

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS  
AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE,  
R.R.O. 1990, REG. 194, AS AMENDED**

**AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF  
ADELAIDE STREET LOFTS INC.**

**FACTUM OF REPRESENTATIVE COUNSEL**

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Court-appointed Representative Counsel

TO: SERVICE LIST

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**FACTUM OF REPRESENTATIVE COUNSEL**

**PART I - INTRODUCTION<sup>1</sup>**

1. Representative Counsel files this factum in support of the proposed Honorarium<sup>2</sup> that it seeks to pay to the members of the Official Committee under the proposed Missing Investor Settlement Funds Payment Plan.<sup>3</sup>

2. Representative Counsel is also seeking the approval of the Missing Investor Final Distribution Funds Plan, a proposed contingency plan to account for any potential Remaining Investors that may not cash their Final Distribution cheques and may be unaccounted for at a later date (defined as the Missing Final Distribution Investors in the Ninth Report).<sup>4</sup> To the extent that this contingency comes to fruition and there are unclaimed funds within the Final Distribution,

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<sup>1</sup> All capitalized terms not otherwise defined herein shall have the same meaning prescribed to them in the Ninth Report of Representative Counsel dated March 29, 2022 (the “**Ninth Report**”), filed in connection with this motion.

<sup>2</sup> Full details on the proposed Honorarium are set out in paragraphs 149 to 154 of the Ninth Report.

<sup>3</sup> Full details on the proposed Missing Investor Settlement Funds Payment Plan are set out in paragraphs 123 to 129 of the Ninth Report.

<sup>4</sup> Full details on the proposed Missing Final Distribution Funds Plan is set out in paragraphs 166 to 174 of the Ninth Report.

Representative Counsel recommends that a Subsequent Honorarium be paid to the members of the Official Committee under the Missing Investor Final Distribution Funds Plan.

3. The basis for the proposed Honorarium (payable to the Official Committee if approved by the Court on this motion) and the Subsequent Honorarium (only payable to the Official Committee at a later date if the proposed Missing Investor Final Distribution Funds Plan becomes necessary) is that Representative Counsel believes that to the extent there is any money unclaimed for under the Distribution Plan, same ought to be delivered to the members of the Official Committee in equal parts to recognize their hard work and devotion to a just outcome in these proceedings and to thank them for their gratuitous services over the last three (3) years.

## **PART II - RELEVANT FACTS**

4. Representative Counsel and the Distribution Agent have successfully delivered the Initial Distribution cheques to all Investors, with exception of one (1) Investor that it has been unable to locate despite its concerted efforts.<sup>5</sup>

5. Under the Distribution Plan, this Missing Investor is entitled to receive a total of \$\$13,081.26, on account of both an Initial Distribution and Final Distribution, representing the Missing Investor Settlement Funds described in the Ninth Report.<sup>6</sup> As this Missing Investor cannot be located, these settlement funds under the Distribution Plan remain unclaimed for.

6. Accordingly, Representative Counsel requests that the Court approve the proposed Missing Investor Settlement Funds Payment Plan,<sup>7</sup> which provides, *inter alia*, that the Missing Investor

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<sup>5</sup> See full details regarding this Missing Investor is set out in the Confidential Missing Investor Brief to the Ninth Report, filed.

<sup>6</sup> Ninth Report, at para. 127.

<sup>7</sup> Ninth Report, at para. 128.

Settlement Funds be treated and delivered to the members of the Official Committee in equal amounts as an Honorarium.

7. There are four (4) members of the court-appointed Official Committee, being Vipin Berry, Michael Singh, Nick Tsakonacos and Marco Arquilla.<sup>8</sup> The members of the Official Committee have been discharging their court-appointed duties on a gratuitous basis since their appointment in April 2019 (one month after Representative Counsel's appointment). As further described below, the Official Committee has played a critical role in these proceedings and in the success of the Settlement. They have had extensive involvement in these proceedings and in instructing and advising Representative Counsel. Their hard work, diligence and the benefit they have conferred on the Investors ought to be recognized.

