Court File No. CV-10-8533-00CL

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 CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Applicants

BOOK OF AUTHORITIES OF POSTMEDIA NETWORK INC.

(Appeal Returnable on January 19, 2012)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Fred Myers LSUC#: 26301A
Caroline Descours LSUC#: 58251A
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Postmedia Network Inc.

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CIVIL APPEALS

BY

DONALD J.M. BROWN, Q.C.

CANVASBACK PUBLISHING

TORONTO, ONTARIO

the punitive message.[140]

15:2000 DISCRETIONARY DECISIONS GENERALLY

15:2100 Overview

Long before the Supreme Court of Canada in *Housen v. Nikolaisen*[141] developed standards of review for questions of mixed fact and law, specific deferential standards of appellate review were applied to the exercise of discretion in various contexts.

15:2110 *Inherent Qualities of Discretionary Decisions*

15:2111 *Implication is that Two or More Reasonable Choices Exist*

"Discretion" in the context of an adjudicative decision suggests a choice between two or more acceptable outcomes,[142] for example, as to the weight to be given to evidence.[143] As one court has said, "[T]o exercise discretion means to choose between two or more reasonable options."[144] It may also mean having a choice as to whether to act or not act.[145] Or it may be characterized as a decision where there is no rule dictating any particular result.[146]

15:2112 *Polycentricity*

A grant of discretionary power is often found where the nature of

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[140] E.g. *Francis v. CIBC* (1995), 21 O.R. (3d) 75 (Ont. C.A.) ($15,000 increased to $40,000); *Ribeiro v. CIBC* (1995), 13 O.R. (3d) 278 (Ont. C.A.) ($10,000 increased to $50,000).

[141] ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235.

[142] See A. Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989) at pp. 7-9. **See also** S. Waddams, "Judicial Discretion," (2001) 1 *Cwth. L.J.* 59.

[143] *Pecore v. Pecore*, [2005] O.J. No. 3712 (Ont. C.A.) at para. 35, aff'd 2007 SCC 17.

[144] *Doiron v. Haché*, 2005 NBCA 75 at para. 57.

[145] E.g. *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 (*parens patriae* jurisdiction of superior courts).

[146] See *R. v. Barnes* (1995), 129 Nfld & P.E.I.R. 151 (Nfld. C.A.) at p. 161, ref'd to in *Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496 at para. 21. **And see** *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1990] M.J. No. 1 (Man. C.A.) (use of "may" in Rule signifies discretion).

the problem is "polycentric",[147] that is, where the subject matter requiring resolution consists of several interacting factors.[148] This characteristic has often led to the observation that such an issue is "fact-specific,"[149] or that the decision is in the nature of a "judgment call,"[150] as, for example, where a judge is approving a plan of arrangement under the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act*.[151]

15:2113 *Exercises of Discretion Raise Questions of Mixed Fact and Law*

However described, the actual exercise of discretion in the adjudicative context is invariably an instance of law-application. That is, using the *Southam*[152] terminology, it will always give rise to a "question of mixed law and fact."

15:2120 ***The Supreme Court of Canada's Formulations of the Standard of Review***

The Supreme Court of Canada has not yet addressed the standard of appellate review of discretionary decisions in a comprehensive way, nor has it attempted to integrate its earlier formulations of the standard with those in *Housen v. Nikolaisen*[153] and *H.L. v. Canada (Attorney*

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[147] The concept of "polycentric" issues appears to have originated with Professor Lon L. Fuller in his seminal article, "The Forms and Limits of Adjudication," (1978), 92 *Harv. L. Rev.* 353.

[148] E.g. *Birkett v. James*, [1978] A.C. 297 (H.L.), *per* Lord Diplock, where he describes "discretion" as decisions which "involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case," referred to in R.P. Kerans and K. Willey, *Standards of Review Employed by Appellate Courts*, 2nd ed. (Edmonton: Juriliber, 2006) at p. 209.

[149] In the words of the Ontario Court of Appeal: "Judicial discretion must respond to specific circumstances": *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.) at para. 33.

[150] E.g. *Succession de feu André Gauthier v. Coutu*, 2006 NBCA 16 at para. 82.

[151] E.g. *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd.*, 2009 ABCA 240 at para. 42.

[152] ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 35.

[153] ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235.

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Case Name:

Murphy v. Sally Creek Environs Corp. (Trustee of)

IN THE MATTER OF the Bankruptcy of Sally Creek Environs Corporation of the City of Brantford in the County of Brant in the Province of Ontario
Between
A. Robert Murphy, A. Robert Murphy Architect Incorporated, and Gray Wave Resources Inc., Appellants, and
Edward White & Associates Inc. in its capacity as, Trustee-in-Bankruptcy of Sally Creek Environs Corporation, Respondent

[2010] O.J. No. 1773

2010 ONCA 312

261 O.A.C. 199

67 C.B.R. (5th) 161

2010 CarswellOnt 2634

Docket: C50130

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., R.G. Juriansz and P.S. Rouleau JJ.A.

Heard: October 27, 2009.
Judgment: May 3, 2010.

(161 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Trustees -- Trustees in bankruptcy -- Remuneration -- Expenses -- Appeal by creditors from variation of taxation of trustee's fees allowed in part -- Registrar reduced trustee's fees to $1 due to misconduct -- Registrar disallowed portion of solicitor's fees and awarded solicitor and client costs against trustee personally -- Court reinstated solicitor's fees, a portion of trustee's fees, and set

aside costs award -- Appellate court found that taxation of solicitor's fees did not preclude review by registrar -- Registrar and court erred in assessment of trustee's fees -- Partial reduction for misconduct was warranted, as was partial award of solicitor and client costs borne personally by trustee -- Bankruptcy and Insolvency Act, ss. 152, 197.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Courts -- Jurisdiction -- Registrars in bankruptcy -- Costs -- Appeal by creditors from variation of taxation of trustee's fees allowed in part -- Registrar reduced trustee's fees to $1 due to misconduct -- Registrar disallowed portion of solicitor's fees and awarded solicitor and client costs against trustee personally -- Court reinstated solicitor's fees, a portion of trustee's fees, and set aside costs award -- Appellate court found that taxation of solicitor's fees did not preclude review by registrar -- Registrar and court erred in assessment of trustee's fees -- Partial reduction for misconduct was warranted, as was partial award of solicitor and client costs borne personally by trustee -- Bankruptcy and Insolvency Act, ss. 152, 197.

Appeal by the unsecured creditors, the Murphy Group, from variation of a registrar's order on the taxation of the fees of the trustee-in-bankruptcy, Edward White & Associates. The bankrupt, Sally Creek Environs, was the owner of lands related to a proposed retirement development that never came to fruition. The Murphy Group provided architectural services for the project and was the bankrupt's largest unsecured creditor. When the financing became jeopardized, the Murphy Group took control of the bankrupt's board of directors and made an assignment into bankruptcy. The Murphy Group intended to purchase the lands from the bankrupt estate to continue the development. In a contested tender, the lands were sold to a third party. The Murphy Group's claim against the estate was contested and reduced in arbitration. The Murphy Group complained of the trustee's role in the arbitration, but no regulatory action was taken. Before the registrar, the trustee claimed fees of $240,000. The registrar was critical of the trustee's conduct. The registrar disallowed a portion of the trustee's fees due to questionable dockets, and reduced the remainder to $1 due to misconduct. The registrar also disallowed disbursements, the most significant being a reduction in the fees of the estate solicitor from $206,547 to $20,000. The registrar awarded solicitor and client costs against the trustee personally. The registrar's decision left the trustee with $1 in income and $478,760 in personal liabilities. On the trustee's application for variation, the Superior Court upheld a portion of the disallowances and set aside others. The solicitors' fees were reinstated, as they had previously been taxed. The costs award was set aside. The decision left the trustee with net income of $59,934 resulting from taxed fees of $87,664, and one disallowed disbursement of $27,729. The judge awarded the trustee $55,000 in party and party costs of the appeal. The Murphy Group appealed from the judge's dispositions concerning the bill of costs for the estate solicitor, the trustee's bill of costs, and the costs of the hearing before the registrar.

HELD: Appeal allowed in part. The registrar was not precluded from considering whether the bankrupt estate was required to pay a previously taxed solicitor's bill of costs. However, the reduction made by the registrar was excessive. In respect of the estate solicitor fees, $100,000 was allowed in lieu of the $20,000 allowed by the registrar. The judge erred in interfering with the registrar's finding of fact that certain of the trustee's claimed fees were based on questionable dockets. Although the registrar erred in reducing fees for misconduct, the judge also committed errors of principle in calculating the appropriate fee. The trustee completed the administration and successfully sold the estate's major asset, achieving a significant recovery for unsecured creditors. A reduc-

tion of $15,000 ensured that the trustee was not compensated for its misconduct. In the result, the trustee's fees were fixed at $49,464. It was unfair that the creditors indemnify the whole of the trustee's costs given the findings of trustee misconduct. Accordingly, the order that the trustee bear the costs of the registrar's hearing personally on a solicitor and client basis was restored in part, with the balance to be paid from the estate on a party and party scale.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 30(1)(e), s. 135(4), s. 135(5), s. 152, s. 152(3), s. 152(4), s. 152(5), s. 152(6), s. 192(1)(i), s. 197, s. 197(1), s. 197(2), s. 197(3)

Bankruptcy and Insolvency General Rules, C.R.C., c. 368, Rule 21, Rule 22, Rule 25(1)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 57

Appeal From:

On appeal from the order of Justice Ruth E. Mesbur of the Superior Court of Justice, dated February 19, 2009, with reasons reported at 2009 CarswellOnt 7608.

Counsel:

Bobby H. Sachdeva and Michael Nowina, for the appellants.

Ronald N. Robertson and R. Graham Phoenix, for the respondent.

The judgment of the Court was delivered by

1 **R.G. JURIANSZ and P.S. ROULEAU JJ.A.**:-- This is an appeal from the decision of the Superior Court of Justice (Commercial List) varying the registrar's order on the taxation motion of the final Statement of Receipts and Disbursements ("SRD") of the Trustee in the bankruptcy of Sally Creek Environs Corporation ("Sally Creek").

2 The Trustee's application to the registrar for approval of its fees, receipts and disbursements was vigorously and successfully opposed by the appellants, referred to collectively as "the Murphy Group", an unsecured creditor of Sally Creek. The registrar was scathingly critical of the Trustee and reduced his fees, disallowed significant disbursements and awarded solicitor client costs against the Trustee personally. The registrar's decision left the Trustee with $1 of income and more than $478,760.11 in personal liabilities.

3 The Superior Court judge, sitting in the Superior Court of Justice, Commercial List, ("commercial court judge") upheld some of the registrar's specific fee reductions and disallowances, but set aside others. As well, she set aside the registrar's costs award. The commercial court judge's decision left the Trustee with net income of $59,934.83 resulting from taxed fees in the amount of $87,664.44 and one disallowed disbursement of $27,729.61. The commercial court judge awarded the Trustee party and party costs of the appeal before her in the amount of $55,000 all inclusive.

