SUPREME COURT OF NOVA SCOTIA
Citation: *Iosipescu v. Kindred Living Inc.*, 2025 NSSC 200

Date: 20250625
Docket: Hfx No. 534181
Hfx No. 534182
Hfx No. 534183
Registry: Halifax

Between:

Michael J. Iosipescu

Plaintiff

v.

Kindred Living Inc., a body corporate

Defendant

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	June 12, 2025, in Halifax, Nova Scotia
Written Decision:	June 25, 2025
Counsel:	Michael Blades, for the Plaintiff Richard Norman and Hannah Helm, for Marc Gill and Nick Gill Heather Wyse and Daisy Fitzgerald, for Julie Chamagne

By the Court:

Introduction

[1] Kindred Living Inc. ("Kindred") is a privately held corporation, which was incorporated in approximately 2012 for the purpose of owning and operating the "Village at the Crossing" property development project in Halifax, Nova Scotia.

[2] It has a mortgage which is again coming due for renewal on July 10, 2025.

[3] In December 2024, three Orders for Default Judgement in favour of Michael Iosipescu, in the amount of approximately $500,000 plus, were issued against Kindred after no Notice of Defence was filed. These Judgements were then registered against the title to the property owned by Kindred.

[4] There is a disagreement between the Shareholders/Directors regarding Kindred's response to these Default Judgements and the impending expiry of the existing mortgage on July 10, 2025.

[5] Its shares are held by four individuals:

1. Julie Chamagne - 25%
2. Thomas Chamagne - 25% (both are children of Valerie Evans)
3. Nick Iosipescu – 25%
4. Marc Iosipescu – 25% (both are children of Michael Iosipescu)

[6] Julie, Nick, and Marc are Directors. Thomas is not listed as a Director by the Registry of Joint Stocks – Exhibit "A" Wyse Affidavit.

[7] However, there is evidence to suggest that Thomas was intended to also have an ongoing Directorship and therefore, I conclude that he was at the relevant times a Director of Kindred.

[8] If there are four Directors, there is an equal split between them, based on familial connections.

[9] By force of circumstances, Kindred has been rendered unable to take a clear position regarding how to respond to the Default Judgements (whether or not to

attempt to have them removed from encumbering the property), and the impending expiry of the mortgage on July 10, 2025.

[10] For this reason, Julie has made a Motion on an "emergency" basis per *Civil Procedure Rule* ("CPR") 28, requesting the Court to permit her alone to act in the best interests of the corporation pursuant to section 4 of the *Third Schedule of the Companies Act*, RSNS 1989 c. 81.

[11] I am not satisfied that the Motion is requested in circumstances of "emergency".

[12] I dismiss her Motion for an expedited hearing.

Background

i. **The Promissory Notes payable to Michael underlie the Default Judgements**

[13] Michael Iosipescu ("Michael") provided ongoing services to Kindred between 2012 and 2022.

[14] As compensation for his services, **on June 27, 2022, three separate Promissory Notes were executed by Kindred naming Michael as the promisee: See Exhibit C of Michael's Affidavit.**

[15] **These were signed by each of the four Directors of Kindred.**

[16] **Michael swears in his June 5, 2025, affidavit at paragraph 39:**

> **Despite Julie's aforementioned assurances [July/August 2022] at no time has Kindred ever made any payment whatsoever to me since June 27, 2022.**

[17] I bear in mind that in her Affidavit, between paras. 29 – 42, Julie states the basis for her claim that she signed the Director's Resolutions and three Promissory Notes on June 27, 2022, in order to avoid Kindred losing the opportunity to renew the mortgage on its properties; and that her legal position is she was placed in a position of "economic duress" and therefore, the validity of her signature on those documents is undermined.

[18] **Valerie Evans** is the mother of Julie and Thomas.

[19] She is presently, and has for some time been, "responsible for the day-to-day management of Kindred" since September 1, 2018, and was previously involved with management of the company as well.

[20] Julie's evidence (para. 15) is to the effect that Valerie is owed a substantial sum for loans she and her husband have made to Kindred.

[21] Julie and Thomas dispute Michael, Nick and Marc's position that the Default Judgments are valid and should remain registered against the title of the property.

[22] Consequently, notionally on behalf of Kindred as a complainant, Julie has filed an "emergency" Motion pursuant to CPR 28 which, if granted (the procedural question), would give her an expedited opportunity to argue to this Court (the merits question) that she should be given leave/authority pursuant to section 4 of the *Third Schedule of the Companies Act*, RSNS 1989, C. 81) to:

> (a) Cause Kindred to defend against liability for the three claimed Promissory Notes made in favour of Michael – and to file a Notice of Defence thereto;
>
> (b) Request an Order that the Default Orders for Judgement be vacated; or
>
> (c) Request an Order for the removal of the June 24, 2024, recorded *lis pendens* references in the land titles register.

[23] Michael, Nick and Marc argue that Julie has not established that there is an "emergency".

[24] Michael Iosipescu is the father of Nick and Marc. He is also the promisee of three Promissory Notes executed by Kindred.