8. For the reasons set out below and given that there is unclaimed money in the Distribution pool, Representative Counsel requests that this Court approve the proposed Honorarium in the amount of \$13,081.26 payable in equal amounts of \$3,270.31 to each member of the Official Committee.<sup>9</sup>

9. The Subsequent Honorarium is not payable at this juncture but rather forms part of the contingency Missing Investor Final Distribution Funds Plan. In the event that any of the proposed Final Distribution cheques (for which Representative Counsel is seeking approval on this motion) become stale-dated after 6 months from delivery (representing the Missing Investor Final Distribution Funds described in the Ninth Report), Representative Counsel recommends that the Missing Investor Final Distribution Funds be delivered to the Official Committee as a Subsequent

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<sup>8</sup> Ninth Report, at paras. 3 & 28. Order of Justice Hainey dated April 15, 2019, at Appendix "B" to the Ninth Report.

<sup>9</sup> Ninth Report, at para. 149.

Honorarium, provided that same does not exceed \$40,000. In the event same does exceed \$40,000, then Representative Counsel shall pay any amounts above this threshold into Court.<sup>10</sup>

10. Representative Counsel believes that the maximum amount of \$40,000 is fair and reasonable as a Subsequent Honorarium.

11. From the perspective of all Remaining Investors participating in the Final Distribution, this amount represents an approximate additional return of \$92 on account of each of their investments, which would have to be completed by way of a third Distribution. From a practical and costs perspective, a third distribution would not be feasible.<sup>11</sup>

12. Representative Counsel also notes that the Subsequent Honorarium forms part of a contingency plan, and may never crystallize. However, the Subsequent Honorarium is proposed to account for this contingency at this juncture, and eliminate the possibility of having to spend the time and costs associated with returning to Court to further deal with this matter, should it arise.<sup>12</sup>

13. The members of the Official Committee have not been given advance notice of the proposed Honorarium, or the potential Subsequent Honorarium. Rather, service of this motion on the Official Committee along with all other Investors, will represent the first time each of the members learn of same. Accordingly, they are not advocating for the proposed Honorarium.<sup>13</sup>

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<sup>10</sup> Ninth Report, at para 169.

<sup>11</sup> Ninth Report at para 171.

<sup>12</sup> Ninth Report at para. 172.

<sup>13</sup> Ninth Report, at paras. 153 and 173.

### **PART III - ISSUES**

14. Whether this Court should approve the proposed Honorarium and the proposed Subsequent Honorarium?

### **PART IV - LAW & ANALYSIS**

15. In *Confederation Financial Services (Canada) Ltd.*, Justice Farley considered an insolvency and bankruptcy proceeding where in the end result, there was “too much money” and the professionals on the file (the insolvency trustee, law firm to the insolvency trustee, and representative to certain certificate holders) sought and were awarded payment from the “excess” funds in equal parts as a form of a success or bonus fee.

16. While this is not a case where “excess” money has been recovered and where Representative Counsel or the Distribution Agent are seeking access to the unclaimed funds in this proceeding, the considerations set out by Justice Farley offer guidance on this matter:

“A helpful review of many of the factors considered by courts in deciding whether to award a bonus to a solicitor over and above the solicitor's hourly rate is found in *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1995), 22 O.R. (3d) 796, at p. 798 (Gen. Div.) They include the legal complexity of the case, the responsibility assumed, the monetary value in issue, the importance of the matter to the client, the degree of skill and competence in the legal services rendered, the results achieved and the ability of the client to pay. If the client is unable to pay, the financial risk assumed by the firm is that it will not be paid if the claim does not succeed.”<sup>14</sup>

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<sup>14</sup> *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* [2003] O.J. No. 1259 at para. 24, citing *Tripp v Ontario (Ministry of Transportation)* (1999), 123 O.A.C. 278 (Ont. C.A.), at Schedule “B” to this Factum.