4 Although many issues were dealt with in the courts below, the appellants take issue only with the commercial court judge's dispositions on three matters: the bills of costs of the estate solicitor, the fees of the Trustee, and costs of the SRD hearing.

5 We would allow the appeal in large measure by reinstating many of the registrar's findings but varying several of his dispositions. We would fix the Trustee's fees in the amount of $49,464.44, allow $100,000 and disallow $106,547.02 of the estate solicitor's fees, and restore in part the registrar's order that the Trustee pay the costs of the SRD hearing personally. The portion of the costs payable by the Trustee personally are on a solicitor and client scale. The balance of the costs, to be paid out of the estate, are on a party and party scale. With respect to the appeals before the Superior Court and this court, we would make no costs award as, overall, each party has had mixed success. Finally, the Trustee will be entitled to recover one half of his legal costs of the two appeals from the estate.

FACTS

6 The decisions of the Registrar in Bankruptcy and the commercial court judge provide a detailed description of the facts of this long and acrimonious dispute. We summarize below only the facts that are relevant to this appeal.

1. The Sally Creek Project and its Bankruptcy

7 The appellants, A. Robert Murphy ("Murphy"), A. Robert Murphy Architect Incorporated, and Gray Wave Resources Inc., have been known collectively as the Murphy Group throughout these proceedings. The Murphy Group was the largest unsecured creditor of the estate of Sally Creek Environs Corporation (Sally Creek), which owned land that it planned to develop into a retirement community and seniors' complex. The purchase of the land was funded through a mortgage held by other shareholders in Sally Creek, including several companies controlled by Ralph Rodgers, that have been referred to as the Rodgers Group in these proceedings.

8 Murphy signed an exclusive contract with Sally Creek to provide architectural services for the project. The contract gave the Murphy Group a 20 per cent interest in Sally Creek. It also provided that Murphy would be entitled to approximately $2.5 million should he waive his exclusive right to provide architectural services.

9 In late 2002, the mortgage on the land owned by Sally Creek became due. As the project was facing financial difficulties, Ralph Rodgers called a meeting of the directors to seek a resolution to quit claim Sally Creek's interest in the land to the mortgagees. Apparently concerned that this would mean the loss of a unique and lucrative project, Murphy executed a plan to wrest control of Sally Creek from the Rodgers Group by successfully ousting a majority of the board of directors. Having gained control of Sally Creek, Murphy, in his capacity as President of A. Robert Murphy Architect Incorporated, sent a letter to himself, as President of Sally Creek, pursuant to which he waived his exclusivity clause. Sally Creek thus owed A. Robert Murphy Architect Incorporated approximately $2.5 million.

10 Murphy caused Sally Creek to make an assignment in bankruptcy on January 10, 2003. He appears to have intended to purchase the Sally Creek lands from the estate and continue the development project himself. Murphy had the company of his then friend, Edward White of Edward White & Associates Inc., appointed as Sally Creek's Trustee in bankruptcy. In these reasons we do not distinguish between Edward White and his company and refer to both as the "Trustee".

11 The Murphy Group's claims, the largest of which was the $2,583,432 damages claim arising out of the architectural services contract, amounted to approximately 80 per cent of the unsecured claims of the estate. The Trustee obtained two legal opinions regarding the Murphy Group claims, both of which held that they were valid for voting purposes.

12 The first meeting of creditors was held on January 29, 2003. With its majority voting rights, the Murphy Group was able to have three persons it selected appointed as the inspectors. According to the Trustee, following the creditors' meeting the inspectors met briefly and approved the retainer of William J. Meyer as estate solicitor.

13 The Sally Creek property was the only significant asset of the estate. In the spring of 2003, the Trustee sold the property for $7,155,000 to a third party known as the Sierra Group. The sale price satisfied the mortgage debt, with $2,596,894.96 remaining in the estate for distribution among unsecured creditors. The sale followed a contested tender and court approved sale in which the Murphy Group was an unsuccessful bidder. The Murphy Group's bid was rejected for technical deficiencies. It contested the sale, eventually losing an appeal to this court: *Sally Creek Environs Corp. (Re),* [2003] O.J. No. 3374. Murray Page represented the estate in that litigation. His retainer, and what actions it authorized, is a central issue in the present dispute.

2. Dispute over the Murphy Group's Claim and Arbitration

14 As noted above, the Trustee had found the Murphy Group's claims to be valid. However, in February 2003, the Rodgers Group took the position that the Murphy Group's large unsecured claim was not a valid one. It therefore indicated it would bring a motion under s. 135(5) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), to expunge or reduce the Murphy Group's proof of claim or to annul the bankruptcy. Pursuant to such a motion, the Rodgers Group would have borne the burden of proving that the Murphy Group claims were invalid or should be reduced despite the Trustee's approval.

15 The relationships between Murphy and the Trustee and between the Trustee and the inspectors had become strained during the contested sale of the Sally Creek lands. The Trustee had come to the conclusion that at least two of the inspectors were simply acting as proxies for the Murphy Group, and so believed he was justified in acting without their approval and at times contrary to their express wishes.

16 Upon reading the Rodgers Group's motion materials, Page came to the conclusion that the best way to settle the issue, along with certain other questions, was through arbitration. On July 23, 2003, Page wrote a letter to counsel for the Murphy Group in which he claimed to have been authorized by the Trustee to disallow the Murphy Group's claims. The Trustee's disallowance of its claims would have meant that the Murphy Group would bear the burden of proving the validity of its claims in a hearing *de novo* pursuant to s. 135(4) of the *BIA*. As noted, if the claims were allowed the Rodgers Group would have to contest them under s. 135(5) and would bear the burden of proving that the Murphy Group claims were invalid. Both the Trustee and Page admitted under cross-examination at the SRD hearing that the Trustee had no intention of disallowing the claims as he believed them to be valid. The registrar found that Page's repeated threat to do so was intended to pressure the Murphy Group to arbitrate its dispute with the Rodgers Group. Furthermore, the registrar found that the issuance of these threats was beyond the scope of Page's retainer and contrary to the express instructions of the inspectors.

17 Nevertheless, the threat was effective and the Murphy Group agreed to arbitrate. However, the inspectors made clear to the Trustee that the estate should not participate in the arbitration. Seeing this as unjustified meddling by the Murphy Group, the Trustee ignored the inspectors' instructions.

18 The arbitration took place in 2004. The Arbitrator found that the majority of the Murphy Group claims were valid, but made certain reductions to them. Page, representing the Trustee, participated in the arbitration process. In what the registrar describes as a "bizarre set of circumstances", the Trustee gave evidence of his belief that the Murphy Group claims were valid, while his counsel Page argued that they were not.

3. Professional Complaints

19 The Murphy Group was unhappy with the reduction in its claims and felt that the Trustee and his counsel had taken sides against it. Thereafter the Murphy Group began a concerted campaign of complaints to various regulatory bodies alleging serious wrongdoing and mismanagement by the Trustee. These included complaints submitted to the Office of the Superintendant of Bankruptcy (OSB), the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), and the Institute of Chartered Accountants of Ontario (ICAO). These complaints did not lead to any disciplinary action, aside from the ICAO reprimanding the Trustee in camera.

4. The Registrar's Decision

a. Fees

20 The Trustee sought $240,000 in fees for his management of the estate together with disbursements. The registrar taxed his fees in the amount of $1 and disallowed or reduced many of the disbursements he claimed.

21 First, the registrar disallowed $69,000 in fees, finding there was "absolutely no description of the work performed".

22 Next, the registrar disallowed $23,660 in fees for time spent in relation to the defence of the Trustee against the professional complaints that the Murphy Group had filed. The registrar rejected the Trustee's rationalization for his failure to obtain the Inspectors' authorization for these fees and expenses. If the Inspectors were the "handmaidens" of the Murphy Group as the Trustee asserted, he should have applied to the court rather than going ahead and spending Estate funds without oversight.

23 If the lack of authorization was not an adequate basis for disallowing these amounts, the Trustee's conduct was. Ordinarily, the registrar recognized, these amounts would be allowed if the professional bodies determined the complaints to be unfounded, as they had in this case. However, the registrar found on the evidence before him that the Trustee had misled or lied to the professional bodies, and the results might have been different had he been truthful. So, despite the resolution of the complaints largely in favour of the Trustee, the registrar refused to exercise his discretion to permit the Trustee to recoup the money expended to defend his professional reputation.

24 The registrar further reduced the Trustee's fees by $23,200 for time claimed where the dockets involved duplications or were otherwise questionable; by $8,136.41 for his failure to collect an outstanding debt owed to the estate (the "Farm Show receivable"); and by $51,539.15 for interest that would have accrued had the Trustee invested the proceeds from the land sale in a higher interest bearing account as opposed to a simple chequing account.

25 With respect to the Farm Show receivable, we would note that the registrar found that, with interest, it cost the estate $8,136.41. However, both the registrar and the Superior Court Judge use the figure $7,650 in their calculations. We have assumed that this was an oversight and use the former figure in our calculations throughout.

26 These disallowances totalled $175,535.56, leaving the Trustee with claimed fees in the amount of $64, 464.44.

27 The registrar then turned his attention to the disbursements made by the Trustee.

b. Disbursements

28 The registrar disallowed or significantly reduced the disbursements for which the Trustee sought reimbursement.

29 The only disbursement currently under appeal is the account of Murray Page, who (as mentioned above) acted as estate solicitor in the sale of the Sally Creek lands. Page's bills of costs, totalling $206,547.22, were not supported by any dockets. Page testified his dockets had been destroyed. In any event, the registrar found that most of the fees charged by Page related to matters for which he was not properly retained. These included the following:

> [H]is machinations in foisting an arbitration upon the Murphy Group; assisting the Rodgers Group in their efforts to expunge the Murphy claims; attending the arbitration when the inspectors had expressly told the Trustee that it and its counsel should stay out of the arbitration; assisting White to respond to the professional complaints, and billing the Estate for same; and generally conducting himself as if this was his own personal litigation file.

30 The registrar found that Page had been retained to represent the Estate in connection with the court approval of the sale of the Sally Creek property, the subsequent appeal, and to complete the sale. He allowed $20,000 for these services. He disallowed the remaining $186,547.22 of Page's bills of costs.

31 The registrar also disallowed several other disbursements. Although these disallowances are not being appealed, they are relevant to our considerations below and thus worth noting. He disallowed a bill for $27,729.61 for the legal services of Fraser Milner Casgrain in connection with defending the Trustee against professional complaints brought by the Murphy Group because it had not been approved by the inspectors and, had the Trustee not been untruthful in those proceedings, their outcome might have been different. The Trustee also submitted two bills of costs of William Meyer, the original estate solicitor, which had previously been taxed and paid. The registrar found that the Trustee had retained Mr. Meyer without proper authorization by the inspectors, and so allowed his fees only up to the date of the first meeting of creditors. Of the $103,517.47 claimed, the registrar allowed $20,832 as a disbursement to the Estate.

