Court of King's Bench of Alberta

Citation: National Bank of Canada v Precision Livestock Diagnostics Ltd., 2025 ABKB 175

Date: 20250324
Docket: 2501 04252
Registry: Calgary

2025 ABKB 175 (CanLII)

Between:

National Bank of Canada

Plaintiff

\- and -

Precision Livestock Diagnostics Ltd., Sunterra Food Corp., Soleterra D'Italia Ltd., Sunwold Farms Inc., Sunterra Farms Iowa Inc., Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., Sunterra Enterprises Inc. and Sunterra Beef Ltd.

Defendants

Endorsement
of the
Honourable Justice M.J. Lema

I. Introduction

[1] Should an interim receiver be appointed under s. 47 of the *Bankruptcy and Insolvency Act* where the predominant purpose seems to be information gathering about possible cheque kiting by some of the defendant corporations?

[2] If not, should a receiver be appointed under the *Judicature Act* or other Alberta statutes authorizing such an appointment?

[3] The answers are no and no, as explained below.

II. Appointment of interim receiver under s. 47 *BIA*

A. Legislative provision

[4] Here is s. 47 *BIA*:

> (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of
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> (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
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> (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
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> (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.
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> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
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> (a) take possession of all or part of the debtor's property mentioned in the appointment;
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> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
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> (c) take conservatory measures; and
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> (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.
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> (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be **necessary for the protection of**
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> **(a) the debtor's estate; or**
>
> **(b) the interests of the creditor who sent the notice under subsection 244(1).**
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> (4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor. [emphasis added]

[5] It is common ground that NBC issued a notice of intention to enforce security under s. 244 *BIA* on March 14, 2025.

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[6] What prompted the issuance of that notice and NBC's reasons for seeking an interim receiver are discussed next

B. Background

[7] In mid-February 2025, NBC apparently identified irregular chequing activity among various defendants and took immediate steps to control further drawdowns from the defendants' various NBC accounts, by cheque or otherwise, and to recover an apparent overdraft of approximately $43 million stemming from that activity.

[8] That overdraft draft was cleared, in various ways, within 15 days of being identified.

[9] No further overdraft or other new debt to NBC, arising from the identified chequing activity or otherwise and owing directly by any of the defendants, has since been identified.

[10] NBC has called its loans, which currently stand at approximately $17 million.

[11] It issued a notice of intention to enforce its security, per s. 244 BIA, on March 14, 2025.

[12] Since approximately February 18, 2025, FTI, a licensed insolvency trustee, has, with the defendants' consent, been monitoring the group's financial transactions (or at least its Canadian operations) on NBC's behalf, albeit an informal (i.e. non-court-appointment) basis.

[13] NBC now seeks an interim receiver under s. 47 BIA for two central purposes:

1. preservation of and control over the "Account Property" i.e. "present and after-acquired bank accounts, money, funds, receivables, cheques, choses in action, and books and records" of the defendant; and
2. investigation of certain "Impugned Transactions" (defined in supporting affidavit), namely, the above-noted irregular chequing activity.

C. Analysis

[14] I start by reproducing NBC's detailed arguments on the preservation aspect, followed by my comments on each.

[15] Here are the first two: NBC's potential exposure and risk, and the effects on third parties.

1. "Potential exposure and risk"

[16] NBC argued:

> [NBC] has serious, well-founded concerns in relation to the Impugned Transactions and the Kiting Scheme. Among other things, **[NBC] faces potential exposure and risk as a result of the Kiting Scheme**, for which was there was no legitimate commercial purpose. While the Lender has mitigated against the over US$ 43 million in Overdraft Indebtedness, due to the implementation of the Risk Management Processes, **the possibility of further claims exists and the scope of the Kiting Scheme has not yet been determined**. Additionally, it is **unknown to what extent any other financial institutions (most notably, Compeer [Financial, ACA, an American bank]) have been affected**. It is possible, and in [NBC's] assessment likely, that the Compeer Accounts were in an overdraft position; but the Sunterra Group has refused to provide the information which would prove (or disprove) whether this is the case. [emphasis added]

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[17] NBC acknowledges that it has eliminated an approximately US$43 million overdraft apparently stemming from the Impugned Transactions.

[18] It has also instituted strict internal monitoring over and debit restrictions on all NBC accounts held by any of the defendants. In other words, it has closed the barn door against further drawdowns occurring without its approval.

