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File: 18242-1079607

January 18, 2021

**HAND DELIVERED**

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax NS B3J 1S7

My Lord/My Lady:

**Re: Canadian Imperial Bank of Commerce v. 3304051 Nova Scotia Limited – Hfx No. 503367 - Application for the Appointment of a Interlocutory Receiver**

We act for the Applicant, Canadian Imperial Bank of Commerce ("CIBC") which brings this motion for the appointment of an interlocutory receiver over certain assets of 3304051 Nova Scotia Limited, which carries on business as Hefler Forest Products ("Hefler").

CIBC is a secured creditor to Hefler, which operates a sawmill and a biomass electric co-generation facility in Middle Sackville, Nova Scotia. CIBC has a first priority security over all of the assets of Hefler, other than one asset secured to a third party, VFS Canada Inc.

We have given notice of this motion to Heffler but have not given notice of it to VFS Canada Inc. as we are not seeking to extend this interlocutory receivership to include that asset.

Filed herewith is an affidavit of Kyle Lane, describing the security and debt relationship between CIBC and Hefler. We have also filed an affidavit of Glenda MacDonald, a legal assistant with our firm, as to various searches.

The motion is for the appointment of Deloitte Restructuring Inc. as Interlocutory Receiver of the assets of Hefler. We anticipate that Deloitte will file a Pre-Receivership Report providing the Court with updated information prior to the hearing.

Please accept the following as the submissions of CIBC on the application.

## Facts

The facts relevant to this proceeding are set out in the affidavits filed herein. CIBC is the first priority secured lender of Hefler. The affidavit of Kyle Lane describes the security facilities and the indebtedness.

Hefler has suffered losses and its stakeholders have advised CIBC that they will no longer inject working capital into Hefler to cover future payments or operating losses. Hefler is in breach of the terms of the credit facilities, has exhausted its working capital, and is no longer able to remain in business.

The demand notices required under the *Bankruptcy and Insolvency Act* were given to the company on September 11, 2020. A forbearance arrangement was entered into between the parties, within which Hefler and Deloitte Restructuring canvassed possible purchasers for the operating assets of Hefler. The forbearance arrangement has now been terminated.

All of Hefler's directors and officers have resigned, leaving it without effective governance.

## Issues

The issue for determination on this motion is whether it is just or convenient for this Honourable Court to appoint Deloitte Restructuring Inc. as interlocutory receiver of assets of Hefler.

## Law

*Civil Procedure Rule* 41 provides for the appointment of an interlocutory receiver. In particular, *Rule* 41.02 states (in part):

> **(3)** An interlocutory receivership serves one of the following purposes:
>
> a) ...;
>
> b) to liquidate some or all assets at issue so as to preserve the value of the assets pending the outcome of a dispute;
>
> c) ...
>
> d) otherwise, to achieve justice in a proceeding about a corporation, another entity, or assets.
>
> [...]
>
> (6) A party may make a motion for an interim or interlocutory injunction, or an interim or interlocutory receivership, in accordance with this Rule.

> [...]
>
> (7) A judge may grant an injunction, or appoint a receiver, before the trial of an action or hearing of an application, in accordance with subsection 43(9) of the *Judicature Act* and this Rule.

Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as amended **[TAB 1]**, provides:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just ... [underlining added].

The bulk of reported cases considering *Rule* 41 does so in the context of interim and interlocutory injunctions. These cases apply the three-part test outlined by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 SCC 117, [1994] 1 S.C.R. 311.

In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, CarswellNS 263 **[TAB 1]**, the court considered an application by a secured creditor for appointment of a receiver-manager over a resort property owned by the respondent companies. The married principals of the respondent companies had become involved in protracted, acrimonious divorce proceedings and the resort had effectively ceased operation.

In granting the order appointing a receiver-manager (pursuant to s. 243(1) of the *BIA*), Justice Edwards articulated the following test for determining whether the appointment was "just or convenient":

> 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

k) the effect of the order on the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties; and

p) the goal of facilitating the duties of the receiver [emphasis added].

In *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 **[Tab 2]**, this Court observed:

> [13] The original Judicature Acts codified and extended, in a single provision, the equitable powers to order, on an interlocutory basis, a mandatory injunction, then referred to as mandamus, a prohibitory injunction, or a receivership. For Nova Scotia, see Judicature Act S.N.S. 1984, c. 25, s.14(7), which was taken word for word from the English Supreme Court of Judicature Act, 1873, s. 25(8). This was a codification because the courts of equity had been granting these interlocutory remedies for years. It was also an extension because law and equity were fused and the remedies became available "whether the estates claimed...are legal or equitable".
>
> [14] At the time of the Judicature Acts, an interlocutory receivership was the primary kind. Equity provided a remedy to control a corporation pending the outcome of a suit about the corporation. The use of receivership as an instrument of liquidation to enforce a

mortgage, or other security, was then emerging. See John McGhee, Q.C., Snell's Equity Thirty-Third Edition (2015, Sweet & Maxwell, Landon) at p. 530.

