IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Nova Scotia v. Fraser Valley Renewables Ltd.*, 2026 BCSC 201

Date: 20260211
Docket: S255551
Registry: Vancouver

Between:

The Bank of Nova Scotia

Petitioners

And

Fraser Valley Renewables Ltd., Fraser Valley Agri Waste Solutions Ltd., Huntingdon Agricultural Ltd., Matthew Blair Grier Malkin and 1315390 B.C. Ltd.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Counsel for the Respondents:	B. La Borie
Counsel for the Receiver, PricewaterhouseCoopers Inc.:	K. Mak A. Ang C. Xu
Counsel for Brenmark Holdings Ltd. and Matway Farms Ltd.:	J. Rauch
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Place and Dates of Hearing:	Vancouver, B.C. November 19 and December 18-19, 2025
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, B.C. December 19, 2025
Place and Date of Written Reasons:	Vancouver, B.C. February 11, 2026

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INTRODUCTION

[1] In late August 2025, I appointed PricewaterhouseCoopers Inc. (the "Receiver") as receiver of the assets of the corporate respondents/debtors, and certain lands owned by the personal respondent.

[2] The Receiver now applies to approve a sale of certain commercial lands that remain under its administration. In addition, the Receiver has applied for other relief; most of that relief is uncontroversial, but some is opposed by the respondent debtors.

[3] On December 19, 2025, I granted orders in relation to the uncontested matters.

[4] On December 19, 2025, I also addressed certain of the contested applications. In particular, I issued orders that firstly, approved the sale, as proposed by the Receiver, and secondly, authorized the Receiver to assign any of the corporate debtors into bankruptcy.

[5] These are the reasons for my orders on the contested matters.

BACKGROUND

[6] The corporate respondents/debtors (collectively, the "Corporate Debtors") are owned and controlled by the respondent, Matthew Malkin (collectively, the "Debtors").

[7] Mr. Malkin owns the shares in the respondent, Fraser Valley Agri Waster Solutions Ltd. ("FV AWS"), which in turns owns the shares in the respondent, Fraser Valley Renewables Ltd. ("FVR"). Both companies were directly involved in organic waste conversation and complementary waste processing activities in Abbotsford, BC.

[8] Mr. Malkin owns two properties in Abbotsford: (1) 5205 Bates Road, which is the site of FV AWS and FVR's commercial operations; and (2) 5133 Bates Road, a

larger property which comprises two tenanted residences from which rent is derived (collectively, the "Bates Properties").

[9] Mr. Malkin also owns the shares in the respondent 1315390 B.C. Ltd. ("131"). 131 is the owner of lands in Abbotsford where Mr. Malkin's personal residence is located (the "131 Lands").

[10] Mr. Malkin also owns the shares in Malkin Group Holdings Ltd., which in turn owns 50% of the shares in the respondent, Huntingdon Agricultural Ltd. ("Huntingdon"). Huntingdon owns lands in Abbotsford, which is tenanted and also used to store various pieces of equipment and waste materials (the "Huntingdon Lands").

[11] The petitioner, Bank of Nova Scotia ("BNS"), holds security against all of the Corporate Debtors' assets and the Bates Properties. As of September 2025, the amount outstanding to BNS was approximately $17 million. BNS made demand in April 2025, citing defaults in the loan facilities dating back to 2024.

[12] Since April 2025, Mr. Malkin has attempted to stave off any enforcement actions by BNS, despite the defaults and the expiry of the demand period. Since April 2025, Mr. Malkin has assured BNS that refinancing efforts were underway to resolve the issues, including a refinancing of the Bates Properties and a sale of the Huntingdon Lands.

[13] Nothing has happened to enable the Debtors to repay BNS.

[14] In addition, BNS became aware of other financial pressures facing the Corporate Debtors (and perhaps Mr. Malkin), including a receivable owing to Canada Revenue Agency ("CRA") for payroll deductions and outstanding property taxes.

[15] This petition proceeding was filed in July 2025.

[16] By the return of BNS' application for the appointment of a receiver (late August 2025), no refinancing had emerged. In Mr. Malkin's Affidavit #1 affirmed

August 19, 2025 (paras. 39–44), his evidence on the refinancing efforts amounted to: (a) he was in communications with two brokers (dated from mid-August 2025) referring to various efforts to refinance the BNS debt as soon as possible; (b) he was attempting to list the Huntingdon Lands for sale; and (c) he was selling some equipment.

