situations, such as when active asset management or realization, or dealing with difficult persons, legal principles, or assets form part of the landscape.

5. The lack of time records will not be fatal to reasonable Trustee compensation, but will impose on the Trustee an additional exercise in discharging its civil burden of establishing the reasonableness of its fees. "If the trustee decides to eliminate time docketing for the sake of expediency, it does so at its peril. The onus is and always remains upon the trustee to justify that the fees claimed are fair and reasonable."

6. "To be clear, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the fees to be claimed by the trustee is supplanted by the approval of the creditors and the OSB that the trustee's fees be fixed by a formula. Creditor and OSB approval

> are factors relevant on a taxation and their approval is not dispositive."
>
> 7. "By the same token, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the trustee's fees is ousted by the court's approval of the proposal….*Res judicata* and *issue estoppel* do not apply."

[7] To summarize, the Trustee that thinks that a Court will rubber stamp its fees

(a) because they are embedded in a proposal,

(b) because the creditors have voted for the proposal,

(c) because the Court has approved the proposal, or

(d) because the OSB has not objected,

had best think again. It will find its burden, burdensome. Not impossible, but incumbent upon it to a civil standard and where it fails to meet that standard, detrimental to its claim. This will be even more so if a proposal has been funded by lump sums or with little ongoing activity, or has been a kind of "running average" by a firm to achieve a commercial return over multiple files using the theory of "some days you're the pigeon, on other days you're the statue" with easy

files subsidizing the fraught ones. That is not an appropriate method by which to tax accounts, which is a bespoke exercise for that activity on that file. Put another way, a formulaic but undocumented (or poorly documented) claim for fees will result in that formula being a ceiling but not a floor when the Court taxes the account, and the floor may be considerably below that which the Trustee had theretofore considered itself in effect "entitled."

[8] Turning to the case at bar. Following my direction, the Trustee forwarded an affidavit containing something akin to a reconstructed time sheet, generating some 700 entries in all, with an average value of $31.63 per entry, or 15 minutes' time (for a weighted average hourly rate in the $125 range). I note the Trustee took some care to eliminate duplicate or auto-generated entries.

[9] There is no indication of time-spent per entry. Many of these are coded as "appointment" or "administration."

[10] That said, many entries contain detailed notes respecting intersects with creditors and the debtor. The "diary" is some 26 pages. While some entries would undoubtedly be less than 15 minutes (e.g., bank reconciliations), others such as meetings and conversations would be considerably more. Overall, I am satisfied that even if time-spent did not add up to 175 hours (700 entries @ 15 minutes

apiece), the combination of time spent, rate charged, and by whom incurred is overall fair and reasonable.

[11] The Trustee declared that this was a difficult proposal, given the assets and personalities at hand. The Trustee outlines these at her Exhibit E. While some of these challenges are "after the fact" (that is to say, the Trustee's fee was set out in the proposal before the difficulties arose or were foreseeable), it is adequate to say that this was not an "autopilot" situation.[3] Overall, I do not find that the efforts expended by the Trustee, both anticipated at the time of filing/approval (e.g. realization of several properties) and after-the-fact (extensive communication, tax implications, and a misdirection of funds by counsel having carriage of at least some of the sales) to be unreasonable, unwarranted, improvident, or (globally speaking) docketed at an untenable hourly rate. Rephrased positively, given the burden on the Trustee, I find that the Trustee's efforts are, globally speaking, reasonable, warranted, provident, and tenable.

[12] I also note that the dividend is significant – about 30 cents on the dollar of proven creditors – and was distributed well in advance of the proposal "due date."

[3] I will add for the record that one of the issues was the treatment of capital gains, as the properties are realized, in the hands of the Trustee. While this is not in issue before me on this file, I do not wish to be construed as approving or disapproving of the Trustee's treatment; I currently have another matter on reserve dealing with this issue on a notional rather than as-realized basis. As a point of guidance, it would be useful if the proposal had defined "net proceeds" as before or after giving effect to the tax implications of disposition.