17. In this case:

Complexity of Proceeding

- (a) This proceeding is extremely complex. While it is not a traditional insolvency proceeding, it involved many of the same components as well as certain other procedures. To date, such procedures include but are not limited to:<sup>15</sup>
- (i) the pre-appointment work of Miller Thomson LLP in its capacity as representative counsel to Investors prior to its formal court appointment;
  - (ii) the appointment of Representative Counsel as a court officer and the appointment of an Information Officer as court officer;
  - (iii) the preparation and distribution of various court reports in these proceedings;
  - (iv) the establishment of a process to select the Official Committee and the undertaking of that process (which included calling for and receiving applications from Investors, interviews with candidates, and the ultimate selection of the Official Committee members, among other things);
  - (v) establishing the Website and Email Account, and regularly communicating with Investors through the Website, Email Account, through posting Communications and through a “town hall” meeting;

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<sup>15</sup> Detailed in each of the Court Reports of Representative Counsel attached to the Ninth Report.

- (vi) consulting with various stakeholders with varied and competing interests, including the Hi-Rise (the Applicant), Adelaide (as Project and previous Property owner), the Financial Services Regulatory Authority of Ontario, Meridian (as secured creditor), Lanterra (as purchaser of the Property), Community Trust Company, a large group of Investors, court officers, as well as many professionals, among others;
- (vii) various negotiations for a Transaction in an effort to maximize value of the Property to the benefit of the stakeholders;
- (viii) two votes of Investors held for the purposes of approving a Transaction, conducted in accordance with the Appointment Order;
- (ix) a competing application for the appointment of a receiver over the Property;
- (x) attending and participating in a Judicial Mediation;
- (xi) the negotiation and sale of the commercial Property through the Lanterra Transaction, which resulted in an Approval and Vesting Order;
- (xii) a heavily negotiated and complex financial distribution scheme for which all stakeholders received a recovery (as set out in the Minutes);
- (xiii) the establishment and implementation by Representative Counsel and the Distribution Agent of a “reverse claims process” to advise Investors of the amounts of their claims, and an “objections process” for Investors seeking to dispute the amounts owed to them under the Distribution Plan;



- (xiv) the resolution of Notices of Objections under the Distribution Plan with certain Investors, which included lengthy settlement discussions and an arbitration before a Claims Officer; and
- (xv) delivering Distribution notices and cheques to the Investors by Representative Counsel and the Distribution Agent;

Responsibility Assumed

- (b) The Official Committee has played an active and critical role throughout the entirety of these complex proceedings, and in many of the steps noted above. In addition to providing general instruction and advice to Representative Counsel on a timely basis at the request of Representative Counsel, the members of the Official Committee have: (i) partaken in countless conference calls regarding various steps in this proceeding, and have deliberated to discuss issues amongst themselves and provide Representative Counsel with instruction that resulted in many Court Orders; (ii) participated in town hall meetings with Investors in respect of the vote processes undertaken by Hi-Rise in accordance with the Appointment Order; (iii) communicated with Investors; (iv) reviewed court reports and various motion materials in this proceeding in order to provide Representative Counsel with advice and direction; (v) appeared at various Court attendances; (vi) attended at and participated in the Judicial Mediation; (vii) assisted Representative Counsel in negotiating the Settlement and Lanterra Transaction; (viii) reviewed, approved and executed the Minutes and Mutual Release; and (v) heavily participated in the

process to resolve Notices of Objection, and provided Representative Counsel with advice and settlement instruction, among many other things. In summary, the members of the Official Committee have spent countless hours relentlessly discharging their court-appointed duties;<sup>16</sup>

#### Monetary Value in Issue

- (c) In the context of the overall Settlement and the Distribution, the monetary value of the Honorarium is negligible. The proposed Honorarium is not intended to compensate the members of the Official Committee, but rather recognize and thank each of them for their hard and gratuitous work;
- (d) Further, the proposed Honorarium will not materially prejudice any of the Investors (as it represents monies that would otherwise be payable to the Missing Investor), and the Missing Investor Settlement Funds Payment Plan accounts for the possibility that the Missing Investor may revive and make a claim to the Distribution;<sup>17</sup>

#### Importance of the Matter to the Client

- (e) This proceeding was extremely important to the Investors, as they invested in the Project years ago and experienced a long period of time where they were out of pocket on account of their principal and accrued and unpaid interest and there was no recovery in sight. The appointment of Representative Counsel, and ultimately

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<sup>16</sup> Ninth Report, at para 151.