[25] The **$33,000** and **$70,500** Promissory Notes contemplated monthly repayment of the monies starting in **August 1, 2022**, over a period of seven years, whereas payment of the **$488,000** (to be adjusted for credits etc.) Promissory Note was to start on **October 1, 2022**, with "amortization and monthly payments decided by the shareholders and attached as an addendum to the Promissory Note by September 1, 2022."

[26] They each also read in part: "The Loan will be paid in full in the event of a sale of the assets of Kindred Living Inc."

[27] Michael claims the adjusted amount after credits to the Defendant, of a total of $658,397.01, $37,950 and $81,075 in his three separate Statements of Claim - one in relation to each Promissory Note [Notice of Action for Debt] filed June 13, 2024:

> 20 To date no payment or partial payment has been paid to the Plaintiff against the Promissory Note;
>
> 21 The Promissory Note provides that the Plaintiff would meet with the shareholders to determine the amount owed for out-of-pocket expenses accrued by the Plaintiff on behalf of the Company;
>
> 22 The Defendant has failed to comply with the terms of the Promissory Note relating to an in-house review of invoicing for out-of-pocket and draws; and
>
> 23 The Defendant has breached the obligations of repayment, pursuant to the Promissory Note. The Plaintiff states the Promissory Note is in default and the full amount is due and payable.

[28] No payment has been made since June 27, 2022, which is when the Promissory Notes were executed.

[29] He filed three Actions – one for each of the Promissory Notes, on June 13, 2024.

[30] In September 2024, he used a bailiff to serve his three Statements of Claim upon Julie Chamagne, as she was a Director of Kindred – para. 44 Affidavit.

ii. Julie does not deny having been properly served on September 20, 2024, with the three Promissory Note Actions.

[31] At that time Julie had the benefit of legal counsel and stated in her rebuttal Affidavit, at para. 4:

> I am not a lawyer. I attended law school by distance in the UK while I was living in France and completed my studies in 2006. I have never been called to the bar in any jurisdiction. I have worked in the legal sphere as the Executive Director of a not-for-profit organization for 17 years, but I have no training in Canadian civil law and proceedings nor any expertise in any domain beyond that of refugee and immigration law.

[32] Michael also swore an Affidavit in a related proceeding (Hfx No. 487255) on September 5, 2024, wherein Julie, Thomas and Kindred were all parties. In that

Affidavit, he made reference to the attached copies of the three separate Debt/Promissory Note Action proceedings that he had filed against Kindred bearing Halifax numbers 534181, 534182, and 534183 – para. 43 Affidavit.

[33] He also provided the documentation to his sons Mark and Nick (who were both Directors and Shareholders of Kindred) through their counsel, Richard Norman, on or about September 5, 2024 – para. 46 Affidavit.

[34] By late October 2024, no Defences were filed in response to any of the Statements of Claim.

[35] Consequently, Michael sought a Default Judgement in each of those three actions, which was granted by the Deputy Prothonotary on December 19, 2024 – Exhibit "K" of his Affidavit.

iii. The motion before me

[36] Before me is an Interlocutory Motion presented by Julie acting as a Director of Kindred, which is characterized as an "emergency".

[37] Therefore, that Motion is governed by our CPR 28.

[38] There are two major issues:

1. Is this a proper case to declare the matter as an "emergency Motion"; and
2. On the merits should any portion of the Motion requests be granted?

[39] This decision addresses only whether Julie's CPR 28 Motion is properly characterized as an "emergency".

[40] I do mention evidence herein that may be associated with the merits of the Motion, but only for the purpose of context in relation to the "emergency" Motion.

[41] Julie's Amended Notice of Emergency Motion requests:

1. Granting Julie leave to defend Halifax numbers 534181, 534182, and 534183 on behalf of Kindred;
2. Vacating the Default Order for Judgement granted by the Deputy Prothonotary in favour of Michael on December 19, 2024 (regarding

each of the separate Actions based on three separate Promissory Notes);

3. Granting Julie permission to file a Defence in each of the Actions 534181, 534182, 534183 on behalf of Kindred by June 30, 2025; and

4. Ordering the removal of the *lis pendens* recorded against Kindred's property on June 24, 2024.

[42] As evidence I have an Affidavit and rebuttal Affidavit from Julie Chamagne, an Affidavit from her brother Thomas and counsel Heather Wyse for the Motion; and for the Plaintiff Michael, an Affidavit from him and one from his son, Nick.

iv. Why I conclude that there is not "an emergency" present in this case

[43] CPR 28 reads:

> 28.01 Request for emergency hearing
>
> (1) A party may request the court appoint a time, date, and place for a motion to be heard as an emergency.
>
> (2) The party must make the request for an emergency hearing by providing all of the following information to the prothonotary:
>
> (a) details of the motion the party wishes to make;
>
> (b) all information concerning the availability of, and means of communicating with, a party who is to receive notice of the motion;
>
> (c) the reasons for proceeding *ex parte*, if the party proposes an *ex parte* motion;
>
> (d) a description of the evidence to be presented;
>
> (e) references to applicable legislation, Rules, or points of law;
>
> (f) a statement of when the party will be ready to file an affidavit;
>
> (g) the amount of time the hearing is likely to require;
>
> (h) the reasons for concluding that an emergency exists.
>
> (3) The information must be in writing, unless a judge permits otherwise.
>
> 28.02 Emergency motion on notice
>
> (1) The court may provide a time, date, and place for an emergency motion to be heard on notice, if a judge is satisfied on each of the following:

