S1-BK-

SUPREME COURT OF PRINCE EDWARD ISLAND

BETWEEN:

THE BANK OF NOVA SCOTIA

APPLICANT

AND:

SILVER HILL FUR FARM LTD., as represented by PricewaterhouseCoopers Inc. as trustee in bankruptcy

RESPONDENT

FACTUM

1. The Bank of Nova Scotia ("BNS") provided financing to Silver Hill Fur Farm Ltd. ("SHFF") which is indebted to BNS in the aggregate amount of $2,663,818 as of March 24, 2017. To secure the amount advanced to SHFF, BNS has obtained various forms of security including but not limited to a General Security Agreement, *Bank Act* security, collateral mortgages and personal guarantees from Casey Gavin and his wife, Joyce Ann Gavin.

2. SHFF is a Prince Edward Island Company with shareholders being Casey Leigh Gavin, Leigh Gavin in trust for Faith Gavin, and Leigh Gavin in trust for Hope Gavin. Its sole director according to the Prince Edward Island corporate registry is Casey Leigh Gavin.

3. On March 13, 2017, SHFF filed for bankruptcy and PricewaterhouseCoopers Inc. ("PWC") became its trustee in bankruptcy. Also on March 13, 2017, BNS

appointed Ernst & Young Inc. ("EYI") as a private receiver over certain assets of SHFF.

4. Prince Edward Island Century 2000 Fund Inc. ("PEICF") is also a secured creditor of the Respondent.

5. SHFF has been in breach of its loan agreements with BNS since as early as August, 2014, but BNS has continued to work with SHFF to allow the time necessary to address is operational and financial difficulties.

6. As part of working with SHFF, BNS and PEICF supported SHFF entering into a financing agreement with American Legend Cooperative ("ALC"), an auction house based in Seattle, Washington.

7. On or about February 23rd, 2017, ALC advised that it was expecting 80,000 pelts and only received 60,000 from SHFF. SHFF disputed its obligation to provide its 20,000 breeder mink to ALC. ALC also confirmed on that date that it would not provide any further financing for SHFF's 2017-2018 mink crop.

8. On March 6, 2017, BNS received copy of an email from Casey Gavin confirming that he and his father killed the breeder mink (approximately 20,000 mink). It is estimated that these mink were worth $1,000,000. BNS was subsequently advised that Leigh Gavin and Casey Gavin ground up the 20,000 mink in a meat grinder and pumped the remains into the ocean. Beyond this account there has been no physical evidence provided as to the death or remains of the 20,000 mink.

9. EYI and PWC have attended at SHFF's premises for the purpose of assessing the nature and extent of the assets and operations of SHFF. SHFF to

cooperate as outlined below and further detailed in the affidavits of James Cook (BNS), Jamie Aiken (PEICF) and David Boyd (PWC as trustee in bankruptcy):

a. Leigh Gavin did not have a key to SHFF's main office in Tignish;
b. There was a delay in accessing the books and records of SHFF and to date EYI has not received the books and records as maintained by Grant Thornton;
c. BNS has received unconfirmed reports that 1,000 palomino minks were reported sold by SHFF live for cash and that the 20,000 (possibly 19,000) mink were killed and loaded into tractor trailers and purported shipped to a fish processing freezer in Prince Edward Island or New Brunswick for storage until a later date;
d. There were 400 foxes located on the premises and SHFF 2016 financial statements disclosed fox inventory as an asset but Casey Gavin advised that these were sold to his father Leigh Gavin, however, has not produced an agreement to date;
e. Similarly, 5 horses were located on SHFF's property and revenue associated with these horses appeared on SHFF's 2016 financial statements, but again these horses were purportedly sold to Leigh Gavin with no agreement being produced;
f. It was noted on the equipment appraisal as commissioned by EYI that there appeared to be missing equipment given the size and operation of the farm;
g. PWC as trustee in bankruptcy has also confirmed that the information in relation to the killing of the 20,000 is uncertain;
h. Leigh Gavin would not allow agents of PWC to attend his premises to access the equipment believed to be owned by SHFF; and,
i. PWC has been unable to obtain all books and records of SHFF and has been unable to locate various properties subject to PEICF security.

10. The creditors of SHFF need to address the issues as outlined herein and in particular the alleged destruction of $1,000,000 worth of mink inventory, the sale of assets to a related party and the missing equipment in order to maximize their respective recovery.

PART II – ISSUE

1. The facts of this application give rise to the following issues:

   a. Should this Court grant an order for the abridgement of time for service of this application, excusing the lack of service of this application, or excusing the lack of service of the Applicant's record on application?

   b. Should this Court appoint a receiver and receiver manager (the "Receiver") over all real and personal property of the Respondent?

   c. Should the Receiver be granted a charge against the property subject to the receivership?

