IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Scala Development Consultant Ltd. v. Spirit Bay Developments Limited Partnership*, 2024 BCSC 1755

Date: 20240924
Docket: S201761
Registry: Victoria

Between:

Scala Development Consultant Ltd.

Petitioner

And

Spirit Bay Developments Limited Partnership by its general partners TSD General Partner Inc. and Beecher Bay GP Ltd.

Respondents

- and –

Docket: S232466
Registry: Victoria

Between:

Beecher Bay First Nation

Petitioner

And

TSD General Partner Inc., Beecher Bay GP Ltd. and 1334314 B.C. Ltd.

Respondents

Before: The Honourable Justice Fleming

Reasons for Judgment

Counsel for the Petitioner/Respondent, Scala Development Consultant Ltd.:	S. Hern, K.C. N. Vaartnou
Counsel for the Petitioner, Beecher Bay First Nation:	R.J.M. Janes, K.C. K. Unrau

Counsel for the Respondent, Spirit Bay Developments Limited Partnership, Beecher Bay GP Ltd. and TSD General Partner Inc.:	P.R. Senkpiel, K.C. E.L. Hansen
Counsel for the Attendee, Western Canada Marine Response Corp.:	A. Beddoes
Counsel for the Attendees, M. Palmer and M. Pond:	D. Tochor (April 8 and 9, 2024) C. Haynes (April 10 – 12, 2024
Place and Date of Trial/Hearing:	Victoria, B.C. April 8 – 12, 2024
Place and Date of Judgment:	Victoria, B.C. September 24, 2024

Table of Contents

INTRODUCTION 4
OVERVIEW 5
Parties 6
Framework Agreement 7
2003 *Land Code* 8
Spirit Bay Established 10
Land Code Amendments 11
Limited Partnership Agreement 13
Headleases 19
Scala's Involvement in Spirit Bay 21
The Arbitration 22
Interim Events at the Spirit Bay Development 23
Future of the Spirit Bay Development 24
Receivership and Dissolution Petition Proceedings 31
ISSUES 36
WHETHER APPOINTING A RECEIVER IS BARRED BY S. 89 OF THE *INDIAN ACT* 37
Indian Act Provisions 37
Partnership Act 39
Limited Partnership Jurisprudence 42
Discussion 52
WHETHER APPOINTING A RECEIVER IS CONTRARY TO THE *LAND CODE* ... 57
CONSTITUTIONAL ISSUES 62
SHOULD A RECEIVER BE APPOINTED? 68
Legal Framework 69
Discussion 72

Introduction

[1] Scala Development Consultant Ltd. (“Scala”) and Beecher Bay First Nation (“Sc’ianew”) bring petitions related to Spirit Bay Developments Limited Partnership (“Spirit Bay”) and its property development on Sc’ianew’s reserve land. The property development has operated through long-term leases that Sc’ianew granted to Spirit Bay (the “headleases”) and the sale of subleases to members of the public.

[2] In addition to its role as lessor, Sc’ianew is a limited partner in Spirit Bay and the sole shareholder of its general partner Beecher Bay GP Ltd. (“Beecher Bay GP”). Sc’ianew is also the sole shareholder of Spirit Bay’s other limited partner 1334314 BC Ltd. (“133”) which wholly owns the other general partner, TSD General Partners Inc. (“TSD GP”).

[3] Through TSD GP, Spirit Bay contracted with Scala to construct houses at the property development. After Spirit Bay failed to pay Scala for its construction work and significant arrears developed, Scala successfully claimed against Spirit Bay in an arbitration proceeding. The arbitral award was ultimately confirmed by the Court of Appeal: 2022 BCCA 407. An order was then made that the award be enforceable as a judgment of this Court (the “Enforcement Order”).

[4] In the first petition, Scala asks that a receiver be appointed to collect on the judgment of approximately $1,860,000. Sc’ianew and Spirit Bay by its general partners oppose the appointment.

[5] In the second petition, Sc’ianew asks that Spirit Bay be declared dissolved and the long-term leases terminated, arguing Spirit Bay is financially and operationally doomed and it has materially breached the leases. Scala opposes the dissolution petition as do some of the sublessees who are non-party respondents. Spirit Bay’s general partners formally take no position.

[6] The parties, including Sc’ianew, agree Scala’s petition should be decided first. In doing so, I have considered the evidence and arguments in the dissolution petition to the extent they bear on resolving the receivership petition.

[7] A receiver is appointed under R. 10-2(1) of the *Supreme Court Civil Rules* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. The applicant bears the burden of demonstrating that appointing a receiver is just and convenient.

[8] In addition to arguing that Scala has failed to satisfy this requirement, Sc'ianew and Spirit Bay through its general partners oppose the appointment of a receiver on a number of other grounds.

[9] Most significantly, they argue the appointment is barred by s. 89 of the *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*], which protects the real and personal property of an "Indian" or a band situated on reserve from seizure. Sc'ianew and the general partners contend that as a limited partner, Sc'ianew has an interest in Spirit Bay's assets and most importantly the headleases (and subleases), that constitutes personal property. Sc'ianew also contends the appointment is barred by the *Beecher Bay First Nation Land Code* (the "*Land Code*"). Further, Sc'ianew takes the position that s. 39 of the *LEA* and R. 10-2(1) are constitutionally inapplicable under the doctrines of federal paramountcy and interjurisdictional immunity.

[10] For the reasons that follow, I have decided a receiver should be appointed on most of the terms in the proposed order and the dissolution petition adjourned generally.

Overview

[11] The Spirit Bay property development and the parties' positions in the receivership and dissolution proceedings engage a somewhat complicated web of contractual instruments and federal, provincial and Sc'ianew law. What follows is a brief discussion of the parties and a loosely chronological discussion of their involvement in the property development and other underlying events, as well as the relevant instruments and laws such as the *Land Code*, the Limited Partnership Agreement ("LPA") and the headleases.

Parties

[12] Scala is a BC company that engages in both commercial and residential construction and development. Scala is co-owned by Aristides Cota and Doug Makaroff.

[13] Spirit Bay is a BC limited partnership under the *Partnership Act*, R.S.B.C. 1996, c. 348 [*Partnership Act*]. The general partners are, as I have said, TSD GP and Beecher Bay GP. As a limited partner, Sc'ianew holds 51% of the Class A limited partnership units in Spirit Bay. When Spirit Bay was formed, Omnibus Land & Cattle Ltd. ("Omnibus") was the other limited partner. It held the remaining 49% of the partnership units. In February 2022, newly formed 133 bought Omnibus' interest in Spirit Bay and also became the sole shareholder of TSD GP. Sc'ianew wholly owns 133. For clarity, Spirit Bay presently consists of the following entities:

a) TSD GP as general partner, with TSD GP being wholly owned by 133;

b) Beecher Bay GP as general partner, with Beecher Bay GP being wholly owned by Sc'ianew;

c) Sc'ianew as limited partner (51% of the partnership units); and

d) 133 as limited partner (49% of the partnership units), with 133 being wholly owned by Sc'ianew.

[14] Sc'ianew is a "band" with eight "reserves" within the meaning of the *Indian Act*.

[15] Sc'ianew's roles in this case then are multiple. It is a government of its lands and people; the operator of the Beecher Bay Lands Register (the "Lands Register"); a limited partner in Spirit Bay; the owner of all other Spirit Bay partners (both directly and indirectly); the lessor of the headleases granted to Spirit Bay, and the evidence shows a creditor of Spirit Bay; as well as a service provider (sewage and water) to Spirit Bay.

[16] The Spirit Bay property development is located on one of the reserves, Becher Bay 1, in East Sooke, which is not far from Victoria. Comprised of almost 203 hectares of oceanfront land, Becher Bay 1 is the largest of Sc'ianew's reserves and the only one that is inhabited.

Framework Agreement

[17] Sc'ianew's *Land Code* resulted from the 1996 Framework Agreement on First Nation Land Management (the "Framework Agreement"), which recognized the rights of First Nations to manage their reserve lands pursuant to their own land codes.[1]

[18] Under the Framework Agreement, once a land code comes into force, the reserve lands to which it applies become "First Nation land" and are not subject to a number of provisions of the *Indian Act* and certain regulations. However, First Nation land continues to be "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act*] and continues to be a "reserve" within the meaning of the *Indian Act*.

[19] Under s. 5.2 of the Framework Agreement, a land code will set out the rules and procedures that apply to the use and occupancy of the First Nation land (including use and occupancy under leases), the transfer of any interest or land rights in the First Nation land and other similar matters. Section 5.3(d) provides that a land code may also contain provisions respecting "encumbering, seizing, or executing a right or an interest or land right in First Nation land as provided for in clause 15".

[20] Section 15.1 reads: "[t]he Parties confirm that section 29 and subsections 89(1) and (2) of the Indian Act will continue to apply to any reserve that is First

---

[1] The Framework Agreement was ratified and brought into effect by the *First Nations Land Management Act*, S.C. 1999, c. 24 [*FNLMA*]. The *FNLMA* was later replaced with the *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19 [*FA FNLMA*]. Section 11 of the *FA FNLMA* makes clear that judicial notice must be taken of the Framework Agreement, a land code enacted by a First Nation that is in force and any First Nation law.

Nation Land." Sections 15.2 and 15.3, under the heading "IMMUNITY FROM SEIZURE, ETC." also provide:

> 15.2 Subsection 89(1.1) of the Indian Act will continue to apply to all leasehold interests or leases that existed when the land code came into force if the First Nation land was designated land at that time.
>
> 15.3 A land code may provide that some or all of the provisions of subsection 89(1.1) of the Indian Act are also applicable to other leasehold interests or leases in any First Nation lands.

[21] As an exception to the prohibition against seizure in s. 89(1) of the *Indian Act*, subsection (1.1) provides that leasehold interests in "designated land" are subject to mortgage and seizure.

[22] Chief Russell Chipps, the elected Chief of Sc'ianew since 2003 and one of two directors of Beecher Bay GP, deposes that Sc'ianew's reserves do not include any "designated land", and when enacting and amending the *Land Code*, Sc'ianew chose not to extend the application of s. 89(1.1) of the *Indian Act* to leasehold interests or leases in its reserves, as permitted under s. 15.3 of the Framework Agreement.

[23] A First Nation with a land code also has the power to make laws in accordance with its land code, dealing with development, protection, management and use of First Nation land and interests, which may include zoning laws, environmental protection laws and laws regarding the provision of local services in relation to First Nation land: ss. 18.1 and 18.2.

[24] To enforce its land code and laws, a First Nation has the power to, among other things, "establish comprehensive enforcement procedures consistent with federal, provincial or territorial law, including inspections, searches, seizures…": s. 19.1.

2003 *Land Code*

[25] Sc'ianew opted into the Framework Agreement and passed the *Land Code* in 2003.

[26] The preamble describes the *Land Code* as the "fundamental land law" of Sc'ianew. It also includes:

> AND WHEREAS the Beecher Bay First Nation wishes to manage its lands and resources, thereby enabling the First Nation to become economically self sufficient, with the means to live in dignity and assume responsibility for its economic, political, cultural and social development within the context of the Canadian society, rather than having its lands and resources managed on its behalf by Canada under the *Indian Act*;

[27] Pursuant to s. 2.9, the *Land Code* is to be interpreted in a "fair, large and liberal manner."

[28] Definitions are set out in s. 2.1. In particular, "First Nation Land" is defined as "any portion of a First Nation Indian reserve that is subject to this Land Code", with s. 5.1 listing the eight Sc'ianew reserves as being subject to the *Land Code*. "Member" is defined as "an individual whose name appears or is entitled to appear on the Beecher Bay First Nation membership list".

[29] Section 4.1 identifies the purpose of the *Land Code*: "to set out the principles and administrative structures that apply to First Nation Land and by which the First Nation will exercise authority over those lands."

[30] The Lands Register is established and required to be maintained by s. 17.1.

[31] Part 7 (ss. 28–37.5) deals with interests and licenses in Sc'ianew land.

[32] Under s. 28.1, "an interest in, or licence to use, First Nation Land may only be created, granted, disposed of, assigned or transferred by an instrument issued in accordance with this Land Code." Section 28.3 provides that "[a] deed, lease, contract, document, agreement or instrument of any kind by which the First Nation, a Member or any other person purports to create, grant, dispose of, assign or transfer an interest or licence in First Nation Land…is void if it contravenes this Land Code."

[33] Section 28.5 requires the written consent of Council to grant a lease to a person who is not a "Member".

[34] Sections 30.1–30.4 deal with Council's authority to grant interests and licenses in the First Nation Land.

[35] Sections 34.1–34.5 set out limits on mortgages and seizures. Despite the preamble, s. 34.1 states that the land-related provisions of the *Indian Act*, ss. 29, 87, 89(1) and (2), continue to apply to Sc'ianew land in accordance with the Framework Agreement. Under s. 34.3, however, a leasehold interest may be subject to a charge or mortgage with the written consent of Council. Section 34.4 specifies that in the event of default, the leasehold interest is not subject to possession, foreclosure, power of sale or any other form of execution or seizure, unless the charge or mortgage: (a) received the written consent of Council; (b) received approval from the Land Management Advisory Committee (where required); (c) was registered in the Lands Register; and (d) Council was given a reasonable opportunity to redeem the charge or mortgage.

[36] Regarding enforcement, s. 43.3 states the *Land Code* (and laws enacted under it) may be enforced in the Provincial Court or the Supreme Court, as the case may be.

Spirit Bay Established

[37] After being approached by property developer David Butterfield, Sc'ianew and Mr. Butterfield's company Trust for Sustainable Development ("TSD") entered into a letter of agreement in May 2013 regarding the development of a new sustainable residential community on a portion of Becher Bay 1 that would be marketed to the general public (the "LOA").

[38] Sc'ianew emphasizes that it lacked development experience and Mr. Butterfield presented himself and TSD as experienced developers of properties that promoted social, economic and ecological values.

[39] Mr. Cota deposes to Mr. Butterfield having significant development experience, indicating the two of them worked on several projects together across

North America. Mr. Cota describes Mr. Butterfield as a visionary developer who throughout his career was involved in building sustainable communities.

[40] Chief Chipps identifies and explains the community's expectation that the property development would bring revenue and establish a tax base that would enable Sc'ianew to provide much needed services. The hope was that, over time, other businesses would be attracted to the development, resulting in both business and employment opportunities for community members. Additionally, it was anticipated that a serious housing crisis driven by a lack of serviced lots on Becher Bay 1 would be mitigated through housing projects funded by revenue from the development and some members purchasing housing at the development site.