[19] Finally, it has provided notice of various defaults under its lending agreements, demanded payment of its aggregate debt (as noted, approximately $17 million), and closed off any further financing of any of the defendants (i.e. other than advances contemplated under the proposed interim receivership).

[20] NBC did not explain or particularize its "potential exposure or risk" here.

[21] Even if it extended the scope of its inquiry earlier than the nine or so months already reviewed (back to May 1, 2024) and discovered (for instance) that more of the high-volume and high-value back-and-forth chequing activities had occurred in the previous (for example) three years, it did not explain how that would or might affect the group's current financial position with NBC.

[22] In other words, how any such uncovered activities would translate to any different overdraft or other debt position with NBC than it faced in mid-February of this year and which it has now cleared.

[23] As far as I can tell, whatever further irregular chequing activities occurred and whenever and in whatever amounts, the net result of them was reflected in the mid-February position in the relevant NBC accounts then. That is, it is not apparent what after-shock effects, if any, NBC is or would be facing even if it uncovered similar chequing activities in earlier periods, at least in terms of a changed, or even a risk of a changed, current financial position for the group with NBC.

[24] NBC's evidence and argument did not show otherwise.

2. Effects on third parties

[25] As for effects on third parties (e.g. Compeer), s. 47's second branch (i.e. after "[protecting] … the debtor's estate") focuses on the interests of the "**creditor**" applying for relief i.e. not any other actual or potential creditor or the creditors (actual or potential) generally.

[26] Accordingly, I do not find the possibly of unearthing information showing the impact of the chequing activities on Compeer or other creditors a meaningful reason for seeking an interim receiver.

3. Need to investigate chequing activities

[27] NBC then argued:

> In light of the sheer scale of the Impugned Transactions, and the period of time over which they were undertaken, it is necessary to ensure that a neutral third party with appropriate powers is in place to **investigate the Impugned Transactions and prevent further Impugned Transactions from occurring**. **[NBC] faces significant prejudice as a result of the Kiting Scheme**. While the management of the Sunterra Group has advised that the Impugned Transactions

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> were caused by Ray Price and that Mr. Price would be removed as a signatory for the Sunterra Group, (i) Mr. Price is the sole director of Sunterra Beef, Precision, and Soleterra, and a director of each Borrower; and (ii) the Sunterra Group has ceased cooperating with [NBC]. As a result, **absent the appointment of the Interim Receiver, [NBC] is unable to assess what further steps may be necessary to protect its interests.** [emphasis added]

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[28] On investigating the Impugned Transactions, NBC did not explain why an interim receivership is needed for such an investigation (assuming one is needed) to occur.

[29] It alluded briefly to "litigation", presumably meaning possible future litigation between it and the defendants or some of them about the chequing activities or possibly litigation between it and other lenders in respect of those activities.

[30] But it did not explain why the document production, document review, and questioning dimensions of any such litigation would be inadequate to investigate those activities.

[31] It did not argue that the defendants or any of them will or even may destroy documentary, electronic, or other records.

[32] It did not offer a detailed comparative analysis of "investigation via IR" and "investigation via litigation."

[33] To the extent urgency is a consideration, it did not show what benefits a possibly faster investigation via IR would yield. As discussed above, NBC did not explain how a fuller understanding of the breadth and scope of the chequing activities would or could change the defendants' current financial position with NBC i.e. how learning more about those activities would or could inform anything that NBC might do now in reaction i.e. identify "what further steps" it might take or why they might be necessary.

[34] As noted above, NBC did not explain or particularize the asserted "significant prejudice" faced by it.

4. Benefits for other creditors

[35] NBC then argued:

> The appointment of the Interim Receiver is also for the **benefit of the Sunterra Group's creditors generally**, for substantially the same reasons. The scope of affected parties is unknown and the **proposed investigation will permit the Interim Receiver to identify other parties, including financial institutions who are affected by or hold claims arising from the Impugned Transactions and the Kiting Scheme**.

[36] As discussed above, the focus on creditor impact is necessarily limited to the interests of NBC itself.

[37] Other possibly affected creditors can take whatever steps they see as necessary to protect and advance their interests.

[38] I discuss this aspect further below.