[15] Our Civil Procedure Rules recognize that the primary role of receivership is as a final remedy for realizing on secured assets, making it necessary to afford the protections that come with notice and resolution of disputes through the trial of an action or the hearing of an application. Thus, Rule 73 – Receiver provides for a "final remedy" in Rule 73.01(1) and Rule 41 – Interlocutory Injunction and Receivership provides for "interim receivership" and "interlocutory receivership" in Rules 41.02(2) and 41.02(3).

[16] With the change in the primary role of receivership comes the recognition that the same protections for those against whom an interlocutory injunction is sought should apply for those against whom an interlocutory receivership is sought. See, Rule 41.02(3)(c). It follows that the rich jurisprudence on interlocutory injunctions applies by analogy to receiverships before default judgement, summary judgement, trail of an action, or hearing of an application.

[17] Writing for a majority of the Supreme Court of Canada in Google Inc. v. Equustek Solutions Inc., 2017 SCC 34, Justice Abella summarized the three test-like questions of Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110 and the overriding general question of RJR-MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311.

> ...[I]s there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific. [Google, at para. 25.]

[18] The applicant referred me to RJR-MacDonald Inc. and Google Inc., but suggested that the approach may be more relaxed where a secured creditor seeks receivership under security instruments that contract for receivership in default. The bank relied on Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc., 2014 NSSC 128, Canadian Tire Corp. v. Healy, 2011 ONSC 4616, and Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7025.

[19] While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order. Although they were brought in an interlocutory proceedings, the cases relied on by the bank were for final orders. As I said, the interlocutory receivership in Nova Scotia is a temporary remedy.

[20] The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the

policy against prejudgement that underlines the Metropolitan Stores, RJR-MacDonald Inc., and Google Inc. line of cases.

## II. ARGUMENT

We submit that the appointment of a receiver is just and convenient on the following grounds:

1. Hefler is in default of the CIBC Letter of Agreement.
2. CIBC worked with Helfer for a period of time in a forbearance relationship, allowing Hefler, working in cooperation with Deloitte Restructuring Inc as financial consultant to CIBC, to seek a purchaser for its assets or operation. That process was ultimately unsuccessful.
3. There is believed to be no dispute about the amount owed or the validity of the CIBC security.
4. The amount owed to CIBC (in excess of $6,000,000) is quite significant.
5. Hefler does not have any working capital to remain in business.
6. All of Hefler's directors and officers have resigned and it has no ongoing governance.
7. CIBC is the only registered secured creditor on the assets to be covered by the order.
8. The CIBC security documents provide for receivership as a contractual remedy.
9. The Hefler assets are valuable, but may not be adequately supervised and protected. The appointment would preserve that property for disposition under order of this Court. Loss of, or harm to, those assets would be an irreparable harm to CIBC.

We submit that the balance of convenience in this matter favours appointment of a receiver. As the major asset of the company is real estate, there is no other effective way to sell the real estate other than through a court appointed receivership. A foreclosure would not be an appropriate process in dealing with assets of this nature.

The question which then arises is: Should the receiver be interlocutory under Rule 41 or "final" under Rule 73. An order which is interlocutory leaves greater room for any party affected by the order to come to court and seek variation.

We have proposed using the interlocutory receiver Rule on the basis that we have sought an abridgment of time, with notice only to the debtor company. There is no concern about a "pre-judgment" here, as the facts are clear and the motion unopposed.

A "come back" date would not be fixed as in an interim receivership. We will return to court in a few weeks seeking to have the receivership made "final" as contemplated by Rule 73.02(2)(a), at which time notice would be given to any stakeholder that had been identified.

In the alternative, the Plaintiff would endorse the issuance of a final order under Rule 73.

## III ORDER & RELIEF SOUGHT

For the foregoing reasons, we submit that the appointment of a receiver is just and convenient in the circumstances, and that issuing such an order as interlocutory best protects the rights of stakeholders.

CIBC therefore requests this Honourable Court grant an order appointing Deloitte Restructuring Inc. as interlocutory receiver of the assets, undertakings, and properties of Hefler. We are not at this time seeking an order extending that receivership to the 2016 Volvo L90H (which we understand to be a kind of "loader") held under security by VFS Canada Inc.

The proposed form of order generally follows the Model Order, with the following points of note:

1. The Interlocutory Receiver would have the power (but not the obligation) to take possession and control of Helfer assets, other than the 2016 Volvo L90H;

2. The Interlocutory Receiver has a right of access to information relevant to the assets;

3. The order restrains interference and requires cooperation from Hefler and its officers, directors, shareholders, employees, and agents;

4. The Interlocutory Receiver may market and sell assets which are chattels but will need to come back to this Court for approval to sell the real estate;

5. The Interlocutory Receiver may apply proceeds of the sale of any assets against its own costs, and against any priority statutory claims, with the balance to be held pending direction of this Court;

6. Requires the Interlocutory Receiver accounts be passed from time to time;

7. Requires the Interlocutory Receiver to file reports on its activities from time to time;

8. Waives the posting of security by the Interlocutory Receiver; and

9. Allows any interested person to apply to the court for further direction.

All of which is respectfully submitted.