[17] As of late August 2025, one particular concern to BNS arose. Many months earlier, on December 3, 2024, the British Columbia Ministry of Environment and Parks (as it is now known) (the "Ministry") issued a Pollution Prevention Order ("PPO") against FV AWS and Huntingdon in respect of the Huntingdon Lands. Essentially, the PPO stated that effluent was being discharged from waste piles on the property.

[18] The PPO required compliance with certain remedial measures. As of August 20, 2025, FV AWS and Huntingdon had failed to complete some of those remedial measures from as early as May 2025. Further measures required by the PPO included the hiring of a "Qualified Professional" to undertake monitoring and sampling programs and submit various reports.

[19] On August 21, 2025, I granted the Receivership Order against the assets of the Corporate Debtors and the Bates Properties. Prior to doing so, I dismissed an adjournment application by the Debtors and rejected their stated grounds to oppose the appointment of the Receiver. The Receivership Order was generally consistent with the Model Receivership Order but, as requested by the Debtors, it also included certain unique provisions. The Receivership Order provided in part that:

a) The Receiver could immediately market all of the "Property" (i.e. as secured in favour of BNS) and apply for any vesting order for sales above certain thresholds. The only exception related to the 131 Lands, which the Receiver was not able to begin marketing until after January 1, 2026 (paras. 2(j)–(k) and 3(b));

b) Mr. Malkin was permitted to continue to seek to refinance the debt owing to BNS (para. 3(a)); and

c) a 30-day stay period was imposed in respect of the Ministry to allow the Receiver to evaluate the economic feasibility of complying with the PPO (the stay was later extended to October 6, 2025) (para. 9).

[20] On October 2, 2025, the Receiver decided to abandon and release its interest in the Huntingdon Lands in accordance with s. 14.06(4)(a)(ii) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 [*BIA*], due to what it considered were significant risks and costs associated with complying with the PPO. If the Ministry undertakes any remedial action in respect of the Huntingdon Lands, the Province will at least presumptively have priority over BNS's security on those Lands pursuant to s. 14.06(7) of the *BIA.*

[21] On November 19, 2025, the Receiver applied for further relief to be included in a proposed Amended and Restated Receivership Order ("ARRO"). The ARRO was granted on an uncontested basis. The amendments included removal of the Huntingdon Lands from the receivership proceedings and an increase in the threshold limits below which the Receiver could sell assets without court order (the latter being over the objections of Debtors' counsel).

[22] Other relief sought by the Receiver on November 19, 2025 was adjourned to December 2025 hearing dates, being an application to authorize the Receiver to assign any of the Corporate Debtors into bankruptcy and an order approving the activities of the Receiver in its First Report dated November 12, 2025 (the "First Report".

[23] At the time of November 19, 2025 hearing, Mr. Malkin also updated the Court on the status of his refinancing efforts in his Affidavit #2 affirmed November 17, 2025. He expressed concern about the sale of any equipment by the Receiver and its effect upon his refinancing and "startup" operations. At paras. 36-46, Mr. Malkin again referred to working with two brokers to secure financing and also, making

efforts to sell the Huntington Lands. At para. 47, Mr. Malkin said he expected to receive bank financing of approximately $12.1 million and an operating line and the remainder of the funds to repay BNS from the Huntingdon Lands.

[24] As of December 1, 2025, the BNS debt alone (without enforcement costs) was approximately $17.5 million.

THE PRESENT APPLICATIONS

[25] On December 18 and 19, 2025, I heard the Receiver's application for the relief that had been adjourned from November 19, 2025 and also new relief under a notice of application filed December 16, 2025. As a result, on December 19, 2025:

a) I granted the uncontested relief, being the approval of the sale of certain equipment to a company controlled by Mr. Malkin (Bates Valley Holdings Ltd.) and approval of a listing protocol with respect to the 131 Lands;

b) I adjourned generally the Receiver's application for approval of its activities in the First Report and its Second Report dated December 13, 2025 (the "Second Report"), to which the Debtors' objected. This adjournment arose because there was insufficient court time to address that matter and the issue was not urgent;

c) I granted an approval and vesting order with respect to the Bates Properties (which included the sealing of certain materials in support); and

d) I empowered and authorized the Receiver to assign any of the Corporate Debtors into bankruptcy and act as trustee in bankruptcy.