Although neither this nor the lack of creditor objection binds the Court, they are factors to be taken into account. I will add, with respect, that I place little weight on the OSB's "clean" letter of comment, as these are issued in at least this jurisdiction more or less as a matter of course, including in estates where I have had substantial issue with the fees as submitted. Or to rephrase, if the OSB had concerns, this would at least from my experience be a significant red flag, but the lack of such concerns is of limited weight for the Court's exercise of its taxation function.

[13] Accordingly, I find that the Trustee has, generally, discharged its civil burden to establish the reasonableness of its fees in accordance with the proposal as filed. I say "generally" as I have some confusion as to the Trustee's calculations.

[14] The proposal claims 100% of the first $1,500 plus 20% "of contributions in excess of $1,500 available for payment to the creditors," plus costs and disbursements. There were, as noted, total receipts of $104,710.37 which included an advance from the Trustee of $3,488.00. I am unclear how the Trustee arrived at $22,142.08 as being 20% of the first $1,500 plus 20% of the balance "available for payment to the creditors." It looks to me that the Trustee calculated it thusly:

Receipts: $104,710.37

Less first $1,500.00

Equals: $103,210.37

20% of $103,210.37 plus $1,500 = $20,642.08 + $1,500 = $22,142.08

[15] If I am correct, it appears this does not address the advance (or why it was made), nor does it account for the Superintendent's s. 147 levy. Again, if I am correct, it appears that the Trustee calculated its fees without considering whether that levy is part of the "balance available for payment to the creditors," or not. It would also be before accounting for disbursements and HST, meaning that the Trustee would get 100% of those disbursements and HST, plus an additional 20% for its fees, despite those funds not being "available for payment to the creditors." Since these are deducted before calculating the dividend, it strikes me that these should be excluded from calculation of fees, unless I can be pointed to binding authority to the contrary. If the Trustee had sought to base its remuneration on "100% of the first $1,500 and 20% of the balance of *gross receipts*," it should have said so for consideration by creditors voting on the proposal.

[16] In making these comments, I am aware that the Trustee employed calculation software in common use in the industry. I am also aware of the OSB's directive 10R providing guidance on calculation of the levy, but that is a separate issue from calculation of fees.

[17] I am inclined to believe, absent clear language in the proposal (bearing in mind that this will be the "ceiling" for fees) or binding authority otherwise, the funds "available for payment to the creditors" would not include costs, disbursements, HST, or the levy – in this case, totaling $8,059.15 in the Trustee's SRD (although this would require recalculation if the fees are recalculated, as the levy would be higher and the fees and HST lower).

[18] I direct the Trustee to submit its calculations to me for review, and to provide such authority (if any) to justify charging its 20% claim on a "balance available for payment to creditors" as including the levy, costs, and disbursements. It is to do so within 30 days of release of this decision, failing which I will proceed without further ado. With that caveat, I reiterate that I consider the Trustee generally to have discharged the civil burden upon it to justify its fees. Upon review of the Trustee's calculations and submissions, or expiration of the noted 30 days, I will finalize this taxation accordingly.

[19] A copy of Associate Justice Jean's *Vonic* decision is appended.

Balmanoukian, R.

Appendix

**ONTARIO**

**Re Vonic**
**Court File No. 32-1983170**

**Parties:**
K. Sharma, LIT

**REASONS FOR DECISION (Taxation read in Chambers on December 10, 2021)**

## The Taxation and Background

The trustee of the debtor's Division I proposal applies for taxation of its Statement of Receipt and Disbursements dated May 19, 2021 (the "SRD"). A review of the SRD reveals that receipts are $38,114.67 and disbursements are $14,252.01. The trustee seeks fees of $9,973.46 plus HST.

The primary issue raised on this taxation is whether the trustee's fees of $9,973.46 are to be approved. The OSB has issued a "clear" letter of comment. In the ordinary course, the debtor and the creditors have not been given notice of the taxation but it would appear that there is unlikely to be any objection.