5. Dissipation of assets

[39] Next NBC argued:

> While risk to the assets of the debtor company is a relevant consideration [under s. 47], it is not necessary for the party seeking appointment of an interim receiver to produce evidence of actual or immediate danger of the dissipation of assets if the factors set out in the *BIA*, concerning protection of the estate or a creditor's interests, are met. The prejudice to the Obligors is limited as the Interim Receiver's appointment will only be over the Account Property, the Obligors will continue operating, and a funding request model will be put in place. [authorities omitted]

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[40] This does not explain how appointment of an interim receiver is necessary to protect the debtors' estates.

[41] NBC did not show a material risk of prejudice to those estates.

[42] It did not provide evidence or argue that the debtors or any of them are dissipating property or that there is a material risk of that occurring.

[43] They did not provide evidence showing any material risk of continuation of similar chequing activities. Given NBC's steps since mid-February 2025, I cannot see how any such activities affecting NBC itself could occur.

[44] At the hearing on March 17, Canadian counsel for Compeer provided a copy of a document apparently showing that Compeer has begun or will soon be starting proceedings in South Dakota for certain relief against some of the defendants.

[45] I infer from the initiation of such proceedings that Compeer is aware of some or all of the chequing activities and that it is also taking steps to eliminate the risk of any further such chequing activities involving Compeer, which (from the record here) I infer is or was the defendants' principal (if not exclusive) US banker.

[46] NBC did not argue that the very existence of the chequing activities translates to a risk of the defendants or any of them taking prejudicial-to-NBC-or-others steps in respect of their assets.

[47] Instead, NBC's focus was on preventing the repetition of the chequing activities and investigating those which have already occurred.

[48] In the absence of evidence showing a material risk of such activities recurring or of the defendants taking other steps to dissipate their assets, and in the absence of evidence showing any other need for protection of the debtors' estates, this dimension of s. 47 (i.e. para 47(3)(a)) is not engaged here.

6. Risk of chequing activities continuing (and recap of earlier factors)

[49] NBC then argued:

> The current situation is untenable, and there is a **serious risk of deterioration of the Account Property – and [NBC's] collateral as a whole – in the short term**. While [NBC's] review of the Impugned Transactions is ongoing, there is strong evidence of a Kiting Scheme, which greatly exceeds the "more than a suspicion or speculation" threshold identified in the case law (as discussed below) concerning the **risk to assets of a debtor company**. The Borrowers have no further access to revolving credit, and it is unclear how the Sunterra Group intends to operate in the absence of further credit. [NBC] is prepared to advance funds, to the Interim

> Receiver, in order to enable the Interim Receiver to carry out its mandate[,] which in turn, will permit funding requests to be made for required operational payments. Given that the Kiting Scheme was ongoing, for an indeterminate but potentially significant period of time, there is a **risk that there are significant but as yet unknown claims against the Obligors.** The appointment of the Interim Receiver, and corresponding investigation powers, are necessary to (i) ensure that **no further Impugned Transactions occur**; (ii) ensure the **protection and preservation of the Account Property**; (iii) enable a third party to **assess, review, and locate information concerning the Impugned Transactions** and identify any further or related transactions which may exist; and (iv) **assess any claims against the Obligors resulting from the Impugned Transactions or the Unauthorized Overdrafts,** including any claims by Compeer or others[.] [emphasis added]

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[50] Again, NBC did not explain or particularize the asserted “serious risk of deterioration of the Account Property – and [its] collateral as a whole.”

[51] As for a “risk that there are significant but as yet unknown claims against the Obligors”, that does not translate to a risk to the debtors’ estates or to NBC’s position as the first-ranking creditor against most of the defendants. (Farm Credit Corporation is the first-ranking creditor on three of the defendants, with NBC in second position.)

[52] The priorities are what they are. Flushing out (possible) further claims against the defendants or any of them is not a convincing reason to install an interim receiver.

[53] Again, I do not see a material risk of further similar chequing activities here or any material risk to the Account Property, given the protective steps already taken by NBC.

7. Loss of confidence in management

[54] Here are NBC’s further arguments:

> Whether the secured creditors of the debtor company have **lost confidence in the management** of the debtor company is also a relevant factor in considering whether the appointment is warranted:
>
>> I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major **secured creditors who have the most at risk** have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets. [citing ***Maximum Financial Services v Corporate Cars Limited Partnership*****,** 2006 CanLII 40988 (ONSC) at para 15]
>
> [NBC] has lost confidence in the management of the Sunterra Group, on numerous reasonable grounds, including as a result of: (i) the **Sunterra Group’s inability or unwillingness to take urgent action to address the Impugned Transactions and share the necessary information, including the Compeer Accounts**; and, (ii) the Sunterra Group’s decision to **cease cooperating with [NBC’s] investigation of the Impugned Transactions** and to backtrack on promises made to [NBC] in February 2025.