BURCHELLS LLP

D. Bruce Clarke, Q.C.

DBC/grm
Encls.
c. Service List
c: client

## SCHEDULE "A"

## SERVICE LIST

| Party | Contact |
|---|---|
| 3304051 Nova Scotia Limited | 230 Lucasville Road<br>Middle Sackville NS B4B 1S1 |

# INDEX

2014 NSSC 128 (CanLII)

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128

**Date:** 20140410
**Docket:** Syd. No. 423486
**Registry:** Sydney

**Between:**

**Enterprise Cape Breton Corporation**, a body corporate, incorporated pursuant to the *Enterprise Cape Breton Corporation Act,* enacted as Part II to the *Government Organization Act, Atlantic Canada, 1987*, R.S., 1985, c. 41 (4th Supp.) ("ECBC")

Applicant

v.

**Crown Jewel Resort Ranch, Inc.,** a body corporate Incorporated under the laws of Nova Scotia ("Crown Jewel")
**And I.N.K. Real Estate Inc.,** a body corporate incorporated Under the laws of Nova Scotia ("I.N.K.")

Together the Respondents

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Frank Edwards

**Heard:** March 5, 2014 in Sydney, Nova Scotia

**Written Decision:** April 10, 2014

**Subject:** **Bankruptcy and Insolvency Act,** s. 243. **Judicature Act,** s.

[3]

43 (9) – Application to Appoint Receiver/Manager

**Summary:** Respondent Companies (RC's) set up to operate high end tourist resort. Husband and wife principals in RC's became embroiled in protracted divorce proceedings which effectively caused resort to cease operation. Loans (secured and unsecured) of almost three quarters of a million dollars seriously in arrears. Monthly payments were just under $19,000.00 per month. Municipal taxes over $70,000.00 in arrears – prospect of tax sale imminent. Remaining principal, Mr. Korem, had no realistic prospect of significantly reducing debt nor refinancing it.

**Issue:** Whether just and convenient to appoint a receiver/manager.

**Result:** Receiver/manager appointed. Just and convenient to do so:

1. Need for protection of the assets;
2. Apprehended or actual waste of assets;
3. Creditor had right to appoint a private receiver pursuant to a general security agreement;
4. Court appointed receiver required as cooperation of Mr. Korem with private receiver highly unlikely;
5. Appointment the most practical and prudent approach to maximizing the return to the parties.

**Cases Noted:** **Bank of Montreal** v. **Sherco Properties Inc.**, 2013 ONSC 7023 (S.C.J.); **Textron Financial Canada Limited** v. **Chetwynd Motels Limited**, 2010 BCSC 477, **Canadian Tire Corp.**, v. **Healy**, 2011 ONSC 4616; **Bank of Montreal** v. **Carnivale National Leasing Ltd.**; **Carnivale Automobile Ltd..**, 2011 ONSC 1007; **Bank of Nova Scotia** v. **Freure Village of Clair Creek** (1996), 40 C.B.R. (3d) 274 (Ont) S.C.J.; **Bank of Nova Scotia** v. **Freure Village of Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div.) [Commercial List]; **Romspen Investment**



2014 NSSC 128 (CanLII)

**Corp.** v. **1514904 Ontario Ltd.**, et al (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.).

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

2014 NSSC 128 (CanLII)

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.* 2014 NSSC 128

**Date:20140410**
**Docket:** SYDJC No. 423486
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**Between:**

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Together the Respondents

[2]

| | |
|---|---|
| **Judge:** | Justice Frank Edwards |
| **Heard:** | March 5, 2014, in Sydney, Nova Scotia |
| **Written Decision** | April 10, 2014 |
| **Counsel:** | Robert Risk, for the Applicant<br>Nahman Korem, for the Respondent Companies |

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[2]

**By the Court:**

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The applicant is applying for an order appointing Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. ("MGM") as receiver and manager of all of the undertakings, property and assets of Crown Jewel and I.N.K. pursuant to Section 243(1) of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3, and/or Section 43(9) of the **Judicature Act,** R.S.N.S. 1989, c. 240

**Grounds for Order:** The applicant is applying for the order on the following grounds:

1. A General Security Agreement made between Crown Jewel Resort Ranch, Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213736 on February 8, 2005, as amended by Registration No. 21915103 on October 11, 2013.

2. A Mortgage made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated February 4, 2005 registered at the Victoria County Registry of Deeds on February 8, 2005 as Document No. 81337157 (PID Nos. 85017614, 85079127 and 85155281), said Mortgage having been assigned to Enterprise Cape Breton Corporation pursuant to a General Conveyance, Assignment and Assumption of Liabilities Agreement dated March 31, 2008 and registered at the Victoria County Registry of Deeds on May 30, 2008 as Document No. 90774226;

3. A General Security Agreement made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213692 on February 8,

2005, as amended by Registration No. 13924725 on May 23, 2008 (together with the above the "Security")

4. The Respondent Companies (RC's) have defaulted on their payments and failed to honour their obligations pursuant to a Letter of Offer made between Crown Jewel, I.N.K. and ECBC dated on or about October 2, 2003 with respect to Project No. 8600338-1 (the "Letter of Offer").