The taxation raises the issue as to the manner by which the trustee is obliged to establish its entitlement to fees where there are no time dockets kept or otherwise available to support the trustee's claim for fees. In this case, the trustee relies exclusively upon the terms of the proposal which contain a methodology for calculating the fees to be taken by the trustee in administering the proposal. The relevant provision contained in the debtor's proposal is as follows, at para. 11:

"11. Provision for payment of all proper fees and expenses, including legal fees, of the Trustee under this proposal shall be made in the following manner:

(i) All such fees and expenses shall be paid in priority to the claims of any and all creditors;
(ii) All expenses, including legal fees to assist the debtor and to the Trustee, in preparation and administration of the proposal, shall be paid in priority and in addition to the fees claimed by the Trustee;
(iii) The fees of the Trustee to assist the Debtor in respect to the filing of the Proposal, prepare and file Cash Flows and all matters up to the preparation of filing the Proposal to creditors shall be $5,000 plus HST;
(iv) The fees of the Trustee for preparing for and attending at the First Meeting of Creditors as well as the Court hearing approving the Proposal shall be limited to a further $1,500 plus HST;
(v) The fees of the Trustee to administer the proposal ("administrative fees") beyond Court approval shall be paid upon each distribution pursuant to Paragraph 9 based on 12.5% of the gross amount thus distributed; and
(vi) Subject to final taxation by the court and independent of the powers of the inspectors, if any inspectors are appointed, the Trustee may take interim draws of its fees and disbursements from the funds paid under paragraph 9 including any retainers received by the Trustee prior to creditors meeting and court approval of this proposal, in full or in party by the Trustee a total amount which shall not exceed the total under paragraph 11(ii), (iii), (iv) and (v)."

The debtor's proposal was approved by the court on June 9, 2015. The proposal called for monthly payments of $525 for 72 months. The proposal was secured by a mortgage on the debtor's real property, a condominium, which mortgage was duly registered by the trustee.

The debtor defaulted in the proposal payments and the trustee issued a notice of default on January 10, 2018. Thereafter, the debtor resumed payments under the proposal but default in the proposal was not formally waived by the creditors. The debtor, within months, decided to sell his real property and, as the trustee had registered the mortgage against the real property, the proposal was paid in full by in or about June, 2018. The proposal was paid early, within approximately 36 months, as opposed to the 72 months called for under the terms of the debtor's

proposal. The trustee issued a certificate of full performance on June 6, 2018. Subsequent to the issuance of the certificate of full performance, the trustee called a "special meeting" of creditors held on June 20, 2018. No creditors objected to the debtor's default in payment and, thereafter, on June 27, 2018, the trustee issued an amended certificate of full of performance.

The trustee claimed fees (plus HST) based on the formula set out at paragraph 11 of the debtor's proposal. While the trustee provided an affidavit in support of its taxation (i.e. the affidavit of Gregory Judd sworn June 7, 2021), the trustee did not provide any further justification for the fees claimed beyond the arithmetic calculation provided for in the debtor's proposal. When the taxation came before me on September 1, 2021, I adjourned the taxation and requested time dockets.

In response to the September 1, 2021 endorsement and my request for time dockets, the trustee filed a report dated October 25, 2021 (the "Report"), and not an affidavit, in support of the taxation and approval of the fees claimed, as calculated by paragraph 11 of the debtor's proposal. The taxation was rescheduled for December 10, 2021.

The trustee states at paragraph 3 of the Report:

"3. In regards to the requested time dockets, we advise that this Trustee does not keep formal detailed time dockets of estate activities for its Division I Proposals where the terms of the Trustee's fees and expenses are set out in paragraph 11 of the Proposal by way of a "fixed fee" formula which was accepted as part of the Proposal by Creditors and later approved by the Court. Therefore, the Court order approving the Proposal with its "fixed fee" formula was relied upon by the Trustee in not having to keep formal detailed time dockets. In respect of the rationale and advantages of the "fixed fee" formula we attach hereto as Appendix "C" a document we prepared titled "Background of Fixed Fee Formulas in Division Proposals." (sic)

Appendix "C" to the Report is a three page document entitled "Background of Fixed Fee Formulas in Division I Proposals" and is signed by members of the trustee firm: Kunjar Sharma, President; Gregory Judd, Vice-President and General Manager; Jenna Li, Vice-President and Uwe Manski, Executive Director. This document appears to provide the rationale for the development by the trustee

of a fixed fee formula to be charged in most, but not all, Division I proposals and for its decision to eliminate time docketing in such Division I proposals containing a formula for fixing a fee.