> It is not required that an applicant prove “actual misfeasance and wrongdoing such that assets are being misappropriated or dissipated”, and even where there are possible explanations regarding alleged wrongdoing by a debtor company, the applicant will succeed if it can establish “on a balance of probabilities the **need for an immediate interim receivership to assure conservation of the Respondents’ assets, and hence, protection of the interests of the Bank through its security**.” [citing ***RBC v Canadian Print Music Distributors Inc*****,** 2006 CanLII 21048 (ONSC) at paras 16-18]
>
> Facts demonstrating a *prima facie* case of borrower misconduct or defaults, including material misrepresentations to lenders and/or serious breaches of the loan agreements, have been sufficient to appoint an interim receiver [citing ***RBC v Applied Energy Systems Inc***, 2009 CanLII 69785 (ONSC) at para 24].
>
> In the context of the *BIA*, a requirement to establish a *prima facie* case has been interpreted as requiring that a claim be supported by evidence and not “mere allegations” or “obviously spurous”, but the threshold is not particularly high. [NBC] has met and exceeded this threshold and there is **no credible, commercially reasonable justification for the occurrence of the Impugned Transactions or the Kiting Scheme**. [citing ***Smith v PricewaterhouseCoopers Inc*****,** 2013 ABCA 288 at para 19] [emphasis added]

[55] Again, NBC did not demonstrate material risk to its interests here.

[56] It may well have lost confidence in Sunterra management, but it did not show material risk to its position if an interim receiver is not appointed e.g. how management’s decisions will or could make the current circumstances worse for NBC.

[57] Even if NBC could learn more about the scope and breadth of the chequing activity, including how Compeer or possibly other financial institutions may have been involved and, if so, how those other parties are or may have been affected, that does not show why any such information is or might be necessary to protect or help protect NBC’s current position.

[58] In ***RBC v Applied Energy*** (cited above), Cumming J. found (among other things) that “the security of RBC [had] been compromised” and that “there is a real danger assets will disappear.”

[59] I have not found similar circumstances here.

8. No justification for chequing activities

[60] Even if no “credible, commercially reasonable justification” exists for the chequing activities, that on its own is not a material factor i.e. where NBC has recovered the overdraft in question, no material risk exists of further such activities, and no evidence shows that any as-yet-unexplored earlier activities have the potential to change NBC’s current position with the defendants (in the sense of additional debt owing by any of them to NBC).

9. Limited powers of interim receiver

[61] Here I also emphasize the limited powers that can be given to an interim receiver, per ss. 47(2) *BIA*:

> The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

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(a) **take possession of all or part of the debtor's property** mentioned in the appointment;

(b) **exercise such control over that property, and over the debtor's business**, as the court considers advisable;

(c) **take conservatory measures**; and

(d) summarily **dispose of property that is perishable or likely to depreciate** rapidly in value.

[62] These are hold-the-line powers, which I have already found are not required here i.e. with no material risk shown of dissipation or other deterioration of the defendants' estates or NBC's position.

[63] Such powers do not extend to conducting investigations, at least not where it is unclear how the outcome of the investigations (i.e. learning everything about the irregular chequing activities) could affect the extent of the defendants' available assets or NBC's position on those assets or its position vis-à-vis the debtors or any of them.

10. Conclusion on s. 47 *BIA*

[64] For these reasons, I conclude that the evidence does not warrant the appointment of an interim receiver under s. 47 *BIA*.

III. No "preserve rights" receiver possible for four key defendants in any case

[65] In any case, as discussed below, no receiver, interim or otherwise, can be appointed for at least four of the defendants, which four happen to be the defendants most centrally (if not exclusively) involved in the irregular chequing activities, at least to the extent the proposed receivership is preservation-of-rights focused.

[66] The reason is a current stay or hold-action period in effect in respect of those defendants under the *Farm Debt Mediation Act*.

[67] I discuss this in detail below.

