

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Business Development Bank of Canada v. Kooshie Cushions of Canada Limited*, 2026 NSSC 224

Date: 20260706

Docket: *Hfx*, No. 554688

Registry: Halifax

IN THE MATTER OF: The Receivership of Kooshie Cushions of Canada Limited

Between:

Business Development Bank of Canada

Applicant

v.

Kooshie Cushions of Canada Limited

Respondent

Decision

Judge: The Honourable Justice John A. Keith

Heard: July 3, 2026, in Halifax, Nova Scotia

Counsel: Joshua J. Santimaw, for the Applicant
Richard Bureau, for the Respondent
Dillon Trider, for the Proposed Receiver, Deloitte
Restructuring Inc.

BY THE COURT:**INTRODUCTION**

[1] On June 15, 2026, Business Development Bank of Canada (“**BDC**”) filed a Notice of Application seeking, among other things, an order appointing Deloitte Restructuring Inc. (“**Deloitte**”) as Court-appointed Receiver and Manager over all of the assets, property, and undertaking of Kooshie Cushions of Canada Limited (“**Kooshie Cushions**”) pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the “**BIA**”) and s. 43(9) of the *Judicature Act*, RSNS 1989, c. 240 as amended. BDC argues that the Company is in default, its security is at risk, statutory notice requirements have been satisfied, and a court-appointed receiver is necessary to preserve assets, collect rents, and conduct an orderly realization process for the benefit of all creditors.

SECURITY INTEREST

[2] All parties agree that BDC holds the following security:

1. Mortgage and Assignment of Rents registered on title to 339 Willow Street, Truro, Nova Scotia (PID 20239059) and registered on January 10, 2025 (the “**Mortgage**”);
2. A personal guarantee executed by the principal directing mind of Kooshie Cushions, Mark Shelley also dated January 10, 2025;
3. The corporate guarantee executed by Sun Kissed Energy Incorporated on January 10, 2025; and
4. A general security agreement executed by Sun Kissed Energy Incorporated and registered under Nova Scotia’s *Personal Property Security Act*, SNS 2009, c. 26 as amended.

[3] BDC alleges default under the terms of the mortgage and also states that:

1. Section 10(p) of the Mortgage contains an acceleration provision in the event of default meaning that the entire debt becomes owing – not simply the arrears;
2. Section 12(d) of the Mortgage confirms a contractual right to a receiver in the event of default.

DEBT, DEFAULT, AND DEMAND

[4] On April 7, 2026, BDC served its Notice of Intention to Enforce Security, as required under the *BIA*. As of that date, BDC claims that it is owed \$2,565,282.75 plus interest and professional fees, all of which are secured under the terms of the Mortgage.

[5] The Respondent Kooshie Cushions does not dispute that a debt is owing, nor does it expressly dispute the principal amount of the indebtedness as it was communicated to it. Kooshie Cushions initially challenged other aspects of the demand package, including the calculation of interest. In particular, Kooshie Cushions states that its May 6, 2026 letter identified:

1. “inconsistent interest rates in the demand package”; and
2. “a corporate demand that was addressed to Mark Shelley personally rather than clearly to the Respondent.”

[6] That said, during oral submissions, Kooshie Cushions softened its position with respect to these technical defects regarding notice and the contents of the demand package. Kooshie Cushions appropriately acknowledged that these complaints could be characterized as minor procedural imperfections that did not undermine the legal requirement to provide the debtor with reasonable notice. There is no doubt, based on the evidence, that Kooshie Cushions received fair and adequate notice and, since early April 2026, has actively challenged BDC’s demands to install a receiver.

[7] That said, Kooshie Cushions maintained its opposition to BDC’s request for a court-appointed receiver. More specifically, Kooshie Cushions argued that it was neither just nor convenient to appoint a receiver at this time and that a rigid but more limited remedy was appropriate.

PRIVATE RECEIVER V COURT APPOINTED RECEIVER

[8] I begin by noting that s. 12(d) of the Mortgage confers upon BDC the contractual right to appoint a private receiver in the event of default. To date, Kooshie Cushions has acknowledged default under the Mortgage but resisted a private receiver, preferring to engage in negotiations. This impasse prompted BDC to seek a court-appointed receiver.

[9] There are two distinct types of receivers. A privately appointed receiver takes its authority from the parties' agreement. As noted above, under the parties' agreements in this case, the Applicant is entitled to appoint a receiver that will function as its agent implementing the Applicant's instructions to enforce its rights against the secured collateral as agreed.

[10] However, private receiverships require a degree of consent and cooperation from the debtor where physical control of the secured assets at least initially is retained by the debtor.

[11] A court-appointed receiver, by contrast, derives its authority from the court order under which it is appointed. As indicated, that is usually made under s. 43(9) of Nova Scotia's *Judicature Act* or s. 243 of the Federal *Bankruptcy and Insolvency Act* - or both, as occurred in this case.