I summarize the contents of Appendix "C" as follows:

1. The fixed fee formula was developed by the trustee approximately 10 years ago to provide debtors and creditors with more certainty as to the costs of administration for the Division I proposal taking into account contingencies, including matters such as time to negotiate the terms of the proposal, verifying the debtor's finances, becoming more complicated, debtor compliance with payments, simpler/streamlined taxations and the averaging of "good" and "bad" files, fee wise, over the trustee's practice;
2. The fixed fee formula was developed for administrative efficiencies to eliminate the need for time consuming accounting for chargeable time;
3. The fixed fee formula was based on the consumer proposal tariff, to a degree;
4. The structure of the fixed fee formula enabled the trustee to keep up front costs relatively low to facilitate earlier payment of dividends to creditors;
5. The fixed fee formula was aimed to reduce unexpected increases in costs of administration and corresponding decrease in dividends;
6. No creditor has ever objected to the trustee taking a fixed fee;
7. The proposals with the fixed fee formula have been approved by the court and therefore the trustee did not keep time dockets;
8. The trustee has many proposals whose administration is under way or completed wherein the fixed fee formula was relied upon and the trustee has not maintained time dockets; and
9. The OSB has not objected to the trustee's fees as claimed pursuant to the fixed fee formula.

Had the proposal been filed as a consumer proposal, the fees pursuant to the tariff would amount to $8,725.51, or approximately $1,250 less than the fees claimed by the trustee pursuant to the fee formula contained in paragraph 11 of the proposal.

## 1 Discussion and Analysis

Section 39 of the BIA provides for the fixing of a trustee's remuneration as follows:

"(1) The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors.

(2) Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

(3) Where the business of the debtor has been carried on by the trustee or under his supervision, he may be allowed such special remuneration for such services as the creditors or the inspectors may by resolution authorize, and, in the case of a proposal, such special remuneration as may be agreed to by the debtor, or in the absence of agreement with the debtor such amount as may be approved by the court.

….

(5) On application by the trustee, a creditor or the debtor and on notice to such parties as the court may direct, the court may make an order increasing or reducing the remuneration."

I have previously noted in Re Boyle (Estate No. 31-2577808, unreported, December 15, 2020) that s. 39(5) of the BIA provides the jurisdiction and discretion to increase or reduce the remuneration claimed by a trustee and, further, stands for the proposition that the court was not a "rubber stamp" obliged to approve the fees claimed by the trustee merely because the fees were set forth in a proposal.

It is observed that it is common practice for a trustee to request remuneration based on the time spent and hourly rates charged but it has been been held that the 7 ½% general rule is no longer realistic having regard to the complexity of administration of estates and the increased statutory and non statutory obligations

imposed on trustees. See Re Unified Technologies Inc (1995), 32 CBR(NS) 300 (Ont. SC).

Houlden, Morawetz & Sarra, The 2018-2019 Annotated Bankruptcy and Insolvency Act (Thomson Reuters: Canada, 2018-2019) summarizes succinctly the principles to be considered in setting trustee remuneration as follows, at pp. 115-116:

"The **onus is on the trustee** to satisfy the court that the amount claimed for remuneration is justified. See Omni Data Supply Ltd. (2002), 39 C.B.R.(4th) 95, 2002 CarswellBC 3111 (B.C..S.C.).