<sup>17</sup> Ninth Report, at para 154.

the Official Committee as its instructing body, was necessary in order to arrive at the Settlement, the Lanterra Transaction, and the ultimate recovery of those investments. The members of the Official Committee have played a critical role in these proceedings and in the success of the Settlement, ultimately to the benefit of each of the Investors;<sup>18</sup>

#### Degree of Skill and Competence in the Services Rendered

- (f) Each of the members of the Official Committee are professionals (or retired professionals) and exercised a high degree of skill and competence in discharging their court-appointed duties. The members often deliberated and considered legal and financial issues amongst themselves before providing Representative Counsel with unanimous instruction. Their instruction and direction was always timely, well-reasoned, organized and methodical. Representative Counsel considers itself fortunate to have worked with the members of the Official Committee in this proceeding;<sup>19</sup>

#### Results Achieved

- (g) The Settlement, and the Lanterra Transaction contemplated thereunder, represents the best possible outcome for the Investors in this proceeding. Whereas the original proposed Transaction contemplated a joint venture agreement in which Adelaide (or a related party) would remain part of the Project and in which the return of

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<sup>18</sup> Ninth Report at para 152.

<sup>19</sup> Ninth Report at paras. 151 and 152.

investments would be delayed (which the Official Committee recommended against), the Lanterra Transaction included a cash sale of the Property for \$69,000,000 and resulted in all Investors seeing a timely recovery on their investment after the closing of the Lanterra Transaction. In particular, this resulted in all of the Registered Investors seeing a full recovery of their principal and accrued and unpaid interest, and the subordinated Non-Registered Investors receiving an estimated total recovery of 37.48%. While not all Investors received a full recovery in light of the manner in which the Second Mortgage is structured, the Settlement deal was negotiated and implemented in the face of a competing receivership application, which Representative Counsel and the Official Committee believe would have likely further diminished the returns to Investors. In Representative Counsel's view, the Settlement and Lanterra Transaction represented the best possible outcome for Investors in this proceeding. The Official Committee attended and actively participated in the Judicial Mediation, provided instruction to Representative Counsel in this regard, and are signatories to that Settlement; and

Ability to Pay

- (h) As noted above, payment of the proposed Honorarium will be paid from the Missing Investor Settlement Funds, representing monies that are otherwise unclaimed under the Distribution Plan.

**PART V - ORDER REQUESTED**

18. For all of the reasons set out above, Representative Counsel requests that this Court approve the proposed Honorarium.

19. Representative Counsel also requests that this Court approve the Missing Final Distribution Funds Plan and the proposed and potential Subsequent Honorarium described therein. Representative Counsel is of the view that the Missing Final Distribution Funds Plan represents a fair, reasonable and practical way to manage the possibility of uncashed cheques from the Final Distribution, as it will allow Representative Counsel to distribute the funds from any uncashed cheques (to the Official Committee as a Subsequent Honorarium) and it will eliminate the possibility of there being any delay to Representative Counsel's discharge.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29<sup>th</sup> day of March, 2022.



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Gregory Azeff and Stephanie De Caria

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Court-appointed Representative Counsel

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* [2003] O.J. No. 1259 at para. 24, citing *Tripp v. Ontario (Ministry of Transportation)* (1999), 123 O.A.C. 278 (Ont. C.A.)