A. Legislative provisions

[68] The *FDMA* imposes an initial stay or hold period when a farmer (see definition below) is facing enforcement and other actions by one or more creditors.

[69] Here is the definition of "farmer", from s 2 *FDMA*:

> *farmer* means any person, cooperative, partnership or other association of persons that is engaged in farming for commercial purposes and that meets any prescribed criteria. (*agriculteur*)

[70] I believe it is common ground that Sunterra Farms Ltd., Sunwold Farms Ltd., Sunterra Farms Iowa Inc., and Sunwold Farms Inc. are farmers so defined.

[71] I believe it is also common ground that all four are insolvent within the meaning of (at minimum) one of the conditions identified in subsection 6(a), (b), and (c) *FDMA*.

[72] Here is the *FDMA* provision requiring interpretation here:

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21 (1) Every secured creditor who intends to

(a) **enforce any remedy against the property of a farmer**, or

(b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer

shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.

(2) The notice must be given to the farmer and to an administrator, in the form established by the Minister and in accordance with the regulations, at least 15 business days before the doing of any act described in paragraph (1)(a) or (b). [emphasis added]

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[73] NBC is a secured creditor within the meaning of ss. 21(1).

[74] NBC issued a ss 21(2) notice to the defendants or at least the four in question on March [14], 2025.

[75] Section 5 *FMDA* (referenced in ss. 21(1)) provides (in part):

(1) Subject to section 6, a **farmer may apply to an administrator for either**

(a) **a stay of proceedings against the farmer by all the farmer's creditors**, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or

(b) a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement.

[76] The four defendants ("the Farmers") argue that the 15-day hold period imposed by s. 21 bars the appointment of an interim or other receiver now or at any point prior to the expiry of that period.

[77] NBC argues that the appointment of an interim receiver falls outside the scope of s. 21.

[78] I find for the Farmers on this point, for the following reasons.

[79] NBC relies on ***Jacob's Hold Inc. v Canadian Imperial Bank of Commerce***, 2000 CanLII 22730 (ONSC) (Jarvis J.). Here is the key segment of that decision:

It seems sensible to deal first with the matters raised by Mr. Fallis. He says, essentially, that the order appointing the Interim Receiver is null and void and that all proceedings taken by PW pursuant to that authority are of no effect and that no immunity ought to be ordered in their favour in the circumstances. He argues that **ss. 21 and 22 of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 operate as an automatic stay of** any action taken against a farmer and that an **application to appoint an Interim Receiver** pursuant to the *Bankruptcy and Insolvency Act*,

> R.S.C. 1985, c. B-3 **constitutes a proceeding to which those sections apply. The appointment by the court of a receiver is for the purposes of preserving the estate of the bankrupt for the benefit of the creditors. It is not formally or otherwise a proceeding for the recovery of a debt, the realization of a security or the taking of any property of a farmer.** [emphasis added]

[80] Assuming for the moment appointing a *BIA* interim receiver falls into one of the latter three categories of action (i.e. the activities described in para 21(1)(b) *FDMA*), the question remains whether doing so constitutes a “enforc[ing] any remedy against the property of a farmer” under para. 21(1)(a).

[81] ***Jacob's Hold*** is silent on this aspect.

[82] It is clear that a preservation order, an attachment order, and other hold-the-line orders constitute a remedy against property i.e. without necessarily being linked to actual or possible future enforcement against the property. In ***Vachon v. Canada Employment and Immigration Commission***, 1985 CanLII 12 (SCC), [1985] 2 SCR 417, the Supreme Court of Canada found that “remedy”, in the context of the *BIA*, should be interpreted broadly and as extending to preservative orders:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", giving to it and to the words "*autres procédures*" ("other proceedings") a **very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black's Law Dictionary* (5th ed. 1979), defines "remedy":
>
> > The means by which a right is enforced or **the violation of a right is prevented**, redressed, or compensated.
>
> and below:
>
> > Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
> > the means by which the **violation of a right is prevented**, redressed, or compensated. …. [paras 21 and 22] [emphasis added]

[83] See also ***Dowd et al. v. Skip the Dishes Restaurant Services Inc.,*** 2020 MBQB 155 (CanLII) (Perlmutter ACJ):