[12] Unlike a private receiver, a court-appointed receiver does not take instructions from its appointing creditor. Its authority is not dependent upon the terms of the security agreement agreed upon by the parties. A court-appointed receiver is a neutral officer of the court exercising stewardship over the assets which are subject to the charge, and all under the Court's direction and supervision.

TEST FOR COURT APPOINTED RECEIVER AND JURISDICTION

[13] The Court may appoint a receiver where it is "just or convenient" to do so. That phrase "just or convenient" is found in both pieces of controlling legislation (s. 243(1) of the *BIA* and s. 43(9) of Nova Scotia's *Judicature Act*)

[14] While the phrase "just or convenient" may appear somewhat broad, the Court's discretion to appoint a receiver is clearly not exercised in an arbitrary fashion. While the Court's discretion is highly fact-sensitive and cannot be reduced to a rigid, one-size fits all formulation, it is also restrained by principle, and the jurisprudence reveals a number of non-exhaustive factors to be assessed holistically before the Court will appoint a receiver.

[15] The key, relevant factors to be taken into account were succinctly summarized by Blair, J. (as he then was) at paras. 11 – 13 of the seminal decision in *Bank of Nova*

Scotia v. Freure Village of Clair Creek, 1996 CanLII 8258 (ON CTGD)¹ and Osborne, J. (as he then was) in *Kingsett Mortgage Corp. v Mapleview Developments Ltd., et al.*, 2024 ONSC 1983 (see paras. 21 – 24 in particular).

[16] Very briefly, the Court considers all of the circumstances, including the nature of the property, the rights and interests of all interested parties, the effect of the proposed order, and the overall balance of convenience. While a secured creditor's contractual right to appoint a receiver under its security documents is an important consideration, it is not determinative and does not automatically entitle the creditor to a court-appointed receiver. The Court equally assesses whether a court-appointed receiver is necessary or desirable to protect the creditor's interests by allowing a receiver to carry out its duties efficiently and effectively, particularly where the powers, authority, or enforcement mechanisms available to a privately appointed receiver may be inadequate to protect or realize upon the secured assets.

[17] A number of more specific relevant factors include:

1. the risk to the secured creditor;
2. any potential unnecessary prejudice to the debtor;
3. the need to preserve, protect, safeguard, or realize upon the property pending the resolution of disputes;
4. the extent to which a court-appointed receiver will increase costs and reduce the value available to stakeholders;
5. any actual or apprehended waste, deterioration, or dissipation of assets;
6. the conduct of the parties;
7. the anticipated duration of the receivership;
8. the costs of the appointment; and
9. the likelihood that a receivership will maximize recovery and facilitate the orderly realization of assets for the benefit of all stakeholders.

¹ Blair, J's instructive decision has been consistently adopted across the country including in Nova Scotia (*Royal Bank of Canada v Eastern Infrastructure Inc.*, 2019 NSSC 243; *First National GP Corporation v 329173 Nova Scotia Limited*, 2018 NSSC 253; *Bank of Montreal v Linden Leas Limited*, 2018 NSSC 82; and *Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128).

[18] The Court may also consider whether irreparable harm may result if no order is granted, although proof of irreparable harm is not a prerequisite where the security documents authorize the appointment of a receiver.

[19] The thing all of these factors or considerations have in common is the underlying notion that appointing a receiver should represent a fair, just, practical, and proportionate means of protecting the property and the legitimate interests of interested parties.

[20] Finally, and although the appointment of a receiver is an extraordinary remedy that should be granted cautiously, the jurisprudence confirms that this consideration carries less weight where the debtor is in default and the secured creditor is seeking to enforce a bargained-for contractual right where it becomes necessary to vindicate and preserve the creditors' rights.

POSITION OF THE PARTIES

Applicant/Creditor Business Development Bank of Canada

[21] BDC's position is that Kooshie Cushions is in default under a \$3.5 million loan facility approved on or about October 16, 2024 and secured by the Mortgage and the other related security identified in para. 2 above.

[22] BDC states, and it appears to be uncontested, that there has been an act of default including a failure to honour payment obligations due to BDC under the credit facility. There is also a significant amount due and outstanding in property taxes owing to the Town of Truro.

[23] As of April 7, 2026, indebtedness totaled \$2,565,282.75 plus interest and professional fees.

[24] BDC issued the necessary demand letter and Notice of Intention to Enforce Security under s. 244 of the *BIA* on April 7, 2026 – almost three months ago and obviously much longer than the bare minimum ten-day period set out in the *BIA* before enforcement steps may be taken. BDC attempted to install Deloitte Restructuring Inc. as a private receiver on or about April 24, 2026 but the parties quickly found themselves at an impasse. Kooshie Cushions was not prepared to consent to Deloitte taking possession of its assets and administer those assets as private receiver for the secured lender, BDC.