**SCHEDULE "B"**

2007 CarswellOnt 3213  
Ontario Superior Court of Justice [Commercial List]

Confederation Life Insurance Co., Re

2007 CarswellOnt 3213, 157 A.C.W.S. (3d) 549, 32 C.B.R. (5th) 108

**In the Matter of Confederation Life Insurance Company**

R.A. Blair J.A. (ad hoc)

Judgment: May 22, 2007

Docket: 97-BK-000543

Counsel: Gale Rubinstein, Graham Smith for Liquidator

James Grout — Representative Counsel

Aubrey Kauffman for Parbold Overseas Limited

Jay Swartz for UBS Warburg LLC

Frank Miller for ASSURIS

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Business associations

VI Changes to corporate status

VI.4 Winding-up

VI.4.b Under Dominion Act

VI.4.b.ix Liquidator

VI.4.b.ix.F Remuneration and expenses

**Headnote**

Business associations --- Changes to corporate status — Winding-up — Under Dominion Act — Liquidator — Remuneration and expenses

Affairs of insurance corporation were liquidated following winding-up — Liquidation resulted in all policyholders worldwide being protected in full — Creditors of corporation were granted \$823 million in distributions over several stages by estate — Value of estate increased significantly during years in which liquidator oversaw assets — Inspector was hired by estate to oversee realization of residue assets on behalf of certain creditors — Liquidator's initial claim for fees and disbursements was approved by court — Liquidator brought motion for order approving payout of additional compensation to liquidator and inspector — Motion granted — Liquidator was granted future lump sum payments in amount totalling \$7 million plus half of all assets realized following payout to remaining creditors — Major stakeholders with remaining financial interest in estate either consented to or were not opposed to request for additional compensation — Skill, knowledge and experience of liquidator had paved way for estate to improve its position greatly — Liquidator made key decision to uncouple assets and liabilities to maximize assets of estate — Liquidator provided services to estate at significantly discounted rate for significant portion of liquidation — Total fees recovered by liquidator to date amounted to only about two per cent of estate's total assets — Payment of \$500,000 in compensation to inspector was authorized — Liquidator had benefit of inspector's helpful and significant contribution for several years.

**Table of Authorities**

**Cases considered by R.A. Blair J.A. (ad hoc):**

*Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1998), 220 A.R. 159, 1998 ABQB 188, 1998 CarswellAlta 1493 (Alta. Q.B.) — followed

*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — referred to



*Hess, Re* (1977), 23 C.B.R. (N.S.) 215, 1977 CarswellOnt 68 (Ont. S.C.) — followed

*Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (2001), 2001 CarswellOnt 2856 (Ont. S.C.J.) — referred to

**Statutes considered:**

*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11

s. 42(1) — considered

s. 43 — considered

MOTION by liquidator for order approving payout of additional compensation to liquidator and inspector.

**R.A. Blair J.A. (ad hoc):**

1 This long — and ultimately very successful — liquidation of the affairs of Confederation Life Insurance Company is finally nearing its end. Commenced in August 1994, the liquidation has resulted in all policyholders in Canada, the United States, and elsewhere being protected in full, and in nine prior distributions, totaling \$823.1 million, as a result of which:

a) all Ordinary Creditors have been paid 100¢ on the dollar on the principal amount of their accepted claims together with some post-liquidation interest (when the proposed ultimate, cumulative Distribution takes place, this interest will amount to an interest realization of 23.3%, or about 3.4% simple interest per year);

b) the creditors of Confederation Treasury Services Limited ("CTSL"), the treasury subsidiary of Confederation Life, have been paid in full, together with 5% interest; and,

c) the Sub Debt Holders have received payments of approximately \$193.8 million, or 72.5% of their claims (which will rise to 95.3% when the ultimate, cumulative Distribution occurs).

2 The Liquidator anticipates that further distributions of approximately \$76 million will be made before the estate is fully wound up.

