2019 01G 7735
SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the
Receivership of Norcon Marine
Services Ltd.

AND IN THE MATTER OF
the *Bankruptcy and Insolvency Act,*
RSC 1985, c B-3, as amended

Estate No.
Court No. 2019 01G 7735

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

APPLICANT

AND:

NORCON MARINE SERVICES LTD.

RESPONDENT

BUSINESS DEVELOPMENT BANK OF CANADA'S MEMORANDUM OF FACT AND LAW

SUMMARY OF CURRENT DOCUMENT	
Court File Number	2019 01G 7735
Date of Filing Document	11 December 2019
Name of Party Filing or Person	Business Development Bank of Canada ("**BDC**")
Application to which Document being filed relates:	Application seeking Court-appointed receiver pursuant to s.243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.
Statement of Purpose in filing:	In support of the Application
Court Sub-File Number, if any	

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OVERVIEW

1. BDC has filed an application seeking an order for the following relief:

   a. for a court-appointed receiver pursuant to s. 243 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended (the "**BIA**") over the assets,

undertakings, and property of Norcon Marine Services Ltd. ("**Norcon**");

b. for the Applicants costs of this Application, on a solicitor-client basis; and

c. for such further and other order as this Court deems just.

2. BDC files this Memorandum of Fact and Law in support of the above noted application (the "**Receivership Application**"). Facts as set out in this Memorandum are set forth in more detail in the Affidavit of Robert Prince dated 11 December 2019.

THE INDEBTEDNESS

3. As of 6 November 2019, Norcon was justly and truly indebted to BDC in the amount of $559,122.20, including interest (the "**Norcon Indebtedness**"), in connection with three loans dated 26 November 2012 (Loan 033518-05), 9 March 2017 (Loan 033518-10) and 22 November 2017 (Loan 033518-11).

4. Pursuant to a Cross-Collateralization Agreement, Norcon is also responsible for the indebtedness of Burry's Shipyard Inc. ("**BSI**") to BDC (the "**BSI Indebtedness**"). Norcon took on responsibility for BSI's debts by virtue of the two companies being related entities with the same share ownership and management.

5. As of 6 November 2019, the BSI Indebtedness is in the total amount of $836,380.43 including interest. As BSI is now bankrupt and in receivership, Norcon is solely responsible for the BSI Indebtedness.

6. Accordingly, Norcon is indebted to BDC in the amount of **$1,389,502.65**, being the total of the Norcon Indebtedness and the BSI Indebtedness as of 6 November 2019 (collectively, the "**Indebtedness**"), which Indebtedness is now due and payable.

7. BDC holds security with respect to the Indebtedness as outlined more particularly in the Receivership Application and supporting Affidavit of Robert Prince. BDC's security includes a GSA dated 15 March 2017, a Marine Mortgage with respect to the four vessels owned by Norcon, several personal guarantees and a Cross-Collateralization Agreement dated 27 June 2018 between BDC, BSI, Norcon and guarantors Sonia and Glenn Burry (the "**Guarantors**"), (collectively, the "**Security**").

MATERIAL FACTS

8. On 21 June 2018, BSI, Norcon and the Guarantors entered into a forbearance agreement with BDC (the "**Forbearance Agreement**") wherein BDC agreed to forbear on enforcing its debt, which was then in default, provided that BSI and Norcon adhered to the terms of the Forbearance Agreement, which included making monthly payments to BDC and complying with certain reporting requirements.

9. On 11 July 2018, i.e. within twenty (20) days of signing the Forbearance Agreement, BSI filed a Notice of Intention to File a Proposal under Division I of the BIA (the "**BSI NOI**"). BSI, with the assistance of Deloitte Restructuring Inc. (the "**BSI Proposal Trustee**"), was then granted the opportunity to conduct a Sales and Investment Solicitation Process (the "**SISP**") to attempt to sell its business and assets. The SISP was initiated on 28 June 2018. Unfortunately, BSI and the BSI Proposal Trustee were unable to reach a viable restructuring plan. After multiple extensions to the stay of proceedings between 11 July 2018 and 26 October 2018, BSI ultimately advised the Court on 25 October 2018 that it would not be seeking a further extension to the stay of proceedings. On 27 October 2018, BSI was deemed to have filed an assignment in bankruptcy. On 28 October 2018, BDC appointed BDO Canada Limited ("**BDO**") as Receiver of BSI.