[41] The LOA identified a plan for Sc'ianew and TSD to develop a new residential community, controlled by a to-be-created limited partnership that Sc'ianew would "own" 51%, and TSD would "own" 49%. TSD was to be the development manager and carry out the day to day activities of the limited partnership. Sc'ianew was to amend the *Land Code* and contribute the land required to build the development through long-term leases.

Land Code **Amendments**

[42] On August 1, 2013, the *Land Code* was amended as contemplated to facilitate the Spirit Bay development. The amendments allowed Sc'ianew to lease Becher Bay 1 land in an area called the Economic Development Zone ("EDZ") to a "Band Owned Entity" for up to 149 years: s. 30.3.

[43] The amendments define the EDZ as particular lands designated for economic development activities including:

> (a) Economic initiatives that will enhance the quality of life and prosperity for the First Nation and its Members;
>
> (b) Development of diverse, sustainable and profitable businesses for the First Nation and its Members that respect the history, culture and the traditions of the First Nation and the environment; and
>
> (c) Economic activities that will assist in building the capacity of Members.

[44] Band Owned Entity is defined as "a corporation, partnership, joint venture, trust or body corporate, the majority ownership of which is held by the First Nation or by a corporation, trust or partnership wholly owned by the First Nation": s. 2.1.

[45] Significantly, s. 30.4 permits a Band Owned Entity to grant sub-interests in the EDZ including subleases and mortgages (as well as permits and licenses) for up to 99 years, exempt from several other provisions of the *Land Code* including:

a) s. 20.1 (requiring approval by the Land Management Advisory Committee for grants or dispositions of an interest for a term exceeding 25 years and for a charge or mortgage of a leasehold interests exceeding 25 years);

b) s. 28.5 (requiring consent of Council to grant or dispose of a lease to a person who is not a Member);

c) s. 33.2 (requiring consent of Council to transfer or assign an interest in First Nation land);

d) s. 34.3 (requiring consent of Council to subject a leasehold interest to charge or mortgage); and

e) s. 34.4 (preventing possession, foreclosure, sale or execution in the event of default).

[46] A document titled "Background Information – Information about the Proposed Development" was prepared for community members regarding the amendments and the need to make a development in the EDZ marketable. The background document explained ss. 30.3 and 30.4 in these terms:

> Section 30.3 will allow Council to grant a lease of lands in the Economic Development Zone to a Band Owned Entity for up to 149 years (this would be the head lease). This power to lease is restricted in two ways: first – the lease can only be to a Band-Owned Entity, and second – it only applies to lands in the Economic Development Zone.
>
> Section 30.4 goes on to provide that the Band Owned Entity can then grant sub-leases or other interests (like mortgages) under the head lease. The restrictive provisions in the Land Code identified above [s. 20.1, s. 28.5, s. 33.2, s. 34.3, s. 34.4, s. 34.5] (together with provisions dealing with spousal

> property matters or expropriation) will not apply to any of those subleases – or interests granted by the holders of the subleases. Any development on the Economic Development Zone lands would need to be marketed to give potential buyers comfort that their interest in land will be almost as secure as purchasing an interest in Land Titles land, and so the restrictive provisions regarding transfers and mortgages, are not to apply to those interests.
>
> Neither the granting of the head lease or any of the subleases will change the status of the lands – they will always remain Beecher Bay reserve lands.
>
> [Emphasis added.]

[47] As Sc'ianew emphasizes, a similar document called "Background Information – Summary of *Land Code* Amendments" identified the proposed amendments as "intended to be as minimal as possible and to apply just to the lands proposed to be developed".

Limited Partnership Agreement

[48] On August 21, 2013, the original partners of Spirit Bay (TSD GP, Beecher Bay GP, Sc'ianew and Omnibus) entered into the LPA.

[49] Found in Schedule A to the LPA, the relevant definitions include:

a) Capital Contribution: "the gross amount invested in the Limited Partnership by a Partners [*sic*] and will be equal in amount to the cash purchase price paid by such Partner for the Units sold to him … and the fair market value … of property transfers by such Partner";

b) Distributable Cash: "… the cumulative amount of gross income received by the Limited Partnership in cash or other distributable form plus the cumulative proceeds from the sale of Limited Partnership property less cumulative operating expenses and any prior distributions of Distributable Cash…";

c) Distribution: "any money or other property transferred without consideration (other than repurchased Units) to Partners with respect to their interests or Units in the Limited Partnership, but does not include any

payments to the General Partner pursuant to section 5.4 or loans to the Limited Partners";

d) "Interest" of a Partner: "all of that Partner's interest in the Limited Partnership as determined under Article 3, including without limitation, all of the Partners' [*sic*] right, title and interest in and to the assets of the Limited Partnership, and to all outstanding loans or capital contributions made by the Partner to the Limited Partnership and in and to the Partner's capital account";

e) Lands: "the lands located on the Becher Bay Indian Reserve No. 1 and more comprising approximately 110 acres …";

f) Net Income or Net Loss: "the income or loss of the Limited Partnership determined in accordance with generally accepted accounting principles in Canada";

g) Partners: the General Partner and to [*sic*] the Limited Partners collectively, and reference to a "Partner" will be to any one of the Partners unless the context will otherwise require"; and

h) Unit: "a unit interest in the Limited Partnership entitling the owner of the Unit, if admitted as a Limited Partner, to the respective voting and other rights afforded to a Limited Partner holding a Unit, and affording to such Limited Partner a share in Net Income, Net Loss and Distributions as provided for in this Agreement."

[50] Neither "assets" nor "property" are defined. Instead they are referred to in other definitions ("Capital Contribution", "Distributable Cash", "Distribution" and "Interest"). In addition to defining "Interest", the LPA refers to "interest", "interests or Units", and "unit interest".

[51] Section 2.3 identifies the business and purpose of Spirit Bay as "to collaboratively create the development of a new sustainable community (the

'Project') to be located on the Lands… as set out in the LOA" which is attached as Schedule C. Section 2.3 also sets out a number of requirements, which include under (a) the general partners entering into a lease of the "Lands" for up to 149 years on terms acceptable to them acting reasonably.

[52] Article 3, titled "Capitalization and Financing", contains ss. 3.1–3.7. Under s. 3.1, the capital of Spirit Bay is the aggregate of the Capital Contributions of the Partners, which must be made in money, not property or services.

[53] Regarding each of the limited partners, s. 3.2 requires Sc'ianew to contribute $51 and be issued 51 Units, and Omnibus, $49 and 49 Units. Section 3.2 also limits the liability of the limited partners to the amount of their Capital Contributions and their share of undistributed income.

[54] The unlimited liability of the general partners for the debts, liabilities and obligations of Spirit Bay is set out in s. 3.4. Addressing the limited liability of the limited partners, s. 3.4 provides they are not required to loan funds to Spirit Bay or "repay" any portion of a deficit balance in a limited partner's capital account. Similarly, under s. 3.6, no limited partner is required to make or guarantee any loan to Spirit Bay, provide capital beyond what is provided for its Units or to otherwise advance funds to Spirit Bay.

[55] Section 3.7 specifies only TSD GP is responsible for obtaining funds including any financing required by Spirit Bay to complete the requirements in ss. 2.3(a) through (c).

[56] Regarding allocations and distributions, s. 4.1 states 0.001% of Net Income, Net Loss, Taxable Income and Taxable Loss for any fiscal year will be allocated to the general partners, jointly, to a maximum of $1.00. The remaining 99.999% is allocated to the limited partners, proportionate to their Units.

[57] Article 5, containing ss. 5.1–5.7, addresses the role of the general partners and the authority of TSD GP specifically. Section 5.1 provides the general partners manage the business and affairs of Spirit Bay through the Policy Committee.

[58] Article 7 establishes the Policy Committee in ss. 7.1–7.17. Comprised of seven members appointed by the general partners, Beecher Bay GP appoints four members and TSD GP appoints the other three.

[59] The Policy Committee has broad authority. Section 7.3 states:

> The Policy Committee will be authorized to carry on the business and affairs of the Limited Partnership with full power and authority to administer, manage, control and operate the business and affairs of the Limited Partnership and will have all power and authority to do any act, take any proceeding, make any decision, and execute and deliver any instrument, deed, agreement or document necessary for or incidental to carrying out the business and affairs of the Limited Partnership for and on behalf of the name of the General Partners as if the Policy Committee were the General Partners.

[60] At the same time, s. 5.3 "acknowledges" TSD GP is authorized to operate and manage Spirit Bay. Its authority itemized at (a) through (q) reads in part:

> (a) Take all actions to acquire a leasehold interest in the Lands on the terms and conditions beneficial to the Limited Partnership;
>
> (b) Borrow money, and, if security is required therefore, to pledge or mortgage or subject the [sic] such portion of the Lands as the Policy Committee agrees to any security device, to obtain replacements of any mortgage or other security device and to prepay in whole or in part, refinance, increase, modify, consolidate, or extend any mortgage or other security device;
>
> …
>
> (m) Place all or a portion of the Limited Partnership's interest in the Lands in one or more single purpose or remote entity, or otherwise structure or restructure the Limited Partnership to accommodate any financing for all or a portion of the Lands;
>
> …
>
> (q) Sign any lease, or sub-lease, deed, deed of trust, mortgage or other instrument of conveyance or encumbrance, with respect to the Lands.

[61] Section 7.12 prescribes a process for making "major decisions." While decisions of the Policy Committee are "usually made" by a simple majority of votes of those present at a meeting, "major decisions" must be agreed to by a vote of at least two representatives from each of the general partners. Major decisions include any decision to (d) "…sell or assign the entire leasehold interest in the Lands or substantially all of the assets of the Limited Partnership", and (k) "[a]ny action by the

Limited Partnership that would have the effect of diluting a Limited Partner's Interest in the Limited Partnership or its Units".

[62] Article 8 deals with the rights, authority and voting (rights) of limited partners, and contains ss. 8.1–8.5. Reiterating the management of Spirit Bay is vested in the Policy Committee, s. 8.1 specifies that no limited partner acting alone is an agent of Spirit Bay, nor can they bind Spirit Bay. Entitled to cast one vote for "each Unit they own", a limited partner's right to vote is limited to the items listed in s. 8.2. Their authority is also limited earlier on in the LPA under s. 5.2; they are not permitted to participate in the management or administration of the business of Spirit Bay in any way and are prohibited from taking any action that may jeopardize or eliminate the status of Spirit Bay as a limited partnership.

[63] Section 8.4 also provides that a limited partner does not have the right to:

> (a) withdraw or reduce its contribution to the capital of the Limited Partnership, except as a result of the dissolution and termination of the Limited Partnership …
>
> …
>
> (c) demand or receive property other than cash in return for its Capital Contributions or as to allocations of the Net Income, Net Loss or Distributions of Limited Partnership.

[64] Section 10.1 identifies the conditions which must be met for a limited partner to sell, assign, encumber or otherwise transfer their "entire interest" in Spirit Bay. Section 10.3 sets out a limited partner's entitlement to (a) "transfer, assign, or sell any part of its Interest as Limited Partner Units to an Affiliate"; and (b) "sell, assign, hypothecate, encumber or otherwise transfer any income or cash distribution" it is entitled to receive, without the consent of the general partners.

[65] Under s. 12.1, Spirit Bay is dissolved, terminated and its assets disposed of when the first of four enumerated qualifying events occurs.

[66] Upon dissolution and termination, a general partner (or if none exist, the limited partners) takes full account of Spirit Bay's assets and liabilities, liquidates the

assets promptly (obtaining fair market value) and applies and distributes the proceeds in order of priority: s. 12.3.

[67] Under the heading “Buy-out”, ss. 13.3 and 13.4 provide a process for determining the purchase price and value of a withdrawing limited partner’s “Interest” in relation to a sale as between limited partners. They are required to attempt to agree on the fair market value of the Interest. Failing that, each is to retain a qualified commercial business valuator to value the Interest on terms of reference agreed to by the limited partners. The fair market value is deemed to be the average of the values each valuator determines.

[68] Section 14.1 states that many of the terms of the LPA are intended to “alter or extend” provisions of the *Partnership Act* as they may apply to Spirit Bay or the limited partners even if not specifically mentioned.

[69] The only provision dealing expressly with limited partners and partnership property is s. 16.16, “Title to Limited Partnership Property”:

> With respect to all property owned by the Limited Partnership … and, insofar as permitted by applicable law, no Limited Partners will have any ownership interest in any Limited Partnership property in its individual name or right, and each Limited Partner’s Limited Partnership Units will be personal property for all.

[70] Some months after the formation of the LPA, Spirit Bay by its general partner TSD GP entered into a development management agreement with Shoal Point Management Ltd. (“Shoal Point”), which was also controlled by Mr. Butterfield. Under that agreement, Shoal Point took on the role of carrying out the property development and overseeing marketing, leasing, designing, planning, financing and construction.

[71] In compliance with the requirement to form a limited partnership under the *Partnership Act*, a certificate of limited partnership for Spirit Bay was filed with the provincial Registrar of Properties on February 12, 2014. An amended certificate was filed on March 10, 2022.

Headleases

[72] On February 28, 2014, Sc'ianew granted the first of four virtually identical 149-year headleases within the EDZ to Spirit Bay through its general partners, on Lot 30, which is approximately 4.8 hectares. The three other headleases, on Lots 29, 31 and 32 comprising approximately 35 hectares, were entered into on June 3, 2014.

[73] All four lots are described as undeveloped. Chief Chipps deposes that together they were appraised at approximately $5 million, although he does not identify a source for this figure. Ms. Sauder similarly writes it is her understanding the lots were formally valued at $5 million when the headleases were granted, but she was unable to locate "the" appraisal. Since the 1970s, the lots had been occupied by a campsite. Home to over 100 residents, the campsite had provided Sc'ianew with revenue of approximately $20,000 per month.

[74] Under the LPA, Spirit Bay was only required to pay Sc'ianew rent of $10 for each 149-year term. However, Spirit Bay was also required to pay Sc'ianew a minimum of $20,000 per month until "at least" August 30, 2022, as an advance distribution to compensate for the loss of campsite revenue. As Scala points out, rather than rent payments, the mechanism for a return on the headleases was distributions to Sc'ianew as a limited partner provided for in the LPA.

[75] Section 1(a) of the headleases defines "Applicable Laws" as including the *Land Code*, and any other applicable federal, provincial, municipal or First Nation government's law, statute, by-law, etc.

[76] Section 6.1 provides that Spirit Bay, as "Lessee", is permitted to assign a headlease, or a portion of it, without the consent of Sc'ianew, as "Lessor". Spirit Bay is also permitted to subdivide the lots or assign leasehold interests in portions of the lots without consent (which is confirmed by s. 30.4 of the *Land Code*).