32 The Trustee also sought a reimbursement in the amount of $51,598.08. It was not clear to the registrar whether this was the arbitration fee, the costs of the Trustee and Page, or both. The registrar found that, regardless of the answer to this question, the amount was not a proper disbursement to the Estate. In addition, the registrar ordered the Trustee to reimburse the nonaligned creditors, who represented approximately 10 per cent of the claims, pro rata for any arbitration disbursement made from the Estate.

33 Having disallowed or reduced these disbursements, the registrar returned to the matter of the Trustee's fees and the question whether they should be further reduced because of his misconduct.

c. Reduction of Fees Due to Misconduct

34 The registrar reduced the Trustee's fees to $1 because of his misconduct, to protect the integrity of the insolvency system and to send "a clear message" to others "that this kind of conduct absolutely will not be tolerated by this Court". He itemized the Trustee's misconduct in the following paragraphs in his decision:

> 65 The Trustee, and White, have lied to regulatory bodies about the conduct of this Estate.
>
> 66 The Trustee has failed to follow the instructions of the inspectors by participating in, and permitting Page to participate in, the arbitration.
>
> 67 The Trustee has failed to properly convene and minute meetings of the inspectors. This is both a breach of its statutory duties, and has resulted in activities being carried out which were not, in fact, authorized.
>
> 68 The Trustee, having allowed the Murphy claims, then permitted or encouraged Page to expend time, and cost others time and money, in responding to or dealing with, attempts to coerce an arbitration.
>
> 69 The Trustee, in so doing, has permitted its good name and office to be attached to what can only be characterized as the waging of a vendetta against Murphy, or at the very least, a shallow and misguided attempt to run up professional fees in the file.
>
> 70 The Trustee, according to the evidence of White, has tried to shield its actions behind those of Page. White very often raised the fact of Page being senior counsel as his response to why certain things were done or not done in the administration of the Estate.
>
> 71 The Trustee embarked upon a course of action to sell the major, if not only, Estate asset, without inspector approval.
>
> 72 The Trustee purposely declined to put a motion to the inspectors, in August, 2003, to confirm the retainer of Page, as he knew or believed that they would, instead, terminate Page's relationship with the Estate.
>
> 73 The Trustee has allowed itself, through White, to become the pawn of a solicitor, and declined to exercise its own judgement, contrary to the letter and spirit of the BIA. For example, White testified that he did not rein in Page on the letter regarding the draft Disallowances. Neither did White explain why he permitted Page to keep the Estate involved in the determination of the Murphy claims, and not let the 135 motion run its course, as instructed by the inspectors.

74 The Trustee failed in its duty to properly invest the proceeds of the property sale, and then misled counsel as to when those proceeds were actually invested.

75 The Trustee failed to get in the Farm Show receipt, and permitted Page to keep it for years without accounting to the Estate for it.

76 The Trustee, according to the evidence of Murphy which I accept for the reasons above, threatened Murphy by telling him that he (White) was surprised that Murphy's solicitor had not taken Murphy aside and explained what happens to creditors who oppose trustees.

77 The Trustee, in purporting to charge the Estate for professional time, and legal costs to defend itself and White, has demonstrated a willingness to prefer its own interests over those of the creditors whom it is charged with protecting.

78 The Trustee has failed in its obligations by not properly checking the accounts of professionals rendered to the Estate. For example, the $8,000.00 error in the Page Bill of Costs.

79 The Trustee failed in its duty to provide sufficient information to the inspectors to do their jobs when he declined to advise them on the taxation process, or draft minutes of meetings in accordance with their wishes.

80 The Trustee failed in its duty to the creditors in failing to bring the appropriate motion or motions to Court if White truly felt that the inspectors were refusing to act properly, or were being merely the handmaidens of Murphy, to the detriment of the other creditors.

35 Citing Farley J.'s remark at page 9 of *Confederation Treasury Services Ltd. (Re)* (1995), 37 C.B.R. (3d) 237 (Ont. Ct. J. (Gen. Div.)) that "[t]he trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate," the registrar reduced the Trustee's fees to $1.

d. Costs of the SRD Hearing

36 The registrar decided that costs should be taxed on a solicitor and client basis and that the Trustee should not be indemnified from the estate for these costs. The registrar recognized that in so doing, he departed from the statutory presumptions set out in ss. 197(2) and (3) of the *BIA*.

37 In determining the scale of costs, the registrar considered that the Murphy Group had been overwhelmingly successful in its objection to the Trustee's SRD, and that, as a matter of policy, the participation of creditors in the insolvency process was to be encouraged. He reasoned that not allowing costs to the Murphy Group, and not allowing them on a solicitor and client scale, would "discourage creditors from performing their very necessary and proper role of trustee oversight in insolvency matters." He noted that the Murphy Group's action resulted in nearly $500,000 in additional funds being available for the estate to distribute, and that they had expended $200,000 of their own money on the hearing. In the registrar's view, no creditor would bring such a challenge and

benefit the estate in this way without the expectation of solicitor and client costs if successful. This view was based on the fact that creditors who attack the integrity of a Trustee and are unable to maintain their allegation face a serious risk of having solicitor and client costs awarded against them. Therefore, the registrar concluded that costs should be fixed on the solicitor and client scale.

38 Turning to the question of whether the Trustee should be reimbursed from the estate for the costs award made against him, the registrar began by observing that a trustee must act fairly and even-handedly, keeping in mind its role as an officer of the court and the duties it owes to all creditors, even those opposing it in the SRD hearing. In presenting its SRD for taxation, a trustee implicitly announces to the court and the creditors that it has reviewed its work and the amounts it seeks are proper and allowable.

39 Here, the Trustee had not provided proper dockets with descriptors of his work; had admitted to the missing Farm Show receivable only after several days of hearing; had claimed to have invested $2 million of proceeds from the sale of land for a year and only admitted that he had not after several days under cross-examination; had required the Murphy Group to call an expert from the Royal Bank to prove relevant interest rates; and had failed to fulfil undertakings from a pre-hearing conference to provide his staff's day timers to fill in the missing descriptors. These were but some examples of conduct that lengthened the hearing and increased the costs of the Murphy Group.

40 Importantly, the registrar went on to find that the Trustee's inappropriate conduct was directed against the Murphy Group specifically and was a continuation of the "scorched earth" approach it had taken to the administration of the estate. Observing that this misconduct went to "the heart of the administration of the estate", the registrar found that the Trustee should not be reimbursed for the costs awarded to the Murphy Group. He added the observation that, as the Murphy Group was the single largest creditor, "to indemnify the Trustee would be to do so, to the extent of some 81 per cent, with the Murphy Group's own money."

e. Summary

41 The Trustee claimed $240,000 in fees for its administration of the estate; the registrar allowed $1 in fees. Of the Trustee's claimed disbursements of $206,547.22 for Page's fees as estate solicitor, $103,517.47 for Meyer's fees as estate solicitor, and $27,729.61 for the services of Fraser Milner Casgrain in defending the Trustee against various professional complaints, the registrar allowed $20,000 for Page's bills of costs and $20,832 for Meyer's bills of costs, and disallowed Fraser Milner Casgrain's bill. This resulted in the Trustee not being reimbursed for $296,962.30 in legal fees that had been paid. The registrar's further order that the Trustee reimburse the creditors on a pro rata basis for the fees associated with the arbitration was not quantified.

42 When the registrar's award of $181,798.81 in costs against the Trustee is taken into account, the registrar's disposition of the SRD hearing left the Trustee with $1 in income and more than $478,761.11 in personal liabilities.

5. The Commercial Court Judge's Decision

43 Recognizing that the proceeding before her was an appeal and not a hearing *de novo*, the commercial court judge allowed the Trustee's appeal in large part.

a. Retainer of Estate Solicitors and Solicitors' Accounts

44 The commercial court judge reversed the majority of the registrar's disallowances, but upheld his decision to disallow the account of Fraser Milner Casgrain.

45 With respect to Page's bills of costs, she found that Page's bills of costs had been approved by the inspectors and taxed by the court prior to the SRD hearing, and that no appeal had been taken. (As will be noted below, not all of Page's bills of costs were approved by the inspectors before being taxed.) Relying on *Chastan Ventures Ltd. (Re)*, 2007 BCSC 975, she found that by disallowing these accounts, the registrar had essentially allowed the Murphy Group to appeal the taxation of the bills after the statutory limitation period and to a court without jurisdiction to vary them. Therefore, she allowed all the taxed bills of costs of Page in the amount of $206,547.22.

46 The commercial court judge reversed the registrar's decision on Meyer's bills of costs for similar reasons. In contrast, she agreed with the registrar that the Trustee had not obtained the inspectors' approval to retain Fraser Milner Casgrain to defend him before the various professional bodies and so disallowed its $27,729.61 bill. Her decisions regarding Meyer's bills and those of Fraser Milner Casgrain are not under appeal.

47 With respect to the costs of arbitration, the commercial court judge found that the arbitrator was entitled to make a costs award that was binding on the parties and that it was beyond the jurisdiction of the registrar to vary that award. The commercial court judge's decision to overturn the registrar's order that the Trustee reimburse the non-aligned creditors for the costs of the arbitration is not being appealed. However, we note that the appellants do argue that the commercial court judge erred by interfering with the registrar's finding that the Trustee's participation in the arbitration against the will of the inspectors was misconduct that should be taken into consideration in reducing the Trustee's fees.

b. Fees

48 The commercial court judge agreed with the registrar that $69.000 of the Trustee's claimed fees that were entirely unsupported by dockets and descriptions of work should be disallowed. The calculations the commercial court judge used indicate that she allowed the $23,200 in fees that the registrar had disallowed because of questionable dockets. She did not discuss the questionable dockets and gave no reason for her disagreement with the registrar.

49 The commercial court judge agreed with the registrar that the Trustee's fees for defending himself against the complaints filed with professional bodies by the Murphy Group should be disallowed because he had not obtained the inspectors' approval to incur such fees. She also upheld the registrar's finding that the Trustee's fees should be reduced by $51,539.15 for the loss to the estate stemming from his failures to earn interest by investing the proceeds from the sale of the Sally Creek lands and by $7,650[1] for his failure to collect the Farm Show receivable.

50 The commercial court judge's specific reductions to the Trustee's fees totaled $152,335.56 leaving claimed fees in the amount of $87,664.44.

c. Further Reduction Due To Misconduct

51 The commercial court judge then turned to the question of whether the Trustee's fees should be reduced further because of his misconduct. She found that the registrar supported his reduction of the Trustee's fees to $1 by making several findings of misconduct that were beyond his jurisdiction.

52 First, she stated that the Registrar's finding that the Trustee had lied to regulatory bodies could not stand. The regulatory bodies had investigated the Murphy Group's complaints including those of perjury and had found no wrongdoing. The Murphy Group could have applied for judicial review of the decisions of the regulatory bodies but chose not to. She found it was beyond the registrar's jurisdiction to make findings about what occurred in another forum and then to suggest that the regulatory bodies would have come to a different conclusion had they been given access to the same evidence that he had. On the same reasoning, the commercial court judge held that the registrar acted outside his statutory authority by finding that the Trustee breached his statutory duties by failing to properly convene meetings of the inspectors and to carry out their instructions.