3 On this motion the Liquidator seeks an order:

a) passing its accounts for the six quarters comprising the period October 1, 2005 to March 31, 2007;

b) approving its fees and disbursements, and those of its counsel, Goodmans LLP and other professional advisors;

c) approving and authorizing a tenth distribution in the amount of \$50 million, to be allocated \$10 million to the Ordinary Creditors and \$40 million to the Sub Debt Holders (in accordance with an earlier Settlement Agreement between these two groups);

d) approving and authorizing the form and manner of notice of the distribution to Sub Debt Holders;

e) approving and authorizing the payment of additional compensation to the Liquidator and Goodmans LLP;

f) approving and authorizing the payment of \$500,000 to UBS Warburg LLC; and

g) approving and authorizing the Liquidator to arrange for the destruction of certain books and records of Confederation Life.

4 At the conclusion of argument on May 15, 2007, I granted the relief sought as described above except for the claim respecting the payment of additional compensation to the Liquidator and Goodmans and the claim respecting the payment to UBS Warburg. I wanted to give some further consideration to these requests.

5 I was, and remain, fully satisfied that the Liquidator's accounts for the six quarters in question should be approved, and that the regular fees and disbursements of the Liquidator and its counsel are fair and reasonable, and should be approved as

well. Mr. Grout, who is appointed to represent the interest of Ordinary Creditors and the Sub Debt Holders as a group in these matters, has advised that he has reviewed the accounts and the fees and disbursements, that he is satisfied with the conduct of the estate as set out in the financial statements, that he can find nothing untoward which requires further explanation, and that in his opinion the fees and disbursements are fair and reasonable. No one is opposing.

6 I was, and am, satisfied as well that the proposed Tenth Distribution should be authorized. There will remain at least \$16 million in liquid assets in the estate, an ample amount, in the opinion of the Liquidator, to enable the estate to meet any future obligations. As noted above, the proposed distribution will be in accordance with the Settlement Agreement between the Ordinary Creditors and Sub Debt Holders made earlier in these proceedings pursuant to which — from this point on — distributions will be distributed as between them on a 20/80 basis, respectively.

7 There is no reason to alter the form and manner of notice with respect to the distribution to the Sub Debt Holders. The same form and manner of notice has been utilized in the past and has worked well. Similarly, the Liquidator should be authorized to arrange for the destruction of books and records as proposed, since it is unlikely the subject documentation will be needed further, ample time (7 years) has elapsed, and the cost of storage is a significant, and unnecessary, financial burden on the estate.

8 This leaves the issues of additional compensation and the UBS Warburg payment, which I reserved for further consideration. On reflection, I have no hesitation in approving both claims.

### **UBS Warburg**

9 The proposed payment to UBS Warburg is in consideration of its services to the estate as an inspector. Whereas other inspectors have previously been reimbursed, UBS Warburg has not. Its mandate as inspector is to oversee the realization of the "Confed residue" on behalf of CTSL creditors pursuant to the CTSL Settlement, and it has also been retained by UBS AG to represent its significant interest as an Ordinary Creditor in the Confederation Life Estate.

10 [Section 43 of the \*Winding-up and Restructuring Act\* R.S.C. 1985, c. W-11](#), authorizes the Court to determine what remuneration, if any, is deemed just for inspectors. Here, the Liquidator has had the benefit of the contribution of UBS Warburg since 2000 and I am satisfied that contribution has been both helpful and significant. I am told that the proposed payment of \$500,000 is an amount that has been robustly negotiated as between the parties. Mr. Kauffman, whose client is one of the major Ordinary Creditors, is content with the UBS claim, as are other affected stakeholders.

11 In all the circumstances, I am persuaded that the claim, and the amount claimed, are appropriate, and I approve the payment to UBS Warburg of the amount of \$500,000 for its services as inspector of the estate.

### **The Claim for Additional Compensation**

12 To this point in the administration of the estate the Liquidator and its counsel have put forward their claims for fees and disbursements solely on the basis of hourly rates approved by this Court. They have indicated from time to time, however, that at the appropriate moment — if the administration of the estate remains as successful as it has been — they would be seeking additional remuneration to compensate partially for previously unrecovered hourly rate discounts and to recognize the high degree of success achieved in the estate. Now, they submit that time has arrived.