[26] The latter two orders above in c) and d) – the approval and vesting order and the bankruptcy issue – are the subject of these reasons.

BATES PROPERTIES SALE APPROVAL

[27] As above, the Receiver was authorized in August 2025 pursuant to the Receivership Order to market the Bates Properties.

[28] Based on the Receiver's Reports, and as summarized below, I am satisfied that the Receiver has undertaken a fair and robust sales process that satisfies the "*Soundair Principles*" that arise from *Royal Bank of Canada v. Soundair Corp.*, 4 O.R. (3d) 1, 1991 CanLII 2727 (C.A.).

[29] The Receiver solicited proposals from various real estate brokers, ultimately choosing Colliers Macaulay Nicolls Inc. ("Colliers") for the listing.

[30] The Receiver was cognizant of the holding costs of the Bates Properties, which included ongoing monitoring and management of the environmental issues. As a result, the Receiver determined that an expedited sales process was the best course of action.

[31] The listing began in early November 2025, with 5133 Bates listed for $4.3 million and 5205 Bates listed for $2 million. Broadcasts on the MLS took place to over 1,800 parties, in addition to publications in regional print magazines, listing on various websites and signage on the Properties.

[32] Colliers addressed expressions of interest from 31 parties, conducted 17 site visits and fielded numerous enquiries.

[33] Four offers were received for 5205 Bates and one offer was received for both Bates Properties. No offers were received for 5133 Bates only. The market response clearly indicated a focus on 5205 Bates, the smaller property that was the location of the commercial operations. 5133 Bates is the larger residential property but market feedback received by Colliers was that this property could take a further 6–9 months to sell. For those reasons, the Receiver concluded that stakeholder value would be maximized by pursuing a sale of both Bates Properties at the same time.

[34] On December 8, 2025, the Receiver accepted an offer from an entity (the "Purchaser") for both Bates Properties ("the Offer"). For important reasons that are discussed below, the sale was on an "as is, where is" basis. After the subjects were removed for the Offer on December 12, 2025, the Receiver ensured that the market was well aware of the upcoming court hearing to address the sale approval.

[35] Prior to a consideration of the Offer on December 18, 2025, on the application of the Receiver, I sealed the Confidential Supplement to the Second Report dated December 13, 2025 (the "Confidential Supplement"). I was satisfied that this was appropriate after applying the principles set out in *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman*]. I concluded that a disclosure of that Confidential Supplement – principally the purchase price under the Offer – could pose serious risks to the sales process, and the object of obtaining the best possible price for the Bates Properties. In particular, those risks arose due to parties expressing an interest in attending the hearing to present offers and, also, Mr. Malkin's apparent ongoing efforts to refinance the BNS debt.

[36] As is sometimes usual in sale approval hearings, four other interested parties (who had not previously submitted offers) appeared in Court on December 18, 2025 and presented offers. In addition, the Purchaser under the Offer also tendered a revised offer.

[37] By the continuation of the hearing on December 19, 2025, the Receiver had prepared its Second Confidential Supplement to the Second Report dated December 18, 2025 (the "Second Confidential Supplement"). For the same reasons as above, I sealed this Second Confidential Supplement under the *Sherman* test.

[38] The Second Confidential Supplement revealed that only one of the "new" offers was for both Bates Properties but at prices materially below the Offer. The other three "new" offers were for only 5205 Bates but at values below what had been assigned to that property by the Purchaser in the Offer.

[39] The clear winning bid from the second round was from the Purchaser, who slightly increased its bid, again for both Bates Properties (the "Amended Offer").

[40] At the end of the day, the purchase price under the Amended Offer will yield a price that is substantially less than the outstanding debt owing to BNS. This fact, in addition to the fact that it is uncertain whether BNS will recover anything from the

Huntingdon Lands, leads me to conclude that BNS is likely to suffer a significant shortfall in the recovery of its debt.

[41] In the Confidential Supplement, the Receiver emphasized various factors leading to its recommendation to approve the sale to the Purchaser. These included that:

a) The Properties had been marketed as a court-ordered sale which typically attracts offers at discounted prices; and

b) There had been various adverse media articles regarding Mr. Malkin's operations undertaken at 5205 Bates which may have affected the market's perception of value.