53 The commercial court judge also disagreed with some of the registrar's findings of fact. She found that the registrar's finding that the Trustee had failed to properly control Page and had allowed him to "coerce" the Murphy Group into arbitration was unreasonable. She pointed out that the Murphy Group was represented throughout by counsel, and that the endorsement of Swinton J. dated September 29, 2003 noted that all parties were considering arbitration at that time. She added that even if the Trustee had failed to control counsel appropriately, participation in the arbitration did not cause any harm to the estate.

54 The commercial court judge pointed out that the registrar had already reduced the Trustee's fees by the amount of the losses to the estate caused by the Trustee's failure to properly invest the proceeds of the property sale and to collect the Farm Show receivable. Therefore, she held it was an error for him to rely on these failings as additional examples of the Trustee's misconduct that warranted a further reduction of his fees. She characterized this as "double counting".

55 Except for these specific matters, the commercial court judge agreed with the registrar that the Trustee had mismanaged the estate in significant ways and had engaged in conduct that was both unprofessional and sloppy. He had followed a pattern of failing to obtain proper instructions from the inspectors and failing to seek the direction of the court where he was unable to obtain such instructions from the inspectors. Looking at the circumstances in their totality, she observed that the Trustee "was clearly unable to manage appropriately the conflict between himself and counsel for the estate on the one hand, and the inspectors on the other." She added that the "conflict was exacerbated by the continued involvement of the Murphy Group's counsel in the background (and foreground) - a situation the Trustee seemed incapable of controlling."

56 However, the commercial court judge found the registrar had erred in principle by further reducing the Trustee's fees to $1. She noted that in no previous case had a Trustee's fees been reduced by more than 50 per cent and found that the registrar erred by departing from this "benchmark". As well, the registrar had imposed a punitive result and had failed to address what fair compensation would have been for the administration of the estate given that the Trustee sold the estate's major asset for over $7 million, and achieved a recovery of $0.69 on the dollar for the unsecured creditors.

57 The commercial court judge reasoned that since the Trustee's fees had already been reduced by $152,335.56, representing 63 per cent of the claimed fees, no further reduction was warranted. The commercial court judge found that a reduction of the Trustee's fees from $240,000 to $87,664.44 was more than ample to send the message that this kind of conduct would not be condoned by the court.

d. Costs of the Taxation

58 The commercial court judge set aside the award of solicitor client costs and replaced it with an award of party and party costs, which she found amounted to $141,718.75. Given the Murphy Group had achieved only mixed success at the SRD hearing, she awarded it only $90,000 in costs. She went on to hold that the registrar should not have made the Trustee personally liable for the costs award.

59 While the *BIA* gave the registrar discretion to determine costs, the exercise of that discretion should be informed by s. 131 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 and r. 57 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, to which the registrar did not refer.

60 She stated that the registrar's finding that the Murphy Group had a reasonable expectation of solicitor and client costs was "simply wrong in law". She recited the registrar's finding that neither side had "succeeded in coming even close to setting out the conduct of the Trustee which lengthened or exacerbated the SRD taxation hearing itself" and described that finding as sufficient to determine that solicitor and client costs were not warranted.

61 The commercial court judge noted that the registrar had accepted the Murphy Group's argument that the Trustee's conduct in the administration of the estate necessitated a 14 day hearing and that the Trustee should therefore bear the costs of that hearing. However, she did not accept that this was a finding of fact and did not accept it as a proper basis for imposing solicitor client costs.

62 She found that the registrar's inference that the Trustee's conduct in the hearing was a continuation of a "scorched earth" approach taken to the administration of the estate in general was unsupportable and criticized his reliance on various examples of misconduct in the administration of the estate to justify his order that the Trustee bear the costs personally. Noting that the Trustee had already suffered the consequences of his misconduct through various deductions to his fees, the commercial court judge found that the registrar was essentially punishing the Trustee a second time for the same misconduct. She set aside the registrar's order and replaced it with an order that the costs of the taxation be paid out of the estate.

e. Summary

63 The commercial court judge thus varied the registrar's award in the following ways. She fixed the Trustee's fees, taxed at $1 by the registrar, at $87,664.44. Page's bills of costs, which the registrar set at $20,000, she allowed in the full amount of $206,547.02. She allowed Meyer's bills of costs, which the registrar had allowed at $20,832, at $103,517.47. She did not disturb the registrar's disallowance of the $27,729.61 bill of Fraser Milner Casgrain for defending the Trustee before the various professional bodies. She overturned the registrar's costs award and replaced it with an award for party and party costs in the amount of $90,000 payable from the estate.

64 The commercial court judge's disposition left the Trustee with net income of $59,934.83 resulting from taxed fees in the amount of $87,664.44 and the disallowed $27,729.61 bill of Fraser Milner Casgrain that the Trustee had to pay personally.

65 Finally, the commercial court judge awarded the Trustee party and party costs of the appeal before her in the amount of $55,000 all inclusive.

ISSUES

66 The appellants raise four issues:

i. Whether the commercial court judge applied the correct standard of review;
ii. Whether the commercial court judge erred in allowing Page's fees;
iii. Whether the commercial court judge erred in varying the registrar's decision regarding the Trustee's fees;
iv. Whether the commercial court judge erred in varying the registrar's decision regarding costs;
v. Whether the Trustee is entitled to costs of the appeals before the Superior Court and this court; and
vi. Whether the Trustee is entitled to be reimbursed for his own legal costs before the Superior Court and this court.

ANALYSIS

1. Standard of Review

67 As this is the second level of appeal, two standards of review must be addressed. The first is the standard governing the commercial court judge's review of the registrar's decision. The second is the standard applicable to this court's review of the Superior Court decision.

68 The parties agreed before this court that the applicable standard that governs the commercial court judge's review of the registrar's decision is that set out by the Supreme Court in the case of *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235. All findings of fact by the registrar are deserving of deference unless he made a "palpable and overriding error". Questions of law and matters of principle are reviewed on the standard of correctness. The standard on mixed questions of fact and law lies along a spectrum. At one end, the palpable and overriding error standard applies to questions that primarily involve fact-finding or the making of factual inferences. At the other, where there is an error in characterizing or considering the proper legal standard to be applied, the standard is correctness.

69 It is worth noting that in *H.L. v. Canada (Attorney General),* [2005] 1 S.C.R. 401, at para. 56, the Supreme Court has made clear that the term "palpable and overriding" , though "elegant and expressive" was not intended to displace the earlier formulations of "unreasonableness", "clearly wrong", or "unsupported by the evidence".

70 Great deference must be accorded to the exercise of discretion, such as where the decision maker chooses from among a range of available alternatives. In order to interfere with a discretionary determination, the reviewing court must first find that "the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor, which led to a wrong conclusion": *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 79 O.R. (3d) 241 (C.A.), at para. 48. Where there has been such an error in the making of a discretionary decision, the reviewing court may exercise the discretion afresh.

71 In this case, the decision of the amount by which the Trustee's fees should be reduced because of misconduct is an exercise of discretion. While decisions of registrars are not subject to judicial review as they are decisions of the court, the appeal court should not lose sight of the fact that the *BIA*, in particular s. 192(1), grants registrars significant authority and broad discretion to apply their expertise in overseeing the bankruptcy process. As the commercial court judge noted at para. 80 of her reasons, "[c]learly, the Registrar's expertise in taxing trustees' fees is a significant factor, particularly taking into account the totality of the evidence."

72 On the further appeal to this court, the same standard of review applies though we must keep in mind that the decision under appeal is that of the commercial court judge and not that of the registrar. An error by the commercial court judge in adhering to the correct standard in reviewing the registrar's decision is an error of law. In our view, the commercial court judge committed such errors, as we explain in the sections below.

2. Disbursements for Estate Solicitor's Bills of Costs

73 The SRD included four accounts rendered by Page for work allegedly done for the estate. The first account covers the period from April 20, 2003 to October 24, 2003. It is in the amount of $120,813.38, primarily for work related to the first meetings of creditors and inspectors, including an opinion as to the validity of the Murphy Group claims, the sale of the Sally Creek lands and subsequent litigation at the Superior Court and this court. This bill was signed by all three inspectors and taxed on October 30, 2003. The second bill covers the period from October 24, 2003 to January 31, 2004 and was taxed on June 15, 2004. It is in the amount of $21,809.20 and includes entries for drafting a disallowance of the Murphy Group claim, preparing for hearings regarding the dispute between the Murphy and Rodgers Groups, and contesting a motion to exclude the Trustee from participating in the arbitration. The third bill, taxed in the amount of $57,000, covers the period from February 1, 2004 to December 1, 2004. This bill includes numerous entries related to the arbitration as well as the drafting of minutes and obtaining an order dispensing with inspector approval of bills of costs. Finally, the fourth bill, covering December 1, 2004 to May 3, 2005 is in the amount of $6,924.64 and is primarily concerned with amendments to the arbitration award and preparation for the Trustee's SRD hearing. The final three bills were taxed without the inspectors' approval. The Trustee obtained an order dispensing with this requirement on July 12, 2004. However, we note that the order was obtained nearly a month after the second bill of costs was taxed without inspector approval.

74 The registrar found that Page had been retained only for the limited purpose of completing the sale of the estate's real estate pursuant to the bid of the Sierra Group, including litigation and an appeal relating to that sale. Retaining Page for this was necessary because a conflict of interest prevented the estate's solicitor, William Meyer, from acting on the transaction and in the court proceedings regarding this bid. The registrar found, however, that Page had carried out a considerable amount of unauthorized work, had presented at least one account containing a significant arithmetic error, had destroyed all of his dockets despite the Trustee having been put on notice that they would be required and generally had acted with arrogance or greed in an attempt to run up his fees.

75 Given the difficulties the registrar had in segregating and valuing those portions of the work for which Page had been properly retained, the registrar relied on his experience in other taxations to estimate a reasonable and appropriate fee. As a result, he allowed only $20,000, inclusive of disbursements and GST, and disallowed the balance of Page's accounts.

76 On appeal, the commercial court judge found that the registrar had erred in law in reducing Page's accounts from the $206,547.22 claimed to $20,000. She indicated that Page's accounts had all been approved by the inspectors, taxed without condition by the court pursuant to s. 192(1)(i) of the *BIA* and paid by the Trustee. In her view, because of the inspector's approval and the taxation by the court, the registrar had no authority to disallow any portion of those accounts. By doing so, the registrar was, in effect, overturning an earlier court ruling pursuant to which the accounts had been found to be proper disbursements of the estate. In so holding, she referenced and relied on r. 22 of

the *Bankruptcy and Insolvency General Rules,* C.R.C., c. 368. This rule provides that a taxed bill of costs has the same effect as a judgment of the court and may be enforced in the same manner as a judgment.