> **While an attaching order is obviously a different form of *pre-judgment remedy* than an order for the preservation of property**, in light of the intrusive nature of both remedies including the potential hardship or harm to the party who is the subject of these pre-judgment orders, in my view, similar weighty considerations arise. It is my view that these considerations are sensibly reflected in the analysis of the Ontario Superior Court of Justice Divisional Court in ***BMW Canada Inc. v. Autoport Limited*****,** 2019 ONSC 4299, which reformulated the following test for motions brought under the equivalent Ontario Rule 45.01 (*Rules of Civil Procedure*, RRO 1990, Reg 194, s 45.01) (which is worded identically to the Manitoba Rule) (para. 53):

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a. **the property sought to be preserved is the property in question in a proceeding or relevant to an issue in the proceeding;**

b. there is a serious issue to be tried with regard to the property;

c. **the interim preservation or custody of the property is necessary to enable a party to advance or defend its claim**; and

d. the balance of convenience favours granting the relief sought by the applicant or moving party. [para 13] [bold and italics emphases added]

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[84] And ***Montreal Trust Company of Canada v. R M Holdings Ltd.,*** 2000 NFCA 27:

> On appeal, Montreal Trust did not submit that the applications judge was wrong in his construction or application of s. 66 or **Rule 29.10(g)**. Instead**, it argued that the applications judge failed to give the Act a broad and liberal interpretation** ***to effect its remedial purposes (which include the preservation of a debtor's exigible property before entry of final judgment*** **to ensure that any resulting judgment can be made effective)** and, more specifically, failed to consider or apply s. 33(4) of the Act. … [para 7] [bold and italics emphases added]

[85] And ***Coast Tractor & Equip. Ltd. v. Halliday***, 1987 CanLII 2760 (BC SC) (Gibbs J.):

> Earlier in these reasons **garnishee before judgment was referred to** ***as one of a genus of preservation of assets remedies*** **together with others including the power of injunction. In** ***Aetna Fin. Services Ltd. v. Feigelman,*** 1985 CanLII 55 (SCC)**, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 971 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 4 C.P.R. (3d) 145, 15 D.L.R. (4th) 161, 32 Man. R. (2d) 241, 56 N.R. 241, during the course of determining whether a Mareva injunction should remain in place, Estey J., for the court, discussed the rationale for the power of the court to make orders for the preservation of assets.** … [para 12] [bold and italics emphases added]

[86] These authorities confirm that a preservation-of-assets-focused order is a form of remedy against property.

[87] I find that that characterization extends to a s. 47 *BIA* interim receivership i.e. as a mechanism aimed at preserving the status quo, as reflected (as discussed above) in the limited powers that can be given to such a receiver.

[88] This conclusion is supported by ***Canadian Imperial Bank of Commerce v Foxtrot Farms ULC***, 2024 BCSC 1019 (Masuhara J.):

> In respect to the argument of nullity advanced by Foxtrot, **CIBC submits that s. 21(1) and (2) of the** ***FDMA*** **are not applicable because the present application is not one seeking to enforce a remedy against the property of a farmer or the recovery of debt, realization of the security, or the taking of any property of a farmer. CIBC submits that it is only taking steps to**

> **protect and preserve its security, and it is a future step in which it will seek a full receiver to which the notice period under s. 21(1) and (2) apply. Reliance is placed upon the Ontario case of *Jacob's Hold v. CIBC*, 2000 CanLII 22730 (ON SC), [2000] O.J. No. 5702; 52 O.R. (3d) 776.**
>
> Foxtrot relies upon the decision of Justice Joyce in *Community Futures Development Corp. v. Litzenberger*, 2006 BCSC 856, where Justice Joyce reviewed and summarized the purpose of the *FDMA* and the approach to be taken in applying the *Act*, the approach being that the *Act* is to be given "**such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" and that the "words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation."**
>
> He noted the case of *Corp. Les Produits de la Jardiniere v. National Bank of Canada*, [1996] F.C.J. No. 460, which states at para. 14 in relation to the *FDMA*'s predecessor act that:
>
>> the *Act* sets out a set of temporary measures intended to enable farmers to continue operating while benefiting from a grace period before entering into arrangements with their creditors with the assistance of a panel of experts acting as a conciliator.
>
> Foxtrot also relies upon the decision of *Westminster Savings Credit Union v. Font*, 2006 BCSC 1308, a decision of Justice Cullen (as he then was) in which he considered s. 21(1)(a), and held that the **registration of a CPL "falls within the scope of s. 21 either as part of the enforcement of a remedy or the commencement of proceedings or action execution or other proceedings for the recovery of a debt or realization of security or taking of any property of a farmer". CIBC attempted to distinguish the *Westminster* case from the present by noting the differences between a CPL and a preservation order.**
>
> I am not persuaded that the distinction assists here given the context of the **broad encompassing words "any remedy against property" and the liberal approach that is to be taken.** ***The language encompasses, in my view, a procedural remedy such as a preservation order. This would be much more consistent with the scheme and language of the FDMA.***
>
> **With respect to the case of *Jacob's Hold*, first, I am not bound by the Ontario decision of Jacob's Hold. Further,** ***the decision does not address the broad scope of s. 21(1), thus the commentary does not assist me in the interpretation of s. 21(1).*** [paras 14-19] [bold and italics emphases added]