[25] BDC argues that the statutory prerequisites for a court-appointed receiver under s. 243(1) of the *BIA* and s. 43(9) of the *Judicature Act* have been satisfied and that it is “just and convenient” to appoint Deloitte now as Receiver and Manager over the assets of Kooshie Cushions. The Applicant emphasizes that the Company is insolvent, is in default, received proper notice under ss. 243 and 244 of the *BIA*, and has failed to cooperate with BDC’s attempts to install a private receiver under the terms of the Mortgage.

[26] BDC also relies on *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243, particularly para. 53 where Gabriel, J. wrote:

It is not necessary to “check all the boxes” with respect to the factors noted in *Enterprise Cape Breton Enterprise [v Crown Jewel Resort Ranch Inc]*, 2014 NSSC 128] ...

[27] BDC invokes this passage to drive home the point that the “just and convenient” inquiry is flexible and contextual, and that not every factor identified in the jurisprudence must be proven to support a receivership order being granted.

[28] BDC argues that because its Mortgage expressly authorizes the appointment of a receiver upon default, the Court should give substantial weight to the parties’ contractual bargain and that its interests are eroding as time goes on and the ongoing uncertainty combined with Kooshie Cushions’ refusal to cooperate or, at a minimum, provide a concrete repayment plan compounds the prejudice. BDC insists the *status quo* is neither acceptable nor sustainable.

Respondent/Debtor Kooshie Cushions of Canada Limited

[29] Kooshie Cushions does not dispute the validity of BDC’s security or that there has been an event of default triggering these security enforcement proceedings.

[30] However, its challenge and its primary position is based on the proposition that a receivership is an extraordinary remedy which is not necessary in all the circumstances; and that BDC has not established that it is “just or convenient” to appoint Deloitte specifically. Kooshie Cushions urges the Court to adopt what it describes as a more reasonable and just approach which best balances the interests of all parties. Kooshie Cushions proposes a short but strict forbearance as the preferred remedy, the terms of which would include:

1. Regular status reporting including cash-flows;

2. A prohibition on extraordinary or out of the ordinary expenditures; and
3. The ultimate right for BDC to return to the Court forthwith if is any breach or further default.

[31] Kooshie Cushions further maintains that there is insufficient evidence to show that Deloitte's appointment is necessary to preserve value. It argues that the Court should be cautious about granting an intrusive receivership remedy on what it describes as a contentious evidentiary record and should consider less invasive alternatives, including an adjournment, additional disclosure, interim preservation measures including the sharing of financial information, or the appointment of a different receiver.

[32] Kooshie Cushions concludes that the Court is not bound to accept the creditor's chosen professional receiver simply because that is what the Applicant BDC might prefer.

ANALYSIS

[33] In my view, it is just and convenient to appoint Deloitte as a receiver in the circumstances of this case.

[34] BDC has demonstrated that:

1. It is owed \$2,565,282.75 as of April 7, 2026 under the terms of a valid credit facility;
2. The debt is secured by a valid Mortgage, among other forms of security. The Mortgage includes a clause accelerating the debt and, more importantly for present purposes, contractually entitles BDC to appoint a receiver in the event of default;
3. There has been an event of default by Kooshie Cushions since at least early April, 2026 regarding payments owing under the credit facility; and
4. The secured creditor BDC has been denied meaningful access to the assets over which it has security.

[35] There is no compelling dispute to these basic and uncontroversial facts. This factual sequence of events substantially weakens the Respondent's contention that the notice was so defective as to justify denying receivership relief. The impasse that arose made it impossible for Deloitte to carry out the intended review of the debtor's circumstances, including the current status of the secured assets. These are troubling challenges that highlight the need to preserve, protect, and realize upon the secured property. And I find that they became a legitimate and significant factor informing BDC's decision to apply to the Court for a receiver.

[36] I am compelled to say that the arguments advanced by Kooshie Cushions in requesting strict forbearance and a more restrained and delayed enforcement process are built almost entirely on hopes for a brighter future without any meaningful or compelling foundation in the evidence that might help better understand the basis for this hope. There was similarly no reliable information that might help the Court understand how the proposed terms of forbearance would operate.

[37] Kooshie Cushions could have provided a proposed cash flow for the Court to consider but did not. It merely promised one. Kooshie Cushions could have given some detail or basic threshold figure as to what might constitute an "extraordinary" expense for which BDC's consent would be required but did not. It left this to be potentially sorted out by the Court, without meaningful input from Kooshie Cushions.

[38] Perhaps most problematic, there was no information regarding the "anchor tenant" for Kooshie Cushion's primary property in Truro, Nova Scotia – and the main real property asset that stands as security for BDC's debt. Kooshie Cushions says that concluding a lease with a new anchor tenant is essential to its survival. Counsel for Kooshie Cushions properly described the process of locating an anchor tenant as a key component of the intended salvage operation.