[42] Another "significant concern" of the Receiver had to do with environmental risks associated with 5205 Bates. Conditions were present that required ongoing management and compliance, with heightened concerns during the rainy season (i.e. now). As a result, the Receiver considered it "crucial" that the transaction proceed expeditiously to ensure that responsibility was transferred to a purchaser who would have the financial capacity to address the environmental issues and ensure compliance in a timely manner.

[43] In my view, these environmental issues were not an illusory concern.

[44] The PPO had set out that Mr. Malkin had advised the Ministry that some of the waste found on the Huntingdon Lands, which were causing the concerns, had in fact been brought there from the Bates Properties. As stated in the Second Report, the Receiver had inspected the Bates Properties and undertaken various water management activities at 5205 Bates via contractors. In fact, on October 29, 2025, Mr. Malkin made a proposal to the Receiver for the clean-up of 5205 Bates, including covering the costs of the clean-up himself which he thought would be cheaper than the cost to the Receiver (said by Mr. Malkin to be $400,000–800,000). On November 2 and 3, 2025, the Receiver requested further information from Mr.

Malkin, including some proof that he had the financial capacity to complete the job. The Receiver received no reply.

[45] However, what was looming in the face of these clean-up efforts and potential efforts was the fact that, on November 28, 2025, the Ministry issued a draft pollution prevention order in respect of 5205 Bates (the "Draft PPO") directed to the Receiver, FV AWS and Mr. Malkin. The Ministry referred to an inspection by Ministry officials on November 18, 2025. The Draft PPO was similar to the PPO in terms of requiring immediate action to stop discharge of effluent and also, requiring action on other remedial fronts, including covering waste piles and hiring a "Qualified Professional" to monitor and report, all by certain short deadlines.

[46] On December 5, 2025, the Receiver responded to the Ministry in respect of the Draft PPO. The Receiver said that it had determined that the estimated cost to remove the waste piles would not yield a corresponding increase in value to 5205 Bates. The Receiver however mentioned that it had initiated an expedited sales process and requested that the Ministry withhold finalization and issuance of the Draft PPO, as doing so would jeopardize the sales process and delay a sale to a purchaser who could comply by addressing the environmental issues.

[47] I consider that the Receiver was validly concerned about the environmental issues regarding 5205 Bates for obvious reasons and that it conducted the sales process and accepted the offer in that context. There were clear risks to the value of 5205 Bates if the Ministry acted upon the Draft PPO by finalizing it. The Receiver does not have the ability to address the raised concerns directly and, as such, the Receiver would have been required to engage third parties to address them. The estimated cost to comply with the Ministry's concerns was substantial, even by Mr. Malkin's calculation. At the far end of his estimate ($800,000), the amount well exceeded the maximum limit of the borrowings available to the Receiver under the Receivership Order ($400,000) (para. 25). As the Receiver told the Ministry, the cost of any clean up by the Receiver was not expected to yield any greater increase in value of 5205 Bates.

[48] Clearly what the Receiver wanted to and had to avoid was the situation akin to what happened with respect to the Huntingdon Lands – where the cost of the remedial action and attendant risks would potentially exceed the value of the property such it had to be abandoned.

[49] The Receiver also tendered further information which it had received from the Purchaser at the December 19, 2025 hearing. The Receiver had received this information to support the certainty of the Amended Offer closing in early January 2026. The Purchaser provided a letter from Farm Credit Canada dated December 18, 2025 confirming its financing of the acquisition and also a $200,000 facility to support the Purchaser's clean-up activities. The Purchaser also advised the Receiver that it had access to "additional family equity" to help fund the clean-up activities.

[50] The Corporate Debtors argue that the sales process was commenced "late" and only for a short time (just over a month). They argue that the land was listed at an improvident value. They also argue that Colliers was not experienced in agricultural land.

[51] I agree that the process was expeditious. Ideally, the Receiver would have exposed the Bates Properties for a longer period of time. However, the Receiver did not have the luxury of time in the circumstances. In addition, any delay, while having the theoretical possibility of yielding higher offers, also came with downsides, including the holding costs on what is a substantial debt load and other costs and risks.

[52] While Mr. Malkin offered to assist with the clean-up of 5205 Bates, there is no evidence that it was a viable offer in the sense that he had the financial capacity to undertake and complete the clean-up so as to allow a longer sales process, let alone that those efforts would have more than offset the holding costs arising from the delay.