[77] Spirit Bay may also sublet the "Lands" and "Improvements", as defined in the headleases, without Sc'ianew's consent, which also aligns with s. 30.4 of the *Land*

Code. Section 7.1 specifies: "[t]he Lessee may sublet any part of the Premises without the consent of the Lessor". Premises is defined under s. 1(o) of the headleases as including the "Lands and the Improvements".

[78] Section 7.2 sets out conditions: the sublease may be for a period of up to 99 years; the sublease is subject and subordinate to the headlease; the sublease will oblige the sublessee not to do anything in contravention of the headlease; and the sublease must be registered in the Lands Register. Addressing the rights of sublessees, s. 7.3 states that they may assign, sublet and mortgage their subleases without Sc'ianew's consent. Further, under s. 7.4, a sublease of Spirit Bay's interest in the headlease does not relieve or discharge its obligations or liabilities under the headlease.

[79] Pursuant to s. 9.1, Spirit Bay may mortgage the whole or any part of its interest in the headlease and a mortgagee may enforce their security by any lawful means including through the appointment of a receiver, without the consent of Sc'ianew:

> The Lessee may mortgage the whole or any part of its interest in this Lease by any means without the consent of the Lessor for a mortgage term of not more than 99 years. The Lessor confirms that any Mortgagee of any interest in the Lease may enforce its security to the fullest extent and acquire the Lease in any lawful way and, by its representative or a receiver, as the case may be, and subject to Section 9.2, take possession of and manage the Lands and sell or assign or sublet the Premises without notice to the Lessor and without the necessity of obtaining any consent from the Lessor.

[80] Sections 34.1–34.10 deal with "Forfeiture" under the headleases. If Sc'ianew gives notice of default and the default cannot be cured, for example, it may by notice declare the term ended: s. 34.2.

[81] Sections 8.1–8.6 of the headleases include rather complex terms under the heading "Non-Disturbance" that apply if Sc'ianew declares the 149 year term ended and cancels the lease, including terms that contemplate prior assignment to the "Owner Association" or Mortgagee of the lease. The Owner Association is defined as

a company incorporated on behalf of Spirit Bay as Lessee and controlled by Spirit Bay or the sublessees.

[82] Section 41.1 of the headleases states the lease is to be a "completely carefree net lease" and Sc'ianew is not responsible for any costs, charges, expenses or outlays of any nature in respect of the Lands or improvements.

Scala's Involvement in Spirit Bay

[83] Asked by Mr. Butterfield in 2014 to bid on the civil servicing contract for Phase 1 of the Spirit Bay property development, Scala began performing the work and was eventually awarded the contract. Scala was also awarded the contract for the Phase 2 civil site servicing work and in December 2017, Scala started the civil site servicing for Phase 3.

[84] In November 2015, Scala and Spirit Bay through TSD GP entered into a contract to build houses on sublease lots, which Scala did from November 2015 until December 2018 (the "Housing Contract"). The Housing Contract required Spirit Bay to pay Scala based on certain milestones.

[85] Spirit Bay failed to make the required payments under the Housing Contract and significant arrears accumulated. Because of a positive working relationship with Mr. Butterfield, Scala continued its construction work.

[86] Unfortunately, Mr. Butterfield became ill and died in 2017. After his death, two people, Kris Obrigewitsch and Mike Zelen took over his role through TSD GP.

[87] The arrears owing to Scala under the Housing Contract continued to increase.

[88] In December 2018, after a promised payment was not made, Scala stopped working on the property development, claiming Spirit Bay had breached the Housing Contract or alternatively had been unjustly enriched.

The Arbitration

[89] The Housing Contract contained an arbitration clause.

[90] On April 8, 2019, Scala started an arbitration proceeding against Spirit Bay seeking approximately $1,800,000 for losses under the Housing Contract. Spirit Bay through its general partner TSD GP counter claimed for almost $1,500,000, alleging some of Scala's construction work was deficient.

[91] In October 2019, Spirit Bay started a second arbitration claiming deficiencies in Scala's civil site servicing work, a pleading it had previously made in the Housing Contract arbitration that was struck because the civil site servicing work was subject to separate contract(s) with their own arbitration provision.

[92] After a lengthy arbitration hearing, in reasons dated February 18, 2020 (amended March 9, 2020), the arbitrator awarded Scala $1,769,787 plus costs and dismissed Spirit Bay's counterclaim. By consent, Scala's costs were later found to include actual reasonable legal fees, as well as disbursements and the arbitrator's fees.

[93] Scala issued its first demand for payment on March 10, 2020, but no payment was made.

[94] On October 15, 2020, Spirit Bay sought leave to appeal the arbitral award to this Court. Leave was granted on three of 17 asserted grounds: 2020 BCSC 1839. On July 20, 2021, the appeal was allowed on one of the three grounds: 2021 BCSC 1415. When Spirit Bay appealed to the Court of Appeal, Scala cross-appealed. On December 7, 2022, Spirit Bay's appeal was dismissed, Scala's cross-appeal was allowed and the arbitral award was restored: 2022 BCCA 407.

[95] Following the Court of Appeal's decision, Scala's costs in the arbitration proceeding were assessed by consent at $230,000.

[96] Four days later, on March 27, 2023, Scala made its second demand for payment. Again, no payment was made.

Interim Events at the Spirit Bay Development

[97] The arbitrator's reasons included adverse findings about the credibility and reliability of the evidence of Mr. Zelen and Mr. Obrigewitsch who testified on behalf of TSD GP and Spirit Bay. In March and April 2020, they resigned from their positions as directors of TSD GP.

[98] Scala filed its original petition on May 20, 2020.

[99] On May 21, 2020, Sc'ianew's administrator Ruth Sauder was "seconded" to Beecher Bay GP to provide "basic caretaker management services" for Spirit Bay. She deposes there were no development activities occurring at that time and she is not aware of any occurring since.

[100] On July 6, 2020, Mr. Butterfield's spouse Norma Butterfield offered to sell the Butterfields' interests in Spirit Bay. A document titled "Spirit Bay Developments Limited Partnership Project Overview" (the "Project Overview") prepared by Mr. Obrigewitsch, set out the offer which included unvalued and valued assets. The unvalued assets consisted of Omnibus' 49% of Class A units in Spirt Bay; all the shares of TSD GP; Omnibus' 49% interest in another company, Spirit Bay Utilities Ltd.; and assignment of Shoal Point's development management agreement with Spirit Bay. The valued assets included Mr. Butterfield's unpaid salary; unpaid development management fees; a promissory note to Omnibus; Omnibus' class B units in Spirit Bay and a $1,530,000 promissory note to Mr. Butterfield's son, Stewart Butterfield.

[101] In the Project Overview, Mr. Obrigewitsch discussed Spirit Bay's financial statements and how the sales of subleases are recorded. He wrote that Spirit Bay is required to record the cost of the sale as a present expense, and the income must be allocated equally over the 99-year lease term, even if the whole price is paid at the time of the sale. The more lots sold in a given year, the bigger the reported loss. According to the Project Overview then, which is admissible only for the fact of what is said, the financial statements make it appear that Spirit Bay's "costs far exceed revenues even though what is sold is quite profitable from a cash perspective."

[102] In February 2022, the newly formed 133, wholly owned by Sc'ianew, entered into an asset purchase agreement with Ms. Butterfield, TSD GP, Omnibus and Spirit Bay. Under the agreement, 133 purchased the interests of TSD GP and Omnibus in Spirit Bay and all liability for the arbitral award. The transaction involved a sublease "swap"; in exchange for the transfer of her existing sublease and other assets, Ms. Butterfield received three subleases.

[103] Chief Chipps deposes that the transaction took place because it became clear that the Spirit Bay project was unable to make progress as long as the Butterfield family remained part of the limited partnership. Scala expresses some skepticism with respect to this explanation, and points out that as a result of the transaction, Spirit Bay was in fact left with fewer valuable assets (sub-interests).

Future of the Spirit Bay Development

[104] The parties present conflicting views regarding the future viability of the Spirit Bay development project, culpability for the challenges in advancing the project to date and where the equities lie in terms of appointing a receiver or dissolving Spirit Bay.

[105] Mr. Cota has continued to visit the development site and deposes that, as of April 2023, there were about 50 single family homes built, 86 registered subleases and about 15 vacant serviced lots.

[106] Ms. Sauder refers to 52 homes being built, about 75 subtenants and 13 vacant lots that she says are unserviced because:

> (a) two of them are adjacent to a retaining wall built by Scala that requires remediation before construction can occur;
>
> (b) some have above-ground temporary hydro poles;
>
> (c) many do not have paved roads; and
>
> (d) they are dependent on the pump and dump sewer service, which is not able to properly support these properties.

[107] Mr. Cota disagrees that the lots are not serviced. He deposes that all of the houses in the first two phases of the development are connected to electrical

services. The previous owners of the lots serviced by the above ground poles were offered the option of having their electrical services moved underground at the same time that Scala was coordinating the removal of the rest of the electrical poles. More importantly, Mr. Cota states the above ground poles would not affect construction of homes on any of the vacant lots. The same is true of the lack of paved roads, which are mostly in Phase 2, where Spirit Bay has sold the vast majority of the lots. Further, the vacant lots are currently connected to the existing sewage system at the development where the sewage is then pumped and hauled to Sc'ianew's sewage treatment facility.

[108] Mr. Cota also deposes that the retaining wall Ms. Sauder refers to is incomplete, because Scala did not finish building the houses on those lots due to its dispute with Spirit Bay. He adds that Scala has informed Spirit Bay many times that it is willing to acquire these affected lots as partial payment for the amounts owing. He gives similar evidence about advising Spirit Bay on several occasions since the start of the arbitration that Scala was willing to receive lots as payment, subject to agreeing on the value or a process of valuation, as well as offering to return to the development to try and resolve some of the civil servicing issues. Mr. Cota states Scala made the offers on the understanding Spirit Bay did not have sufficient cash but remains open to partial payment by way of land transfers so long as it can be assured that construction permits for houses would be issued.

[109] Both Chief Chipps and Ms. Sauder depose to significant infrastructure deficiencies including the sewage and water systems at the development related to Spirit Bay's asserted cashflow and costs problems, which they say have burdened Sc'ianew and are not sustainable.

[110] Chief Chipps refers to the limited partnership having financial problems from the outset that became critical after Mr. Butterfield became ill and then died. Chief Chipps indicates that Mr. Butterfield's assets passed to Ms. Butterfield, and no one in the family was willing or able to take on his role in managing the partnership or the property development.

[111] With respect to the sewage and water service issues, Chief Chipps explains there is no municipal or district sewage infrastructure in the vicinity of Becher Bay 1. As a result, all sewage services must be provided through on-site treatment or by being pumped out and taken to another facility for treatment. Spirit Bay was supposed to provide for its own sewage needs but no treatment facility was ever built due to cash flow problems.

[112] Chief Chipps deposes that Sc'ianew's sewage treatment facility was built to service the community. It currently provides service to 17 homes and could also service an 18-home residential development for community members that Sc'ianew is seeking federal approval for. According to Chief Chipps, Sc'ianew's facility cannot service 18 new residential lots plus additional Spirit Bay development.

[113] Sc'ianew has permitted Spirit Bay's sewage, which is pumped out of an on-site tank by a private contractor, to be taken to its facility at no cost. Ms. Sauder deposes that Sc'ianew has been paying the cost of the private contractor at between $160,000 and $200,000 each year. She also deposes the nearest available off-reserve facility is further away in Chemainus.

[114] Chief Chipps did not identify the source of his evidence about the capacity of Sc'ianew's sewage facility. Ms. Sauder relies on a letter from engineer Michael Day dated November 14, 2018, and what she has been told during consultations with Sc'ianew's engineers, Chatwin Company LLC ("Chatwin"), about the sewage service needs of Spirit Bay and Becher Bay 1. According to Ms. Sauder, Chatwin has advised a new plant is required to service both Sc'ianew and Spirit Bay at an estimated cost of $16,900,000.

[115] According to Mr. Cota, Scala worked with Spirit Bay and various consultants and service providers to develop several plans for the development's sewage system. All of the plans contemplated the sewage requirements growing over time with the development as a whole. Initially Spirit Bay planned to construct an on-site treatment facility for residents. Spirit Bay engaged MSR Solutions Inc. ("MSR") to design the proposed facility. A copy of MSR's proposal is in evidence, dated

September 1, 2015. The cost of the facility to be built in two phases was estimated at $5,700,000.

[116] Mr. Cota also deposes that after receiving the proposal, Spirit Bay decided that constructing a sewage treatment facility at the development was not financially feasible. Consequently, Mr. Cota assisted Spirit Bay in developing a plan for sewage treatment that involved connecting the development's sewage system to Sc'ianew's treatment facility, located about 1.5 kilometres away and upgrading the capacity of that system to meet the needs of both the community and Spirit Bay, with the costs of maintaining the facility being shared.

[117] Mr. Cota's evidence includes a plan and a feasibility report prepared by MSR in 2018. Based on meetings he attended with Spirit Bay and Michael Seymour of MSR, Mr. Cota said he understood the estimated cost of the project was $4,372,000. He is aware that after 2018 Sc'ianew engaged a contractor to make some preliminary updates to the sewage treatment facility in preparation for the project, but he does not know whether any additional work was done in order to connect Spirit Bay's tank to Sc'ianew's facility or to upgrade the facility.

[118] Ms. Sauder states that she is not aware of Spirit Bay taking any meaningful steps to pursue MSR's sewage proposal, in addition to saying that in her role as Sc'ianew's administrator she received information from another engineer identifying gaps in the 2018 report.

[119] Ms. Sauder and Chief Chipps describe Sc'ianew transferring $2.9 million in federal funding it received to Spirit Bay in 2018 and 2019 for a sewage plant to service the Spirit Bay lots, BC Hydro improvements and infrastructure for the town center located on the lots (the "Deliverables"). Spirit Bay used the funding to pay for the BC Hydro improvements which cost just over $2 million. None of the funds were contributed to a sewage plant or development of the town centre. Chief Chipps also says $600,000 of the funding was not spent on the Deliverables, putting Sc'ianew at risk of a claw back and being ineligible for further economic development funding until the Deliverables have been completed.

[120] Ms. Sauder and Chief Chipps also provide similar evidence about Spirit Bay's failure to build dedicated water services. The development has continued to rely on Sc'ianew's water reservoir which, like the sewage facility, was built to service Sc'ianew's members. Each deposes the reservoir has a limited capacity and cannot meet the needs of the community, especially in the event of a fire.