The following principles must be considered on taxation: (a) **trustees are entitled to fair compensation for their services**; (b) unjustifiable payments for trustee fees to the detriment of the bankrupt estate and its creditors must be prevented; and (c**) efficient, conscientious administration of the bankrupt estate for the benefit of creditors and, so far as the public is concerned, in the interests of the proper carrying-out of the objectives of the BIA, ought to be encouraged**. Where a trustee has not administered a bankrupt estate in accordance with the BIA and has not fulfilled its statutory duties, whether at all or on a timely basis, the registrar has the discretion to reduce the trustee's fees on taxation, whether or not the trustee's conduct or lack thereof has had a negative financial impact on the bankrupt estate. In arriving at an appropriate amount by which the trustee's fees ought to be reduced, a registrar ought to consider whether the trustee's deficiencies were inadvertent; harm was caused to the bankrupt estate; and the office practices of the trustee that led to the deficiencies were remedied once brought to the trustee's attention: Re Nelson (2006), 2006 CarswellOnt 4198, 24 C.B.R.(5th) 40; additional reasons at (2006), 2006 CarswellOnt 6192, 31 C.B.R.(5th) 181 (Ont. S.C.J. [Commercial List]).

…

The **approval of the inspectors** of the trustee's remuneration is a factor that must be taken into account: Re Rico Enerprises Ltd. (1994), 30 C.B.R.(3d) 62 (B.C. Master)…

…

In calculating the fee for time spent, **the rate charged by the trustee should be reasonable** and in line with charges by other trustees in the jurisdiction in similar estates. **Rates for purely routine matters will be less than those for complex protracted negotiations. Routine work should be delegated to employees with**

**reduced hourly rates. Trustees who prefer not to delegate routine work should reduce their hourly rate to that of employees who would normally perform such routine tasks:** Re Gibney (2003), 2003 CarswellSask 546, 45 C.B.R.(4th) 256 (Sask.Q.B.).

In the absence of compelling reasons to the contrary, the trustee should be permitted to charge its fees for the time spent in the administration of the estate at a **reasonable rate of remuneration**; and for obtaining a positive result in getting in or saving assets for distribution to the creditors. **A trustee is expected to exercise judgment, restraint and common sense in making claims for fees**; it cannot expect the court to accept overly generous charges that exhaust the estate and leave little for creditors. The court must therefore exercise some judgment as to the overall costs and gains to the estate of the trustee's administration and may decide that, as a matter of judgment, a fee otherwise justifiable should be reduced, but this discretion must be exercised judicially and with care, especially if the fee is approved by the creditors or inspectors: Re Hess (1976), 23 C.B.R.(N.S.) 215 (Ont. H.C.)."

[emphasis added]

In Re Boyle, supra, I dealt with the taxation of a statement of receipts and disbursements in a Division I proposal where no time dockets were kept. I held that the lack of time dockets was not fatal to the approval of fees as claimed by a trustee but it does place the court in a position where there is no corroborative evidence as to the time and effort spent in the administration of the proposal.

Similarly, I said, in Re Diltze, 2002 CanLii 49588 (ONSC) at paragraph 4:

"…However, in my view, it is the responsibility of the Trustee to establish a record of the time spent on a matter if the Trustee wishes to be remunerated on that basis (see Three Stars Excavating & Grading Ltd., Re (1977), 25 C.B.R.(N.S.) 255 (Ont. S.C.). However, the fact that the Trustee in this case did not keep a record of time spent made contemporaneously with the rendering of the service is not fatal to the Trustee's application for approval. In Three Star, supra, the court said, at p. 259:

"The bill of costs of the liquidation was, in my view, very unsatisfactory. If a liquidator or any professional person intends to claim remuneration on the basis of

an hourly rate for time spent, it is his responsibility in my judgment, to keep a careful record of the hours, spent in the matter. He could not have received adequate remuneration by applying a percentage figure to the amount of the estate and I infer that he charged on a time basis for that reason. In the absence of time records, which, as I have said, I think he should have kept, I feel that the liquidator should have broken down his time estimation and those of his associates and staff to show their estimates of the amount of time spend by them on each of the individual items listed in the account. In that way, the parties interest in the amount of the account could satisfy themselves as to whether there were any items with which they had no dispute. The reference before the master would then be involved only with those matters, if any, as to which the parties felt the liquidator had spent more time than was necessary."