5. The total amount of indebtedness secured by the Security is $226,134.00 as at October 8, 2013 together with overdue interest on arrears in the amount of $1,738.19 and interest thereafter at a per diem rate of $37.17.

6. The RC's were provided with respective Notices of Intention to Enforce Security pursuant to section 244 of the **Bankruptcy and Insolvency Act** on October 24, 2013.

7. Greg MacKenzie of MGM has agreed to act as the court-appointed receiver and manager of all of the undertakings, property and assets of both Crown Jewel and I.N.K. and the Applicant consents to his appointment.

8. The Applicant, ECBC relies on Section 243(1) of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3, which reads:

> 243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

9. The Applicant, ECBC relies on Section 43(9) of the **Judicature Act**, R.S.N.S. 1989, c. 240, which reads:



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> 43. (9) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

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**Background:** The RC's had obtained financing from the Cape Breton Growth Fund Corporation (CBGF), the Atlantic Canada Opportunity Agency (ACOA), and the Applicant, Enterprise Cape Breton Corporation (ECBC).

ECBC succeeded CBGF when the latter wound up in 2008. ECBC delivers and administers all programs offered by ACOA.

The RC's' intent was to establish an upscale, four-season, fly-in active vacation resort near Baddeck, Nova Scotia. Operations commenced in 2006 but struggled financially from the outset. The financial problems multiplied when the two principals in the RC's, Nahman Korem (Korem) and Iris Kedmi (Kedmi) became embroiled in protracted divorce proceedings. These continued between 2010 and December, 2012 when the Nova Scotia Court of Appeal dismissed Kedmi's appeal.

The resort essentially ceased to function as of the start of the domestic trouble between Korem and Kedmi in 2010.

By October 8, 2013, the RC's were in serious arrears on their loans. By that date, the total amount of indebtedness was as follows:

1. **ECBC Secured Letter of Offer:** $226,134.00 with overdue interest on arrears of $1,738.19 plus interest of $37.17 per day.
2. **ECBC Unsecured Letter of Offer:** $268,254.86 with overdue interest on arrears of $1,738.19 plus interest of $44.10 per day.
3. **ACOA Unsecured Loan:** $256,642.00 plus arrears of $4,425.80.

Throughout the period of 2005-2009 the RC's were able to make their regular scheduled payments on the ACOA Unsecured Loan, having repaid approximately $234,360.00 of the initial $500,000.00 loan disbursement. (Lane affidavit para. 22)

The RC's have, however, paid only approximately $6,000.00 toward the outstanding principal on the ACOA Unsecured Loan since 2009. Further, no repayments at all have been made on this loan within the 12 month period from December of 2012 to December of 2013. (Lane Affidavit para. 23)

[2]

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With respect to both the ECBC Secured and Unsecured Letters of Offer, the RC's have to date made only a combined repayment in the approximate amount of $9,235.00. As noted above, these loans are in significant arrears. Furthermore, overdue interest is due and owing and is accruing daily. (Lane affidavit para. 24)

The Applicant gave the RC's Notices of Intention to Enforce Security on October 24, 2013. Korem knew by November 2013 at the latest that ECBC intended to apply to have a receiver/manager appointed by the Court. A General Security Agreement given to CBGF/ECBC by the RC's provided for the appointment of a private receiver upon default.

Despite the fact that the loans were already overdue, ECBC took a hands-off approach during the divorce proceedings. Korem and Kedmi were making competing claims regarding the assets of the RC's. ECBC thus decided not to enforce its security until the divorce outcome was known. After dismissal of the Kedmi Appeal in December, 2012, Korem became the effective owner of all the assets and liabilities of the RC's.

Korem insists that ECBC is partially responsible for the present situation because it allowed Kedmi to liquidate some of the assets. I reject any such notion. During the 2010 – 2012 period, the resort was clearly in survival mode. The two



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principals were locked in a particularly acrimonious marital dispute. The resort was generating no revenue. Kedmi was living on the resort property and was assuring ECBC that she was doing her best to maintain it.

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It was in that context that ECBC allowed Kedmi to liquidate some assets that were not essential to the survival of the resort. ECBC also allowed her to liquidate assets which in fact had actually become liabilities. These included the horses which were very expensive to maintain but had no foreseeable prospect of generating revenue. Korem's grievance with ECBC is misplaced.

Korem now rests his hopes of financial recovery on the possibility of operating a timber cutting business. He presented ECBC with an appraisal of the timber resources on the resort property. The appraisal indicated that the value of the standing timber was 1.5 to 2 million dollars less harvesting costs.

ECBC gave Korem permission to do some limited wood harvesting but insisted upon the presentation of a business plan by July, 2013. The business plan Korem provided did not address how the RC's intended to service the ECBC and ACOA debts. Nor did it indicate how the RC's would finance the start-up of the timber business.

[2]

In October, 2013, ECBC again reviewed proposals put forward by Korem. Incidentally, ECBC learned that property taxes for the resort were $80,000.00 in arrears (Korem says it's now $75,000.00) and that a tax sale was imminent. ECBC decided it was time to apply to have a Receiver/Manager appointed.