[121] Ms. Sauder relies on information and advice she has received from Chatwin, which includes that the limited capacity of the reservoir has already contributed to water shortages in 2021 and 2022 that involved leaks. In response to her request, Chatwin estimated the cost of developing a new and larger reservoir in 2021 for Becher Bay 1 at approximately $8 million. When she asked for an updated cost analysis in 2023, they expected the cost to be above $11 million.

[122] Mr. Cota deposes that Scala installed the existing water distribution system at the development. He states it has "fire flow capacity" and there are fire hydrants installed throughout the first two phases. MSR prepared a report regarding the potential expansion of the water services dated April 28, 2016.

[123] Like Ms. Sauder's information, the report identifies the reservoir as insufficient for long-term storage and fire flow requirements but adequate under the minimal fire flow protection requirements in the BC Building Code for the first phase of the development, meaning about 100 homes.

[124] Both the report and Mr. Cota refer to a lake located on Sc'ianew land that could be used as a back-up reservoir, which was one of MSR's recommendations for increasing the water supply. Mr. Cota also deposes that based on his discussions with Mr. Butterfield and Mr. Obrigewitsch, he understood that Spirit Bay planned to use the proceeds from the sale of new lots to help fund the expansion of water services, including water distribution and storage, as the development expanded beyond the second phase. Spirit Bay also planned to use tax revenue from existing lot owners to fund the maintenance costs of operating the water services.

[125] Ms. Sauder deposes that no new homes have been completed since 2020. She identifies the lack of sufficient capital and qualified development management experience since the death of Mr. Butterfield, along with the infrastructure problems as explaining why the development has stalled. She also identifies Scala's arbitral award as a barrier.

[126] Ms. Sauder states that after Mr. Obrigewitsch and Mr. Zelen resigned, no one was appointed to TSD GP or Shoal Point which had been managing the limited partnership pursuant to the development management agreement from 2014. After her secondment, she says, she reviewed Spirit Bay's records obtained through TSD GP and discovered TSD GP had failed to leave the remaining partners with all of the appropriate financial and other records and there were large gaps in the financial records of Spirit Bay.

[127] Indicating Sc'ianew was not in a position to provide expertise, experience or capital, Ms. Sauder also states that she began reaching out to possible development contacts in 2020 and had sustained discussions with four separate developers, but to date none have been willing to invest in or assume management of Spirit Bay. Indicating she is bound to keep the names of the developers confidential, she identifies a major sticking point as the "legal uncertainty surrounding the Development and the Partnership in particular, including the status of the arbitral award" and the underdeveloped infrastructure. As it stands, Ms. Sauder asserts the partnership has no revenue stream with which to address any of these issues.

[128] In terms of impacts on Sc'ianew, in addition to sewage and water services, Ms. Sauder identifies $3.2 million in loans to Spirit Bay as of March 2020, based on an analysis completed by Sc'ianew's auditor in January 2021.

[129] Spirit Bay's financial statements, consisting of balance sheets and income information for 2021 through 2023 (the "Financial Records"), were provided to Scala in late February 2024.

[130] Between December 2023 and February 2024, Scala conducted an examination in aid of Spirit Bay's general partners (the "Examination") through written questions and answers. Ms. Sauder was the representative for both TSD GP and Beecher Bay GP. Ms. Sauder identified herself as the sole director of TSD GP since March 10, 2022, an officer of Beecher Bay GP and its manager. Regarding the Financial Records, Ms. Sauder said she asked a bookkeeper to prepare them in 2024 and that she had not received any accounting advice related to them. Nonetheless, based on her review of the Financial Records, in her affidavit evidence she expresses the view the partnership is essentially insolvent.

[131] Scala points to some obvious errors in the Financial Records. For example, the 2023 Financial Records do not record income received from Western Canada Marine Response Corp. ("WCMRC") and BC Hydro that Ms. Sauder was aware of; they mischaracterize cash held in trust accounts as receivables; and they continue to reflect amounts owing to the Butterfields.

[132] In addition to challenging the reliability of Ms. Sauder's dire view of Spirit Bay's financial situation, Scala points to an appraisal of certain subleases and headleases completed by My Phung of Phung Horwood Real Estate Appraisers in October 2022. The appraisal was completed for Ms. Sauder in her role as Chief Administrative Officer of Sc'ianew. The 54 page report was produced as a result of the Examination.

[133] Mr. Phung valued the remaining undeveloped parts of Lots 30 and 31 at $19,000,000; the leasehold interest in Lot 32 at $12,000,000; and 10 serviced subleases within Lots 30 and 31 at $5,420,000.

[134] Sc'ianew and the general partners of Spirit Bay challenge the $19,000,000 valuation largely because it assumes "services adequate for the proposed development are available at the lot line". Mr. Phung writes that Sc'ianew has informed him that the intended development would require upgrades to utility infrastructure which would involve significant costs. Identifying the estimation of those costs as beyond the scope of the report, Mr. Phung clarifies that he assumes

adequate services are in place to the lot line or nearby in Lots 30 and 31 for the purposes of his report. These services include hydro, water and sewer. Mr. Phung also specifies that his appraisal is based on his own inspection and extensive research.

[135] Of course, all the evidence about what others have told Ms. Sauder, Chief Chipps and Mr. Cota verbally or in writing, including Mr. Phung's report and his opinions about value, is hearsay evidence that presumptively is not admissible for its truth.

[136] In response to an Examination question, Ms. Sauder provided a document that she prepared that identifies and lists 22 lots in phases 1 and 2 of the Spirit Bay development that are available for sale. According to her own document, seven of the 22 lots are not serviced. Relying on the "Last list price set in November, 2019" she states the lots have a total value of $9,216,800. This document too is subject to the hearsay rule if its contents are admitted for its truth. The admission against interest exception would arguably apply.

Receivership and Dissolution Petition Proceedings

[137] Scala's amended petition was filed on May 2, 2023.

[138] The day before, Sc'ianew sent a letter to Spirit Bay outlining allegations of unfulfilled lease obligations related to the provision of utilities and basic services, and the cost of removing sewage. The letter included, "[i]f [Spirit Bay] is in actual default of its material obligations under the Leases, the nation is entitled to exercise its rights to Forfeiture under Article 34 of the Leases."

[139] On July 21, 2023, Sc'ianew filed its petition to dissolve Spirit Bay, declare the limited partnership in default of each of the headleases and declare them terminated. A few days prior, Sc'ianew had sent a further letter to Spirit Bay that included notice it was in material breach of various articles under the headleases.

[140] In its petition and submissions, Sc'ianew takes the position that Spirit Bay must be dissolved because it is unable to carry on the business of the limited partnership and the headleases should be terminated because Spirit Bay is in material breach. Underlying the assertion that Spirit Bay is unable to carry on its business is a depiction of the development project as financially and operationally doomed, based on various circumstances such as the loss of effective management and expertise, Spirit Bay's inability to secure adequate financing and investment for the development along with the material breaches. The alleged material breaches are based most significantly on Spirit Bay's failure to build sewage and water services infrastructure.

[141] In response, Scala raises concerns about transparency, based on the timing of the dissolution petition relative to the amended receivership petition and the long-standing nature of the underlying allegations and circumstances. Scala also advances a number of arguments in support of its substantive position that Sc'ianew has not established Spirit Bay materially breached the headleases, including its contractual interpretation of various lease provisions; Sc'ianew's decision to voluntarily incur the costs of Spirit Bay's sewage disposal; and the absence of evidence that Sc'ianew ever sought reimbursement for those costs despite options being available.

[142] On these last points, Scala notes there were steps that could have been taken to require Spirit Bay residents to cover or contribute to the cost of sewage disposal going forward. Section 6.1 of the *Land Code* provides Council may make laws respecting, among other things, "development, conservation, protection, management, use and possession of First Nation Land"; section 6.2 specifies that this includes laws related to the "provision of local services and the imposition of user charges". While s. 11.1 of the headleases states that Spirit Bay is responsible for providing all services, s. 11.2 contemplates that services, including sewage disposal, may be paid for by sublessees. Indicating Spirit Bay previously obtained financing secured against the head and subleases to fund its operational costs,

Scala also notes Ms. Sauder did not give evidence about attempting to secure financing for the servicing issues she identified.

[143] Prior to the hearing originally scheduled for March 2024, non-party respondents, sublessees Maureen Palmer and Michael Pond and WCMRC filed responses opposing the dissolution petition based on precisely this issue. Ms. Palmer and Mr. Pond bought two lots or subleases in Lot 30 and reside in one of the two. WCMRC is a marine oil spill response organization that entered into a 20 year commercial sublease in September 2022.

[144] Ms. Palmer and Mr. Pond have brought a civil claim against Spirit Bay for breach of their sublease related to infrastructure deficiencies. They argue the dissolution petition is premature and their action should be resolved before Spirit Bay is dissolved. Among other complaints, Ms. Palmer deposes that there is no governing structure among sublessees, leaving it to individual residents to raise funds for certain services on an ad-hoc basis; this is despite the fact that the Spirit Bay Owner Corporation was established and intended to function akin to a strata corporation, according to the terms of their sublease. Ms. Palmer asserts that Spirit Bay, its "parent company" or Sc'ianew should build roads and services in their lot location or provide them with alternate lots, stating there are many serviced lots available.

[145] Under WCMRC's sublease, it occupies 50,000 square feet of land in Lot 31. Controller Suman Lalari describes this as an optimal location for WCMRC. It is the only Transport-Canada certified marine response organization on the west coast and is tasked with responding to spills along BC's coastline. Ms. Lalari also deposes that WCMRC has spent about $9 million constructing its base and expects to spend $11 million to complete the construction.

[146] In opposing the dissolution petition, WCMRC emphasizes that it entered into the sublease based on a constellation of contractual arrangements designed to give them security of tenancy, with the headlease being the backbone. Despite seeking termination of the headleases, Sc'ianew has not addressed the legal status of

WCMRC's sublease (or any other subleases). As of the petition hearing, Sc'ianew had not presented a plan about what it will do if it inherits the subleases. WCMRC expressed concern that it faces serious uncertainty about continuing to occupy the base.

[147] Ms. Sauder does not address the potential impact of dissolution on sublessees. Chief Chipps addresses the issue only very briefly in his last affidavit made July 28, 2023. He says nothing more than, "Sc'ianew is committed to ensuring the non-disturbance of the subtenants' interests in the Spirit Bay Lots", invoking s. 8.2 of the headleases.

[148] Under that 8.2, sublessees "may peaceably and quietly possess, hold and enjoy their subleased lands during the term of the Lease and their subleases without interruption or disturbance by the Lessor, or anyone claiming under it, despite any default by the Lessee of its obligations under the Lease." However, s. 7.2 states that subleases "will be expressly subject and subordinate to the Lease and to the rights of the Lessor under this Lease, and will terminate on termination of this Lease". Both are part of a complicated, less than clear multi-part scheme about what can happen to subleases in the event Spirit Bay is dissolved.

[149] The scheme requires Sc'ianew to assign the unexpired term of the headlease to the "Owner Association" representing the sublessees (upon its written request) prior to any cancellation of the headlease (ss. 8.1 and 8.4). Ms. Palmer deposes however that the Spirit Bay Owner Corporation is not in good standing with the B.C. Registrar of Companies, meaning it fails to meet one of the pre-conditions for exercising its right under s. 8.1.

[150] The headlease also provides that, if the Owner Association is "not in a position to take an assignment of the Lease", a mortgagee can request that it be assigned to them. If the headlease is not assigned to either the Owner Association or a mortgagee, s. 8.5 allows a sublessee to require a new lease directly from Sc'ianew on the same terms, but accessing this provision is subject to the initial

"default in respect of which the Lease is cancelled"—the dissolution of Spirit Bay—being cured.

[151] Further, on the second day of the petition hearing, April 9, 2024, I was provided with an affidavit from Neil Carfra, counsel for Ms. Palmer and Mr. Pond, that addresses his correspondence with Sc'ianew's counsel Robert Janes, seeking to clarify a potential new "lease" as "contemplated by s. 8 of the head lease". In a detailed letter to Mr. Janes dated March 6, 2024, Mr. Carfra referred to an earlier discussion about the possibility of entering into a direct lease with Sc'ianew. Based on s. 8.5 of the headlease, Mr. Carfra suggested a new lease should have the same terms as those in the existing sublease. Mr. Janes' reply to the letter was limited to indicating that he would respond in the near future.

[152] At the hearing, Mr. Janes submitted proposed terms of an order that included staying a dissolution for 60 days to permit Sc'ianew and sublessees to negotiate and attempt to reach agreement on suitable replacement leases, and leave to apply for further orders or directions in the event they were unable to reach agreement.

[153] Mr. Carfra submits the Court should be concerned about the interests of sub-tenants because either Sc'ianew does not have a plan despite seeking termination of the headleases or it has a plan but is not disclosing it.

[154] Returning to previous events in the receivership proceeding, within a week of the Enforcement Order being made in August 2023, Scala wrote to the Lands Register asking to register the judgment against the headleases and nine subleases registered to Spirit Bay and its general partners. The judgment was not registered against the headleases or subleases.

[155] Together with post-judgment interest, the judgment amounted to $2,004.787.

[156] Mr. Cota deposes that since 2018, Scala has paid approximately $478,000 to its material suppliers and sub-trades, despite not being paid by Spirit Bay. The effort has required Scala to sell its equipment and spend effectively all of its working capital, impacting its ability to take on further projects. As of April 2023, Scala still

owed its material suppliers and sub-trades approximately $458,000 for their materials and work performed at the development, which has badly damaged Scala's reputation.

[157] Asked whether Spirit Bay intends to pay Scala's judgment during the Examination, Ms. Sauder said it does, "if and when it has adequate cash and revenues to do so." She also stated:

> Spirit Bay does not currently have adequate cash or revenues to do so. I believe the development stopped being able to meet its obligations in or about early March of 2020, and that hasn't changed in the intervening years, and is unlikely to change in the absence of a new developer.

[158] Responding to questions about the asset purchase agreement with Ms. Butterfield in 2022, Ms. Sauder confirmed that Spirit Bay has transferred three sublease lots to Ms. Butterfield since 2020 and she released all of Spirit Bay's debts to her including promissory notes totalling $3.2 million. Regarding the value of the subleases, Ms. Sauder said that she understood no formal valuations were obtained in relation to the swap of subleases but reference was made to BC Assessment values for equivalent properties.

[159] Scala learned from Ms. Sauder's Examination that Spirit Bay had funds in its lawyers' trust accounts. With Scala poised to garnish those accounts, a partial payment of approximately $450,000 was made from these funds towards the judgment.

[160] The proposed revised receivership order is based on this Court's model order.