13 What is put forward is the approval of additional compensation to the Liquidator and counsel as follows:

- a) \$6 million at the time of the Tenth Distribution;
- b) after the distribution of the next \$26 million to the Ordinary Creditors and Sub Debt Holders, the next \$1 million as additional compensation; and
- c) thereafter, the remaining funds for distribution, if any, are to be split 50% to the Ordinary Creditors and Sub Debt Holders and 50% as additional compensation

14 Section 42(1) of the *Winding-up and Restructuring Act* states:

A liquidator shall be paid such salary or remuneration by way of percentage or otherwise, as the court directs, on such notice to the creditors, contributors, shareholders or members as the court orders.

15 Wachowich A.C.J.Q.B. (as he then was) dealt with the very broad discretion which the court has as to the form and amount of remuneration for a liquidator in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1998), 220 A.R. 159 (Alta. Q.B.). At para. 19, he said:

I fail to see how the court could have any wider discretion in determining whether compensation should be payable on the basis of hourly rates, or hourly rates combined with a performance bonus, or a lump sum at the end of the liquidation, or any other basis of remuneration which it deems reasonable and justifiable. The winding-up court is not restricted by the wording of s. 42(1) to allowing remuneration on an hourly rate basis only, and a performance bonus in this or any other liquidation could be an entirely proper basis for compensation

[Underlining added.]

16 I agree with this statement.

17 The factors to be considered in determining whether to award additional compensation to counsel and insolvency professionals over and above their hourly rates include, but are not limited to, the complexity of the estate, the responsibility assumed, the monetary value in issue, the importance of the matter to the client, the degree of skill and competence in the legal services rendered, the results achieved, and the client's ability to pay. Of particular importance is the result achieved. See *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.), at 30-31 (Farley J.).

18 These proceedings meet all of those criteria. On an earlier passing of accounts herein I had the occasion to make the following observation:

In the annals of winding up and insolvency proceedings, the results achieved in these proceedings can only be described as truly remarkable. All Canadian and U.S. policyholders will recover in full and — quite unexpectedly at the outset — there will even be a distribution to ordinary creditors. While market and other factors have certainly played a role in this turnaround, I have no doubt whatsoever that the skill and efforts of the Liquidator, its counsel, and the other professionals involved have had an enormously positive impact on the outcome. They are all to be commended.

19 That statement applies with even more force at this stage of the winding-up. Not only has there been "a distribution" to the ordinary creditors, they have been paid the principal amounts of their claims in full *and* they are now receiving monies on account of post-liquidation *interest*. In addition — with the proceeds from the ultimate, cumulative Distribution — the Sub Debt Holders will have been paid over 95% of the debt owing to them. These kinds of results are almost unheard of in insolvency proceedings.

20 There is no doubt that a turnaround in market conditions was critical to the success of the winding-up. As the judge who has been supervising this proceeding for many years, however, I am fully satisfied that it was the skill, knowledge and experience of the Liquidator and its counsel that paved the way for the estate to be in a position to benefit from that turnaround. They took a very "businesslike" approach to the challenge facing them. The decision not to liquidate on a slash and burn basis at the outset, but instead to "uncouple" the assets and liabilities of Confederation Life and deal with them as "blocks of business" in a way that permitted the management and liquidation of the assets over time so as to maximize the return to the estate, was key. To carry this off, the Liquidator and its counsel were required to develop and implement an array of creative financial insolvency initiatives, coordinate stakeholders, negotiate with parties and governments on an international scale, and manage both Confederation's business and its liquidation. They did so adroitly and with great dexterity, and they deserve a bonus by way of remuneration for their services.