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**RC's' Objections to Appointment of Receiver/Manager:** Korem acted for the RC's without legal counsel. He put forward three objections to the appointment of a Receiver/Manager:

1. That the Mortgage dated February 4, 2005 is not valid;
2. That I.N.K. Real Estate Inc. is capable of making payments;
3. That it is not "just and convenient" to appoint a receiver.

I will deal with the objections in turn:

**1. The Mortgage is Valid:** It was properly executed by Korem and was duly recorded. Its repayment terms reflect those agreed to by Korem when he signed as president of I.N.K. Real Estate Inc. on October 2, 2003. Those repayment terms were subsequently modified (in I.N.K.'s favor) on March 23, 2005 and October 30, 2010. On both occasions, Korem signed. (See Lane Affidavit Tabs A & B).

The Mortgage was given as security for a Promissory Note dated January 21, 2005. Korem's objection seems to be based upon his view that ECBC's counsel at the time questioned the promissory note. On the contrary, the record shows that the lawyer was satisfied with the promissory note and authorized ECBC to disburse funds.

The RC's' obligations and ECBC's rights under the Mortgage remain in full force and effect.

**2. The RC's are not Capable of Making Payments:** As an aside, Korem seeks to claim that he cannot speak for Crown Jewel Resort Ranch Inc. (CJRR) because Kedmi still owns that company. At the same time Korem acknowledges that all CJRR's assets and liabilities have been transferred to him. Korem is the effective principal of both companies.

To service their debts to ECBC and ACOA, the RC's would have to make monthly payments of just under $19,000.00 per month. (To say nothing of the arrears). As noted they are also in substantial arrears regarding property taxes ($75,000.00) and owe contractor D.W. Matheson about $35,000.00.

[2]

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Korem has provided no details to show how he can finance the start-up of the timber business. By his own estimate, he would need one to two years just to pay off the ECBC Secured debt. He give no indication of how much longer it would take to pay off the Unsecured debts. Korem has been given ample opportunity to seek re-financing with another lender. He admits that commercial lenders will not go near him. There is no realistic prospect that the RC's will ever be able to address their debts.

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**It is Just and Convenient that a Receiver/Manager be Appointed**: What follows, I adopt, in large measure from the Applicant's Brief.

In **The 2013-2014 Annotated Bankruptcy and Insolvency Act**, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c)the nature of the property;

(d)the apprehended or actual waste of the debtor's assets;

(e)the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

(i)the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order on the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.

The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument –



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appoint a receiver. In **Bank of Montreal** v. **Sherco Properties Inc.**, 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc. , finding at paragraph 42 that:

> [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See **Textron Financial Canada Limited** v. **Chetwynd Motels Limited**, 2010 BCSC 477; Freure Village, supra; **Canadian Tire Corp**. v. **Healy,** 2011 ONSC 4616 and **Bank of Montreal v. Carnivale National Leasing Ltd**. and **Carnivale Automobile Ltd.**, 2011 ONSC 1007.

The court in **Bank of Montreal v. Sherco Properties Inc**. offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> (a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
>
> (b) the terms of the mortgages permit the appointment of a receiver upon default;



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(c) the value of the security continues to erode as interest and tax arrears continue to accrue;

(d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

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As noted at paragraph 33 of the Affidavit of Steve Lane, the General Security Agreement entered into by Crown Jewel provides ECBC with the specific authority to appoint by instrument a receiver or receiver and manager of the assets of the company upon default. The RC's are in default of the obligations owed to ECBC pursuant to the Secured Letter of Offer as referenced in paragraph 4 of the Affidavit of Steve Lane.

Certain other factors to be considered in determining whether it is just and convenient to appoint a receiver are particularly relevant to the case at Bar. These are:

*(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;*

Mr. Lane states at paragraphs 50 and 51 of his Affidavit that the RC's owe outstanding property taxes to Victoria County, Cape Breton in the approximate

amount of $80,000.00 as of October, 2013 and that, failing payment, Victoria County intends to put the lands up for tax sale in March of 2014. Permitting this situation to continue will undoubtedly place ECBC's security interest at risk.

Paragraphs 58 and 59 of the Affidavit of Steve Lane sets out the concerns ECBC has with the alleged lease agreements entered into by Korem. Clearly Korem did not have, on behalf of the RC's, any authority to enter into these lease agreements without the consent of ECBC. Further, the lease agreements appear to have been made by the RC's under a different business name, notwithstanding the fact that this entity has no legal standing. Clearly the RC's can no longer be entrusted with protecting and safeguarding their assets and the actions they have taken with respect to these alleged lease agreements clearly places ECBC's security interest at risk.

*(d) the apprehended or actual waste of the debtor's assets;*

It is apparent that Korem intends to continue with timber harvesting on the lands of the RC's that are subject to the ECBC security interest. Although limited timber harvesting was permitted by ECBC while Korem attempted to resolve the outstanding matrimonial property dispute, ECBC is understandably not confident



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that Korem will seek such consent in future. Given what appears to be an increasingly desperate financial situation of the RC's, ECBC holds a reasonable apprehension that the assets of the RC's, and in particular the timber resources, may be depleted or wasted.