Issues

[161] The parties' positions in the receivership proceeding raise a number of legal issues. Perhaps the most significant issue is whether appointing a receiver is barred by s. 89 of the *Indian Act*. In determining this issue, I discuss the *Indian Act* provisions, the *Partnership Act* regarding limited partnerships, the limited partnership jurisprudence and the LPA. The other issues include whether appointing a receiver

is contrary to the *Land Code* (and the Framework Agreement), are the provincial statutory provisions that provide for the appointment of a receiver constitutionally inapplicable based on the doctrines of federal paramountcy and interjurisdictional immunity, and lastly has Scala established that a receiver should be appointed.

Whether Appointing a Receiver is Barred by s. 89 of the *Indian Act*

[162] This issue engages perhaps the most significant legal question in the receivership proceeding, which simply put is: what does Sc'ianew own as limited partner in Spirit Bay? The dispute arises from Sc'ianew and the general partners' contention that Sc'ianew, as a limited partner, has an interest in Spirit Bay's assets, namely the headleases and subleases, that is its personal property and therefore protected from seizure by s. 89 of the *Indian Act*.

Indian Act Provisions

[163] Along with the Crown's fiduciary duty, the Supreme Court of Canada has recognized that a First Nation's interest in reserve land, as with aboriginal title, includes rights of use and occupation, is sui generis, distinct from "normal" proprietary interests and is inalienable except to the Crown: *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 at paras. 42–46.

[164] Under the *Indian Act*, a reserve is a tract of land held in fee simple by the federal Crown for the benefit and use of a band: see ss. 2 and 18(1).

[165] Various provisions of the *Indian Act* deal with the use and possession of reserve land.

[166] Section 89(1) prevents the real and personal property of an "Indian" or a band situated on reserve from being subject to mortgage, seizure and other restraints, along with an exception for some leasehold interests:

> **Restriction on mortgage, seizure, etc., of property on reserve**
>
> 89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

> **Exception**
>
> (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

[167] Related to s. 89(1.1), s. 38(2) provides a band may "designate" all or part of a reserve for the purpose of it being leased or a right or interest therein being granted.

[168] Section 29 also provides that reserve lands are not subject to seizure under legal process.

[169] Scala does not dispute that s. 89 could capture an order appointing a receiver, although it does not expressly refer to receiverships, consistent with the holding in *Bogue v. Miracle*, 2022 ONCA 672 at para. 32.

[170] Sc'ianew and the general partners accept that s. 89 like s. 87, which confers a tax exemption on "Indians" regarding their interest in reserve land and their personal property situated on reserve, does not apply to corporations because they are neither "Indians" nor "bands". Sc'ianew and Spirit Bay accept, in other words, that the *Indian Act* does not shield the real and personal property held by the general partners, Beecher Bay GP and TSD GP, from seizure.

[171] In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 1990 CanLII 117, Justice LaForest considered the history and meaning of ss. 87, 89 and 90. He characterized s. 89 as: "weav[ing] another strand into the protection afforded property of natives by shielding the real and personal property of an Indian or a band situated on a reserve from ordinary civil process": at 128. LaForest J. explained, "the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations": at 130–131.

[172] Although Sc'ianew emphasizes the link between the insulation provided by s. 89 and the recognition of the unique nature and special importance of a First Nation's interest in reserve land, the provisions have also been widely recognized as

limiting the ability of First Nations and individual members living on reserve to access credit and develop the land. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58 at para. 42, for example, Chief Justice McLachlin discussed the *Report of the Royal Commission on Aboriginal Peoples* which noted: "[t]he *Indian Act* contains certain provisions that make it very difficult for lenders to secure loans using land and other assets located on-reserve as collateral. These provisions serve as a significant deterrent to financing business activity on-reserve."

[173] Also emphasizing the principle that statutes (and treaties) relating to "Indians" are to be liberally interpreted and in favour of "Indians", arising from *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 1983 CanLII 18, Sc'ianew submits that property for the purposes of s. 89 must include beneficial title given the Crown holds legal (fee simple) title to reserve land.

[174] The issue here, however, is what comprises Sc'ianew's interest as a limited partner in Spirit Bay and specifically, whether that interest includes a personal property interest in the headleases (and subleases) within the meaning, and thus ambit of protection, of s. 89(1). The nature of Sc'ianew's interest in Spirit Bay is determined by the law governing limited partnerships.

[175] Accordingly, I turn next to the relevant provisions of the *Partnership Act* followed by the case law, which the parties seem to agree is unsettled.

Partnership Act

[176] Limited partnerships are a creation of statute. In British Columbia, that statute is the *Partnership Act*. Part 3 of the *Partnership Act* pertains specifically to limited partnerships.

[177] All partnerships are defined as the relation that subsists between persons carrying on business in common with a view of profit: s. 2.

[178] A limited partnership consists of one or more general partners and one or more limited partners: ss. 50 and 51.

[179] Section 56 provides that a general partner in a limited partnership has the same rights, powers and liability as a partner in a partnership, but does not have the authority to do any of the following:

> (a) to do an act which makes it impossible to carry on the business of the limited partnership;
>
> (b) to consent to a judgment against the limited partnership;
>
> (c) to possess limited partnership property, or to dispose of any rights in limited partnership property, for other than a partnership purpose;
>
> (d) to admit a person as a general partner or to admit a person as a limited partner, unless the right to do so is given in the certificate;
>
> (e) to continue the business of the limited partnership on the bankruptcy, death, retirement, mental incompetence or dissolution of a general partner, unless the right to do so is given in the certificate.
>
> [Emphasis added.]

[180] The rights of a limited partner, identified in s. 58, are circumscribed:

> **58** (1) Subject to subsection (2), a limited partner has the same right as a general partner to do any of the following:
>
> > (a) to inspect and make copies of or take extracts from the limited partnership books at all times;
> >
> > (b) to be given, on demand, true and full information of all things affecting the limited partnership and to be given a formal account of partnership affairs whenever circumstances render it just and reasonable;
> >
> > (c) to obtain dissolution and winding up of the limited partnership by court order.

[181] Unlike a general partner, a limited partner is not liable for the debts and obligations of the limited partnership beyond the amount they contribute to the capital of the limited partnership: s. 57.

[182] A limited partner can become liable as a general partner, however, if they take part in the management of the limited partnership: s. 64.

[183] Limited partners are permitted to contribute money and other property to the limited partnership but not services: s. 55(1).

[184] Subsection 55(2) provides that "[a] limited partners' interest in the limited partnership is personal property." The term "limited partners' interest" is not defined but is referred to in other provisions.

[185] Under s. 66, which deals with assigning a limited partner's "interest…in the limited partnership", subsection (2) provides an assignee does not become a limited partner until their "ownership of the assigned interest is entered into the register referred to in s. 54(2)(a)". That provision includes: "(2) a limited partnership must keep at its registered office (a) a register showing…for each limited partner…(ii) if the participation by limited partners is defined by percentage interests or by the number of units or other similar rights held by them, the percentage interest or the number and class of units or other rights held". Further, on application by a judgment creditor of a limited partner, the Court may charge the interest of a limited partner but the property of the limited partnership may not be disposed to obtain a release of that charge: s. 76.

[186] Partnership property is defined only in Part 2, s. 1.1:

> **"partnership property"** means property and rights and interests in property
>
> (a) originally brought into the partnership stock,
>
> (b) acquired, whether by purchase or otherwise, on account of the firm, or
>
> (c) acquired for the purposes and in the course of the partnership business.

[187] Addressing the share of profits, s. 59(1) provides a limited partner has the right to a share of the profits or other compensation by way of income and to have their contribution returned, subject to other provisions of the *Partnership Act* and the partnership agreement.

[188] Regarding the return of a limited partner's contribution, s. 62 restricts their entitlement to receive any part of their contribution from the general partner or "out of the limited partnership property" until, among other things, the liabilities of the limited partnership (excepting liabilities to general partners and to limited partners on account of their contributions), have been paid or there remains sufficient limited

partnership property to pay them. Further, "despite" the nature of the contribution, a limited partner only has the right to demand and receive cash in return for it, unless all the partners consent or the certificate provides otherwise: s. 62(3).

[189] The only reference to a limited partner and the assets or property of the limited partnership is found in s. 60(2), which deals with a limited partner as creditor. Permitted by s. 60(1) to lend or borrow money and transact business with the limited partnership, s. 60(2) specifies that "[u]nless the limited partner is also a general partner, a limited partner having, with respect to anything done under subsection (1), a claim against the assets of the limited partnership may receive a proportionate share of the assets along with other creditors" (emphasis added). A claim under subsection (2) expressly does not include a claim for a return of capital contributions: s. 60(3).

Limited Partnership Jurisprudence

[190] Again, Sc'ianew and the general partners argue that Sc'ianew as a limited partner in Spirit Bay has an (indivisible) interest in the ownership of the assets of the limited partnership, including the headleases, that is its personal property.

[191] Relying heavily on particular aspects of a discussion of limited partnerships in *Lehndorff General Partner Ltd., (Re)* (1993), 17 C.B.R. (3d) 24, 1993 CarswellOnt 183 (Ont. Gen. Div.) [*Lehndorff*, cited to WL] and *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 [*Asset Engineering*], Sc'ianew identifies its interest in Spirit Bay's assets as proprietary, beneficial or equitable. The general partners suggest the interest is more circumscribed and arising from a fiduciary obligation that governs the exercise of their powers as owners of the limited partnership's assets, relying in part on the limits on their authority to deal with partnership property other than for a partnership purpose under s. 56(c) of the *Partnership Act*.

[192] In *Lehndorff*, a group of companies involved in property development and management sought protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] and applied for a stay of proceedings. The applicants

consisted of the sole general partner in three limited partnerships and a number of companies who were bare trustees holding title to properties on behalf of the limited partnerships. The limited partners were over 2,750 individual investors. A consolidated restructuring plan was being negotiated.

[193] The applicants sought the stay to prevent the limited partners from attempting to remove the general partner or dissolve the limited partnerships before the restructuring plan could be presented. The issue was whether a stay could apply to the limited partners who were not companies and therefore not subject to the *CCAA*.

[194] Justice Farley decided a stay under the *CCAA* could be supplemented using the court's inherent power. He found approving a consolidated restructuring plan would be appropriate given the significant financial intertwining of the applicant companies, each of which had a realistic possibility of being able to continue operating. Before granting the supplementary stay directed at the limited partners, he embarked on a general discussion of limited partnerships and how they operate, based largely on the Ontario statute (at para. 17):

> A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law…A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership…Limited partners have no liability to the creditors of the limited partnership's business, the limited partners' exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors…In the event of the creditors collecting on debt and enforcing security, the creditors can only look at the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership.
>
> [Emphasis added, citations omitted.]

[195] Justice Farley focussed on limited partners after canvassing case law that recognizes a limited partnership, like a general partnership, is not a separate legal entity. Along with describing a limited partner's role as completely passive, he stated (at para. 20):

> …The limited partners leave the running of the business to the general partner and in that respect the care, custody, and maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner over the operation of a limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership…
>
> [Emphasis added.]

[196] Scala identifies the qualifier that follows Farley J.'s statement about the "undivided interest", "for the purpose of legal process", as constraining the notion of a stand alone proposition. Further, given the issue in *Lehndorff* was the potential impact of the limited partners' ability to exercise their contractual rights to vote in favour of removing a general partner or dissolving the limited partnership, the statement is *obiter* if read without the qualifier. I would agree with both points.

[197] The same passages from *Lehndorff* were set out in *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1998), 167 D.L.R. (4th) 272, 1998 CanLII 4236 (O.N.C.A.) [*Kucor*], where Justice Borins. referred to them as a "very helpful explanation of the features of a limited partnership and how its business is conducted" (at para. 30).

[198] At issue in *Kucor* was a mortgage granted by a limited partnership and whether it could be prepaid based on a statutory provision that applied to mortgagors other than corporations. The general partner had conveyed the property to the limited partnership, purportedly as trustee to the beneficiary. The limited

partnership in turn granted a mortgage on the property, which was amended and extended.

[199] Justice Borins agreed with the application judge that the mortgage could not be prepaid because the limited partnership is not a legal entity capable of holding title to real property or granting a mortgage. Taking a "functional" approach, Borins J.A. concluded the mortgage was granted at law by the general partner, which as a corporation was not entitled to the benefit of the statutory provision. He also relied on some of the statutory distinctions between general and limited partners, including: restricting a limited partner's obligation to providing a capital contribution; their limited liability "similar to a shareholder"; and the restriction from participating in the business of the limited partnership.

[200] Justice Borins reasoned that if a general partner is exclusively responsible for the management and control of a limited partnership, which is not a legal entity, title to real property is acquired and conveyed through the general partner. After considering the limited partnership agreement and the conveyance, and despite the trustee language, he concluded the general partner held title to the property "on behalf of" all the partners (at para. 41).

[201] *Asset Engineering* involved an appeal from a "comeback order" under the *CCAA*, which extended a stay of proceedings and continued the appointment of a monitor over the limited partnership's property. The limited partnership was named in the stay order because R. 7 of the former *Supreme Court Rules* permitted a partnership or "firm" to be sued in its own name. At the chambers hearing, a creditor had argued there was no jurisdiction over partnerships under the *CCAA*, which applied to companies only. The chambers judge found the power to stay was supplemented by the court's inherent jurisdiction based on *Lehndorff*.

[202] On appeal, the creditor took the position the limited partnership, as the "primary business actor," owned the assets of the partnership, should have been named in the order and was a legal entity unto itself as opposed to a set of relations (at para. 13).

[203] Justice Newbury followed both *Lehndorff* and *Kucor* in finding a limited partnership is not a legal entity, including the same passages from *Lehndorff* and noting they were quoted with approval in *Kucor*. Instead of discussing them, however, Newbury J.A. focussed on the conclusion in *Kucor*. Referring to para. 33 of the decision, she wrote that title to real property "owned by" the limited partnership is generally registered in the name of the general partner rather than in the names of "the [limited] partners themselves", who would thereby risk exposing themselves to "unlimited liability" (at para. 19). She also commented "[w]hether the general partner holds such property as a true 'trustee' or in some lesser fiduciary capacity is another question" (at para. 19). While deciding an answer was unnecessary, she added nonetheless that she would expect the answer in most cases to be expressly addressed in the partnership agreement.