10. Following its appointment as BSI's Receiver, BDO facilitated a court-approved sale transaction between 524 Locust Corp. (the "**Purchaser**") in relation to all of the property of BSI for the purchase price of $750,000.01 (the "**BSI Sale**").

11. On 31 October 2018, the Forbearance Agreement between Norcon, BSI, the Guarantors and BDC expired. Norcon, through its counsel, requested that BDC extend and revise the Forbearance Agreement in favour of Norcon. On 19 November 2018, Norcon, BSI and the Guarantors entered into the revised and extended Forbearance Agreement.

12. On 16 May 2019, counsel for BDC sent a letter to counsel for Norcon advising that the November Forbearance Agreement had expired and, accordingly, BDC was entitled to proceed to enforce the Security in satisfaction of the Indebtedness. At the same time, counsel for BDC advised that it would be issuing a demand forthwith to Norcon for the total amount of the Indebtedness in the absence of a new forbearance agreement.

13. On 28 October 2019, counsel for BDC sent a letter to counsel for Norcon and the Guarantors again advising that the Indebtedness was due and payable to BDC and noting the joint and several liability of the Guarantors. Counsel for BDC advised that, in the absence of a forbearance agreement, BDC would immediately issue formal demands along with s. 244 Notices under the BIA. BDC also requested that Norcon provide a detailed proposal by 1 November 2019 outlining how it would meet its payment obligations with respect to the Indebtedness over the following 12-month period.

14. The information requested by BDC was not provided by 1 November 2019. As such, BDC served Norcon with a formal demand for payment of Indebtedness (the "**Demand**"), as well as with its s. 244 notice under the BIA, on 9 November 2019.

15. In addition to failing to provide the requested information, Norcon has committed several Events of Default with respect to the Indebtedness, including, but not limited to, by failing to make payments to BDC when due as required by the terms of the Loans.

16. On 25 November 2019, BDC was notified that Norcon had filed a Notice of Intention to make a Proposal (the "**NOI Filing**") under s. 50.4(1) of the BIA. Having sent its demands more than 10 days prior to the NOI Filing, BDC was not subject to the stay of proceedings. Before BDC could take steps to enforce on its security, however, Norcon filed an Originating Application with the Court, being matter no. 2019 01G 7732, seeking an "Initial Order" for a stay of proceedings pursuant to s. 11.02(1) of the *Company's Creditors Arrangement Act* (the "**CCAA Application**").

17. BDC became aware from the CCAA Application that one of Norcon's vessels has been arrested pursuant to a Warrant issued in the Federal Court of Canada. This material non-disclosure constitutes a further Event of Default.

18. Searches at the NL Registry of Deeds, the Registry of Mechanics' Liens for NL and the NL Personal Property Registry ("**PPR**") reveal that Norcon has the following registered creditors in addition to BDC:

    a. Roynat Inc. in respect of generator(s) described in a financing statement registered in the NL PPR at Registration Number 13768437;

b. Wells Fargo Equipment Finance Company in respect of certain serial numbered equipment described in financing statements registered in the NL PPR at Registration Numbers 14952253 & 14954937;

c. The Bank of Nova Scotia ("**BNS**") in respect of all present and after-acquired personal property and certain serial numbered equipment described in financing statements registered in the NL PPR at Registration Numbers 13916374 & 15033780; and

d. BNS in respect of Marine Mortgages on the vessels Norcon Galatea, Northern Seal, and Norcon Triton (being two of the same vessels over which BDC holds a security interest).

19. In addition to the above, Norcon has incurred a significant liability of $443,000 to Canada Revenue Agency.

20. As outlined in Robert Prince's Affidavit, Norcon has not presented a credible restructuring plan and the evidence indicates that Norcon is incapable of sustaining its business operations under any scenario. It is BDC's assessment that Norcon's monthly payments to creditors over the next three months would significantly exceed cash generated. BDC is therefore seeking the appointment of Grant Thornton Limited ("**GTL**") as receiver of all the assets, undertakings, and property of Norcon pursuant to s. 243 of the BIA (a "**Receiver**").

<u>ISSUE</u>

21. Whether BDC is entitled to have GTL installed as a court-appointed receiver pursuant to s. 243 of the BIA over the assets, undertakings, and property of Norcon.