*(e) the preservation and protection of the property pending judicial resolution;*

Crown Jewel Resort is no longer in operation and has been closed down for quite some time. ECBC remains concerned as to whether the assets of the resort are being adequately preserved and protected. For instance, ECBC has no way of ensuring that Korem will continue to properly maintain the resort property. Further, ECBC is concerned as to whether the assets of the resort will be properly insured on a continuing basis.

*(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;*

As noted above, ECBC has the right to appoint a receiver by instrument under the General Security Agreement entered into by the Respondent, Crown Jewel. ECBC advised the RC's of its intention to appoint a private receiver with respect to this matter during the November 20, 2013 negotiation referenced at paragraph 53 of Mr. Lane's Affidavit.

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*(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;*

In **Bank of Nova Scotia v. Freure Village of Clair Creek** (1996), 40 C.B.R. (3d) 274 (Ont) S.C.J. granted the motion for appointment by the court of a receiver-manager, holding at paragraph 13:

> [13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1½ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.



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Mr. Lane, at paragraph 60 of his Affidavit, notes the concerns ECBC has with the ability of MGM to carry out its duties. It is clear from the email stream of correspondences referenced at paragraph 59 of the Affidavit that Korem intends to set up as many road blocks as he can with respect to both the appointment of the receiver and the subsequent carrying out of its duties. As in **Bank of Nova Scotia v. Freure Village of Clair Creek** above, it appears inevitable that Korem will continue to bring costly, protracted and unproductive litigation against both ECBC and its privately appointed receiver. Further, it appears clear that Korem will not agree on the proper approach to be taken to marketing and selling the assets of the RC's subject to the ECBC security interest. Certainly any such attempts to dispose of the property by the privately appointed receiver would be met with further litigious skirmishing.

*(l) the conduct of the parties;*

It is clear from a reading of Mr. Lane's Affidavit that ECBC has extended the RC's with every opportunity to turn the resort business around. Unfortunately, the business became insolvent and has not been in operation for some time. Ultimately, ECBC had no option other than to enforce its security in an attempt to recover some of the losses it incurred in relation to the loans granted to the RC's.

[2]

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Despite the personal investment Korem has made in the resort, as well as the arduous and extremely adversarial divorce proceedings with Kedmi in regard to the assets of the RC's, Korem has not, despite being given ample opportunity to do so, made any reasonable progress in obtaining alternate financing with a view to paying out the ECBC indebtedness. Further, Korem has yet to provide ECBC with a meaningful business plan outlining the timely repayment of the ECBC debt.

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*(o) the likelihood of maximizing return to the parties;*

The most practical and prudent approach to maximizing the return to the parties, including the unsecured debt, would be to proceed with a sale of the resort as soon as possible. In the interim, it remains open to Korem, while the receiver is in place, to obtain alternate financing with a view to paying out the ECBC debt.

The authors of **The 2013-2014 Annotated Bankruptcy and Insolvency Act** comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed

receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court. Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.

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The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in Houlden, Morawetz and Sarra at p. 1024 below:

> The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: **Bank of Nova**

**Scotia v. Freure Village on Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].

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Finally, the authors note at p. 1024 of **The 2013-2014 Annotated Bankruptcy and Insolvency Act** that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In **Romspen Investment Corp. v. 1514904 Ontario Ltd.** et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

> [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.

**Conclusion:**

I therefore order the appointment of Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. as the receiver and/or manager of all of the undertakings, property and assets of the RC's, Crown Jewel Resort Ranch, Inc. and I.N.K. Real Estate Inc. The Applicant shall also have its costs in the amount of $1500.00 payable forthwith.

Edwards, J.

Sydney, Nova Scotia

[2]

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**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223

**Date:** 20170818
**Docket:** Tru No. 408708
**Registry:** Truro

2017 NSSC 223 (CanLII)

**Between:**

Bank of Montreal

Applicant

v.

Linden Leas Limited

Respondent

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**Decision**

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**Judge:** The Honourable Justice Gerald R.P. Moir

**Heard:** June 28, 2017, in Halifax, Nova Scotia

**Counsel:** Bruce D. Clarke, Q.C., counsel for the Bank of Montreal
Jillian Foster, agent for Linden Leas Limited
Sean Foreman, counsel for the Nova Scotia Farm Loan Board

**Moir, J. :**

**Introduction**

[1] Five years ago the Bank of Montreal sued for the appointment of a receiver of a beef farm owned and operated by Linden Leas. The suit was brought by notice of application in chambers. The application is scheduled to be heard next October 30th.

[2] The Bank of Montreal moves for the appointment of an interlocutory receiver with limited authority to sell parts of the herd. Linden Leas moves for the preliminary determination of what it says are questions of law: "A. Did the applicant creditor BMO act in contravention of section 12 of [the *Farm Debt Mediation Act*]?" and "B. Did the applicant BMO give the respondent farmer notice of 15 business days as prescribed in section 21(2)...?" It says an order should follow declaring that this application is null and void, setting aside various agreements, and releasing the secured debt.