[204] Turning to whether the *CCAA* stay power could be supplemented by this Court's inherent jurisdiction and whether naming the limited partnership extended the stay to the limited partners, Newbury J.A. concluded the limited partners did not have to be named because any action that could affect the partnership assets or business was stayed by an order against the general partner, and the inherent power was only required to address a procedural problem. Her explanation includes the only other reference to the passages from *Lehndorff*:

> [20] If (as I believe) Farley J. was correct in stating that the process of debtor and creditor relationships associated with the business of a limited partnership is between the general partner and the creditors, it is unnecessary in my view in substantive terms for the Partnership or the limited partners in this case to be included in the *CCAA* order in order to stay proceedings affecting the Partnership assets or business. A valid charge has been granted on those assets by the General Partner. It was unnecessary for AE to proceed against the limited partners. Had it done so, it would have been met with the fact that under s. 57 of the *Partnership Act*, they are not liable for the obligations of the Partnership above and beyond their capital contributions unless they participated in the management of the business. … It would also have been unnecessary to proceed against the Partnership per se, since it is not a legal entity, and the partners are bound by the General Partner's actions on behalf of the Partnership (i.e. all the partners) in carrying on the business. ….
>
> [21] But there is a procedural difficulty … R. 7 of the *Supreme Court Rules* allows a partnership or "firm" to be sued in its own name. … Rule 7 is procedural … but, the potential for a multiplicity of proceedings in apparent

> conflict with the *CCAA* order is obvious. Accordingly, to control its own process, the court below had an inherent discretion, confirmed by s. 10 of the Law and Equity Act, to grant a stay in respect of proceedings against the Partnership. This is not the granting of a "freestanding remedy" under the *CCAA* … nor an exercise of discretion under that Act to supplement perceived shortcomings in its application. Rather it is a purely procedural step to forestall a purely procedural problem.
>
> [Citations omitted, emphasis in original.]

[205] Ultimately then, Newbury J.A. did not give effect to the statement of Farley J. regarding an undivided interest in the property, assets and undertaking of the limited partnership. Her reference to limited partners owning a beneficial interest was linked to what is provided for in a limited partnership agreement.

[206] Ownership of the beneficial interest in the property of a limited partnership was touched on in *Edenvale Restoration Specialists Ltd. v. British Columbia (Finance)*, 2013 BCCA 85.

[207] The Court of Appeal reversed the chambers judge's determination that sales tax was not payable on the whole value of the sale of personal property. The purchaser was a limited partnership by its general partner. The assets purchased were part of a larger transaction in which the seller received cash and 15% of the limited partnership units. Tax was paid on 85% of the assets based on the assertion the limited partners retained an undivided interest in the remaining 15%.

[208] Referring to *Lehndorff* and *Asset Engineering*, the chambers judge had considered whether the limited partners had the same interest in limited partnership property as partners in a general partnership. He concluded the general partner was the purchaser but had legal title only, and was acting on behalf of or as the agent of the limited partners who had a beneficial interest in the property of the partnership. Apparently invoking *Lehndorff*, he also stated: "[e]ach limited partner has an undivided interest in the partnership property, and carries on the business of the partnership through its agent, the general partner": *Edenvale Restoration Specialists Ltd. v. Her Majesty the Queen*, 2011 BCSC 1748 at para. 34.

[209] Along with identifying errors in his use of some of the authorities, the Court of Appeal held the chambers judge erred in his approach by failing to apply the wording in the *Tax Act* and the limited partnership agreement. The Court agreed with the chambers judge's conclusion that the general partner was a purchaser but found the limited partners were not, because the terms of the limited partnership agreement limited their ability to be involved in the business of the partnership and gave the general partner the right to acquire assets for the business: at para. 26.

[210] Rather than endorsing the chambers judge's view of the limited partners' interest in the partnership property, the Court stated, "the fact that the limited partners may have had an ownership interest in the assets did not detract from the conclusion the General Partner was a 'purchaser'": at para. 29, emphasis added. In other words, nothing turned on whether the limited partners had an ownership interest in partnership property and accordingly it was unnecessary for the Court to resolve that question.

[211] The passages from *Lehndorff* were again recited and *Kucor* considered in *Harrison Hydro Project Inc. v. British Columbia (Environmental Appeal Board)*, 2018 BCCA 44 [*Harrison Hydro*], where a majority of the Court of Appeal found the general partner held both the legal and beneficial interest in the property of the limited partnership.

[212] The chambers judge had dismissed a petition for judicial review of a decision of the Environmental Appeal Board dismissing an appeal from an order that the power produced by five power plants should be combined as if they were one plant for the purposes of calculating water rentals payable to the Province. The power plants were located on Crown land and each required a water license as well as land tenure. All of the water licenses had been in the names of five limited partnerships, all of which had the same general partner. When the Ministry of Forest, Lands and Natural Resource Operations learned the leases of the Crown land appurtenant to the water licenses were in the name of the general partner, it adjusted its records to

name the general partner as the licensee under each water license. The Board held the water licenses were properly in the name of the general partner.

[213] In addition to the five limited partnership agreements, the general partner had entered into trust agreements regarding each limited partnership. Each of the trust agreements stated the general partner held title to the limited partnership's property as bare trustee, for the sole use, benefit and advantage of the limited partnership, and it had no beneficial interest in the limited partnership's property and only acted as agent for the limited partnership in dealing with the property.

[214] Writing for the majority, Justice Tysoe quoted (at para. 41) from Alison R. Manzer's discussion of the origins and concept of a limited partnership in *A Practical Guide to Canadian Partnership Law*, loose-leaf (updated to December 2014) (Aurora, Ont.: Canada Law Book, 1994) at 9-10 and 9-11:

> The limited partnership is a relatively modern concept, evolving essentially during the 20th century. The limited partnership combines the limited liability, shareholder-type contribution, in the relationship of a limited partner to the remaining partners, with many of the concepts of a general partnership. The purpose behind the development of the limited partnership assists in understanding the evolution of the statutory entity. The limited partnership was designed to facilitate the raising of capital, while maintaining the partnership structure required for many enterprises, resulting in a combination of legal concepts. A limited partnership, like a corporation, can only be formed by statutory compliance, taking its existence from the filing of a statutory declaration and from the powers stated in the statute. It is often confusing that the limited partnership is similar to the corporation, which also takes its powers from statutory authority, because limited partnerships legislation encompasses the concept of general partnership powers for the undertaking of business.

[215] He also articulated several propositions regarding the legal characteristics of limited partnerships based on previous authorities:

> [55] … First, a limited partnership is not a legal entity. Second, a limited partnership acts through its general partner (subject to the hypothetical possibility that a limited partner could act contrary to the typical provisions of a limited partnership agreement and become involved in the management of the limited partnership, in which case he or she would lose the protection of limited liability and become the equivalent of a general partner). Third, a general partner has exclusive control of the management of the business of the limited partnership and its property. Fourth, the property of the limited partnership can be held only by the general partner.

[216] In determining the appeal should be dismissed, Tysoe J.A. disagreed with the appellant's contention that partnership law does not recognize a distinction between the rights and actions of a partner and a limited partnership itself with respect to partnership property, referencing s. 55(2) of the *Partnership Act* and noting a limited partnership can act only through its general partner.

[217] Despite the trust agreements, Tysoe J.A. concluded they could not vest the beneficial interest in each property in the respective limited partnerships because they are not legal entities. Following *Kucor*, he wrote the trust agreements "must be taken to be nothing more than a statement that the General Partner was holding the property for the benefit of the Limited Partnership": at para. 62.

[218] One of the cases Tysoe J.A. considered was *Hudson's Bay Company v. OMERS Realty Corporation*, 2016 ONCA 113, which Scala relies on. The facts are somewhat involved. Essentially, the Hudson's Bay Company ("HBC") was a tenant in three shopping malls. Based on the terms of its lease, HBC sought the landlord's consent to assign and sublease the leases to itself as the general partner in a limited partnership for the purpose of a joint venture. The landlord refused, and HBC brought an application for a declaration that their consent was not required for assignment and sublease, or alternatively, that they were unreasonably withholding consent. The landlord contended its refusal was reasonable because the limited partner in the joint venture limited partnership was one of its main competitors and, based on *Lehndorff*, would therefore acquire an undivided interest in the leases and decision-making power over actions related to the leases.

[219] The application judge found in favour of HBC and the Ontario Court of Appeal dismissed the appeal. The Court endorsed the conclusion of the application judge that, "based on the unique legal nature of the limited partnership structure and the role played by the general partner, the Leases will be assigned to HBC, as general partner": at para. 15.

[220] The Court also adopted the application judge's other conclusions relying on *Lehndorff's* description of a general partner's role, which the Court restated as follows:

> [19] First, any property in which a limited partnership has an interest can be held only by the general partner. In the case of a lease, there can be no assignment of the lease to the limited partnership – it must be assigned to the general partner.
>
> [20] Second, it is not simply a matter of the general partner acquiring legal title to the property. The general partner has control over the property and is solely responsible for the operations of the limited partnership. The limited partner, as a passive investor, is restricted from taking part in the control or management of the business. To do otherwise would jeopardise its limited partner status.
>
> [21] Third, from the perspective of the other contracting party, the general partner is solely liable for all payments under the contract and performance of all obligations thereunder. The limited partners have no such liability. In this case, once the Leases are assigned, the legal relationship will continue to be between the Landlords and HBC. There will be no relationship between the Landlords and the limited partner. HBC alone will be liable for rents and all amounts owing under the Leases. HBC alone will be responsible for compliance with all obligations and covenants under the Leases. Thus, there will be no change in the legal relationship between HBC and the Landlords following the assignments.

[221] The parties have also referred to *Asher Place Senior Residency Limited Partnership v. Balcom*, 2021 BCCA 162 [*Asher Place*], which made no mention of *Lehndorff*.

[222] In *Asher Place*, Justice Harris relied on *Harrison Hydro* for its discussion of limited partnerships:

> [28] A limited partner has an interest in the limited partnership and is liable only for the amount of property contributed to it. Typically, a limited partner does not participate in the management of the limited partnership, a function reserved to the general partner. As a general rule, a limited partnership acts only through its general partner. Limited partners are passive investors in a limited partnership but, nonetheless, they have an interest in it. Section 55(2) of the *Partnership Act* provides that a limited partner's interest in the limited partnership is personal property: see also *Harrison Hydro* at para. 42.
>
> [Emphasis added.]

[223] The issue on appeal was whether a limited partner could bring an action against a general partner in the name of, or on behalf of a limited partnership as found by the chambers judge. In upholding the decision, Harris J.A. concluded (at paras. 41–44) that a limited partner could bring a derivative action on behalf of the limited partnership where the general partner was alleged to have wronged the partnership, relying on *Watson v. Imperial Financial Services Ltd.* (1994), 88 B.C.L.R. (2d) 88, 1994 CanLII 3293 (C.A.) and on the fraud exception to the rule in *Foss v. Harbottle* (1843), 67 E.R. 189 (Ch.).

Discussion

[224] Examined both separately and together, the authorities do not establish that limited partners have an undivided interest in the assets of a limited partnership, other than for a procedural purpose. Although *Asset Engineering* raised the prospect of limited partners having a beneficial interest depending on the partnership agreement, *Harrison Hydro* decided the general partner was the sole owner of the limited partnership's assets subject to a fiduciary obligation arising from trust agreements.

[225] I also do not accept the general partners' assertion that, while formally undecided, the weight of the authorities show as a matter of principle that a limited partner has an interest in the property of the limited partnership that is personal property.

[226] The notion that limited partners have an ownership interest in partnership property or an interest that could be characterized as personal property, in my view, is not supported by the contrasting statutory rights, powers and obligations of general partners and limited partners and the characteristics of limited partnerships discussed in the cases I have reviewed. I do not intend to reiterate all of those provisions or characteristics, but I have in mind that:

(a) a limited partnership is not a legal entity;

(b) general partners are fully liable for the debts and obligations of the limited partnership;

(c) only general partners can hold partnership property;

(d) general partners have exclusive control over partnership property and the business of the partnership;

(e) limited partners are essentially passive investors, with liability limited to the extent of their contribution; and

(f) limited partners otherwise have an entitlement to the return of their contribution and a share in the profits of the partnership as specified by the limited partnership agreement, as well as tax advantages.

[227] My conclusion further aligns with the defining statutory framework which provides:

(a) a distinction between a limited partner's interest in the limited partnership and limited partnership property arises from s. 55(2) of the *Partnership Act*, which refers to a limited partner's interest in the limited partnership itself, not the property of the limited partnership;

(b) the limited partner's interest is referred to in ss. 54(2)(a) and 66(2) as what the limited partner receives for their contribution;

(c) the secured creditors of a limited partner are prohibited from accessing partnership property, by operation of s. 76; and

(d) there is no discussion of a limited partner having rights in relationship to partnership property itself, other than the requirement in s. 56(c) that limited partners provide consent before a general partner can use partnership property for something other than a partnership purpose.

[228] In my view, the plain meaning of the text in s. 55(2) cannot properly be interpreted as creating an interest in the property of the limited partnership. Instead, it identifies and describes the interest of a limited partner in the limited partnership itself as personal property. Interpreted in context, that interest is limited to what the limited partner receives under the partnership agreement and in exchange for their capital contribution.

[229] The general partners rely on s. 56(c) of the *Partnership Act*, as well as provisions in clauses 5 and 7 of the LPA, which they refer to as obligating the general partners and TSD GP in particular to manage the assets of the limited partnership, namely the headleases, for the benefit of the limited partnership. They contend these provisions are consistent with, or sufficient to establish, the limited partners having an interest in the headleases that constitutes personal property.

[230] Certainly, s. 5.3(a) of the LPA requires TSD GP to acquire leases on terms beneficial to Spirit Bay.

[231] As I understand it, the general partners' argument also relies on the distinction between a corporation and a limited partnership as business organizations, and in particular limited partners not being akin to shareholders, as well as the unexercised power of TSD GP under Clause 5.3(m) of the LPA to place Spirit Bay's interest in the Lands in "one or more single purpose or remote entity, or otherwise structure or restructure the Limited Partnership to accommodate any financing for all or a portion of the Lands".

[232] On this last point, the general partners ask me to draw meaning from TSD GP having the option of "going the corporate route" but not doing so. Apart from anything else, Clause 5.3(m) underscores the breadth of TSD GP's rights and powers with respect to the headleases, consistent with holding the whole of the leasehold interest or being the sole "owner" of the interest.

[233] Assuming s. 56(c) should be interpreted as imposing a fiduciary obligation on the general partners in dealing with partnership property, as well as impliedly

recognizing a limited partner's right to prevent the general partner from using that property contrary to a partnership purpose by requiring their consent, I do not agree the obligation (and the implied right) gives rise to a form of proprietary interest in the assets of the limited partnership held by the general partners. Nor, in my view, is such an interest created by a limited partner's ability to bring an action against a general partner on behalf of the limited partnership related to the property of the limited partnership, as discussed in *Asher*. Although a constructive trust is an available remedy for breach of fiduciary duty, the ability to bring a derivative action is not the same as having a personal right to bring an action that could result in such a remedy.