In Re Dilkes, the trustee did provide an estimate of time spent but not a time record or dockets. I thereafter drew upon my experience in matters of taxation and fixed the fee accordingly.

In disposing of this taxation, I consider and apply the above factors. I intend to fix the trustee's fees in this case although the trustee has not provided an estimate of the time spent or time dockets. I proceed on the basis of the trustee's materials filed on this taxation. For future taxations, it is my view that the trustee is obliged to prove entitlement to the fees claimed and this should take the form of sworn affidavit and other admissible evidence.

In disposing of this taxation, I consider the following factors that favour the approval of the fees claimed by the trustee:

1. The creditors have approved the fees claimed by the trustee, by virtue of the approval of the proposal;
2. The creditors will receive a not insignificant dividend of approximately 50%;
3. The creditors will receive their dividend sooner than anticipated; and
4. The OSB is not opposed to the taxation and the fees claimed by the trustee and has issued a clear Comment Letter.

I consider the following factors that weigh against approval of the fees as claimed by the trustee:

1. The trustee failed to keep time dockets to justify the fees claimed. There is no ability for the court to discern the amount of time and effort that was required to administer the estate and which would warrant the fee claimed;
2. It is not fair and reasonable that the trustee be compensated for work that was not done or not needed. Here, the proposal was completed in 3 years, approximately half of the anticipated time that the proposal was to be performed;
3. It is questionable as to whether the Division I proposal was capable of being performed. The debtor defaulted in the proposal and a notice of default was issued by the trustee on January 10, 2018. The creditors did not waive default in payment until June 20, 2018, after the trustee had issued a Certificate of Full Performance on June 6, 2018. The trustee reissued an amended Certificate of Full Performance on June 27, 2018, after a special meeting of creditors had been held on June 20, 2018 to waive default;
4. I question whether the trustee properly requested that the debtor's default in payment be waived and whether it was appropriate to move instead for an order annulling the proposal which would have the effect of the debtor being deemed to have made an assignment in bankruptcy. In my view, had this step been taken, the creditors would likely have been paid in full or would have received an improved dividend. I note that the debtor's real property, valued at $300,000 when sold in May/June 2018, was subject to a mortgage in the amount of $165,000 at the date of the filing of the proposal. By my estimation, the debtor's equity in the property was in the range of $100,000 to $135,000 (before costs of sale) . This equity would have been more than sufficient to pay the creditors, proven at $46,988.72; and
5. The debtor had limited income on account of medical condition and receipt of CPP and disability pension. The net benefit of a Division I proposal over that of a consumer proposal is not entirely clear. The trustee claimed that the debtor needed one additional year to make payments that were viable. One year of such payments ($6,300) are off set by legal fees ($1,722.50) and the additional fees above the consumer proposal tariff ($1,247.95). The net benefit of a Division 1 proposal, disregarding other disbursements, is $3,329.55 with a one year delay in completion. To my mind, it was not a foregone conclusion that a Division I proposal was more beneficial to the debtor or the creditors, given the increased costs and delay in distribution.

In fixing the trustee's fees, I have various options:

1. Fix fees at the statutory rate of 7.5%. This would result in fees of $2,858.60;
2. Fix fees on the basis of the consumer proposal tariff. This would result in fees of $8,725.51;
3. Fix fees on the basis of the consumer proposal tariff but reduce it due to reduced period of administration (3 years vs. 7 years);
4. Fix fees on the basis of the calculation in the proposal. This would result in fees of $9,973.46.

In my view, it is appropriate to start from the proposition that the statutory rate of 7.5% should be applied, absent any request by the trustee for an increased amount. Inferentially, the trustee is seeking more than a 7.5% statutory rate, given the terms of paragraph 11 of the proposal.

If the trustee is seeking fees above the statutory rate, the onus is on the trustee to establish entitlement and that the amount is fair and reasonable. Typically, a trustee in such a case claims fees on a time and hourly rate basis. Dockets would be vital in this situation.