[89] And by ***North 40 Farms (Re)***, 1999 CanLII 14089 (MBQB) (Reg Sharp) at paras 13-18.

[90] Per ss 21(2) *FMDA*, no step that constitutes enforcing a remedy against a farmer's property can be taken until expiry of the 15-day waiting period i.e. ss. 21(2) provides an implicit stay of proceedings in advance of any further stay that may be triggered under s. 5 *FMDA*.

[91] Accordingly, even if a s. 47 *BIA* interim receivership were warranted, NBC moved prematurely here i.e. in applying in respect of the Farmers before expiry of the implicit ss. 21(2) stay.

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[92] The same applies to any form of receivership -- whether under the Judicature Act or other provincial statute authorizing the appointment of a receiver -- to the extent it is aimed at preserving the status quo i.e. providing a remedy in respect of the Farmers' property.

[93] I find that, concerning NBC's arguments in favour of a Judicature Act or other provincial-statute-based receiver that is preservation-focused, the same FMDA bar operates against them in the present circumstances i.e. concerning the Farmers.

[94] That leaves NBC's arguments in favour of an "investigative receivership."

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IV. Investigative receivership

[95] To the extent NBC is seeking investigative powers for a preservation-focused receiver, the answer is that, with no preservation-focused receivership warranted or possible here, it is not necessary to consider the investigative dimension of such a receivership.

[96] If NBC is alternatively seeking a stand-alone investigative receivership, I have already explained why such is not available here as part of a s. 47 BIA interim receivership i.e. with its necessarily preservative focus and with no evidence showing how an investigation will or is likely to assist in preservation efforts.

[97] The spotlight shifts then to whether a stand-alone investigative receivership is possible and, if so, warranted here, under one or more of the Judicature Act or other provincial statutes.

[98] At paragraph 76 of its brief, NBC argued that the arguments raised in support of a s. 47 interim receiver addressing the risk of the lender's security deteriorating, the need to stabilize and preserve the debtor's business, and the loss of confidence in the debtors' management, apply equally in support of a "just or convenient" receiver under s. 13 of the Judicature Act.

[99] In answer I make the same arguments as above on those aspects.

[100] NBC provided a more detailed argument on a fourth aspect, namely, "positions and interests of other creditors." At para 78 it argued (in part):

> … The final factor, regarding the positions and interests of other creditors, also militates toward the appointment of [an] Interim Receiver in this case, as (i) it appears that there is **likely an overdraft position in the Compeer Accounts**, and **Compeer will likely benefit from the completion of an investigation of the Impugned Transactions**; (ii) the appointment of [an] Interim Receiver will **permit the Sunterra Group to continue operations** with minimal impact on third-party creditors and stakeholders; (iii) there may be **other financial institutions or parties impacted by the Impugned Transactions and who will benefit from identification of the claims against Sunterra Group** arising form the Kiting Scheme and the Impugned Transactions; and (iv) the funding of [an] Interim Receiver, by [NBC], by way of the [proposed] Interim Receiver's Borrowing Charge, will **ensure the preservation of the Sunterra Group's property and business** while investigations are ongoing.

[101] At the hearing on March 20, Compeer's Canadian counsel advised that Compeer supports NBC's application for an interim receiver and (presumably) for an investigative receiver.

[102] However, Compeer did not provide any evidence at the hearing i.e. other than for the purpose of showing (as noted above) that it has commenced certain proceedings against some of the defendants in the US. Meaning no evidence from Compeer about its dealings with the defendants or any of them or anything else from which I might gauge how Compeer might benefit from the proposed receivership here.