77 In this court, the appellants submit that the commercial court judge erred in her interpretation of the *BIA*. The fact that a solicitor has taxed his account pursuant to s. 192(1)(i) and can then recover the amount taxed does not mean that a creditor of the estate is thereby prevented from objecting to the trustee's SRD as provided in s. 152(6) of the *BIA*. In this sense, the appellants argue that this court should not follow the decision of a registrar of the British Columbia Supreme Court in *Chastan Ventures*, wherein it was decided that a registrar taxing the trustee's SRD does not have jurisdiction to vary a bill of costs previously taxed.

78 The respondent submits that the commercial court judge was correct. Absent an appeal, once the account of a solicitor is taxed and allowed pursuant to s. 192(1)(i) of the BIA, the trustee is bound to pay the account and it cannot later be disallowed as a proper disbursement of the estate. The respondent further argues that, even if the registrar had the authority to disallow the account as a proper disbursement of the estate, he erred in doing so. In his analysis, the registrar gave little or no weight to the fact that at least one of the accounts had been approved by the inspectors and that all of the accounts had been taxed by the court. In these circumstances, he erred in reducing the accounts or, in the alternative, in reducing them to the extent that he did.

79 For the reasons that follow, we would set aside the commercial court judge's decision on this issue. We would find, contrary to the decision in *Chastan Ventures*, that a registrar taxing a trustee's SRD is not precluded from considering whether the bankrupt estate is required to pay a previously taxed solicitor's bill of costs. In our view, however, the reduction made by the registrar was excessive and we would set the appropriate amount of the Trustee's disbursements for the Page accounts at $100,000 in lieu of the $20,000 allowed by the Registrar.

a. The Proper Interpretation of s. 152 of the BIA

80 The first issue to be addressed is whether a registrar hearing an application for the taxation of a trustee's SRD that has been objected to pursuant to s. 152(6) has the authority to disallow a disbursement for a solicitor's account that has already been taxed by another registrar pursuant to s. 192(1)(i). The commercial court judge was of the view that the registrar did not have such authority. The issue does not, however, appear to have been raised before the registrar and it was not, therefore, addressed by him.

81 Section 30(1)(e) of the *BIA* provides that a trustee can retain counsel "to take any proceeding or do any business that may be sanctioned by the inspectors." Section 192(1)(i) provides that a registrar can tax or fix costs and pass accounts. The taxation of bills of costs for legal services is governed by rr. 18-25 of the *General Rules*. The registrar will only agree to tax a bill of costs if the trustee is represented or signs a declaration stating that the trustee has examined the bill, that the services were duly authorized and rendered, and that the charges were reasonable (r. 20). The registrar must then determine whether the services were duly rendered, accounted for and authorized and whether the charges are reasonable (r. 21). The taxation of a solicitor's bill of costs by a registrar may be appealed within 10 days (r. 25(1)). Once a bill is taxed, r. 22 of the *BIA* provides that the bill "has the same effect as a judgment of the court and may be enforced in the same manner as a judgment".

82 Section 152 sets out the procedure for the taxation of the trustee's SRD. The trustee first prepares a report and sends it to the inspectors. Once they have approved the report[2], it is sent to the Superintendent, who is given the opportunity to comment on it (ss. 152(3) and (4)). After it is taxed by a registrar, the trustee then sends a final notice to every creditor, the registrar, the Superintendent and the bankrupt (s. 152(5)). Those who wish to object must provide written notice of their intention to do so within 10 days (s. 152(6)). The s. 152 process, therefore, involves creditors and others who would not necessarily have been aware of or involved in the taxation of the solicitor's account pursuant to s. 192(1)(i) and rr. 18-25. Indeed, the s. 152 process will often be the creditors' first opportunity to challenge the trustee's disbursements: see Houlden, Morawetz and Sarra, *The 2009 Annotated Bankruptcy and Insolvency Act,* (Toronto: Thomson Carswell, 2009), at pp. 737.

83 It is apparent, therefore, that the taxation of a solicitor's bill of costs pursuant to s. 192(1)(i) and rr. 18-25 is separate and distinct from the taxation of the trustee's SRD pursuant to s. 152(6). Indeed, the two appear to form a two-step process. Section 192(1)(i) describes a process that will often not involve creditors. The registrar will generally rely on the trustee's assertion that the work being billed for was properly authorized and carried out. It follows, therefore, that as between the trustee and the solicitor the work set out in the account is determined to have been authorized and the amount properly charged.

84 In our view, however, the s. 192(1)(i) taxation is not determinative of the issue to be addressed when a trustee presents his SRD for approval pursuant to s. 152(6). The purpose of the SRD hearing is to determine whether the disbursements incurred by the trustee on behalf of the estate were proper and should be paid by the estate and, ultimately, the creditors. Section 152(6) therefore allows creditors the opportunity to challenge the trustee's disbursements and there is no language in that section that limits the types of disbursements that can be challenged. Thus, s. 152(6) allows creditors to challenge any disbursement, including taxed solicitors' accounts. A s. 152(6) challenge does not, as found by the commercial court judge, constitute a collateral attack on another registrar's finding under s. 192(1)(i). Insofar as these two processes create certain redundancies, such overlap is intended to provide appropriate scrutiny of the trustee's management of the estate.

85 This said, although the taxation of an account and the SRD hearing are distinct, the two processes are not totally unrelated. In our view, the two steps in the process should work in harmony so as to ensure that the interests of all affected parties are fairly considered while at the same time avoiding repetition and unnecessary expense.

86 By the time a solicitor's bill of costs is presented at an SRD hearing, it will normally have been scrutinized by both the court and the inspectors. When a solicitor's account has been taxed by the court, a registrar will have assessed the reasonableness of the account and, based on the representations of the trustee, determined that the work was approved and the amounts charged were reasonable. In addition, the inspectors will normally have approved the solicitor's retainer as well as approving of the solicitor's accounts in advance of their being paid. It is important to keep in mind the role of the inspectors in giving such approval. They represent the creditors throughout the administration of the estate and when they approve of disbursements they do so on behalf of the creditors. Thus, at an SRD hearing, there should be a presumption that a previously taxed bill of costs should be paid by the estate provided that the services covered by the bill had been authorized by the inspectors and the inspectors had approved the bill before taxation.

87 As a result, the scope of a s. 152(6) review of a disbursement for a taxed solicitor's account will, of necessity, be quite narrow. In essence, the court will decide whether there is reason to look

behind the trustee's approval, the inspectors' approval (if any), and the court's previous taxation of the account and whether, in the circumstances, the trustee should be prevented from claiming all or part of the account as a disbursement of the estate.

88 In our view, therefore, the commercial court judge erred when she concluded that the registrar did not have jurisdiction to vary the bills of costs because, pursuant to r. 22, once taxed they had the same effect as a court order and could be enforced as such. Once the bills of costs were taxed, the solicitor could recover them. In fact, by the time the SRD hearing took place before the registrar, Page's legal accounts had been taxed and paid out of the estate. The decision the registrar was called upon to make was not whether the solicitor would be permitted to collect but whether the Trustee would be able to claim the payments as disbursements of the estate.

89 Furthermore, given the registrar's findings of fact, this is one of those rare cases where he was entitled to look behind the approval of the Trustee and inspectors and the previous taxation of the court. As found by the registrar, much of the work carried out by Page was, to the knowledge of the Trustee, not authorized by the inspectors. In fact, some of the work was carried out in the face of express opposition by the inspectors. In this context, it was open to conclude that it was necessary to look behind the previous taxation of Page's bills of costs, as well as the approval of the Trustee and the inspectors as the s. 152(6) hearing was, in practical terms, the first opportunity creditors had to challenge the propriety of the Trustee's retainer of Page.

90 We would note that the Trustee was well aware of the need to justify having incurred these costs. In cross-examination the Trustee conceded that the taxation of Page's accounts pursuant to s. 192(1)(i) did not insulate these expenses from a challenge by creditors at a s. 152(6) hearing. This concession was correct and, no doubt, explains why the Trustee did not argue to the contrary before the registrar.

b. The Appropriate Adjustment to Page's Bills of Costs

91 Having concluded that it was within the registrar's jurisdiction to consider whether Page's bills of costs were proper disbursements despite having been taxed pursuant to s. 192(1)(i), we turn to the respondent's alternative argument, that the registrar erred in applying excessive reductions to the accounts. The commercial court judge did not address this argument as she rested her decision exclusively on her interpretation of ss. 192 and 152.

92 The registrar determined that a reduction of the Page accounts to $20,000 was appropriate. In reaching this conclusion, the registrar made no reference to the inspectors' approval of the first bill, the order dispensing with inspector approval of the other bills, or the fact that all of the bills had already been taxed. Nor did he address the effect, if any, of these factors on his decision to reduce or disallow the bills. In our view, the registrar ought to have addressed these questions.

93 Given that the bills were approved in different ways and that each contained descriptions of different tasks performed, the registrar ought to have considered each bill separately. The first bill was approved by all three inspectors and taxed by the court. The second bill was taxed, but never approved by the inspectors. The third and fourth bills were taxed without inspector approval pursuant to a court order dispensing with this requirement. We turn now to an examination of each.

i) <u>First Bill: Inspector Approval and Taxation</u>

94 The first of Page's bills was approved and signed by the inspectors prior to being submitted to the s. 192 taxation. Two issues need to be addressed: Whether the registrar could look behind the inspectors' approval and, if so, the appropriate adjustment, if any, to be made to the bill.

95 As noted earlier, inspector approval is required before a trustee can retain the services of a solicitor. The inspectors' approval of a retainer does not, however, give carte blanche to the trustee to involve the solicitor in any and all matters pertaining to the bankrupt estate. This is made clear by the wording of s. 30(1)(e) which authorizes the trustee to "employ a barrister or solicitor ... to take any proceedings or do any business that may be sanctioned by the inspectors." It is well established that where a trustee hires a solicitor or undertakes litigation without the approval of the inspectors, he can be held personally liable for the costs and may be prevented from being reimbursed from the estate: see *The 2009 Annotated Bankruptcy and Insolvency Act* at pp. 898 and 103-104. A solicitor's retainer is thus usually limited to providing the services that have been approved by the inspectors. If, as in the present case, the inspectors make it clear that they do not wish the solicitor to be involved in certain matters, the trustee will normally be expected to respect such limits. If he does not, he does so at his peril.

96 The appellants submit that the registrar's failure to specifically address inspector approval and the taxation of the bill in his reasons is of no moment. As noted by the appellants, the Trustee admitted in cross-examination that he did not instruct the inspectors on their rights and obligations with respect to such bills. As a result, in the appellants' view, the inspectors would not have understood that they could have refused to approve the bills if they were of the view that the accounts included unauthorized work. Thus, their approval is of little or no value.