<u>APPOINTMENT OF RECEIVER</u>

22. Section 243(1) of the BIA authorizes a court, upon the application of a secured creditor, to appoint a receiver where such appointment is "<u>just or convenient</u>", provided that a Notice of Intention to Enforce Security was sent by the secured creditor under s. 244 of the BIA and a ten day period has expired since the notice was given.

BIA, s. 243, 244 [Tab 1]

23. Rule 25.01(1) of the *Rules of the Supreme Court, 1986* also allows the appointment of a receiver if the Court believes it is "just or convenient" to do so:

> **25.01.** (1) The Court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the Court thinks just.

***Rules of the Supreme Court, 1986*, rule 25.01(1) [Tab 2]**

24. Courts have held that, in determining whether it is just or convenient to appoint a receiver, a court must consider all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property.

***Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, para 41[Tab 3]**

25. In ***Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.***, Justice Edwards adopted the following factors to be considered in determining whether it would be appropriate to appoint a receiver:

> (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.

***Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128 [Tab 4]**

26. A court will typically place considerable weight on the fact that the creditor has the right to instrument-appoint a receiver. In ***Bank of Montreal v. Sherco Properties Inc.***, the court noted at para 42:

> [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. [Citations omitted.]

***Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, para 42 [Tab 3]**

27. In ***Bank of Montreal v. Carnival National Leasing Ltd.***, Newbould J. held that on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. <u>Reasonable time would generally be of short duration, not more than a few days and not encompassing anything approaching 30 days.</u>

***Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 [Tab 4]**

28. In the present case, the written demand for payment and the Notice of Intention to Enforce Security were both provided to Norcon on 9 November 2019. A "reasonable time" has passed since the demand for payment was made and the 10 day period under required under s. 244 of the BIA has long been expired. BDC is therefore entitled to exercise its right as a secured creditor to seek the court appointment of a receiver under s. 243(1) of the BIA.

29. BDC submits that it is just and convenient for this Court to appoint a receiver in the present case for the following reasons:

(a) BDC has the contractual right to appoint a private receiver.

(b) The amount of the Indebtedness is not in dispute.

(c) As outlined above and in BDC's supporting Affidavit, Norcon has withheld information, has shown disregard for BDC's rights and has occasioned several Events of Default. A court-appointed receiver will be able to prevent and/or mitigate further defaults through greater transparency.

(d) The arrest of one of Norcon's vessels in which BDC has a security interest establishes that BDC's security is in jeopardy. A court-appointed receiver is necessary to immediately protect and preserve BDC's security interest in Norcon's property.

(e) A court-appointed receiver will be able to more effectively deal with and sell property in a manner that will maximize the value for the creditors of Norcon.

(f) A court-appointed receiver will be able to provide all stakeholders with a more efficient forum for creditors of Norcon to resolve priority issues.

(g) A court-appointed receiver is required as the cooperation of Norcon with a private receiver is unlikely, given Norcon's conduct to date.

30. The Court's refusal to grant the Receivership Application would place the interests of BDC and other creditors at significant risk. Norcon's financial position has inexorably and precipitously declined with no reasonable prospect of recovery. BDC submits that, overall, the appointment of GTL as Receiver is justified in order to immediately protect and preserve the property of Norcon and to more effectively deal with Norcon's property in a manner that will maximize the value for all stakeholders. Receivership is the most practical and prudent approach in the circumstances of this case and represents the most efficient forum for creditors of Norcon to resolve any priority issues that may arise.

CONCLUSIONS

31. Based on the foregoing, BDC submits that it would be appropriate for the Court to exercise its power under s. 243(1) of the BIA to grant an order appointing GTL as Receiver of Norcon.

32. BDC seeks its costs on a solicitor-client basis.

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Tab 1

(g) generally, for carrying into effect the purposes and provisions of this Part.

R.S., 1985, c. B-3, s. 240; 1992, c. 27, s. 88.

f) changer ou prescrire, à l'égard de toute province, les catégories de dettes auxquelles la présente partie ne s'applique pas;

f.1) régir le renvoi des procédures dans une province autre que celle où l'ordonnance de fusion a été rendue;

g) prendre toute autre mesure d'application de la présente partie.

L.R. (1985), ch. B-3, art. 240; 1992, ch. 27, art. 88.

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

PARTIE XI

Créanciers garantis et séquestres

Court may appoint receiver

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

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

(c) take any other action that the court considers advisable.