> (a) an emergency exists of sufficient gravity to require a speedy hearing;
>
> (b) it is possible for all parties who wish to be heard to be in attendance for the motion;
>
> (c) the gravity of the emergency outweighs any inconvenience to a party.
>
> (2) The court must provide directions for giving notice, unless the parties agree on giving notice, and the directions may include a short notice period and a speedy method of giving notice.
>
> (3) A judge may give directions for conduct of the motion, including directions on notice, form of documents, filing deadlines, or evidence.
>
> (4) If a judge does not give directions on form of notice, the party who makes the motion may notify other parties by delivering a notice of motion under Rule 23 - Chambers Motion, with both of the following modifications:
>
> (a) the notice need not refer to the time required for the motion to be heard, and it must not refer to the judge as presiding in chambers;
>
> (b) the notice must state the name of the judge and that the motion is by special appointment to respond to an emergency.

[44] Let me repeat what I stated in another case of this nature - *Capital Demolition and Environmental Services II Inc. v. Nova Scotia (Attorney General)*, 2022 NSSC 368[1]:

> **Issue 1 - Is there "an emergency" per CPR 28?**
>
> [27] Capital asks me to declare that the motion should proceed on an emergency basis.
>
> [28] Before I may find an emergency basis exists, per CPR 28.02(1), I must be satisfied on each of the following:
>
> (a) an emergency exists of sufficient gravity to require a speedy hearing;
>
> (b) it is possible for all parties who wish to be heard to be in attendance for the motion;
>
> (c) the gravity of the emergency outweighs any inconvenience to a party.
>
> [29] When one thinks of "an emergency" in common parlance, firetrucks and ambulances come to mind.

[1] I have abridged in part some of what I said in *Capital Demolition* within these quotations.

[30] The Random House Dictionary of the English language, second edition unabridged 1987, Random House of Canada Limited, Toronto Ontario defines "emergency" as:

> A sudden, urgent, usually unexpected occurrence or occasion requiring immediate action.

[31] **In summary, CPR 28.02 requires that the moving party establish (having both the evidentiary and legally persuasive burdens) that the relevant factual circumstances, viewed contextually, amount to a request that the court decide on an inter partes basis, an issue whose gravity (the nature and seriousness of the issue itself, and the extent to which the untimely decision thereof will frustrate the ends of justice) is such that it is in the interests of justice to hear it, not just earlier than the normal course, but proportionately earlier ("a speedy" or proportionately accelerated hearing date) than would normally be the case.**

…

[33] There is little jurisprudence directly on point, however I find helpful Justice Beveridge's reasons (as he then was) in *Aurelius Capital Partners v. General Motors Corporation*, 2009 NSSC 100, and will liberally repeat them here.

…

> 6 The defendants also point out that one of the usual and mandatory requirements of bringing such an application is an appropriate undertaking by the moving party for damages pursuant to Civil Procedure Rule 41.06. *The defendants also submit that there really is no emergency; that any emergency is more apparent than real, it having been created by the plaintiffs letting a full two months pass before bringing their motion for the appointment of an interim receiver*.

[35] Then next he stated:

> …
>
> 10 However, more specifically, Civil Procedure Rule 28.02(1), which the moving party relies on, provides that:
>
> The court may provide a time, date, and place for an emergency motion to be heard on notice, if a judge is satisfied on each of the following:
>
> (a) an emergency exists of sufficient gravity to require a speedy hearing;
>
> (b) it is possible for all parties who wish to be heard to be in attendance for the motion;
>
> (c) the gravity of the emergency outweighs any inconvenience to a party.

…

15 **I do not think it appropriate for me on this motion to make any preliminary or tentative views of the merits of the relief being sought by the plaintiffs, either in their overall action or in their motion** for the appointment of interim receiver.

…

17 Looking at the criteria that I referred to earlier under C.P.R. 28.02 I am not satisfied that an emergency exists of sufficient gravity to require a speedy hearing. **The plaintiffs have not satisfied me that there was a legitimate reason for delaying the bringing of the motion.** Even if I was satisfied that there was an emergency and it was otherwise of sufficient gravity to require a speedy hearing, I am still required to then turn my attention to each of the requirements set out in 28.02(1) (b) and (c).

18 I do not think the responding parties here have suggested that it would be impossible for them to be in attendance for the motion. ***The real crux of their position is under paragraph (c) with respect to the requirement that the gravity of the emergency must outweigh any inconvenience to a party. No one has suggested to me exactly what meaning to attribute to the word "inconvenience", but it strikes me it is not what you would find in an ordinary dictionary meaning. I think the proper approach to that term would be it works some unfairness, some prejudice to the responding parties' abilities to marshal their evidence, to prepare for cross-examination and other procedural steps, and ultimately to be in an appropriate situation or position to deal with the merits of the motion.***

[My italicization added]

[36] On a superficial examination, I generally agree with the Province when it says in its brief that “the perceived emergency is artificial and of Capital’s own making, due to delay.”