97 The respondents argue that there is little in the record or reasons that would justify looking behind the inspectors' approval of the account. We disagree. Having concluded that the inspectors had not been properly instructed as to their roles and duties where some of the work covered by this account was not within the scope of the retainer approved by the inspectors and was contrary to the wishes of the inspectors, the registrar was entitled to look behind their approval. Because Page's dockets had been destroyed, the registrar was unable to breakdown the charges in the account into authorized and unauthorized work. He therefore relied on his experience and decided that $20,000 was a reasonable charge for the work carried out to complete the sale of the property. A detailed analysis was not possible due to the absence of dockets. Although there are entries for work that the registrar found was never authorized, on our review of the narrative of that account, the majority of the time billed for appears to have been spent on authorized tasks, including the sale of the Sally Creek lands and representing the estate in litigation related to that sale.

98 The fact that the account was taxed creates a presumption that the amount of time spent on given tasks and the amount charged for this time were reasonable. Nothing in the record suggests that they were not. Indeed, the registrar took no issue with these amounts, but rather based his reduction on his finding that many of the tasks had not been authorized. Accepting these amounts to be reasonable and considering that the bulk of the work detailed in the first bill of costs was approved, the registrar's reduction to all of the Page accounts from a total of $206,547.22 to $20,000 to account for unauthorized work was, in our view, unreasonable. In our view, the value of the authorized work should be set at $100,000 inclusive of disbursements and GST. The bulk of the authorized work was encompassed in the first bill and, as a result, we would adjust the first bill, taxed at $120,813.38, and allow $100,000 inclusive of disbursements and GST.

ii) Second Bill: Lack of Inspector Approval Before Taxation

99 As noted above, the second bill of costs was taxed on June 15, 2004 in the amount of $21,809. From the record, it appears that this bill was taxed without inspector approval and before the July 12, 2004 Superior Court order dispensing with this requirement. Given these facts, the registrar's finding that Page had a limited retainer, that most if not all of the work carried out by Page during the period covered by this account was contrary to the instructions of the inspectors, and that the accounts were unsupported by dockets, we see no basis to allow any amount for this bill. To the extent that a small portion of the work billed for in this account was approved, it has been included in the $100,000 we would allow for the first bill.

iii) The Third and Fourth Bills: Order Dispensing With Inspector Approval

100 The final two bills of costs were taxed without having been signed by the inspectors as the Trustee had applied for and obtained an order dispensing with the need for inspector approval. The Trustee was entitled to bring such a motion. However, the affidavit filed in support of the order dispensing with inspector approval stated only that the order was required because, after being presented with the second bill of costs, "the inspectors refused to approve the same and gave no reasons." While it is correct that the inspectors did not respond to the Trustee's request to approve the second bill of costs, the Trustee was aware that the inspectors opposed Page's involvement in the arbitration. The affidavit did not disclose that opposition to the court.

101 It would have been preferable for the registrar to address the fact that the accounts were taxed and that an order had been obtained dispensing with inspector approval. However, given the circumstances in which this order was obtained, the registrar's findings of fact with respect to most if not all of the work having been carried out without inspector approval, and the lack of dockets in support of these bills, the registrar was, in our view, entitled to look behind the findings of the previous taxation. Based on the record before him, the registrar was entitled to disallow these two bills in their entirety. To the extent that a small portion of the work in these bills was approved, it has been included in the $100,000 we would allow for the first bill.

iv) Issue Estoppel

102 In its submissions, the respondent directed the court to correspondence between the Murphy Group's solicitor and Page respecting the third and fourth bills of costs. In this correspondence the respondent submits that the appellants' solicitor, in effect, settled the amount of the last two bills of costs. As part of that settlement, Page reduced the amount of these two accounts by $25,056. In exchange, the Murphy Group agreed not to challenge the taxation of these accounts at the s. 192(1)(i) hearing. The respondent argues that, in light of this settlement, the appellants were _topped from challenging the appropriateness of these accounts at the s. 152(6) hearing.

103 We disagree. The settlement was between the Murphy Group and Page. It allowed Page to have the last two bills of costs taxed without opposition from the Murphy Group in exchange for providing an affidavit acknowledging that he and the Trustee were aware that Page's participation in the arbitration was directly contrary to the inspectors' instructions. The settlement was thus based on the Murphy Group's position that the Trustee had instructed Page to perform the work in question, but that the Trustee had acted contrary to the instructions of the inspectors in doing so. Although the Murphy Group was aware of the taxation and, in a sense, participated through their agreement with

Page, it was apparent to the parties that the Murphy Group would later be disputing the Trustee's authorization and considered the SRD hearing the appropriate forum to do so. In these circumstances, we see no conflict between this settlement, which allowed Page to have his bills of costs taxed, and the Murphy Group's later challenge to these same fees at the SRD hearing, which sought to prevent the Trustee from claiming them as a proper disbursement of the estate.

3. Estate Trustee's Fees

104 The commercial court judge varied the registrar's award regarding fees in two significant respects. First, she did not deduct the $23,200 in "questionable" dockets that the registrar disallowed. Second, she overturned the registrar's decision to make a further reduction in the Trustee's fees to $1. We address each in turn.

a. Questionable Dockets

105 As noted, the registrar deducted $23,200 from the Trustee's claimed fees because of questionable dockets. He explained that the questionable dockets contained duplication and otherwise claimed for work which ought not to be compensated. He cited as an example the Trustee's claim to have spent 22 hours to put together a four page tender document from precedents. He found that the Trustee had failed to provide direct evidence to support any of the claimed work, and indicated his inclination to disallow them entirely. However, the Murphy Group requested that only $23,200 be disallowed as "it is clear that some work was done".

106 The registrar's finding that $23,200 of the Trustee's claimed fees were based on "questionable dockets" was largely one of fact. The commercial court judge could not interfere with the disallowance of these fees without first finding that he had erred in making that finding of fact. However, she gave no reason for refusing to accept the registrar's disallowance of this amount. The registrar's disallowance of $23,200 for fees based on "questionable dockets" must be restored.

107 This results in a net balance of claimed fees of $64,464.44 rather than the $87,664.44 used by the commercial court judge in her calculations.

b. Reduction of the Trustee's Fees to $1

108 The commercial court judge recognized that the registrar's decision to reduce the Trustee's fees for misconduct in the exercise of his statutory powers was a discretionary decision. She found that the registrar committed errors of principle in exercising that discretion. Specifically, she found that the registrar had departed from a 50 per cent benchmark established by jurisprudence, that he had taken a punitive approach to the reductions, that he made factual determinations beyond his jurisdiction, that he mischaracterized the Murphy Group's participation in the arbitration and that he had "double counted" reductions already factored into the Trustee's fees.

109 We agree that the registrar committed certain errors of principle that entitled the commercial court judge to vary his decision. However, we conclude also that the commercial court judge herself committed errors of principle that affected her calculation of the appropriate fees.

i) Factors to be Considered

110 Before analyzing the decisions below, we note that the general principles to be considered in determining a trustee's fees were described by Henry J. in *Hess (Re)* (1997), 23 C.B.R. (N.S.) 77 (Ont. S.C.), and recapitulated by Lax J. in *Nelson (Re)* (2006), 24 C.B.R. (5th) 40 (Ont S.C.), at para. 21 as follows:

a) to allow the trustee a fair compensation for his services;
b) to prevent unjustifiable payments for fees to the detriment of the estate and the creditors; and
c) to encourage, rather than to discourage, efficient, conscientious administration of the bankrupt estate for the benefit of the creditors and, so far as the public is concerned, in the interests of the proper carrying out of the principles and objectives of the [*BIA*].

111 We read this passage together with s. 152 of the *BIA* as allowing the registrar a wide discretion to set the appropriate amount of a trustee's fees. There is no dispute that this includes the authority to reduce a trustee's fees for specific acts of misconduct that have cost the estate quantifiable amounts. This ensures that the trustee will not receive "unjustifiable payments for fees to the detriment of the estate and the creditors." In our view, it is also within the jurisdiction of the registrar to reduce a trustee's fees further in appropriate cases. This further reduction of a trustee's fees advances the third principle set out in *Nelson*.

112 Although consideration of the public interest in the proper carrying out of the principles and objectives of the *BIA* is a valid objective of such reductions, it is not the role of the registrar to punish trustees for misconduct. Rather, the reduction is made in recognition of the fact that, through his misconduct, the trustee has not acted in a way that merits collection of his fees in their full amount. In such situations, for the court to allow the trustee his fees in their entirety would be to endorse his conduct. A further reduction also helps uphold the principles and objectives of the *BIA* by expressing the court's displeasure with the conduct in question: see *Nelson* at para. 23.

v) The 50 per cent Benchmark

113 The commercial court judge erred in ruling that the cases establish a "benchmark" of 50 per cent as the upper limit by which a trustee's fees can be reduced. It is true that in the few previous cases on point the trustee's fees have not been reduced by more than half because of misconduct and mismanagement. However, bankrupt estates differ widely in size and complexity and the range of potential trustee misconduct is simply too wide to make the adoption of such a rigid standard sensible. The size of the estates and the quantum of trustee fees in the previous cases were much smaller. A 50 per cent reduction in fees in a small estate may not amount to much, but in a large estate its financial impact will be greater.

114 Rather than introducing a benchmark, we consider it sufficient to keep in mind the three established general principles guiding the fixing of a trustee's fees described in *Hess* and *Nelson*.

vi) Punitive Sanction

115 We agree with the commercial court judge that the registrar lapsed into a punitive approach. For example, his reference to the criminal law concepts of "the elements of both specific deterrence and general deterrence" suggests that the registrar viewed this further reduction in fees as being akin to a criminal sanction. Combined with the extreme nature of the reduction, this suggests that his aim was punitive and not geared toward a balancing of the factors outlined in *Nelson*. Although the reference to the public's interest in the principles and objectives of the *BIA* is quite similar to criminal concepts of deterrence and denunciation, the analysis is nonetheless distinct in that its primary goal is to ensure just and adequate compensation for the work done by the Trustee.

vii) The Registrar's Jurisdiction and Collateral Attacks

116 We do not agree that the registrar exceeded his jurisdiction by revisiting questions that had already been determined by professional regulatory bodies acting on the Murphy Group's complaints. In ruling as she did, the commercial court judge appears to have had in mind the principle that it is an abuse of process to re-litigate an issue already determined in another forum. The principle, however, has exceptions as Arbour J. explained in *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77. At para. 52 of her reasons, Arbour J. set out three instances where re-litigation is permissible because it enhances rather than detracts from the integrity of the judicial system. These are:

i. when the first proceeding is tainted by fraud or dishonesty;
ii. when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or
iii. when fairness dictates that the original result should not be binding in the new context.