[234] The cases make clear that the limited partnership agreement is key to determining the rights of a limited partner.

[235] Interpreting the LPA based on the principles articulated in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, in my view, it can not be construed as providing the limited partners an interest in the assets of Spirit Bay that is personal property. Instead, the limited partners have a personal property interest in the limited partnership itself, consistent with my interpretation of s. 55(2), that includes their Class A limited partnership units and what those units provide in terms of rights to income (and losses) and other specific rights under the LPA.

[236] Only Spirit Bay's general partners own its assets. Most significant are the headleases (and sub-interests), which s. 56(c) of the *Partnership Act* requires the general partners to deal with for partnership purposes only.

[237] As indicated, the LPA defines "Interest" but also refers to "interest", "interests or Units" and "unit interest". The "Interest" of a partner (general or limited) means all the partner's interest in Spirit Bay as determined under Article 3, "including without limitation" their "right, title and interest in and to the assets of" Spirit Bay. However, Article 3 does not contain a provision concerning the limited partners' right, title or interest in those assets. Instead, with respect to limited partners, Article 3 deals with their capital contributions, the units they receive in exchange, and their limited

liability. In other words, the limited partners' personal property is in their "Interest" and "Units" which entitle them to a bundle of rights in respect of the limited partnership, including a share in the net income, net loss and distributions.

[238] Although s. 14.1 of the LPA states that many of the terms are intended to alter or extend the provisions of the *Partnership Act*, no extensions were apparent to me. In fact, in dealing with general and limited partners, the LPA does not appear to deviate in any meaningful way from the statute.

[239] Perhaps most significantly, the only provision dealing expressly with limited partners and limited partnership property, s. 16.16, renders impermissible what may well be permitted by "applicable law", by stipulating no limited partner will have any ownership interest in any Spirit Bay property in "its individual name or right", as well as, each limited partner's units will be personal property for all. Although poorly drafted, considered in the context of the LPA as a whole and consistent with the parties' objective intention to create a commercially viable property development, the only reasonable interpretation of the provision is that the limited partners have no ownership interest in the assets of Spirit Bay, but the units of each limited partner are their personal property. In other words, s. 16.16 of the LPA further supports the distinction between an interest in the assets of Spirit Bay and the limited partner's ownership interest in their units.

[240] Sc'ianew's similar argument that it has a proprietary interest in Spirit Bay itself, described as a "direct 51% ownership interest," is not correct given a limited partnership is not a legal entity. Instead, Sc'ianew owns 51% of the Class A limited partnership units in Spirit Bay, which are personal property.

[241] It is Spirit Bay's assets, namely the leasehold interests, owned by the general partners, each of which is a corporation, that would be subject to the receivership order. Accordingly, the prohibition contained in s. 89 of the *Indian Act* barring seizure of Sc'ianew's personal property is not engaged.

Whether Appointing a Receiver is Contrary to the *Land Code*

[242] As indicated, Sc'ianew argues the appointment of a receiver "runs contrary to" or is inconsistent with the *Land Code* (and the Framework Agreement).

[243] In addition to relying on s. 28.1 which provides that no interest, land right or license in relation to the reserve may be acquired or granted except in accordance with the *Land Code*, Sc'ianew emphasized that the *Land Code* intentionally limits the means of executing against reserve land and imposes clear restrictions on who may create and dispose of leasehold interests on any part of its land. Apart from the power of a Band Owned Entity to grant subleases in the EDZ under s. 30.4, the *Land Code* requires Council's consent for all grants and dispositions to non-members. Similarly, the *Land Code* prohibits the granting of charges on leaseholds absent Council's consent, subject to the same exception for a Band Owned Entity regarding leaseholds in the EDZ.

[244] Initially Sc'ianew argued the proposed order would give the receiver powers directly contrary to the *Land Code* and the Framework Agreement regime, largely because the receiver would not be a Band Owned Entity. Empowering the receiver to sublease or charge the lands would, Sc'ianew asserts, "do away with" or compel the breach of the statutory requirement for Council's consent.

[245] Scala asserted the argument misunderstands the nature of the receivership order as vesting title to the general partners' property in the receiver. The receivership order does not result in a grant or disposition of the headleases to the receiver; they would continue to be held by Spirit Bay's general partners. In other words, the receiver would not displace the general partners as the lessee under the headleases or lessor under subleases. Instead the receiver would be empowered to act on behalf of the general partners. Further, the proposed order does not override the "general law" or regulators. The receiver is required to comply with the *Land Code* and as set out in the proposed order, must apply for permits, license approvals and permissions from governmental authorities including the Lands Register as appropriate.

[246] There is no question that assets do not vest in a receiver. A receiver only has possession and custody of the assets: *Commercial Bank v. Simmons Drilling Ltd.*, 62 D.L.R. (4th) 243, 1989 CanLII 4785 at para. 15 (S.K.C.A.).

[247] At the petitions' hearing, Sc'ianew focused on the appointment of a non-Indigenous receiver who would control the Band Owned Entity (Spirit Bay) and the headleases or subleases, which it argued is inconsistent with s. 30.4 of the *Land Code*. According to Sc'ianew, the purpose of s. 30.4 is to put control of the property development in the hands of an entity that represents its interests as the First Nation, and ensures Sc'ianew continues to exercise authority over its land. In support of this asserted purpose, Sc'ianew relies on references in the "Background Information – Summary of *Land Code* Amendments" document to the then yet to be enacted amendments as being as "minimal as possible" and applying just to the lands in the EDZ.

[248] Sc'ianew submits this purposive interpretation accords with other provisions in the *Land Code* such as: aspects of the preamble; interpretative principles in ss. 2.5[2] and 2.9; the definition of a Band Owned Entity; the *specific* identification of what a Band Owned Entity may grant in relation to leasehold interests; the limits on execution and seizure in the event of a default absent Council's written consent and an opportunity to redeem the mortgage or charge (s. 34.4); the requirement for written consent of Council before a leasehold interest may be subject to a charge or mortgage (s. 34.3); and the absence of an enforcement mechanism for civil judgments.

[249] Sc'ianew says the absence of an enforcement mechanism and the constraints in ss. 34.3 and 34.4 reflect or are consistent with a positive decision to not allow seizure on its land without its consent and *de facto* supervision. However, ss. 34.3 and 34.4 are among the provisions that do not apply under s. 30.4, with

[2] Section 2.5 of the *Land Code* which requires the structures, organizations and procedures established by or under the *Land Code* to be interpreted in accordance with Sc'ianew's culture, traditions and customs, is different from a requirement about how to interpret the *Land Code* itself. Sc'ianew did not provide evidence or make submissions that would enable me to apply this provision.

respect to a lease held by a band owned entity in the EDZ. Considering ss. 30.4, 34.3 and 34.4 together points away from the notion that prohibition on execution and seizure contemplated by s. 34.4 was intended to be exhaustive.

[250] With respect to the interpretive significance of there being no mechanism for enforcing judgements in the *Land Code*, Scala emphasizes that apart from drawing an inference from its absence, Sc'ianew has not provided any compelling evidence that the drafters made an intentional choice to bar all enforcement of civil judgments concerning its lands. There is no evidence at all about the drafting process regarding the original *Land Code* or the amendments. Further, the terms of the Beecher Bay Land Registration Form No. BB-04, provide that judgments can be registered, although Scala's request to do so was not granted.

[251] Scala also relies on other provisions in the *Land Code*, the LPA, and headleases in support of its view a receivership order would not violate the *Land Code* or its purpose. Regarding the use of the headleases, Scala notes that Sc'ianew and the general partners were required to complete application forms for the registration of the headleases that included a declaration they were not aware of any conflict between the *Land Code* and the headleases.

[252] In addition to the enforcement power of this Court set out in s. 43.3 of the *Land Code* with respect to the *Land Code* itself, Scala points to the broad definition of applicable laws in the headleases. Further, under the LPA, TSD GP is authorized to pledge wide-ranging security to third parties without the consent of Sc'ianew, which Scala says correlates with the general partners' broad rights under the headleases with respect to the leased lands.

[253] Scala underscores that s. 6.1 of the headleases empowers the Band Owned Entity — i.e., Spirit Bay by its general partners — to assign the lease or any portion of it without the consent of Sc'ianew, subject to being "current" with the lease obligations "and the requirements of the *Land Code*". This, in Scala's submission, is directly contrary to the notion that s. 30.4 of the *Land Code* requires a Band Owned Entity to remain in control of Sc'ianew's leased lands in all circumstances. In other

words, Sc'ianew chose to create leases that are alienable rather than structuring the leases to require continued ownership or control by a Band Owned Entity. The general partners of Spirit Bay were also provided with broad authority to subdivide and sublet or mortgage all or any part of the leased lands without Sc'ianew's consent for up to 99 years. Further, sublessees were empowered to assign, sublet and mortgage without consent.

[254] These aspects of the headleases, acknowledged by the parties to comply with the *Land Code*, are contrary to the notion that Sc'ianew control, or even consent, is required for subleased portions of the headleases to change hands.

[255] Similarly, under the LPA, TSD GP is authorized to pledge wide ranging security to third parties. TSD GP can "[b]orrow money, and, if security is required therefore, to pledge or mortgage or subject the such portion of the Lands as the Policy Committee agrees to any security device, to obtain replacements of any mortgage or other security deice and to … refinance, increase, modify, consolidate, or extent any mortgage or other security device": ss. 5.3(b), (o) and (q).

[256] Also significant, s. 9.1 of the headleases specifically contemplates the appointment of a receiver if a headlease or sublease mortgage is in default, without notice to Sc'ianew as lessor. The receiver has the power to "take possession of and manage the Lands and sell or assign or sublet the Premises", again without notice. Scala states that given the presence of this clause, Sc'ianew must be taken to acknowledge that a court appointed receiver is not contrary to the *Land Code*.

[257] In response, Sc'ianew asserts that permitting a receiver and execution "to a limited degree" for contractually agreed upon mortgages and charges with general partners does not offend the *Land Code*, without explaining the distinction and how the role of a contractual receiver can be reconciled with what Sc'ianew says about the purpose of s. 30.4.

[258] As Scala points out, whether appointed under a lending contract or by the court, the receiver, not a Band Owned Entity, would be directly "controlling" the leased or subleased lands.

[259] I agree with Scala's submissions. On a fair, large and liberal interpretation of the *Land Code* as required by s. 2.9, I am satisfied that appointing a receiver would neither violate nor be inconsistent with the *Land Code* or the Framework Agreement.

[260] In my view, a purposive interpretation of the *Land Code* and Framework Agreement cannot be reconciled with the view they intend to foreclose remedies that would enable third parties to collect on judgments owed by the Band Owned Entity in relation to the development of leased lands in the EDZ.

[261] Sc'ianew amended the *Land Code*, entered into the LPA and granted the headleases to facilitate a commercially viable development of a mostly residential community marketed to the public, based on very long-term leases over particular lands designated for economic development. In doing so, Sc'ianew's overall goal was the improvement of the economic circumstances of the community and its members. Before the amendments, the *Land Code* would have barred any such development. Clearly, to achieve commercial viability, and therefore contribute to Sc'ianew's goals, the development had to be able to attract financial investment through secure financing and the involvement of those needed to construct the development.

[262] Not only is the freedom to mortgage the leases and subleases as expressly provided for in s. 30.4 necessary to achieve this purpose, but so is the availability of a remedy in the event of non-payment to those such as Scala who were contracted to build.

[263] All of this accords with the preamble to the *Land Code*, which sets out Sc'ianew's wish to become economically self-sufficient rather than having its lands and resources managed by Canada under the *Indian Act*. Although Sc'ianew chose not to extend the application of s. 89(1.1), which again provided for leasehold

interests to be subject to mortgages and seizure, it created much the same scheme through the amendments.

[264] Sc'ianew also argues the charging clauses in the proposed receivership order providing for payment of the receiver's fees and those of its legal counsel offend the *Land Code* because all charges, except for those granted by Spirit Bay, must receive the consent of Council (s. 34.3). However, the proposed order provides for an equitable charge against the general partners' property, namely the headleases and unsold subleases. Again, under s. 30.4 of the *Land Code*, the headleases may be encumbered without Sc'ianew's consent. Section 34.3 would not apply to the receivership order.

Constitutional Issues

[265] As stated, Sc'ianew submits that s. 39 of the *LEA* and R. 10-2 of the *Supreme Court Civil Rules* are constitutionally inapplicable in this case by operation of the doctrines of federal paramountcy and interjurisdictional immunity.

[266] Sc'ianew focussed most of its oral submission on federal paramountcy, taking the position it is the decisive framework. Interjurisdictional immunity was addressed in brief written submissions.

[267] Sc'ianew relies on two companion cases, *Canadian Western Bank v. Alberta*, 2007 SCC 22 and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 [*Lafarge*], which provide the preferential order for deciding constitutional questions is: (1) an analysis of the pith and substance of the impugned legislation; (2) applying federal paramountcy; and (3) if the question is not resolved, considering interjurisdictional immunity.

[268] There is no issue with pith and substance here. Sc'ianew agrees that R. 10-2 of the *Supreme Court Civil Rules* and s. 39 of the *LEA* are otherwise valid provincial laws.

[269] The onus is on Sc'ianew as "the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law": *Canadian Western Bank* at para. 75.

[270] Sc'ianew asserts the second kind of conflict—i.e., a frustration of the purpose of federal law—and submits the circumstances here are analogous to those in *Lafarge*.

[271] In that case, Lafarge Canada Inc. wished to build a ship facility on waterfront lands owned by the Vancouver Port Authority ("VPA"), a federal undertaking pursuant to the *Canada Marine Act*, S.C. 1998, c. 10. The City of Vancouver proposed certain modifications and VPA approved the project in principle. A group of ratepayers opposed it, arguing the City had declined to exercise jurisdiction over the lands and ought to have insisted that Lafarge obtain a City permit. VPA took the position such a permit was unnecessary because its lands enjoyed interjurisdictional immunity as "public property" within the meaning of s. 91(1A) of the *Constitution Act*. In the alternative, VPA argued there was an operational conflict and, applying the doctrine of federal paramountcy, the conflict must be resolved in favour of federal jurisdiction.

[272] The majority of the Supreme Court of Canada endorsed VPA's alternative argument. Finding the *Canada Marine Act* and the City's zoning and development by-laws were valid federal and provincial laws, the majority concluded both laws were incapable of simultaneous enforcement and to apply the provincial law to the VPA lands would frustrate the federal purpose by depriving VPA of its final decisional authority on the project.