[39] Kooshie Cushions says it is in negotiations with an anchor tenant but offers no further information as to the proposed tenant's name or even the financial terms of a proposed lease. A stark example of the paucity of evidence around this issue may be found in the affidavit evidence of Kooshie Cushion's directing mind, Mark Shelley. Mr. Shelley suggests that the Town of Truro was prepared to forbear upon signing an anchor tenant for the subject property and he is concerned by BDC's failure to extend a similar accommodation. At paras. 19 – 20 of his Affidavit, Mr. Shelley states:

Kooshie has made arrangements with the Town of Truro to catch up on the outstanding property taxes by of [sic] monthly payments. The arrangement will be confirmed upon leasing of the anchor tenant space.

Kooshie's concern is that a court appointment of Deloitte at this stage, and on the present record, is premature, disruptive and risks unnecessary destruction of value for all of the stakeholders.

[40] Respectfully, this evidence is distressingly weak. In essence, Kooshie Cushions says that some unknown person from the Town of Truro indicated a willingness to forbear payment of the significant property tax debt (in excess of \$248,000) until such time as Kooshie Cushions enters into a lease with an unidentified anchor tenant – the terms of which will be confirmed if/when a lease is signed.

[41] Respectfully, while BDC has the evidentiary burden, this is insufficient to sustain a legitimate contest. Kooshie Cushions' plan is ultimately founded on personal aspirations and highly optimistic assumptions which are disconnected from any discernable, factual foundation or objective means to fairly test its feasibility or assess whether it is grounded in reality.

[42] I do not condemn Mr. Shelley for his optimism but it is no evidentiary basis to contest BDC's otherwise legitimate arguments.

[43] The Respondent's alternate argument is that Deloitte specifically should not be appointed because Deloitte was previously engaged by BDC as a private receiver must similarly fail. The authorities relied upon by BDC establish that a court-appointed receiver is an officer of the court and owes fiduciary duties to the Court and to all interested parties – not just the creditor BDC. That is how Deloitte will be treated and that is how the expectations placed upon Deloitte will be measured. Deloitte will, from this day forward, be the Court's officer and not any single creditor's creature.

[44] Kooshie Cushions has identified no evidence suggesting actual bias, conflict of interest, misconduct, lack of independence, or inability on Deloitte's part to fulfill those obligations.

[45] It is trite to say that the receiver is an officer of the court and as a fiduciary, acts for all parties. In *Fotti v. 777 Management Inc.*, [1981] 5 W.W.R. 48 (Man. Q.B.) stated at p. 54:

Appointed as he was by order of this court, the receiver is an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.

[46] Moreover, a court-appointed receiver must not only be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, but they must also appear to possess these qualities.

[47] I am satisfied that Deloitte, both in fact and in appearance, will meet its obligations as a court-appointed receiver. The fact that Deloitte was retained as a private receiver and communicated with Kooshie Cushions does not disqualify Deloitte. Similarly, the mere fact that those communications reflect disagreement and gave rise to an impasse do not lead to the automatic inference that Deloitte cannot serve (or cannot appear to serve) the obligations placed upon it as a court-appointed receiver. It should also be noted that Deloitte did not actually take physical possession of the debtor's assets and was never acted (nor could reasonably be said to appear to act) in an improper or commercially unreasonable manner.

[48] The receiver is qualified and is familiar with the business and its assets. I also note that while Kooshie Cushions has described a potential problem, it offers no solution or alternative receiver.

[49] In summary and in all the circumstances, I am satisfied that BDC has proven that it is just and convenient to appoint Deloitte as Receiver:

1. BDC is owed \$2,565,282.75 as of April 7, 2026 under a valid credit facility secured, among other things, by a Mortgage. The Mortgage contains an acceleration clause and expressly entitles BDC to appoint a receiver upon default, which has existed since at least early April 2026. Despite its secured position, BDC has been denied meaningful access to financial information and the secured assets. In the circumstances, there is a significant risk to BDC as a secured creditor and its ability to properly enforce its valid security. There is a corresponding pressing need to preserve, protect, safeguard, or realize upon the property;
2. While it is true that a court-appointed receiver will (and have) increased professional costs, I am satisfied that they will equally

maximize recovery and facilitate the orderly realization of assets for the benefit of stakeholders, in the circumstances. On this, I also take into account the fact that an alternative, private receivership was attempted but failed as the debtor was not prepared to cooperate.

3. Any further delay will result in unnecessary erosion of asset value. As indicated Kooshie Cushion's arguments to the contrary were not grounded in the evidence.

CONCLUSION

[50] BDC's application is granted. Deloitte shall be appointed as Court-appointed receiver over the assets and undertakings of Kooshie Cushions.

Keith, J.