PART III - THE LAW AND ARGUMENT

A – ABRIDGEMENT OF TIME

2. This Court has the discretion to abridge the time for service of this application, to excuse the lack of service of the application, or to excuse the lack of service of the Applicant's record on application.

> **EFFECT OF NON-COMPLIANCE**
>
> 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> **COURT MAY DISPENSE WITH COMPLIANCE**
>
> 2.03 The Court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time
>
> **EXTENSION OR ABRIDGMENT**
>
> **General Powers of Court**
>
> 3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
>
> (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

3. The Court's discretion under Rules 2 and 3 to abridge the time for service, if necessary, is wide and permits the Court to dispense with strict adherence to any rule in appropriate circumstances.

   In Re Entegrity Wind Systems Inc., 2009 PEISC 25 (CANLII) **[Tab A]**

4. It is submitted that no party has been prejudiced as a result of the notice period provided. As well, all parties with an economic interest in these proceedings have received notice. The parties with the largest and primary interest in SHFF and its assets have consented or support the request of BNS.

B – Appointment of Receiver

5. The Applicant seeks an order appointing Ernst & Young Inc. ("EYI") as the Receiver, as is more particularly set out in the draft order attached to the Notice of Application (the "Draft Order"). The Applicant relies on:
   a. Section 44 of the *Judicature Act*, R.S.P.E.I. 1988, Cap. J-2.1, (the "Judicature Act");
   b. Rule 41 of the *Rules of Court*;
   c. Section 243 of the BIA.

6. EYI has consented to act as the Receiver.

7. PricewaterhouseCoopers Inc., as trustee in bankruptcy of the Respondent has consented to the relief requested.

8. PEICF as additional secured creditor supports the relief requested in this application.

Section 44 of the Judicature Act

9. The Court has the authority under section 44 of the *Judicature Act* to appoint a receiver where it considers it to be just and convenient:

> **44.**(1) A court may
>
> (a) by interlocutory order,
>
> (i) grant an injunction, or
>
> (ii) appoint a receiver or receiver and manager; and
>
> (b) make a mandatory interlocutory order,
>
> where it appears to the court to be just or convenient to do so.

10. Bennett on Receiverships states:

> A court appointment may become necessary where the privately appointed receiver encounters problems in taking possession of the debtor's property or where there are numerous creditors exercising their remedies simultaneously against the debtor. Alternatively, where the security holder anticipates difficulties of this nature, it may proceed directly for a court appointment. The court appointment in these situations ensures that the protection of the assets is sanctioned by the formal authority of the court.

F. Bennett, *Receiverships*, (Toronto: Carswell, 1985), p.14 **[Tab E]**

11. In *Bank of Nova Scotia* v. *Freure Village on Clair Creek,* Justice Blair of the Ontario Court of Justice, General Division, Commercial List stated at paragraph 10:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O., 1990 c. 43, s.101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security

to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...

Bank of Nova Scotia v. *Freure Village on Clair Creek*, 1996 CanLII 8258 (ON S.C.) **[Tab F]**

12. In this matter, it is just and convenient to appoint the Receiver as the representatives of SHFF have failed to cooperate fully with representatives of E&Y as private receiver and PWC as trustee in bankruptcy which it is submitted in jeopardizing the BNS's recovery efforts. An appointment by the Court is necessary to enable the Receiver to carry out its work and duties more efficiently and to balance the competing interests of various parties.

Rule 41 of the Rules of Court

13. This Honourable Court has jurisdiction to appoint a receiver under Rule 41 of the *Rules of Court*, which states:

41 APPOINTMENT OF RECEIVER

DEFINITION
41.01 In Rules 41.02 to 41.06, "receiver" means a receiver or receiver and manager.
HOW OBTAINED
41.02 The appointment of a receiver under section 44 of the *Judicature Act* may be obtained on motion to a judge in a pending or intended proceeding.

FORM OF ORDER
41.03 An order appointing a receiver shall,
(a) name the person appointed or refer that issue in accordance with Rule 54;
(b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of his duties, or refer that issue in accordance with Rule 54;

(c) state whether the receiver is also appointed as manager and, if necessary define the scope of his managerial powers; and
(d) contain such directions and impose such terms as are just.

REFERENCE OF CONDUCT OF RECEIVERSHIP
41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54.

DIRECTIONS
41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee.

DISCHARGE
41.06 A receiver may be discharged only by the order of a judge.