**Interlocutory Receivership: Facts**

[3] The bank claims to be owed $513,058, and the principal position at least is not contested by the farming company. It mortgaged its assets, including the herd, to the Nova Scotia Farm Loan Board and the bank. It settled with the Farm Loan

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Board. The rights of the bank over the herd, including rights to appoint a receiver and to request the court to appoint a receiver, are uncontested.

[4] The bank gave notice of its intention to enforce security sometime between March 13, 2012 and April 3, 2012. It sued on April 11, 2012.

[5] Two weeks later, Justice Edwards heard the bank's motion for an interim receiver. In the meantime, the bank had received a notice from the Farm Debt Mediation Service that Linden Leas had made an application under the *Farm Debt Mediation Act* and that a stay of proceedings was in effect until May 19, 2011.

[6] The notice was proved before Justice Edwards and evidence was given by affidavit that the Farm Debt Mediation Service supported the appointment. Counsel for the bank pointed out that the draft order was for a purely supervisory interim receiver and one of the affidavits swore, "BMO does not intend to seize any cattle or take possession of any assets of Linden Leas at this time."

[7] Linden Leas contested the motion and referred to the *Farm Debt Mediation Act* provisions for notice by a secured creditor and the stay that follows upon a farmer's application. Nevertheless, Justice Edwards granted the order. No appeal was undertaken.

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[8] Two years later, the order was rescinded. The Bank of Montreal and Linden Leas had come to terms.

[9] In October of 2012 the bank agreed to forbear for a few months, and the farming corporation agreed to make four substantial payments. Further forbearance agreements saw the parties through to the late spring of 2016. The last payment was made this past October.

[10] Linden Leas' 2015 financial statements acknowledge close to $500,000 owed to the Bank of Montreal. The cattle inventory is booked at over a million dollars in value. The 2016 financial statements and a recent appraisal suggest the values have remained about steady. Having settled with the Farm Loan Board and having realized a modest net income, the company reduced its deficit significantly. However, the bank is not getting paid.

[11] Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.

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[12] The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

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**Interlocutory Receivership: Principles**

[13] The original Judicature Acts codified and extended, in a single provision, the equitable powers to order, on an interlocutory basis, a mandatory injunction, then referred to as *mandamus*, a prohibitory injunction, or a receivership. For Nova Scotia, see *Judicature Act* S.N.S. 1984, c. 25, s.14(7), which was taken word for word from the English *Supreme Court of Judicature Act*, 1873, s. 25(8). This was a codification because the courts of equity had been granting these interlocutory remedies for years. It was also an extension because law and equity were fused and the remedies became available "whether the estates claimed...are legal or equitable".

[14] At the time of the Judicature Acts, an interlocutory receivership was the primary kind. Equity provided a remedy to control a corporation pending the outcome of a suit about the corporation. The use of receivership as an instrument of liquidation to enforce a mortgage, or other security, was then emerging. See

John McGhee, Q.C., Snell's Equity Thirty-Third Edition (2015, Sweet & Maxwell, Landon) at p. 530.

[15] Our *Civil Procedure Rules* recognize that the primary role of receivership is as a final remedy for realizing on secured assets, making it necessary to afford the protections that come with notice and resolution of disputes through the trial of an action or the hearing of an application. Thus, Rule 73 – Receiver provides for a "final remedy" in Rule 73.01(1) and Rule 41 – Interlocutory Injunction and Receivership provides for "interim receivership" and "interlocutory receivership" in Rules 41.02(2) and 41.02(3).

[16] With the change in the primary role of receivership comes the recognition that the same protections for those against whom an interlocutory injunction is sought should apply for those against whom an interlocutory receivership is sought. See, Rule 41.02(3)(c). It follows that the rich jurisprudence on interlocutory injunctions applies by analogy to receiverships before default judgement, summary judgement, trail of an action, or hearing of an application.

[17] Writing for a majority of the Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc.,* 2017 SCC 34, Justice Abella summarized the three test-like questions of *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*,

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[1987] 1 S.C.R. 110 and the overriding general question of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

> ...[I]s there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific. [*Google*, at para. 25.]

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[18] The applicant referred me to *RJR-MacDonald Inc.* and *Google Inc.*, but suggested that the approach may be more relaxed where a secured creditor seeks receivership under security instruments that contract for receivership in default. The bank relied on *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, and *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7025.

[19] While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order. Although they were brought in an interlocutory proceedings, the cases relied on by the bank were for final orders. As I said, the interlocutory receivership in Nova Scotia is a temporary remedy.

[20] The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the policy against prejudgement that underlines the *Metropolitan Stores*, *RJR-MacDonald Inc.*, and *Google Inc.* line of cases.

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**Whether to Grant the Interlocutory Receivership?**

[21] The question of a serious issue to be tried is equated with "the claim is not frivolous": *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 as quoted at p. 335 of *RJR-MacDonald Inc.* The notice of contest filed by Linden Leas Ltd. is argumentative and fails to clearly delineate what issues it raises for the hearing. It appears that the respondent is contesting the application on the grounds of a failure to comply with the *Farm Debt Mediation Act*, on an argument about fairness and the court's equitable jurisdiction, and on a complaint about the expense of the interim receivership.