117 The registrar found that the earlier findings of the professional bodies had been obtained by dishonesty and that the Trustee had contradicted his statements to those bodies in his testimony at the SRD hearing. Therefore, he was not bound by the findings made by the professional bodies and it was open to him to reach different conclusions on the different evidence that was before him. The commercial court judge could not therefore interfere with the registrar's conclusions without first finding that he had erred in concluding that the Trustee had lied to the professional regulatory bodies. She did not make such a finding and so erred by setting aside the registrar's conclusions.

viii) Coercion of the Murphy Group

118 We disagree with the commercial court judge's conclusion that the Trustee's coercion of the Murphy Group into arbitration and his participation in the arbitration should not be viewed as misconduct. That conclusion was based principally on the fact that the Murphy Group had counsel throughout and the arbitrator had ruled that the Trustee should participate in the arbitration. The record clearly supports the registrar's finding that the Trustee abused his statutory authority by allowing Page to threaten to disallow the Murphy Group's claims despite believing them to be valid and, in fact, having already approved them. The threat was an admitted tactical ploy to persuade the Murphy group to agree to arbitration. It is reasonable to assume that legal counsel ensured that the Murphy Group appreciated it would bear the burden of proof if the threat was carried out. The registrar found, and the record establishes, that the Trustee and his counsel were intent on participating in the arbitration from the outset; that they did so with full knowledge that they were proceeding against the wishes of the inspectors; that they executed the arbitration agreement; that they opposed the motion of the Murphy Group that the Trustee not participate; that "Page was successful in obtaining a ruling" that he participate; and that Page's participation far exceeded the scope of what was required by the arbitrator's ruling. The commercial court judge had no basis for overturning the registrar's findings of fact on this issue.

ix) Double Counting

119 We do agree with the commercial court judge that the registrar erred by "double counting" certain instances of misconduct of the Trustee. The clearest examples of this are the Trustee's failure

to properly invest the sale proceeds and his failure to collect the Farm Show receivable. The registrar reduced the Trustee's fees by the amounts lost to the Estate as a result of these failings and then cited them as examples of misconduct that warranted further reduction of his fees.

120 In any event, double counting and the commercial court judge's other criticisms of the findings of misconduct by the registrar are not of great consequence in this case. In the final analysis, the commercial court judge did conclude that "the Registrar quite properly made sufficient other findings of misconduct on the part of the Trustee to justify reducing the Trustee's fees on account of these failings". An example of serious additional misconduct found by the registrar is that the Trustee had threatened Murphy by telling him that he was surprised that his solicitor had not taken him aside and explained what happens to creditors who oppose trustees. This misconduct did not result in quantifiable detriment to the estate, but strikes at the core of the credibility and integrity of the bankruptcy process. The commercial court judge was correct to find that the registrar had made sufficient other findings of misconduct to justify reducing the Trustee's fees further.

121 Although she concluded that the registrar had made such findings, the commercial court judge made no further reduction. After so concluding, it was not open to her to conclude that the registrar erred in making further reductions for this additional misconduct.

x) Appropriate Further Reduction

122 Given that both the registrar and the commercial court judge committed errors in principle, it falls to us to determine the amount of the further reduction.

123 Determining fair compensation for the Trustee's services must surely begin with the quantum of fees legitimately claimed. On the findings of the registrar, $69,000 and $23,200 of the Trustee's claimed fees were either entirely unsupported or inadequately supported by dockets. These amounts should not be regarded as representing legitimate fees in the subsequent calculations. Hence, the starting point for measuring the impact of the specific reductions made to the Trustee's fees, the amount of fees legitimately recorded, is $147,800, not the figure of $240,000 used by the commercial court judge.

124 We note, as the commercial court judge pointed out, that the Trustee did complete the administration of the estate, successfully selling the estate's major asset and achieving a significant recovery for the unsecured creditors. Additional fees would have been properly incurred had the Trustee taken the steps suggested by the registrar, such as applying to the court to proceed without the inspectors' approval or having the dispute between the Murphy and Rodgers Groups determined under s. 135(5) of the *BIA*. The fees that would have been earned for the proper administration of this estate with its warring creditors are an important factor in determining the Trustee's fees.

125 In preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that has cost the estate quantifiable amounts. The specific reductions to the Trustee's fees for particular instances of misconduct total $83,335.56, leaving the Trustee with a net claim for fees of $64,464.44 to which the further reduction must be applied. In considering a further reduction, the court should bear in mind the disbursements properly disallowed, for which the Trustee will be personally responsible. These total $134,276.63.

126 A pivotal factor to consider in applying a further reduction in this case is the degree and extent of the Trustee's misconduct as described by the registrar, and the harm he caused to the Estate, the Murphy Group, and the integrity of the bankruptcy process in general.

127 Finally, we keep in mind that the discretion to reduce fees is that of the registrar and we attempt to reflect the decision he would have made had he acted on the proper principles. He considered that a reduction was required.

128 We would make a further reduction of $15,000 and fix the Trustee's fees in the amount of $49,464.44. This reduction is a considerable amount of money from any perspective and a heavy burden on this Trustee, who is already encumbered by disbursements for which he is quite rightly not being reimbursed. In the circumstances of this case, a reduction of $15,000 ensures that the Trustee will not be compensated for his misconduct, upholds the principles of the bankruptcy system, and communicates the court's displeasure with his actions while recognizing that an estate of substantial value was administered.

4. Costs of the SRD Hearing

129 The appellants submit that the commercial court judge erred in setting aside the registrar's award of solicitor and client costs against the Trustee personally. This raises two issues: whether the Trustee ought to be entitled to recover costs from the estate and the appropriate scale of such costs.

a. Reimbursement from the Estate

130 The registrar determined that the Trustee should not be able to recover the costs awarded to the appellants from the estate. He referenced certain conduct by the Trustee throughout the course of the hearing which, in his view, was inappropriate given the Trustee's role as an officer of the court and which lengthened the proceeding. In so doing, he referred to the Trustee's "scorched earth" approach and made the following finding:

> [T]he Trustee brought such an approach to bear at the taxation hearing in the misguided belief that it would be safeguarded from any direct costs for such an approach, and that cannot be countenanced. I find that the evidence to support my inference of misconduct in the conducting of the taxation hearing by the Trustee may be found in a recollection of the attempts made by [the Trustee] on his cross-examination to avoid admission of even the most painfully obvious truths about insolvency and estate administration. Those alone increased the costs of the hearing, and are indicative of a darker agendum of the Trustee in respect of [the appellants].

131 The registrar went on to find that it "would be manifestly unfair to saddle any creditors with the costs incurred in this matter by the objecting creditors. Given the fact that the [appellants are] the single largest creditor, to indemnify the Trustee would be to do so, to the extent of some 81 per cent, with [the appellants'] own money."

132 The commercial court judge set aside the registrar's decision on this issue on the basis that the inference drawn by the registrar to the effect that the Trustee employed a "scorched earth" approach at the SRD hearing was not available on the record before him. In her view, the registrar was, in effect, re-punishing the Trustee for his handling of the estate. She saw no reason to depart from the presumptive statutory right of the Trustee to be indemnified out of the estate.

133 The respondent submits that the commercial court judge was correct and that the registrar was in fact re-punishing the Trustee. Further, the statutory presumption of indemnification should only be displaced when the Trustee is guilty of misconduct in bringing the proceeding itself. In the

present case, the Trustee could not be faulted for being involved in the SRD hearing as he was required, by statute, to bring his accounts before the court for approval.

134 The appellants submit that the registrar took note of the statutory presumption and recognized that he ought not to punish the Trustee twice for the same misconduct. In the appellants' submission, the commercial court judge erred in overturning the registrar. There was ample basis for the registrar's finding that the Trustee adopted a "scorched earth" policy at the SRD hearing. In addition, having found that the Trustee had failed in its duty as an officer of the court and extended the length of the SRD hearing by his conduct, the registrar was justified in exercising his discretion to order that the Trustee not be indemnified by the estate for the costs awarded against him.

135 In our view, the registrar's inference that the Trustee employed a scorched earth approach at the SRD hearing was available on this record and ought not to have been set aside as "unsupportable" by the commercial court judge. Further, the registrar was alive to the danger of re-punishing the Trustee for his handling of the estate. As we read his reasons, the registrar's decision is based on two different but related factors.

136 First, the registrar determined that the Trustee's inappropriate conduct was "directed at or against" the appellants and that this "same mindset was present in the trustee's approach to the hearing". The Trustee acted in this way in the belief and expectation that the Murphy Group, principal beneficiaries of the estate, would ultimately bear the costs. A review of the Trustee's conduct at the hearing and a reading of the transcript of the SRD hearing provide ample support for the registrar's finding in this regard.

137 Second, the conduct of the Trustee at the hearing was far removed from his obligation, as an officer of the court, to make full and frank disclosure. At the hearing, he sought recovery of costs and fees that he knew had not been properly incurred and his unjustified denials at the hearing only served to lengthen the proceeding and increase the costs.

138 We acknowledge that proceedings where the trustee is made personally liable for the payment of costs are rare and usually involve the bringing of unnecessary proceedings or bringing proceedings without authority: see *Revere Electric Inc. (Re)* (1993), 13 O.R. (3d) 637 (Ont. Ct. J. (Gen. Div.)) and *Greenstreet Management Inc. (Re)*, (2008) 41 C.B.R. (5th) 86 (Ont. S.C.). This stands to reason. In bringing necessary proceedings, the Trustee is simply carrying out his statutory duties and defending the interests of the estate. He should not therefore be held personally liable for costs, unless it is found that those proceedings were in fact contrary to the interests of the estate.

139 In an SRD hearing, however, the trustee is in a peculiar position. The proceeding is required by statute but, to some extent, the trustee is advancing his own financial interests and not those of the estate. It can be, in some cases or with respect to some issues, an adversarial hearing between one or more creditors and the trustee. A consideration of whether to reimburse a trustee for the costs of such a hearing must take into account this dual nature of the SRD hearing. A trustee must not be punished for simply carrying out a statutory duty, but in carrying out this duty he is still bound by his duty to the court and must not be permitted to use such a proceeding to advance his own interests at the cost of the estate and, ultimately, the creditors who oppose him.

140 Although we conclude that the registrar's findings were supported in the record, the registrar ought, in our view, to have given appropriate weight to the fact that the hearing was mandated by the *BIA*. The *BIA* required that the Trustee prepare and submit an SRD and, when challenged, appear at the hearing to justify the disbursements and his fees.

141 In a sense, the costs arising from the SRD hearing in this case can be viewed as falling into one of two categories. One category includes the costs that would of necessity arise from the hearing as mandated by the statute. The second category includes costs that arise from the part of the proceeding that the registrar found was unnecessary and improperly pursued by the Trustee in breach of his duty to the court, wherein the Trustee sought recovery of inappropriate fees and disbursements and acted in furtherance of his "scorched earth policy" against the appellants. Viewing the costs associated with the hearing in this way, the appropriate disposition is to permit the Trustee to be indemnified for the portion of the costs which arose out of necessity, but deny reimbursement for those costs incurred as a result of what the registrar termed the Trustee's "scorched earth policy" in pursuit of his own interests. In our view, such an approach will only be appropriate in exceptional cases. Indeed, it will be both unnecessary and undesirable for registrars to attempt to parse out the costs of SRD hearings in this way in all but the most extreme cases. In the present case, however, the findings of misconduct by the Trustee are such that it would be unfair to the creditors to have to indemnify the Trustee for the whole of the costs award.