14. For the reasons set out herein, the appointment of the Receiver is appropriate in the circumstances.

Bankruptcy & Insolvency Act

15. The *BIA* provides further authority for the appointment of a receiver by application in section 243 which provides:

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

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

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

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

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

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

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

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

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

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

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

BIA, s. 243.

16. The Respondent is bankrupt so no Notice of Intention to Enforce Security pursuant to section 244(1) of the *BIA* is required. Pursuant to section 243(1) of the BIA, the Court may appoint a receiver.

17. This Court has the authority to grant the relief sought under section 44 of the *Judicature Act*, Rule 41 of the Prince Edward Island Rules of Court and section 243 of the BIA. The Applicant submits that the facts outlined in the Affidavits, particularly the concerns raised by both EYI as BNS's appointed private receiver and PWC as trustee in bankruptcy, make the court appointment of a Receiver just and convenient for the resolution of the affairs of the Respondent in an orderly and efficient manner.

18. In order to maximize recovery of all creditors and the interests of justice, the Applicant submits the Cooperation Order is required given the events that have unfolded to date.

19. The Cooperation Order is an affirmation of the positive duty imposed under the BIA on all persons who may have information or property of a bankrupt. The issuance of the Cooperation Order will facilitate the orderly administration of the estate of SHFF in a cost effective and appropriate manner.

C – Receiver's Charge on Receivership Property for Fees and Disbursements

20. This Court has the authority to grant its receiver a charge against the property of the Respondent for its fees and disbursements in priority to all other secured creditors.

21. The *BIA* provides:

> 243. (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, <u>including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements</u>, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations. [emphasis added]

BIA, s. 243.

22. In the circumstances, the interested parties have been given reasonable notice of these proceedings.

23. A judicially appointed receiver may generally charge its fees and expenditures against the estate it administers. Writing for the Ontario Court of Appeal in *Braid Builders Supply & Fuel Ltd.* v. *Genevieve Mortgage Corp.*, Dickson J.A. (as he then was) held:

> ... a receiver appointed by the court is the receiver of the court, not the receiver of the parties who sought the appointment: *Boehm* v. *Goodall* (1911) 1 Cr. 155 followed by the British Columbia Court of Appeal in *Johnston* v. *Courtney*, [1920] 2 W.W.R. 459. <u>In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment.</u> This is subject, however, to the proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B. 67. [emphasis added]

Braid Builders Supply & Fuel Ltd. v. *Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305 at para. 1 (Man. C.A.). **[Tab G]**

24. Generally, a charge for a receiver's fees and expenses against the property it administers is in relation to property that is not subject to the claims of secured creditors. The Receiver is entitled to priority over the interests of secured creditors in certain circumstances, including in the following circumstance:

(a) if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;

(b) if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him, provided the secured creditors have notice of the proceedings; and

(c) if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors.

Robert F. Kowal Investments Ltd. v. *Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 at paras. 13-14, 17, 20-21 (Ont. C.A.). **[Tab H]**

25. In the instant case, the Receiver should be granted a priority charge over the claims of the creditors, including secured creditors, in the assets of the Respondent. The Applicant is the largest secured creditor of the Respondent, and the Receiver will be charged with the task of preserving and realizing assets for the benefit of all interested parties. The proposed receivership will benefit all of the creditors of the Respondent and their interests as a Receiver will have the necessary authority to ensure all assets of the Respondent are managed in an orderly manner.

26. The Receiver should also be granted a charge because it may need to expend money for the necessary preservation or improvement of the property subject to the proceedings.

27. Further, the draft order provides that the costs incurred and represented by the charges against the assets of the Respondent are to be satisfied from the proceeds from any realization of assets associated with the costs giving rise to the applicable charge. This will ensure that the interests of any one creditor are not unfairly burdened with costs associated with assets in which they do not have an interest.

28. In the absence of the appointment of the Receiver by the court, the administration of the estate may be disrupted. Accordingly, should this Honourable Court appoint the Receiver pursuant to the Applicant's request, it will be under the supervision and control of the Court and the Receiver should be granted a charge over all of the assets of the debtor for its fees and expenses in priority to the claims of all creditors, including the secured creditors.

PART IV – RELIEF SOUGHT

29. The requested relief is appropriate given the nature of the Respondent's assets, what has occurred to date in the bankruptcy, the potential for competing interests and the interests of justice. A court-appointed receiver is just and convenient in the circumstances.

30. The Applicant therefore applies to this Honourable Court for the relief set out in its Notice of Application.

31. All of which is respectfully submitted this 28 day of March, 2017.

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