[53] While Mr. Malkin's offer to clean up 5205 Bates was arguably made to assist the situation, the Ministry's counsel rightly expresses significant concerns, citing a "lengthy history" of non-compliance with sites owned and controlled by Mr. Malkin. I share those same concerns.

[54] In addition, there is no evidence that the short duration of the listing resulted in potential offers not coming forward. There is nothing to support that the listing was at an improvident value. If that were the case, no doubt many bargain hunters would have come forward. Finally, I am not aware that this is agricultural land in the classic sense. The Corporate Debtors operated a commercial enterprise on the Bates Properties, and it is beyond question that Colliers has extensive experience with this type of property.

[55] Mr. Malkin also refers to appraisal evidence of the Bates Properties, being $5.35 million for 5113 Bates and $3.63 million for 5205 Bates. However, appraisal values are nothing more than opinions of value and, particularly in a receivership context, must be put to the test by determining what the market will pay for those properties. Here, the market has clearly spoken and inherently determined what the "market value" is, as that phrase is commonly defined in real estate circles.

[56] What emerged from the sales process was an offer – the Offer – that arose from a competitive process. It also underwent a final bid process, involving not only the Purchaser, but other still interested parties and that process gave rise to the Amended Offer.

[57] Importantly, the Purchaser was aware of the environmental issues and was also aware of the Draft PPO. The Purchaser had engaged with the Ministry in advance of making the Offer or during due diligence to understand what would be involved upon a sale. What emerged was a purchaser who was comfortable with the situation and who had the financial wherewithal to address what needed to be addressed from the Ministry's point of view. Hence, the Purchaser's important agreement to accept the "as is, where is" status of the Bates Properties.

[58] In summary, I accept that the Receiver ran a fair and reasonable sales process in light of the challenges before it. That sales process was extensive and broadly advertised and attracted considerable interest. Overall, nine offers were received and considered by the Receiver – and this Court. I accept the Receiver's business judgment that the Amended Offer is the best opportunity for recovery in respect of the Bates Properties in the circumstances: *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406 [*Kruger*] at para. 28.

[59] I see no basis for the Debtors' argument that the Amended Offer is an improvident sale.

[60] Ultimately, I considered that Mr. Malkin's most significant opposition to the sale of the Bates Properties arose from his continuing wish to refinance the BNS debt and exercise his "right to redeem" to allow him to recover control of the lands and continue his business operations.

[61] In Mr. Malkin's response to application on behalf of himself and the Corporate Debtors, it is boldly stated:

> … the Respondents have achieved financing for not only the Bates Lands but for the other properties under the Receivership. The sale of the Bates Lands puts that refinancing at risk.

[62] In my view, nothing could be further from the truth despite Mr. Malkin's sincere wish that it was.

[63] In Mr. Malkin's Affidavit #3 affirmed December 16, 2025, he refers to various sources that give rise to this "(re)financing", including:

a) Financing of the Bates Properties at $7 million on a subject-free basis which would yield $6.75 million and close by January 30, 2026. This amount is admittedly higher than the purchase price under the Amended Offer;

b) An offer of refinance with respect to the 131 Lands for $4,250,000 with a $250,000 holdback. The closing date is no later than January 31, 2026; and

c) An offer to purchase the Huntingdon Lands for $6.25 million with a $200,000 non-refundable deposit, which is to close March 15, 2026, subject to removal of the PPO by February 15, 2026.

[64] Mr. Malkin also says that the various offers of financing and sale are of a value that will pay the BNS in full. He argues that a sale of the Bates Properties will compromise this recovery to BNS.

[65] Firstly, I will address the Bates Properties "refinancing". There is a brief term sheet dated December 16, 2025 from Jagdip Purewal, MetroVan Development Inc., although it is not accompanied by any support as to its validity. Significantly, the security required is a "first ranking mortgage" over the Bates Properties. However, there are two other mortgages behind BNS' mortgage and no indication how those are to be addressed. In addition, Mr. Malkin is unable to force BNS to accept this "refinancing" save as it allows for *full repayment* of its debt.