[22] I describe the *Farm Debt Mediation Act* defence in the part of their decision on the respondent's motion for determination of a question of law. While the respondent faces some challenges in making the defence, I cannot find that it fails to raise a serious question.

[23] The applicant generously permitted the respondent to present unproved documents and to make complicated representations of facts. I cannot find that the proposal to liquidate a limited part of the herd each month is sufficiently fair to satisfy my general discretion now. Nor can I find that the respondent fails to raise serious issues for the hearing judge's discretion on the ultimate determination.

[24] I say there is a serious issue for the hearing judge with reservation. Problems with the *Farm Debt Mediation Act* defence will be discussed. Problems with the argument about fairness include the lengthy default under contracted promises, the numerous accommodations and acknowledgements, and the need to protect the credibility of security.

[25] The question of irreparable harm turns on complicated representations of fact about limiting culls to maintain the integrity of the herd. These facts and representations were permitted, and may support a finding of irreparable harm if accepted.

[26] A concern was also expressed about the herd being uninsured. Representations were permitted. The indication is that insuring beef cattle raised outside is prohibitively expensive and uncommon. The interim receiver filed four reports. The absence of insurance was recorded twice in 2012. The bank made no protective disbursement and the interim receiver did not purchase insurance.

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[27] The balance of convenience is much affected by the time between the hearing for an interlocutory receiver and the final hearing. I cannot find that the value of the herd will diminish these times. I have concerns that the issues may not be determined that quickly, but such is the path the applicant has set. In the meantime, the bank's primary concern appears to be that the herd is increasing at the expense of the obligations owed to the bank. Against that valid concern, I have to weigh the farm's concern about partial liquidation compromising the integrity of the herd.

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[28] I find that granting the interlocutory receivership sought by the Bank of Montreal would not be just and equitable in all the circumstances, including the short time between now and the date for the final hearing.

**Question of Law**

[29] I explained to the respondent that we cannot separate a question of law unless "the facts necessary to determine the question can be found without the trial or hearing": Rule 12.02(a). The respondent submitted that the necessary fact-finding was simply counting some days. The required findings are more complicated than that.

[30] The purpose of the *Farm Debt Mediation Act* is to allow insolvent farmers an opportunity for mediation with farm creditors. The farmer applies to an administrator. A review is conducted and a report is prepared. The administrator appoints a mediator. If the mediation is successful, the parties execute an instrument referred to as an arrangement. If unsuccessful, the administrator terminates the mediation.

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[31] The mediation process is supported by restrictions on starting enforcement of security and by provisions for stays of proceedings.

[32] A secured creditor who decides to "enforce any remedy against the property of a farmer": s. 21(1)(a) or "to commence any proceedings...for the recovery of a debt, the realization of any security or the taking of any property of a farmer": s. 21(1)(b) must notify the farmer of the secured creditor's intention and of the right to make an application for mediation. This notice "must be given to the farmer in the prescribed manner at least fifteen business days before the doing of any act as described in paragraph 1(a) or (b)."

[33] Section 17 of the Farm Debt Mediation Regulations prescribes the manner in which the secured creditor's notice is to be given. Paragraph 17(1)(b) allows the creditor of a farming corporation to deliver the notice to an officer, to leave it with anyone at the farm's place of business, or to send it by "priority post, courier or

registered mail" to the place of business. In the later case, the notice "is deemed to be given seven business days after the day on which the notice is sent": s. 17(3). Subsection 1(1) defines "business day" as "a day that is not a Saturday or a holiday". Subsection 35(1) of the federal *Interpretation Act* defines "holiday" to include Sundays, Good Friday, and Easter Monday.

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[34] Subsection 22(1) of the *Farm Debt Mediation Act* provides "any act done by a creditor in contravention of section 12 or 21 is null and void". It also provides that the farmer "may seek appropriate remedies against the creditor".

[35] There is some suggestion the notice was delivered to the business office of the farm by a courier shortly after the notice was prepared. If it were so, and if a person was present to take the delivery, there was plenty of time before this proceeding was commenced. If the notice was not given to a person, there was not enough time for the seven day presumptive delivery time and fifteen days following that.

[36] I have a discretion to separate, or refuse to separate, a question of law. In the circumstances, I would not make a finding about when the delivery was made and, therefore, would not separate the proposed questions. But, the problems with this motion extend beyond that.

[37] Even if the commencement of this proceeding was initially "null and void", that may not now be the case or it may be something Linden Leas Limited can no longer rely on. Conduct over the past five years, including successfully engaging in the process the secured creditor's notice was designed to protect and entering into the arrangements with their acknowledgements of the bank's position, may have overcome the effects of insufficient notice, waived those effects, or lead to estopple.

[38] Further, the remedies sought by the respondent for insufficient notice are by no means axiomatic. A remedy that restores the farmer to the position it would have been in had sufficient notice been given would be far less drastic than what the respondent proposes.

[39] There are, therefore, findings of fact and legal determinations required before the subjects of the respondent's motion could be resolved.

**Conclusion**

[40] I dismiss both motions. Costs will be in the cause.

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Moir, J.

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