Here, the trustee submits that the formula or manner of calculating the fee in paragraph 11 of the proposal is fair and reasonable. There is nothing filed to support the submission, aside from a description of the tasks that the trustee fulfilled in the administration of the estate.

Without the benefit of dockets which would provide a basis for an increased fee above the statutory rate, the court may be seen as pulling a number out of thin air. In my view, that approach is not principled, although in some ways justifiable if the trustee is unable to discharge its onus.

In my view, drawing on my experience over 15 years in taxing SRDs and given the circumstances of this case, it is my view that the statutory rate of 7.5% is not appropriate to fairly and reasonably compensate the trustee.

In my view, it is appropriate to award fees and disbursements on a consumer tariff, in the circumstances of this case, based on receipts for a 5 year period (or $31,500). A good argument can be advanced that the debtor ought to have filed a consumer proposal and the fees taken by the trustee would have been fixed under the consumer proposal tariff. It is not up to the trustee to decide what the creditors

would accept or not in a consumer proposal situation. It is my experience that creditors have accepted consumer proposals involving far less than a 50% dividend.

Given my view that a consumer proposal was appropriate, I decline to fix fees on the basis of the formula contained in the Division I proposal. The more complex administration of a Division I proposal and the costs associated with the same were not warranted and were only slightly more beneficial to the creditors. I would decline to allow the legal fees incurred to obtain court approval and to register the mortgage security, as these fees and steps would not have been required or be permitted disbursements in a consumer proposal.

The trustee shall be allowed the usual tariff disbursements. Legal fees are specifically not approved and shall be borne by the trustee.

Further justification for the reduced fees and disbursements is based on my view that the trustee did not take appropriate steps to administer the estate properly. In my view, the creditors would have been better served had the trustee annulled the proposal and placed the debtor in bankruptcy. The creditors could have been paid in full. I would have reduced the fees entirely on this basis, however, I am mindful that no creditors objected to the waiver of the default and took no steps to annul the proposal and place the debtor in bankruptcy. Alternatively, I would have reduced the trustee's fees by 10% to reflect this issue.

In conclusion, I am of the view that the fees and disbursements be fixed on the basis of the consumer proposal tariff and on the basis of receipts of $31,500 (payments over 5 years).

To be clear, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the fees to be claimed by the trustee is supplanted by the approval of the creditors and the OSB that the trustee's fees be fixed by a formula. Creditor and OSB approval are factors relevant on a taxation and their approval is not dispositive.

By the same token, I do not accept the position of the trustee that the court's jurisdiction to approve the SRD and the trustee's fees is ousted by the court's approval of the proposal. The court's approval of a proposal under section 59 of the Bankruptcy and Insolvency Act is aimed at assessing whether the terms of the

proposal are reasonable and calculated to benefit the general body of creditors. The quantum of the trustee's fees is not an issue specifically addressed on an application for court approval of a Division I proposal. *Res judicata* and *issue estoppel* do not apply.

I also wish to be clear that I do not accept that administrative efficiencies associated with a fixed fee properly oust the court's jurisdiction to approve the trustee's fees. If the trustee decides to eliminate time docketing for the sake of expediency, then it does so at its peril. The onus is and always remains upon the trustee to justify that the fees claimed are fair and reasonable. As held in *Re Boyle* and *Re Diltze*, the failure to file time dockets will not be fatal but there must be some evidence or other admissible material to establish the fees claimed.

As to the trustee's position that creditors seek certainty as to the costs of administration, that may be so. However, I am of the view that such certainty (or efficiencies) does not override the trustee's obligation to justify the fairness and reasonableness of its fee. And to be clear, it has been my experience that time dockets have been filed by this trustee firm where the proposal contains a fixed fee or formula for calculating the fee.

The trustee is directed to prepare an amended SRD in accordance with the rulings here, to resubmit for comment to the OSB and thereafter resubmit to me for final issuance.

**Associate Justice Jean**

**April 11, 2022**