[66] The MetroVan term sheet also refers to Mr. Malkin maintaining the Bates Properties "in good standing", presumably referring to the Draft PPO. Mr. Malkin also attaches a December 16, 2025 letter addressed to him from Terrawest Environment Inc. ("Terrawest"), presumably with the intention of providing it to the Ministry and indicative of his statement that Terrawest has the ability to clear up the Draft PPO. Adam Mabbottt of Terrawest states in that letter:

> Terrawest is actively engaged in managing the PPO file and advancing the compliance framework.
> …
> … the Bates Road PPO is under active professional management and progressing toward compliance and closure.

[67] This letter is perplexing because it is contradicted even by Mr. Malkin's own evidence referring to another letter, also from Terrawest. Earlier in Mr. Malkin's Affidavit #3, he attached another letter from Mr. Mabbott of Terrawest addressed to

him of that same date, seemingly to support his criticisms of the Receiver's remedial actions with respect to 5205 Bates. This letter states:

> … Terrawest and other [Qualified Environmental Professionals] have not had the opportunity to assess, manage, or mitigate site conditions since the Receiver assumed control …

[68] Secondly, I will address the purported refinancing of the 131 Lands. There is a term sheet dated December 15, 2025 from BTB Mortgage Investment Corporation as lender. The financing amount is $4.25 million with a $250,000 holdback set to close January 31, 2026. The offer is highly conditional, including due diligence relating to "property valuation" (the July 2024 assessed value was about $3.4 million). Mr. Malkin had not accepted this offer although he states that he intended to do so before the expiry on December 20, 2025.

[69] As with the Bates Properties refinancing, Mr. Malkin is unable to force BNS to accept this "refinancing" on the 131 Lands save as it allows for *full repayment* of its debt.

[70] Thirdly, I will address the potential sale of the Huntingdon Lands. Mr. Malkin has attached a purchase and sale agreement dated December 15, 2025 from Riverside Recycling Ltd. for $6.25 million on a sale to close March 15, 2026. On December 16, 2025, Mr. Malkin accepted this offer on behalf of Huntingdon. However, by December 19, 2025, there was no evidence that the $200,000 deposit had been paid, as required.

[71] As with the 131 Lands refinancing offer, this offer was also highly conditional. Conditions precedent, to be satisfied on or before February 15, 2026, included: a feasibility study, engineering and environmental assessments and, not surprisingly, a clearance letter with respect to the PPO. Again, Terrawest provided support in this regard to Mr. Malkin with another (third) letter dated December 16, 2025 indicating that the PPO was being "actively managed" and a plan was in place. Mr. Mabbott stated that he anticipated that:

> … all required actions will be completed and that a request for formal closure of the PPO will be submitted no later than April 1, 2026, subject to regulatory review timelines.

[72] Even on the face of this offer for the Huntingdon Lands, Mr. Mabbott's outside date for just the request to the Ministry (April 1, 2026) does not meet the February 15, 2026 deadline for a clearance letter regarding the PPO.

[73] As with the Bates Properties and 131 Lands refinancings, Mr. Malkin is unable to force BNS to accept a sale of the Huntingdon Lands save as it allows for *full repayment* of its debt. Having said that, since the Receiver has abandoned that property, I have no doubt that BNS would be happy to recovery something from it.

[74] Mr. Malkin cites two cases as supporting his right of redemption: *Kruger* and *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 [*Haro-Thurlow*].

[75] I accept that a debtor's interests in accomplishing a redemption before any sale of the secured assets are properly considered in this situation, as stated in *Kruger* at paras. 73–74, as I adopted in *Haro-Thurlow* at paras. 102–103.

[76] However, the context here is that Mr. Malkin has stated that he has been working on refinancing since April 2025 without any success. All of these purported transactions have only arisen on the eve of these hearings.

[77] The overall difficulty in any event with Mr Malkin's planned refinancings and sale in concluding these transactions toward a "redemption" is that they are very conditional and uncertain and Mr. Malkin does not provide any firm support that would give credence to their viability.

[78] Further, and in any event, Mr. Malkin's plan is insufficient to satisfy BNS' debt so as to allow him to regain control of the Corporate Debtors and save his home. The overall net recovery would be $16.5 million, well below BNS' debt now ($17.5 million and receivership costs). There is absolutely no evidence as to whether Mr. Malkin intends to address the outstanding loans to satisfy the two other mortgages on the Bates Properties, who are represented on this application and who say they are owed substantial funds.