142 How then should we determine the portion of the costs award made against the Trustee to be paid by the estate? This was a substantial estate and an SRD hearing would necessarily take time. It is impossible to determine this figure with precision. From our review of the proceedings it is fair to say that a substantial part of the hearing dealt with issues addressed in the normal course of an SRD hearing. As well, there was, to some extent, time taken up by the appellants during cross-examination pursuing issues on which they were unsuccessful and repeatedly returning to lines of questioning in a manner that reflected the obvious animosity of the appellants toward the Trustee and Page. Taking this as well as the findings of the registrar into account, we are of the view that 50 per cent of the costs of the SRD hearing can fairly be attributed to trustee misconduct. The other 50 per cent we would attribute to what we would term the statutorily provided component of the hearing. As a result, we would limit the Trustee's recovery from the estate of costs awarded against him to this latter 50 per cent.

b. The Scale of Costs

143 The registrar awarded the appellants solicitor and client costs fixed in the amount of $181,789.81. On appeal, the commercial court judge set aside the award, substituting an award of party and party costs for a portion of the proceeding fixed at $90,000.

144 The appellants submit that the commercial court judge should not have interfered with the scale of costs. Discretionary cost awards ought not to be lightly interfered with and, in their view, there was ample basis for the award in this case. The registrar found that the Trustee had lied, had misled the court and had failed to fulfill his duties as a trustee. Further, the conduct of the Trustee both before and during the SRD hearing increased the cost and length of the proceeding.

145 The appellants argue that, as an officer of the court, the Trustee has an absolute duty to make full and frank disclosure of what occurred in the administration of the estate. He clearly did not do so, preferring to claim inappropriate amounts, prevaricate in his testimony, lie and mislead the court. As a result, an award of solicitor and client costs was warranted.

146 The appellants also submit that the registrar was correct in finding that awarding solicitor and client costs advances an important policy goal, that of encouraging creditor participation in the bankruptcy. As the registrar noted, had the appellants' allegations concerning trustee misconduct not been proven, the appellants may well have had to pay solicitor and client costs. In these circum-

stances, the reasonable expectation of both parties should be that, if the allegations are proven, the appellants would receive solicitor and client costs just as they would be required to pay such costs if they were unable to substantiate the allegations made.

147 The respondent submits that the commercial court judge was correct in setting aside the award. As found by the commercial court judge, the registrar erred in his analysis of the costs issue. He made no reference to the *Courts of Justice Act*, the *Rules of Civil Procedure* and the well-established case law respecting the award of solicitor and client costs. Nor did the registrar consider the established principle that solicitor and client costs ought to be awarded only where there has been "reprehensible, scandalous or outrageous conduct": see *Young v. Young*, [1993] 4 S.C.R. 3. Further, the respondent argues that s. 197(2) of the *BIA* creates a statutory presumption that costs will be on a party and party scale. Nothing in the conduct of the Trustee warrants displacing this statutory presumption.

148 We agree, in part, with the appellant. We note that s. 197 of the *BIA* grants a very broad discretion on the court to award costs. Section 197(1) states that, subject to the *BIA* and the *General Rules*, "the costs of and incidental to any proceedings in court under this Act are in the discretion of the court." Subsections (2) and (3) create presumptions for party and party costs to be paid from the estate unless the court orders otherwise. In our view, this wide discretion allows the court to balance the myriad factors and diverse interests at play in bankruptcy proceedings.

149 We agree with the respondents that, in exercising this discretion, registrars and courts have often been guided by the *Rules of Civil Procedure*, the *Courts of Justice Act* and the case law flowing from them. Rule 3 of the *General Rules* states: "In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules." Provincial rules of procedure thus perform a gap filling function in the interpretation and application of the *General Rules*. With respect to costs, reference to the *Rules of Civil Procedure* has been made in determining whether an appellant should post security for costs of an appeal (*Towers Marts & Properties Ltd. (Re)*, [1968] 1 O.R. 605 (S.C.)) and the effect of an offer to settle on a costs award (*Baltman v. Coopers & Lybrand Ltd.* (1997), 47 C.B.R. (3d) 121 (Ont. Ct. J. (Gen. Div.)).

150 In the present case, although reference to the *Rules of Civil Procedure* or *Courts of Justice Act* may have been helpful, the Supreme Court's clear direction in *Young v. Young* governs. As noted above, this case held that solicitor and client costs are to be awarded only in the rarest of occasions. Although not decided in the bankruptcy context, that case laid out broad principles that we would apply to the present case.

151 In our view, the registrar's findings of misconduct by the Trustee were sufficient to meet the threshold established in *Young v. Young*. As noted, although the SRD hearing was, in essence, a dispute over money between the principal creditor and the Trustee, this does not diminish the duties that the court and the estate's creditors were owed by the Trustee, nor the high standards of conduct that both were entitled to expect of him. The registrar's findings with respect to the Trustee's conduct were very critical. These findings, and the registrar's exercise of discretion with respect to costs, were entitled to deference by the commercial court judge. His finding that, given his conduct, the Trustee ought to pay solicitor and client costs should not have been interfered with.

152 In making his costs award and deciding not to allow the Trustee to be indemnified, the registrar noted the injustice of awarding solicitor and client costs against the Trustee, only to have

those costs reimbursed to him from the estate. To do so would, ultimately, sanction only creditors other than the Murphy Group for the Trustee's conduct and would see the Murphy Group, as the major creditors, funding the bulk of the Trustee's costs out of its share of the estate. On the other hand, half of the expenses incurred at the hearing were necessary and would have been paid from the estate in the normal course. In order to balance these factors, we find that the 50 per cent of the costs to be paid by the Trustee are to be calculated on a solicitor and client basis, whereas the 50 per cent of the costs for which he is to be reimbursed are to be calculated on a party and party basis.

153 In reaching this conclusion we have considered the registrar's comment that the policy consideration of encouraging creditor participation in bankruptcy proceedings justifies the award of costs on a solicitor and client scale. Assuming without deciding that this could potentially be a valid reason to award costs on a solicitor and client scale, we do not believe that this consideration applies in a case such as this one. Given the Murphy Group's financial interests in the estate, they had ample incentive to oppose the Trustee at the SRD hearing. As the registrar noted, this opposition resulted in a net benefit to the estate which ultimately benefitted the Murphy Group as the major creditor.

154 The registrar calculated solicitor and client costs at $181,789.81. The commercial court judge calculated party and party costs at $141,718.75. We would therefore award the Murphy Group $90,894.91 in costs for which the Trustee will not be reimbursed from the estate, and $70,859.38 in costs for which the Trustee will be reimbursed from the estate. The end result is that the Murphy Group is awarded a total of $161,754.29, a substantial amount that reflects their success at the SRD, holds the Trustee accountable for his behavior at that hearing, and ensures that the estate will pay only those costs that would normally be associated with an SRD hearing.

155 We would reiterate that this admittedly unusual costs disposition is a product of the unusual facts of this case. The vast majority of cost awards arising from SRD hearings have and will continue to follow the statutory presumptions of party and party costs paid from the estate. However, the facts of this case dictate the need for a unique solution that balances the need to reimburse the Murphy Group, sanction the Trustee's conduct at the hearing, and protect the non-aligned creditors.

5. Costs before the Superior Court and the Court of Appeal

156 The commercial court judge awarded costs of the hearing before her to the respondent fixed in the amount of $55,000. The appellants submit that this award should be reversed and, in addition, the respondent should be denied indemnification from the Estate.

157 In our view, it can reasonably be said that the end result of the appeals before the commercial court judge and this court is a divided success. Although we have varied several findings of the commercial court judge, at the end of the day the Trustee is nonetheless in a better position than he had been after the registrar's decision at the SRD hearing. On balance, the result of the two appeals considered together is a mix of success for each party. In these circumstances we consider it appropriate that the parties bear their own costs in both proceedings. The costs award of the commercial court judge of $60,000 to the Trustee is set aside and there shall be no costs awarded to either party for this appeal.

6. Reimbursement of the Trustee's Legal Costs From the Estate

158 The commercial court judge's order awarding the Trustee $55,000 in costs against the Murphy Group provided that the Trustee be allowed to recover the balance of his costs from the Estate. The Trustee submits that the presumption that he is entitled to recover his costs of the appeal to the Superior Court and this court from the estate should be applied. The Murphy Group, however, submits that the Trustee should not be entitled to recover his costs from the estate as it would, despite our order that neither the Trustee nor the Murphy Group receive costs, mean that the Murphy Group as principal creditors of the estate will effectively pay approximately 80 per cent of those costs.

159 In our view, the reasoning that led the court to require the Trustee to pay 50 per cent of the Murphy Group's costs personally applies to the recovery of his own costs from the Estate. Considering the registrar's findings of misconduct and our decision to award neither party costs, it is appropriate, in our view, that some of the costs incurred by the Trustee not be recovered from the estate. To do otherwise would be to penalize the creditors for the Trustee's misconduct.

160 As to the portion that can be recovered, one might argue that, but for the misconduct, there would have been no appeals. This, however, must be balanced by the fact that the Trustee was fully entitled to bring the appeals and, as noted earlier, the Trustee has, in some respects, been successful. As a result, we would apply the same 50 per cent measure and would allow the Trustee to recover from the estate 50 per cent of the costs he incurred before the Superior Court and this court.

CONCLUSION

161 In conclusion, we would vary the commercial court judge's order to provide that:

(a) the Trustee's remuneration for the administration of the estate be fixed at $49,464.44;
(b) the appropriate disbursements to be attributed to the estate in respect of the legal accounts of Page, Arnold be fixed at $100,000, inclusive of disbursements and GST;
(c) the appellants receive one half of their party and party costs before the registrar, fixed at $70,859.38, to be paid from the estate;
(d) the appellants receive one half of their solicitor and client costs before the registrar, fixed at $90,894.91, to be paid by the Trustee personally;
(e) there be no order as to costs for the proceeding before the Superior Court or this court; and
(f) the respondent to be entitled to reimbursement from the estate of 50 per cent of his costs for the proceedings before the Superior Court and this court.

R.G. JURIANSZ J.A.
P.S. ROULEAU J.A.
D.R. O'CONNOR A.C.J.O.:-- I agree.

cp/e/qllxr/qlpxm/qljyw/qlhcs

1 As noted above, the commercial court judge, like the registrar, used the $7650 figure. However, we will proceed on the assumption that this was an oversight and use the figure of $8,136.41.

2 We would note that in the present case, the Trustee did not obtain inspector approval of the SRD, but rather included a comment that, "[t]he Inspectors, all of whom were nominated by a creditor at the first meeting of creditors have declined to either approve or disapprove of this Statement of Receipts and Disbursements stating that they were uncertain as to whether the fees of the Trustee and the counsel representing him with respect to the various complaints should be borne by the Bankrupt Estate ..."