[My bolding added]

[45] Also in evidence before me is Exhibit No. 1, which is an email thread including a June 10, 2025 email from Valerie Evans at 13:41 to Dean Tucker of Manulife.com and copied to kindredliving@gmail.com, which reads:

Subject Re: Debt Maturity – 07/10/2025; MLI Loan No 869559:11; Kindred Living Inc.; Village at the Crossing

Hello Dean, thank you for your email.

> We would like to ask for a 3 month extension if that is possible from Manulife's side to give time to get some things resolved with all the shareholders.
>
> I have just forwarded you the Colliers' appraisal for 11.5 million.
>
> Warm regards, Valerie Evans
>
> Manager Kindred Living Inc.

[and from Dean Tucker on **April 30, 2025** at 11:25 AM]

> Good morning Valerie,
>
> Hope all is well. I'm just trying to connect with you regarding the Village at the Crossing, which matures in July 2025, to determine what your plan is for the debt (renewal or refinance).
>
> Please give me a call when you have a chance to discuss. Thank you
>
> Dean Tucker MBA, B.Comm., Senior Dir., Canadian Real Estate Finance Group

[and earlier from Valerie Evans to Hannah Green at Cooperators.ca – June 9, 2025 at 14:45]

> Subject: Re Loan Number 86955911 – Request for Renewal Certificate
>
> Thanks very much – always so prompt!

[and earlier from Hannah Green **June 9, 2025** at 14:08]

> Good afternoon, Val,
>
> I have sent your renewal documents to Manulife for review.
>
> If you have any further questions or concerns, please let me know.
>
> Cooperatively yours,
>
> Hannah Green/Commercial Specialist
>
> Bishop Insurance Group Inc./Co-Operators

[46] Earlier in that message thread Valerie received from Manulife on June 6 at 3:23 AM:

> Subject: Loan Number 86955911 – Request for Renewal Certificate
>
> Good day!
>
> Attached is our request for confirmation of insurance for the policy expiring shortly. It is imperative that we receive confirmation of continuing insurance coverage 10 business days prior to the current expiry date… Please confirm by

> email that the peril of fire has not been excluded under the property insurance coverage.

[47] In the present circumstances (although Kindred has requested a three-month extension), Julie has identified the renewal of the mortgage presently set to expire July 10, 2025, as a tripwire which requires her motion to be heard as an "emergency".

[48] I conclude there has been significant unsatisfactorily explained delay in addressing that deadline which has been known since the mortgage was last renewed in June 2022[2].

[49] I attribute to Julie/Thomas (and Valerie) the responsibility for this delay, and consequently it tends to support an inference that they may have purposefully done so to create the circumstances of "emergency" to further their own ends[3].

[50] Also of note in that respect, is that the motion herein was signed by Julie's counsel on May 23, and filed with the Court on May 26.

[51] Mr. Norman wrote to Ms. Wyse on May 23, 2025 (Exhibit "S" – Julie's affidavit sworn May 28 and filed May 29, 2025):

> Re-Kindred
>
> **Last September, Nick gave notice to the Kindred Directors that he intended to pursue a derivative claim on behalf of Kindred seeking a declaration that the alleged loans from Ms. Evans were not authorized** and the money directed from Kindred to Ms. Evans was improperly transferred and needed to be returned. **I have instructions to file that claim and will do so sometime next week**. **Attached is a draft** of what will be filed. This will be the sixth or seventh proceeding relating to Kindred. The company needs to be sold and a better process needs to be put in place to resolve these disputes.

[52] The mortgage also had to be renewed in 2022. At that time, the same underlying problems were deferred.

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[2] I realize that Valerie had sent emails to Nick and Marc and Thomas and Julie in late **March 2025** – Exhibit "H" Nick's affidavit regarding the upcoming refinancing in June. However, Julie/Valerie/Thomas do not appear to have taken any material active steps in relation to the refinancing of the mortgage until early June 2025 - especially since Mr. Norman wrote to Julie's counsel/Patterson Law on **April 17, 2025**, that "**Marc and Nick are very concerned about the Manulife renewal**… In addition, I am advised that **[Michael] had registered a judgement against Kindred in the amount of approximate $770,000. A search of the Judgement Roll confirms this**. All of this will likely have to be disclosed to Manulife. From Marc and Nick's perspective, Manulife is unlikely to agree to refinance."

[3] I appreciate that Nick and Marc were opposed to the mortgage being renewed in 2025.

[53] The circumstances in 2025 bear great similarity to what happened in 2022, when last the mortgage was renewed. This claimed "emergency" based on the renewal of the mortgage in 2025 was confidently predictable long ago.