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245 (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou

Tab 2

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RULE 25
RECEIVERS

Analysis

RULE 25
RECEIVERS

25.01 Application for receiver and injunction

25.02 Giving of security by receiver

25.03 Remuneration of receiver

25.04 Receiver's accounts

25.05 Default by receiver

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Application for receiver and injunction

25.01. (1) The Court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the Court thinks just.

(2) When appointing a receiver, the Court may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought, from assigning, charging or otherwise dealing with that property until after the hearing of the application for the appointment of the receiver.

(3) Where an applicant wishes to apply for the immediate grant of an injunction, the applicant may do so *ex parte*.

(4) Where on a hearing of an application for the appointment of a receiver, it appears that the matter in dispute should be dealt with by an early trial, the Court may order accordingly and fix the place and mode of trial, and make such other order as is just.

1986 c42 Sch D rule 25.01

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Tab 3

CITATION: Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7023
COURT FILE NO.: CV-13-10244-00CL
DATE: 20131203

2013 ONSC 7023 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

APPLICATION UNDER S. 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c-B-3, S. 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c.C-43, and RULES 14.05(2), (3) (d), (g) and (h) OF THE *RULES OF CIVIL PROCEDURE*

RE: **BANK OF MONTREAL, Applicant**

AND:

SHERCO PROPERTIES INC., SHERK FARM LIMITED, COSHER PROPERTIES INC., AND DONALD SHERK, Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **S. D. Thom, for the Applicant**

R. B. Moldaver, Q.C., for the Respondents

HEARD: **NOVEMBER 4, 2013**

ENDORSEMENT

[1] This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

[2] Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher

Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

[3] The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of $2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

[4] The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at $2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

[5] Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

[6] Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

[7] In addition, Sherco granted to the Bank a demand $6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

[8] As additional security, Mr. Sherk granted the Bank a $5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of $275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

[9] Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a $5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

[10] Cosher, as security for the Sherco obligations to the Bank, granted a $770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

[11] In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

2013 ONSC 7023 (CanLII)

[12] The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

[13] The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

[14] In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

[15] At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

[16] Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

[17] As of September 9, 2013, interest arrears total approximately $124,346.79.

[18] In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: $50,721.52;

(b) 325 Estate Court: $59,596.49.

[19] The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

[20] On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "BIA").

2013 ONSC 7023 (CanLII)

[21] On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;

(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and

(c) Cosher, pursuant to the Cosher Guarantee in the amount of $700,000.

[22] The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

[23] The Bank had other concerns with the Desjardins proposal including:

(a) the $800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;

(b) the remaining realty tax arrears;

(c) Sherco continued not to pay its monthly interests;

(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and

(e) the Bank was concerned about servicing issues regarding the phases of development.

[24] Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

[25] The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

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[26] The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

[27] Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay $2,300,000 in exchange for a complete release. However, the $2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

[28] Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

[29] In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

[30] The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

(a) after permitting Mr. Sherk to access the Cosher mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;

(b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;

(c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and

(d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

[31] The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

[32] From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

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[33] Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

[34] Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

[35] In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

[36] From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

[37] Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

[38] The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

[39] Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers 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.

[40] Section 101 of the *Courts of Justice Act* states:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

[41] In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the

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property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.).

[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.

[43] Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investment Limited* (1982) 21 Sask. R. 14 (Q.B.) where Estey J. (as he then was) reasoned as follows:

> ...that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

[44] Similar comments were stated in *Royal Bank of Canada v. Whitecross Properties Limited Saskatchewan*, (1984) 53 C.B.R. (N.S.) 96.

[45] Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

[46] Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

[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;

(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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[48] In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

[49] In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

[50] I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

[51] However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

[52] In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

(a) Sherco;

(b) Farm; and

(c) 317 Estates Court

[53] The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

[54] The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

[55] The Bank is also entitled to its costs on this application.

MORAWETZ J.

Date: December 3, 2013

2013 ONSC 7023 (CanLII)

Tab 4

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

LIBRARY HEADING

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**

[2]

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
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

[2]

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

2014 NSSC 128 (CanLII)

[2]

By the Court:

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,

[2]

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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:

[2]

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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.

2014 NSSC 128 (CanLII)

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.

[2]

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

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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]

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.

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.

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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).

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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.

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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.

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;

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(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.

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

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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.

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(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.

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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.

(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

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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.

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**

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

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:

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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

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