[79] In addition, I can only say that these transactions *might* close, but in the meantime the other stakeholders risk the ongoing cost of $80,000 per month interest on the BNS debt and further receivership costs. I accept BNS' counsel's submissions that it will suffer material prejudice if the Amended Offer is not approved, let alone the other creditors.

[80] Having considered all of the above circumstances, including the interests of the Debtors, I conclude that the Amended Offer is fair and reasonable and should be approved.

THE BANKRUPTCY ASSIGNMENT

[81] The Receiver seeks an order that would authorize, but not obligate, the Receiver to assign the Corporate Debtors, or any of them, into bankruptcy. In its First Report, the Receiver seeks this relief in order to:

> 6.1.1 gain enhanced investigatory powers available to a Trustee in bankruptcy, which are necessary to thoroughly review certain pre-receivership transactions and dealings with related-party entities; and
>
> 6.1.2 reorder the priorities of the CRA deemed trust on unpaid GST amounts, which, upon bankruptcy, will be converted to an unsecured claim and rank subordinate to the security held by BNS and other creditors with valid security interests.

[82] The Receiver states that it has begun a comprehensive review of transactions and funds transferred prior to the Receivership, based on the Corporate Debtors' books and records, some of which were only recently provided by a third-party IT provider.

[83] The Receiver also says that the increased powers of a trustee in bankruptcy will allow a trustee to investigate pre-receivership dealings and, if necessary, avail itself of the remedies provided under the *BIA* to pursue preference payments or seek to recover assets that may have been the subject of any undervalue transactions that may have taken place, including, amongst other payments, certain alleged unauthorized advances to Malkin Group Holdings Ltd., Mr. Malkin's company.

[84] In its Second Report, the Receiver states that its review of transactions is still in progress. To date, the Receiver has identified 20 transactions warranting further review, with a value of approximately $1.8 million.

[85] In addition, the Receiver has identified broader concerns, including unrecorded equipment sales, missing assets, and unreconciled receivables and other transactions that are not recorded in the general ledger. In the October/November 2025 timeframe, the Receiver made various enquiries of Mr. Malkin regarding these matters, to which it has not received a response.

[86] The Corporate Debtors oppose any bankruptcy at the behest of the Receiver. They acknowledge that the Court has the authority to authorize the Receiver as requested, however, they submit that it is not appropriate to do so in this case or at least at this time.

[87] Firstly, Mr. Malkin argues that a bankruptcy is unnecessary as it will compromise his refinancing of the BNS debt. As I have concluded above, these refinancing efforts are not a viable option at this time given the overall debt and the risk to the stakeholders to delay any realization of the assets. In that same vein, a delay of the authorization to bankrupt the Corporate Debtors to January 1, 2026, as suggested by Mr. Malkin, has little utility.

[88] Mr. Malkin also argues that the Receiver has not calculated the Corporate Debtors' assets and liabilities properly in its First Report. However, the First Report was issued well before the Receiver abandoned the Huntingdon Lands and the sales process was underway for the Bates Properties. Further, it is not the role of the Receiver to independently conduct a claims process. What clearly has emerged is that BNS is not being paid, other mortgagees are not being paid, and other creditors are not being paid, the latter including an equipment financier and CRA.

[89] Under s. 49 of the *BIA*, an "insolvent person" may file an assignment in bankruptcy. Here, the evidence clearly confirms the insolvency of the Corporate Debtors, in that they are unable to meet their obligations as they generally become

due, they have ceased paying their current obligations in the ordinary course of business and, on a balance sheet basis, their debts exceed their liabilities (*BIA*, s. 2 definition of "insolvent person"). Proof of at least one unpaid creditor is sufficient to establish the failure to meet liabilities generally as they fall due: *Braich v. Clarke*, 2023 BCCA 305 [*Braich*] at para. 43.

[90] Under s. 43 of the *BIA*, any creditor has the ability to file an application for a bankruptcy order against a debtor. In doing so, the creditor must show that their debt exceeds $1,000 and that the debtor has committed an act of bankruptcy within the six months preceding the filing of the application, including ceasing to meet their liabilities generally as they become due (*BIA*, s. 42(1)(j)).