[54] On June 15, 2022, Julie wrote to Nick and her brother Thomas in an email:

> Re-Upcoming Mortgage
>
> Hello Nick,
>
> Thanks for your email. **I agree that we need to figure these things out among shareholders, but I don't think we should, or can, do so before going through with the Manulife mortgage, which does nothing but benefit us all (and which would be disastrous to all if we don't get in place)**. The situation right now is that our two mortgages with CM LS and manual life are due. CM LS is awaiting payout from the new Manulife mortgage. No one other than CM LS or Manulife will receive anything from the new mortgage – it all goes to pay off the two mortgages and the cost of an appraisal, environmental and property condition studies and the legal fees. Kindred's paid advances of $15,000+64,000 = $79,000 good faith deposits to Manulife, that would be lost if we do not go through with the mortgage with Manulife. CM LS can charge a higher rate if they are not paid out now, as we would be in default. Manulife can keep the deposits to date and charge more until it is paid out. **The Manulife mortgage has to be in place by June 22**, one month after the interest rate was set (and interest rates are higher now).
>
> **The reason for taking a three year Manulife mortgage (the lowest term Manulife gives) is with the thought to sell the Kindred assets before the mortgage is over. This will require working out the payments to everyone involved.**
>
> **If we can all sit down with a mediator or an accountant a lot of this could be resolved. We are more than willing to meet with a mediator or an accountant of your choosing, who will look at the year ends in the figures that went into the year ends, evaluate everyone's claims, and then go on to detail what is remaining to come to agreement on.**
>
> **Not going through with the Manulife mortgage at this point (after all four shareholders have sent info and sign documents) would mean we would have to come up with money to pay out the first and second mortgages that are now due**. Manulife offered the best terms for a mortgage, better than CM LS. BMO refused to bid on it. **Selling in this present market would be not at all advantageous, as anyone reading the news these days can see.**
>
> The books are available for any shareholder to see. All the accounting is fully documented.

> **Let's sign this and then get together as shareholders to discuss a plan for the resolution of accounts and what we should do to move forward**. I'm free most evenings next week and can make myself available sometimes over the weekends. Whatever works best for everyone.

[55] Earlier in that thread on June 15, 2022, Nick wrote to Julie, Thomas, and Marc:

> **As we are all aware, the deadline is fast approaching**. What Michael has pointed out in recent emails is not reflected in our company FS [I infer that this is a reference to: Financial Statements] . We will need to notify and amend or come to some other satisfactory agreement. **This can't wait much longer but I think it could fall into place quickly and without too much pain if there is the will**.…

[56] More recently, we see that Dean Tucker had emailed Valerie on April 30, 2025, inquiring about the renewal of the mortgage. The next contact one sees in evidence is on June 9, 2025, from Valerie - a mere month before the renewal date.

[57] The existing mortgage term on the real property of Kindred is due to expire on July 10, 2025.

[58] Valerie Evans has sought a three-month extension.

[59] At the time of the hearing, there was no evidence that such an extension will be granted by Manulife.

[60] Moreover, Julie has not established, by direct evidence, that Valerie has the authority to renew the mortgage or request an extension thereof in any event[4].

[61] Valerie is not an Officer, Director or Shareholder.[5]

[62] She is nominally referred to as the "Manager".

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[4] Exhibit "A" in Heather Wyse's affidavit contains the Registry of Joint Stocks records which confirm that Marc is President and Thomas is Secretary, whereas Valerie is the Recognized Agent. I appreciate that Nick stated in his affidavit at paragraph 18: "Valerie Evans manages and oversees the financial and administrative affairs of Kindred. While she is not a shareholder, director, officer or employee of Kindred, she *de facto* operates and controls the Company. Neither Marc nor I authorized Ms. Evans to manage the Company".

[5] Exhibit "A" in Heather Wyse's affidavit contains the Registry of Joint Stocks records which confirm that Marc is President and Thomas is Secretary, whereas Valerie is the Recognized Agent.

[63] On the evidence, I conclude that Valerie has not been shown to be a "directing mind", as opposed to one who must take her instructions from a directing mind of the Company[6].

[64] I am satisfied that neither Marc nor Nick gave her such instructions.

[65] There is no direct evidence as to who, if anyone, purportedly gave Valerie such instructions.

[66] However, it appears that given the circumstances in general, and the ongoing differences of opinion existing between Julie, Thomas ,Valerie and Nick and Marc, regarding whether to engage the renewal process, either Thomas and/or Julie, or neither may have done so.

[67] The evidence establishes that at the relevant times, Thomas was the Secretary of Kindred and therefore an Officer of Kindred.

[68] In his affidavit he states:

> I have always understood myself to be a Director of Kindred… On November 17, 2017, a Notice of Officers and Directors for an Incorporated Company was submitted on behalf of Kindred… On May 28, 2025, it came to my attention that the Notice designates me an Officer of Kindred, but not a Director. I have never resigned from my position as a Director of Kindred, nor to my knowledge has been a vote by the Board of Directors to remove me from this position. [See also Thomas' Affidavit Exh. "A"]

[69] Corroboration thereof may be found in reviewing the Promissory Notes, executed on June 27, 2022.

[70] Michael states at paragraph 35 of his affidavit: "True copies of each of the three executed promissory notes are attached hereto as Exhibit "C"."

[71] In Nick's affidavit at paragraph 39 he states: "True copies of what we signed in 2022 are attached as Exhibit "E"."

[72] The documents that Nick and Michael refer to are identical.