21 A number of additional factors may be mentioned in this regard.

22 First, both the Liquidator and its counsel provided their services to the estate on a significantly discounted hourly-rate basis from the inception of the liquidation in August 1994 until July 1999 when policyholder recovery reached 100%. At that time an order was made permitting recovery of the discounted amounts from September 1997. However, neither the Liquidator nor its counsel have ever recovered for the discounted amount from their standard rates for the period between 1994 and 1997. This discount amounted to \$21.6 million.

23 Secondly, the total fees recovered by the Liquidator and its counsel to date, while significant, amount nonetheless to about 2% of the assets of the Canadian estate, valued at August 11, 1994 (considerably less than that if one considers the Confederation Life operations as a whole and the value of policyholder liabilities). This is a very reasonable percentage, given the complexity and size of the insolvent estate.

24 Thirdly, other professionals in the insolvency proceedings relating to Confederation Life have been awarded additional compensation. These include awards made by the Michigan Court to the U.S. Rehabilitator's attorneys (U.S. \$5 million) and a special deputy to the U.S. Rehabilitator (U.S. \$14 million), and the approval by this Court of a bonus to the CTSL trustee, its counsel and the CTSL note holder representative (\$3.2 million). See *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.*, *supra*.

25 Fourthly, the major stakeholders with a remaining financial interest in the estate — and who will be most affected by the payment of additional compensation — either consent to, or are not opposed to the request for additional compensation. These include Parbold Overseas Limited (the Sub Debt Holder with the single largest financial stake in the remaining estate), UBS Warburg (representing a major Ordinary Creditor and itself, and an inspector), and Assuris (an inspector) who support and consent; Mr. Grout (the Court-appointed Representative Counsel for the Ordinary Creditors and the Sub Debt Holders), and the Superintendent, who do not oppose. In addition, the request is supported by a number of individuals who have knowledge of the winding-up and whose testimonials are found in the Record.

26 I have considered the letter from Mr. Tingley, an ordinary creditor, who opposes the request on a number of grounds. In substance, however, his complaint is that the Liquidator and its counsel should not be paid a bonus unless and until the creditors have been paid in full, including interest at a higher rate than the effective rate presently received and on a compounded basis. I am told that another creditor contacted Mr. Grout and expressed similar concerns. While I can appreciate the viewpoints of these creditors, I do not think it would be fair to all concerned to give effect to them. I simply do not accept Mr. Tingley's submission that "the Liquidator has performed an adequate rather than a superlative job". In my view, the job done by the Liquidator and its counsel may well be described as "superlative" in the circumstances of this winding-up (even though it is not necessary that an insolvency professional's services be superlative or "spectacular" in order to warrant extra payment: *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [2001] O.J. No. 3272 (Ont. S.C.J.)).

27 Insolvencies by their nature very rarely, if ever, result in full recovery. To adopt Mr. Tingley's approach would have the practical effect of nullifying the notion of additional remuneration in insolvency matters. Neither s. 42(1) of the *Winding-up and Restructuring Act* nor the jurisprudence support such a result.

28 Finally, counsel conceded that in choosing the amount requested for additional remuneration they could not point to any particular bench mark or criteria. As with the UBS Warburg payment, it represents a healthily negotiated amount. As Henry J. noted in *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), at 219, however, "the court should take into account the views of the creditors or the inspectors if they are expressed" and "[c]onsiderable weight should be given to their approval or disapproval." Here, as noted above, the request for additional remuneration, in the amount sought, is either supported or not opposed by the major creditors with a remaining interest in the estate, and two of the inspectors, the Superintendent and Representative Counsel. This carries considerable weight, in my opinion.

29 In conclusion, then, I am satisfied that an award of additional remuneration for the Liquidator and its counsel — in the amount, and payable in the fashion proposed — is fully warranted in the circumstances of this case, and I approve the request.

**Disposition**

30 For the foregoing reasons, then, an order is granted in terms of the relief claimed in the draft order that is contained at Tab 1A of the Motion Record.

*Motion granted.*

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IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE  
STREET LOFTS INC.

Court File No.: CV-19-616261-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE –  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

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