[91] In my view, it cannot be seriously contended that the Corporate Debtors are solvent in that the value of the Corporate Debtors' assets and the Bates Properties exceed the indebtedness owing to the various creditors. Further, it cannot be seriously disputed that the Corporate Debtors have failed to meet their liabilities generally as they become due and, indeed, Mr. Malkin's counsel conceded as much during his submission.

[92] In any event, the Corporate Debtors have failed to provide any "clear and independent" evidence that they are solvent or able to pay their liabilities generally as they become due: *Braich* at para. 37, citing *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1409 at para. 30.

[93] Section 243(1)(c) of the *BIA* grants the Court the power to empower a receiver to "take any other action that the court considers advisable".

[94] As the Receiver argues, granting a receiver authority to assign debtors into bankruptcy is not extraordinary and has been commonly granted by this Court and other Canadian courts: see, for example, *RBC v. Gustin*, 2019 ONSC 5370 at para. 12, citing *Royal Bank of Canada v. Sun Squeeze Juices Inc.,* [1994] O.J. No. 567 (Gen. Div.) [*Sun Squeeze ONSC*] at paras. 6–10; aff'd 1994 Carswell Ont. 310 (C.A.)

and *Bank of Montreal Owen Sound Golf and Country Club Ltd.*, 2012 ONSC 557 at para. 7.

[95] The Court is required to consider all relevant circumstances to determine whether granting such authority to a receiver is appropriate: *Sun Squeeze ONSC* at para. 11.

[96] In this case, I agree with the Receiver that a bankruptcy is appropriate for the following reasons:

a) As stated above, there is ample evidence to support that the Corporate Debtors are insolvent and likely facing applications for bankruptcy in any event;

b) There is clearly more than one creditor who would qualify to bring such a bankruptcy application so as to meet the *BIA* test: *Gustin* at para. 9;

c) It is in the interests of all stakeholders. It will avoid unnecessary and costly further bankruptcy proceedings by a creditor(s);

d) A bankruptcy will allow a trustee in bankruptcy to potentially avail itself of remedies under ss. 95–96 of the *BIA* to recover any preference payments or transfers at undervalue, again for the benefit of all stakeholders. This will allow for more efficiency and less expense than pursuing any such transactions under provincial legislation, particularly where there are issues with a debtor's cooperation: *Gustin* at para. 17; *Sun Squeeze ONSC* at para. 13. Contrary to Mr. Malkin's submissions, the Receiver is not required at this stage to identify those potential transactions in detail and engage with Mr. Malkin's potential defence in that respect;

e) It is also well-established that a reversing of priorities may itself be a sufficient cause to justify the filing of a bankruptcy by a receiver: *CIBC v. 1340182 Ontario Limited,* 2024 ONSC 3658 at para. 14. Here, CRA has advanced a claim under its statutory deemed trust for GST, a priority which

would be reversed in the event of a bankruptcy. CRA takes no position in respect of this relief; and

f) There is no need to delay the matter of potential bankruptcy proceedings in these circumstances, and any such delay may in fact be prejudicial to the stakeholders. A filing or filings would have the effect of crystallizing the "look back" or "initial bankruptcy event" date for consideration of any challenge to transactions under ss. 95–96 of the *BIA*: see *BIA* s. 2 definition of "date of initial bankruptcy event".

[97] No issues arise with respect to the Receiver also acting as trustee in bankruptcy. The *BIA* permits receivers appointed in respect of a debtor to also act as trustees in bankruptcy of the debtor as long as, at the time of being appointed as trustee and at the first meeting of creditors, full disclosure of that fact and of the potential conflict of interest is disclosed (*BIA* s. 13.3(2)). In addition, the Receivership Order (para. 38) expressly provides that the Receiver is not prevented from acting as trustee in bankruptcy of the Corporate Debtors.

[98] As in this receivership, the Receiver acting as a trustee in bankruptcy would be acting not just on behalf of BNS, but on behalf of all creditors, toward maximizing value for all of the stakeholders of the Corporate Debtors. As the Receiver points out, receivers are commonly appointed as a trustee for the debtor. This makes sense in terms of efficiency and reducing costs of a bankruptcy, given a receiver's familiarity with the debtor and its affairs as gained in the receivership.

[99] Accordingly, I conclude that it is appropriate for this Court to grant the Receiver the authority to assign the Corporate Debtors into bankruptcy and to act as the trustee in bankruptcy of the Corporate Debtors and I grant the authorization sought.

"Fitzpatrick J."