[73] Of particular significance is that they are signed by Marc, Julie, Nicholas, and Thomas, each as a "Director".

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[6] The concept of "directing mind" was canvassed in *ACA Cooperative Association v. Associated Freezers of Canada Inc.*, (1992) 113 N.S.R. (2d) 1 (CA); 93 DLR (4th) 559 at paras. 47-49 and 88-90.

[74] Thomas was considered to be a Director of Kindred by Michael and Nick on June 27, 2022.

[75] I infer that they were satisfied he was properly authorized to sign those documents as a Director.

[76] I will proceed with the analysis herein on the basis that Thomas was at all relevant times, and still is, a Director of Kindred.

[77] The tenor of Julie and Thomas' affidavits herein, and Julie's cross examination, strongly suggest that they were in favour of Valerie moving ahead with the mortgage renewal in June/July 2025.

[78] Julie filed an Affidavit and a rebuttal Affidavit.

[79] At paras. 51-3 of her Affidavit, in relation to the delay by Kindred in filing its Defence to Michael's three Statements of Claim, she stated: [7]

> **I do not recall being served with the Iosipescu Actions, but I am not disputing that I was served**. There was considerable activity in relation to these matters happening around the time the affidavit indicates I was served, as we had just become aware from our legal counsel that Nick and [Convent Lane Townhouses Inc.] were dropping their claims against Kindred in Halifax number 487255, which resulted in the motion for a receiver being withdrawn. **I failed to realize that I needed to bring to my legal counsel's attention that I had been personally served with the Iosipescu Actions.**

[80] She was cross-examined.

[81] I found her credibility somewhat wanting.

[82] Regarding important aspects of her testimony, *inter alia,* she was vague and guarded in her responses in relation to evidence that on its face tended to favour Michael, and she repeated (hearsay) her "understanding" of significant facts which were known to her though her mother, Valerie Evans.

[7] In the Affidavit of Service, bailiff, Mike Devine, swore that he "did on September 20, 2024 before the hour of 11:30 AM personally deliver a certified copy of Notice of Action for Debt and Builders Lien, the same as the certified true copy to which this Affidavit is attached and marked Exhibit "A" to this Affidavit to Julie Chamagne. The delivery took place at xxxx Macara Street Halifax Nova Scotia. I knew the person to be the one to whom delivery was to be made because she verbally identified herself when addressed and accepted service."

[83] In cross-examination, she confirmed that Manulife has not been advised of the existence of the December 19, 2024 Orders for Default Judgements against Kindred and the *lis pendens* registered against title of the property - Village at the Crossing.

[84] Julie argues that her motion is an "emergency" because the outstanding *lis pendens* and Default Judgements against the real property of Kindred will substantially interfere with, if not preclude, the refinancing of the existing debt presently financed by way of the Manulife mortgage which is due to expire on July 10, 2025.

[85] When asked what the status thereof is, she answered: "I have no specifics".

[86] She confirmed she has never spoken with Manulife.

[87] There is no persuasive evidence that the existence of the three Default Judgements will preclude a lender from refinancing the existing Manulife mortgage, but I infer that their existence may affect the terms of the mortgage.

[88] I conclude that she appears to be her mother's surrogate in the war of attrition between these opposing parties, and that finding undermines the weight one can ascribe to her expressed or implied assertion that she is acting "in good faith" *vis-à-vis* the best interests of Kindred.[8]

[89] Julie's expressed position is that Michael is owed money- it is just a matter of how much money Michael is owed (para. 24 her Affidavit). Kindred is not denying liability, however it is arguing about the appropriate quantum.

[90] Kindred cannot sign the mortgage unless under its constituting documents and/or legislation those persons that need to be authorized to legally bind the company are specifically authorized by Kindred's lawful directing minds to do so.

[8] For example, she testified that she is a Director and Shareholder, but that her mother Valerie is the one who manages Kindred and is making the mortgage application on behalf of Kindred to Manulife. Her mother has not presented evidence on this Motion, however the evidence does suggest she appears to have her own claim against Kindred for alleged loans she and her husband made to Kindred. It is not clear who, if anyone, purportedly expressly authorized her mother to make the mortgage renewal application on behalf of Kindred. More contentious is on what authority would that person purport to bind Kindred by authorizing the execution of a mortgage on its behalf, in the face of at least half, if not more, of the contrary voices from the Directors of Kindred.

[91] Julie confirmed that Marc and Nick as Directors/Officers have communicated that they do not agree to an extension of the mortgage beyond July 10, 2025.

[92] Therefore, no such extension of the due date of the mortgage is possible, since at least 50% of the Director, Shareholders and Officers are opposed to the renewal, while the remainder are in favour of the renewal.

[93] Julie's position is that she is acting in the best interests of Kindred - and that Marc and Nick are not. She is asserting that she is acting in good faith.