[103] Neither did it bring its own application for a receiver or jointly apply with NBC.

[104] I do not find that providing a possible albeit unspecified benefit to a third party possibly involved (albeit with no details), is a sufficiently compelling reason for an investigative receiver or even a material consideration when gauging whether one should be appointed.

[105] Particularly with no evidence on whether whatever benefits might be achieved for Compeer are not achievable otherwise and, if achievable otherwise, evidence allowing an assessment of the comparative advantages and disadvantages of proceeding receiver-wise versus otherwise.

[106] Still less so concerning asserted (but unspecified) benefits for unidentified third parties (“other financial institutions or parties impacted”).

[107] As for the proposed receivership being the sole means by which the defendants (or some of them) can continuing operating i.e. via the funding contemplated by the proposed receivership order, that ignores the possibility of the defendants attracting replacement financing during the current hold period (at least concerning the Farmers) and any extended stay period that might be triggered the FDMA or by other proceedings taken by the group (or some members) under the BIA or other restructuring statute.

[108] Concerning “preservation and accessibility of relevant records”, NBC presented no evidence showing any risk of destruction of records.

[109] Concerning the asserted necessity of an investigative receivership to obtaining information from Compeer or other third-party financial institutions, NBC did not show that it can only obtain such information via receivership of the defendants. For instance, it provided no evidence of having requested information from Compeer or of any response from Compeer and, if negative, the reason(s) for it declining or being unable to provide the information.

[110] NBC also alluded to the possibility of obtaining the (or some of the) information “by court order” (see para 84(e)), but did not explain further.

[111] NBC stated (paragraph 79(c)): “Any investigatory, preservatory and administrative actions can be completed by the Interim Receiver more simply and cost effectively than any available means.” But characterized the IR route as simpler and more cost-effective, it did not identify the comparables and how and why the IR route is better, other than a statement (at para 86) that “[NBC] is [not] seeking any sort of freezing order or similar relief (such as a Mareva injunction)” i.e. without any further discussion.

[112] In ***Akagi s Synergy Group (2000) Inc***, 2015 ONCA 368, the Ontario Court of Appeal explored the “investigative receiver” concept, surveying the Ontario law to that point. It identified the following common factors in the cases appointing such a receiver:

> Some consistent themes emerge from these authorities:

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- **The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery**: *Loblaw Brands*, at paras. 10, 14 and 16.
- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, *supra*, at para. 75.
- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see, *e.g.*, *Loblaw Brands*, at para. 17; *Century Services*.
- Finally, in all cases the investigative receivership must be **carefully tailored to what is required to assist in the recovery of the claimant's judgment** while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends. [para 90] emphasis added]

[113] As already discussed, I do not find sufficient evidence of "a risk to [NBC's] right to recover" its claims against the defendants or that it otherwise requires "assist[ance] in the recovery" of those claims.

[114] NBC did not offer any detailed submissions on seeking a receiver under any other provincial statute e.g. the *Personal Property Security Act* or the *Business Corporations Act*.

V. Conclusion

[115] NBC has not shown that an interim receiver under s. 47 BIA is warranted in the present circumstances or, at least concerning the Farmers, that appointing such a receiver is possible in the face of the current FMDA hold period.

[116] And same for a provincial-statute-anchored receivership aimed at preservation of rights.

[117] It has also not shown that an investigative receivership is possible under s. 47 BIA (at least where no evidence shows how the proposed investigation(s) would aid in preservation efforts) or is warranted under the Judicature Act or any other provincial statute in the current circumstances.

[118] Accordingly, I dismiss NBC's application for the appointment of an interim receiver under s. 47 BIA or, alternatively, an equivalent receiver under any applicable provincial statute, or alternatively, an investigative receiver under the BIA or any applicable provincial statute.

[119] The defendants are entitled to costs on a scale (e.g. Schedule C or otherwise) and quantum to be determined.

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[120] The defendants' costs submissions, via maximum 3-page letter (excluding attachments), are due by close of business on Thursday, April 10, 2025, with NBC's due (same rules) by close of business on Thursday, April 17, 2025.

[121] I thank counsel on both sides for their helpful written and oral submissions.

Heard on the **20th** day of March, 2025.
Dated at the City of Calgary, Alberta this 24th day of March, 2025.

M.J. Lema
J.C.K.B.A.

Appearances:

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