



February 3, 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 Receiver**

We act for the Applicant, Canadian Imperial Bank of Commerce (“CIBC”) which brings this motion for the appointment of a Civil Procedure Rule 73 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.

CIBC applied for, and was granted, an interlocutory receivership order against Hefler on January 22, 2021. On that motion, we filed an affidavit of Kyle Lane, describing the security and debt relationship between CIBC and Hefler. We also filed an affidavit of Glenda MacDonald, a legal assistant with our firm, as to various searches. Deloitte Restructuring Inc. filed a pre-filing report.

The motion is for the appointment of Deloitte Restructuring Inc. as a final Civil Procedure Rule 73 Receiver of the assets of Hefler. On this motion, we rely on the affidavits already on file. We anticipate that Deloitte will file a Report providing the Court with updated information acquired during its interlocutory receivership mandate.

Contemporaneously with this motion, CBIC has also filed an application for the issuance of a bankruptcy order against Hefler.

Please accept the following as the submissions of CIBC on the Rule 73 application.

Facts

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

As noted in our brief of January 18, 2021, Hefler had suffered operating losses and its stakeholders advised CIBC last summer that they will no longer inject working capital into Hefler to cover future payments or operating losses. Since that time, Hefler became in breach of the terms of the credit facilities, exhausted its working capital, and was 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 terminated on January 14, 2021.

On January 22, 2021, this court granted a Rule 41 Interlocutory Receivership order. Since then, the time for defending the Statement of Claim has expired and CIBC is now applying for judgment and the grant of a Rule 73 Receivership order as a final remedy.

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 receiver of assets of Hefler.

Law

Civil Procedure Rule 73 provides for the appointment of a receiver as a final remedy. In particular, *Rule 73.02* states:

73.02 Motion for appointment of receiver

- (1) A party who obtains a judgment for an amount of money may make a motion for the appointment of a receiver to enforce the judgment.
- (2) A party who claims for the appointment of a receiver may make a motion for an order appointing a receiver in either of the following circumstances:
 - (a) the party is entitled to the order under Rule 8 - Default Judgment, or Rule 13 - Summary Judgment; ...

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. 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.

ARGUMENT

We submit that the appointment of a Rule 73 Receiver as a final remedy is just and convenient, including on the following grounds:

1. Hefler is in default of the CIBC Letter of Agreement.
2. There is no defence filed and CIBC is therefore entitled to an order under Rule 8 – Default Judgment.
3. Hefler is no longer in business.
4. The CIBC security documents provide for receivership as a contractual remedy.
5. 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.
6. This court issued an interlocutory receivership order on January 22, 2021, having been advised that we would be returning to court for a final order in mid-February, 2021.

We submit that the balance of convenience in this matter favours appointment of a Rule 73 Receiver.

ORDER & RELIEF SOUGHT

CIBC therefore requests this Honourable Court grant an order appointing Deloitte Restructuring Inc. as Receiver of the assets, undertakings, and properties of Hefler.

The proposed form of order generally follows the Model Order

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

Person	Contact	Method of Service
3304051 Nova Scotia Limited	No officers, directors or recognized agent	Delivery to registered office, 300-1969 Upper Water Street, Halifax, NS B3J 3R7
Canadian Imperial Bank of Commerce	Bruce Clarke, QC	bclarke@bruchells.ca
Hawthorne Capital Inc.	Maurice Chaisson, QC	mchaisson@stewartmckelvey.com
Katalyst Wind Inc.	Amy Chan, Recognized Agent	Delivery to registered office, 300 Prince Albert Road, Unit 216, Dartmouth, NS B2Y 4J2
Maritime Pressureworks Limited	Brian Creighton	bcreighton@creightonshatford.ca
RiverRoad Holdings Inc.	Michael Simms, Recognized Agent	Michael.simms@mcinnescooper.com
Thornridge Holdings Limited	Maurice Chaisson, QC	mchaisson@stewartmckelvey.com
VFS Canada Inc.	238 Wellington St., E., 3 rd Floor Aurora, ON L4F 1J5 Fax: (905) 726-5525	infocanada@vfsc.com

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Tab	Authority
1.	<i>Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.</i> , 2014 NSSC 128, CarswellNS 263

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.**

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**

**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

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Under the laws of Nova Scotia (“I.N.K.”)

Together the Respondents

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

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,

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:

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.

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)

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

[2]

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.

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.

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.

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;

- (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 –

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;

(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

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

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.

(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.

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.

(1) 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.

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

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**

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:

[2]

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