[94] In *Link v. Link*, 2022 NSCA 14 (leave to appeal dismissed-Dec. 15, 2022, Case #40150/2022 CanLII 118497 (SCC)), Justice Bourgeois stated for the Court:

> [47] Of greater significance are the pre-conditions for a complainant to bring an action. Set out in s. 4(2), these were of central importance in the decision under appeal. The section provides:
>
> > (2) No action may be brought and **no intervention in an action may be made under subsection (1) of this Section unless the Court is satisfied that**
> >
> > a. the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) of this Section if the directors of the company or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
> >
> > b. the complainant is acting in good faith; and
> >
> > c. it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.
>
> [48] The appellant acknowledges, correctly in my view, that for leave to be granted, **all three of the above criteria must be established by an applicant**.

[I have also carefully read paragraphs 49-60.]

> ...
>
> *General principles*
>
> [61] **Having reviewed the above, I set out the following summary of the approach governing applications for leave to commence a derivative action:**
>
> • The granting of leave is a discretionary remedy and is governed by s. 4(1) and (2) of the Third Schedule of the *Act*;

- The Third Schedule is remedial legislation. As such, the wording of its provisions must be interpreted liberally and in favour of an applicant. This liberal approach is applied where statutory provisions are open to differing interpretation, and mandates accepting the meaning that favours an applicant. It does not serve to lessen a burden or obligation placed upon an applicant by unambiguous provisions;

- To bring an application for leave, an applicant must establish they fall within the statutory definition of "complainant" (s. 4(1));

- **An applicant must establish on a balance of probabilities all three of the criteria set out in s. 4(2) to be granted leave**;

- Whether an applicant has provided "reasonable notice" (s. 4(2)(a)) is a finding of fact. An applicant is required to establish on a balance of probabilities that notice was provided and it was "reasonable" in the circumstances;

- **Section 4(2)(b) is not ambiguous. Whether a complainant is acting in good faith is a finding of fact. The burden rests upon an applicant to adduce evidence that establishes on a balance of probabilities (not some lesser standard) that they are acting in good faith. In assessing this criterion, a judge should look to the entirety of the record, including the pleadings, submissions and evidence adduced by all parties. There is no need to attempt to define good faith, but rather a judge should analyse the evidence for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met. Like any other finding of fact that must be made, a judge can use the tools at their disposal, including drawing inferences from the evidence and making assessments of credibility**;

- **Determining whether an applicant is acting in good faith is a necessary pre-condition to granting leave. It must be resolved at the leave stage—it is not an issue for trial. Therefore, the admonition against assessing credibility does not apply here**. If an applicant has not established they are acting in good faith on a balance of probabilities, there is no "benefit of the doubt" that applies in his favour; and

- **Section 4(2)(c), whether the proposed action "appears to be in the interests" of the company, has historically been subject to interpretative debate. However, given the remedial nature of the legislation, an approach favourable to an applicant has been endorsed. The threshold for meeting this criterion is low. An applicant does not have to show that the proposed action is in the interests of the company, only that it appears to be**. In considering whether this criterion has been met, **a judge should not delve into the merits of the proposed action, but rather look to whether the issues**

> **raised are arguable**. Because potential trial issues are not to be resolved at this stage, an application judge should refrain from credibility assessments relating to the ultimate merits of those matters.
>
> [My bolding added]

[95] Given the composition of the Shareholders, Officers and Directors of Kindred, and their positions in these matters, it is somewhat difficult to speak in terms of what are the "best interests" of the Corporation in these circumstances.[9]

[96] However, Julie has the evidentiary and persuasive burden herein to establish that these are circumstances rising to the level of an "emergency".

[97] Julie argues that this is an "emergency", because Kindred will be unable to satisfy its obligations to Manulife regarding the existing debt, which is encumbering its real property, unless the Order she seeks is granted sometime before July 10, 2025, so that she can move for the Default Judgements and the *lis pendens* to be vacated.

[98] In her June 9, 2025, brief Julie stated:[10]

> **Julie respectfully submits that Marc and Nick do not have standing to oppose vacating the default judgements**. Julie is seeking leave to defend the above-noted actions on behalf of Kindred pursuant to section 4 of the *Third Schedule of the Companies Act RSNS* 1989, C. 81. If leave is granted, she will move for the default judgements to be vacated. In that case, Julie will be representing Kindred's interests, and Marc and Nick will not have authority to make submissions on Kindred's behalf… will also not be entitled to make submissions in their personal capacities as they are not parties to this litigation… have not requested leave to represent Kindred in these matters… **Therefore… all**

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[9] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [2008] 3 S.C.R. 560, the Court stated (see also paras 34-39):

"[40] In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives." The Court went on in para. 66 to reference that Directors owe a fiduciary duty to the corporation to act in the best interests of the corporation, not to stakeholders and there is a "[111] … duty on directors to resolve the conflicts between interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation."

[10] Nick and Marc are, at the same time, Shareholders, Officers and Directors of Kindred. Julie and Thomas are the only other Shareholders, Officers, Directors. Nick and Marc have an existing and fundamental interest in Kindred's affairs. Julie is a Director, and Thomas appears to be so as well. Their duty is to act in a fair manner to stakeholders that reflects the best interests of Kindred. In present circumstances, the Court cannot rely on Julie to "fairly" represent the shareholder interests of Nick and Marc. Therefore they should be permitted to independently advocate for themselves in this motion.

> **submissions made by Marc and Nick relating to the default judgements should be disregarded by this Honourable Court.**
>
> [My bolding added]

[99] The issuance of the Orders for Default Judgements themselves are questioned on the basis that, although Kindred was served, through the carelessness of its representatives, Kindred did not file a timely Notice of Defence.

[100] Julie and Thomas's claim of "economic duress" should not be assessed at this time, however material factors will include the relevant level of sophistication of Julie and Thomas and their very close and prolonged association with Kindred.

[101] In his affidavit **Thomas** states:

> I agreed with Julie that there would be **irreparable harm to Kindred** if I did not sign the Directors Resolutions and promissory notes on June 27, 2022. I did not agree with the amounts being claimed by Michael and I would not have agreed to sign the Directors Resolutions or the promissory notes in favour of Michael if the Renewal Offer was not imminently about to expire.
>
> [My bolding and underlining added]

[102] In her affidavit Julie states:

> 20 There were many emails being exchanged in the lead up to the mortgage renewal in relation to amounts being claimed by Michael.
>
> 21 In my emails, I tried my best to strike a conciliatory tone in order to keep negotiations moving forward.
>
> 22 I advised Nick, Marc and Michael numerous times that I objected to the amounts being claimed by Michael.
>
> 23 On June 15, 2022, I responded to an email from Nick setting out my reasons as to why we needed to deal with the Manulife mortgage prior to the resolution of accounts…
>
> 29 Shortly before the Renewal Offer was scheduled to expire, Marc and Nick stated that they refused to sign the Renewal Offer unless Tom and I agreed to transfer additional funds from Kindred to Convent.
>
> 30 Marc and Nick advised that they refused to sign the Renewal Offer unless there was an agreement on the amounts owing by Kindred to Michael.
>
> 31 As a result of Marc and Nick's position, two Directors Resolutions were signed on June 27, 2022, setting out the calculation for the amounts Kindred owed to Michael for acting as a project coordinator from December 1, 2012 to

> December 31, 2017, and for out-of-pocket expenses incurred while acting in that role….
>
> 32 The Directors Resolutions were negotiated and signed over a short period with the looming deadline for the mortgage renewal.
>
> 33 I did not have independent legal advice in the negotiation and drafting of the Directors Resolutions.
>
> 34 A meeting for all parties to sign the Directors resolutions were scheduled for June 27, 2022.
>
> …
>
> 38 We have been unable to locate copies of the signed promissory notes.…
>
> 40 I did not agree with the amounts being claimed by Michael and Convent, and I would not have agreed to sign the Directors Resolutions or the promissory notes in favour of Michael or the transfer funds to Convent if the Renewal Offer was not imminently about to expire.
>
> 41 I believed there would be **irreparable harm to Kindred** if I did not sign the Directors Resolutions and promissory notes on June 27, 2022.
>
> 42 **If the Renewal Offer was not signed, Kindred would have lost its down payment as well as other costs associated with the Renewal Offer, and Manulife would have been in a position to foreclose**.
>
> …
>
> 56 As noted above, I dispute the amounts being claimed by Michael and signed the promissory notes under duress.
>
> [My bolding and underlining added]

[103] Julie and Thomas both state they would not have signed those documents, but for their belief there would be **irreparable harm** to Kindred if they did not.

[104] In summary, Julie's evidence and argument is to the effect that she and Thomas believed there would be "irreparable harm to Kindred" in 2022, and I infer they are arguing the same in 2025:

> If the Renewal Offer was not signed, **Kindred would have lost its down payment as well as other costs associated with the Renewal Offer, and Manulife would have been in a position to foreclose.**

[105] There is no evidence in relation to what Manulife will do once it discovers the existence of the Default Judgments nor what financial impact a foreclosure proceeding would be expected to have on Kindred's assets and liabilities (shareholder value).

[106] Moreover, the failure to pay off the debt to Manulife and the consequent foreclosure proceeding is not the only recourse that Kindred has to deal with that debt.

[107] As Mr. Norman pointed on in his brief:

> It is true that there is an urgent situation unfolding relating to the future of Kindred. But the remedy sought by Julie will not do anything to resolve the problems facing the Company. The fact that a mortgage must be paid or refinanced is not in itself an 'emergency'. When faced with the maturity date for a mortgage loan, companies or people have three choices: one – repay the loan; two – refinance the loan; or three – default on the loan.

Conclusion

[108] There is a disagreement within the ranks of the Shareholders, Directors and Officers over what should be done.

[109] Marc and Nick say the Manulife loan should be repaid by selling Kindred's assets- and Michael's Default Judgements against Kindred should similarly be left to stand and paid by Kindred – Julie and Thomas disagree.

[110] Julie and Thomas say the Manulife loan should be refinanced, and Kindred should be given the opportunity to defend against Michael's claims; Marc and Nick argue that neither of these are in Kindred's best interest.

[111] If the impasse continues, there is a risk that the choice will be made for Kindred, and there will be a default on the loan.

[112] In my respectful opinion, the fact that the Officers and Directors of Kindred, once again, cannot agree on the best path forward, has not been shown to be an "emergency".

Rosinski, J.