[273] Much as it did in arguing the proposed order would violate the *Land Code* and the Framework Agreement, Sc'ianew identifies both as federal laws that advance two purposes, with the effect of excluding the application of the provincial laws providing for appointment of a receiver. First, the Framework Agreement is intended

to confer all powers over the regulation and management of leases and interests in reserve land to First Nations, including the power to determine what remedies are available to satisfy judgments. Second, the proposed receivership order would frustrate the purpose of the *Land Code*, which allows for a limited range (and market) of leases under the direct control of a Band Owned Entity.

[274] Focusing on the second purpose, Sc'ianew submits that empowering a non-Band Owned Entity, that is the receiver, to carry out the functions as described in ss. 28.1 and 30.4 of the *Land Code*, would frustrate the purpose of those two sections when read together.

[275] I disagree. I have already concluded that appointing a receiver over the leases would not be contrary to the *Land Code* (or the Framework Agreement) based on an interpretation of its purpose and the amendments in particular. That same analysis, which I do not intend to repeat, applies here. There is no operational conflict to resolve.

[276] My view is reinforced by the principle of cooperative federalism, which requires federal paramountcy to be narrowly construed. I am required to take "a 'restrained approach', and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility": *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 at para. 21.

[277] *Canadian Western Bank* further provides:

> [75] … the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes (*Attorney General of Canada v. Law Society of British Columbia*, at p. 356).

[278] More recently, the Supreme Court of Canada stated that "[c]onflict must be defined narrowly so that each level of government may act as freely as possible

within its respective sphere of constitutional authority": *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para 66.

[279] I am satisfied that applying R. 10-2 and s. 39 of the *LEA* to appoint a receiver who would have control over the headleases (and subleases) in order to enforce Scala's judgement against Spirit Bay through its general partners would not frustrate the purposes of the *Land Code* or Framework Agreement. As I have already discussed, the purpose of the amendments to the *Land Code* was to facilitate the granting of leasehold interests by Sc'ianew over its reserve land, so as to encourage third party investment and direct involvement in the development project by providing greater security than would otherwise exist. The application of mechanisms to enforce judgment against Spirit Bay gives rise to no incompatibility because enforcement, and the security it provides, is a necessary element of the framework Sc'ianew created.

[280] Turning to interjurisdictional immunity, in very brief submissions Sc'ianew argues the doctrine applies to prevent provincial enactments like the *LEA* and *Supreme Court Civil Rules* from regulating the headleases and other on-reserve land interests and thereby impairing the core federal power over "Indians, and Lands reserved for the Indians" found in s. 91(24) of the *Constitution Act*.

[281] *Canadian Western Bank* emphasized that interjurisdictional immunity is a doctrine of limited application. It is engaged when legislation from one level of government impairs the core competence or essential part of a legislative head of power which belongs to the other level of government. The doctrine's effect is to "cloak" the non-enacting jurisdiction with immunity from the enacting jurisdiction's legislation by reading it down to render it inapplicable.

[282] In *Canadian Western Bank*, the majority observed that interjurisdictional immunity was initially developed in the specific context of federal corporations and undertakings before being applied to other areas of federal jurisdiction, including over Indigenous peoples and their lands: at paras. 39–40. In cautioning against overreliance on interjurisdictional immunity, the majority pointed to the risks of

serious uncertainty and the centralizing tendency related to its asymmetrical application, which is contrary to the flexibility and co-ordination required by contemporary Canadian federalism: at paras. 42–47.

[283] In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*], Chief Justice McLachlin, writing for the majority, set out a two-step framework to assess interjurisdictional immunity:

> [27] The first step is to determine whether the provincial law … *trenches on the protected 'core' of a federal competence*. If it does, the second step is to determine whether the provincial law's effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of interjurisdictional immunity.
>
> [Emphasis in original.]

[284] The first step in this case asks whether the power to appoint a receiver over a lease of reserve land trenches on the core of s. 91(24). Put differently, does the impugned provincial legislation come within the "basic, minimum and unassailable content" (*Canadian Western Bank* at para. 50) of Parliament's jurisdiction over "Indians, and Lands reserved for the Indians"? I am not convinced it does.

[285] In considering the "Indian Cases", the majority in *Canadian Western Bank* noted that in some, but not all, a vital or essential federal interest was found to justify federal exclusivity because of the special position of Indigenous peoples in Canadian society. The cases included *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, 1986 CanLII 56, where provisions of the *Family Relations Act* dealing with the division of family property were found to be inapplicable to lands reserved for "Indians". *Canadian Western Bank* observed that *Derrickson*, and similar cases which upheld federal exclusivity involved "relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival" (at para. 61).However, the majority also emphasized that not all cases dealing with Indigenous peoples or lands engage the federal core: citing *Four B Manufacturing Ltd. V. United Garment Workers of America*, [1980] 1 S.C.R. 1031, 1979 CanLII 11 , which held that provincial labour

regulation applied to a business located on reserve that was partly owned and operated by band members.

[286] Based on what I have already determined, namely that (1) as a limited partner Sc'ianew does not have a personal property interest in the headleases, instead they are owned by the general partners, which are corporate entities, in an area of reserve land designated for economic development (by Spirit Bay) pursuant to instruments that Sc'ianew was a party to or implemented, and (2) the reality that an appointed receiver's powers in relation to the headleases would not extend beyond those of the general partners, I am of the opinion that the provincial legislation does not trench on the core of s. 91(24).

[287] In any event, even if I accepted that the federal core is impacted here, the level of "trenching" is insufficient to render the provincial legislation inapplicable. *Canadian Western Bank* and *COPA* confirmed that the standard to be applied at the second step of the analysis is impairment. In *COPA*, the majority endorsed a description of "impairment" as occurring when provincial legislation "not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power": at para. 45.

[288] Sc'ianew relies primarily on S*echelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262 in support of its argument. The case involved the application of the *Manufactured Home Park Tenancy Act*, S.B.C. 2002, c.77 [*MHPTA*] to leases in a manufactured home park located on land owned in fee simple by the Sechelt Indian Band under the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27 [*Self-Government Act*].

[289] The *MHPTA* sets out specific requirements for leases of manufactured homes including how parks are to be administered, what rent increases are permitted and how tenancies end. It also empowers the Residential Tenancy Branch to deal with disputes between landlords and tenants. Further, a director appointed under the *MHPTA* has the power to prosecute offences and administer penalties.

[290] The Band notified tenants of the park of a very substantial proposed rent increase. The tenants applied to the Residential Tenancy Branch to dispute the increase. The Band took the position the Residential Tenancy Branch had no constitutional jurisdiction to hear the dispute as it concerned “Lands reserved for the Indians”.

[291] The Court of Appeal considered the *MHPTA* framework for regulating the possession of land under tenancy arrangements and the tenancy agreements at issue between the Band and non-Band lessees. Based on *Derrickson*, and the *Self-Government Act*, which designated the Band’s lands as reserved for “the Indians” within the meaning of s. 91(24) of the *Constitution Act*, the Court concluded that interference “on this subject” by a provincial enactment was not permissible and the *MHPTA* was inapplicable under either the doctrine of interjurisdictional immunity or federal paramountcy: at para. 52.

[292] Scala argues, and I agree, that the decision is distinguishable. Here, appointing a receiver does not affect, let alone impair, Sc’ianew’s regulatory function or the *Land Code*, nor any other core aspect of the federal jurisdiction over “Indians, and Lands reserved for the Indians” under s. 91(24). The receiver’s powers under the proposed order are already exercisable by the general partners, which themselves are not “Indians” or “bands”. The general partners will continue to “own” the leasehold interests transferred by Sc’ianew under the headleases. An appointed receiver would be required to comply with the *Land Code*. Applying the restrained approach to interjurisdictional immunity set out in *Canadian Western Bank*, in my view the doctrine is not properly engaged.

Should a Receiver be Appointed?

[293] Under s. 39 of the *LEA*, Scala is required to establish that appointing a receiver would be just and convenient in all the circumstances.

Legal Framework

[294] The authority to grant a receivership derives as I have stated from R. 10-2(1) of the *Supreme Court Civil Rules* and s. 39 of the *LEA*.

[295] Rule 10-2(1) provides the Court with the broad power to appoint a receiver "in any proceeding either unconditionally or on terms, whether or not the appointment was included in the relief claimed by the applicant."

[296] Section 39 of the *LEA* reads in part:

> (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
>
> (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

[297] In *Quest Capital Corp. v. Longpre*, 2012 BCCA 49 [*Quest Capital*], the Court of Appeal described the power to appoint a receiver and the effect of the appointment, citing *Capewell v. Her Majesty's Revenue and Customs*, [2007] Costs L.R. 287 (H.L.) at para. 19. In *Capewell*, the appointment power was described as follows:

> … It was used in a wide variety of situations in which there was a need for the interim protection of property (and the income of property), including disputes about partnerships, sales or mortgages of land, and administration of estates. Receivers could also be appointed by way of equitable execution. The receiver, being appointed by the Court, was an officer of the Court. His duty was to act impartially, and in accordance with the directions of the Court, in administering the property to which the receivership extended.

[298] The decision to appoint a receiver is both discretionary and extraordinary.

[299] When, as here, the purpose of the appointment is equitable execution or collection of the applicant's judgment, a substantial legal impediment to enforcement of the judgment is a prerequisite: *Graybriar Indust. Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. (2d) 256, 1988 CanLII 3070 at para. 3.

[300] The court will generally refuse to appoint an equitable receiver if ordinary attachment procedures can be used, unless special circumstances exist that "make equitable execution more convenient": *Down (Re) (Trustee of)*, 2002 BCSC 1023 at para. 8, citing *NEC Corporation v. Steintron International Electronics Ltd.* (1985), 67 B.C.L.R. 191, 1985 CanLII 249 (S.C.) and subsequent cases. *Down* included the following discussion of relative convenience:

> [8] …Relative convenience is measured by considering (a) the amount of the judgment; (b) the costs of the receiver weighed against the likely return to the judgment creditor; and (c) the capacity of the judgment debtor to hinder legal execution.
>
> [Citations omitted.]

[301] *Down,* at para. 9, also endorsed the circumstances described in *Pacific West v. Fehr Dri-Wall Ltd.*, 2001 BCSC 354 as supporting a finding that equitable execution is more convenient:

> (a) the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment;
>
> (b) where the assets are exigible, the applicant could benefit by the appointment, and there is an impediment to the applicant's recovery by legal process or special circumstances warrant the intervention of a receiver; and
>
> (c) the likelihood that a receiver will be able to realize upon very considerable assets that would otherwise remain sheltered.

[302] In *Quest Capital* at para. 16, Chief Justice Brenner adopted the very similar comments of Professor E. R. Edinger regarding the rules that govern the appointment of an equitable receiver in *The Appointment of Equitable Receivers: Application of Rules or Exercise of Pure Discretion*? (1988), 67:2 Can Bar Rev 306 at 308:

> ... [F]irst, the asset must be of a kind that is exigible by a common law or legal process; second, there must be some impediment to employment of a legal process; third, there must be some benefit to be obtained by the appointing of an equitable receiver and the appointment must be just and convenient; but fourth, special circumstances established by the judgment creditor may permit the court to disregard the second rule.

[303] Related to the analysis of whether the appointment is just and convenient, *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32 [*Ward Western*], included a non-exhaustive list of factors[3] (at para. 49):

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties; and
>
> p) the goal of facilitating the duties of the receiver.

[3] Although not expressly endorsed in *Ward Western*, the list of factors—originally from Frank Bennet, *Bennet on Receiverships*, 2d ed (Toronto: Carswell, 1999)—has been applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527; *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477; and *BG International Limited v. Canadian Superior Energy Inc.*, 2009 ABCA 127.

[304] Some of the factors seem to overlap with the considerations identified in *Down* and *Quest Capital*. Others strike me as bearing more on an interim appointment instead of equitable execution.

[305] I note that in their petition response the general partners took the position that the test for appointing an equitable receiver was unsettled, citing a pending appeal from *Access Road Capital, LLC v. Bron Media Corp.*, 2023 BCSC 497. In that case, citing *Quest Capital* and *Ward Western*, the chambers judge appointed a receiver based on his finding the appointment was just and convenient. In granting leave to appeal, Marchand J.A. (as he then was) concluded there was an arguable case the judge erred in principle by determining what was just and convenient without first considering the "rules" referred to in *Quest Capital: Creative Wealth Media Lending LP 2016 v. Access Road Capital, LLC*, 2023 BCCA 208 at para. 24 (Chambers). Unlike this case, the appointment of the receiver was opposed by two secured creditors. I am not aware of an appeal decision in *Access Road*.

Discussion

[306] I begin nonetheless with the two "rules" set out in *Quest Capital* that require the assets over which receivership is sought to be exigible by a common law or legal process, and an impediment to employing a legal process. Both requirements are met here.

[307] The headleases, subleases and any sublots subject to registration as subleases are exigible under the headleases and the amendments to the *Land Code*.

[308] As to the second rule, I accept that enforcing Scala's judgment is all but impossible absent appointing a receiver.

[309] Scala has done what it can to collect on the judgment. It made demands for payment which went unmet apart from a small payment made shortly before the original petition hearing date, made from funds held in lawyers' trust accounts revealed to Scala by the Examination. After obtaining the Enforcement Order, Scala

attempted to register the judgment with the Lands Register, without success. The *Land Code* does not include a mechanism for enforcing judgments.

[310] Turning to what is just and convenient in all the circumstances, I agree with Scala's assertion that the equities lie squarely with ordering the appointment.

[311] With reference to the factors set out in *Ward Western*, Scala focuses on the conduct of the parties; the nature of the property; the effect of the order; the length of time the receiver may be in place; and the likelihood of maximizing return to the parties.

[312] In addition to reiterating arguments about the receivership order conflicting with the *Land Code* and the Framework Agreement (which I have rejected) and addressing some of the same factors as Scala, Sc'ianew and the general partners focus on the assertions made in support of dissolving Spirit Bay and terminating the headleases, namely the dire financial and operational state of Spirit Bay and the material breaches involving serious and costly infrastructure deficiencies and an unsustainable impact on Sc'ianew.

[313] At the same time, the general partners refer, as does Scala, to a lack of reliable evidence about Spirit Bay's financial state and the cost of remedying the infrastructure deficiencies. In doing so, however, the general partners suggest Scala needs to adduce expert evidence to meet its burden.

[314] The general partners provide no authority for this proposition. I agree with Scala that such a burden would be unreasonably high for a judgment creditor, and beyond what is contemplated by requiring the applicant to establish the appointment of a receiver is just and convenient. In my view, the onus is just that and not a requirement to prove each and every circumstance. I see no merit if not some irony in the notion that a judgment creditor in a petition proceeding ought to bear the additional expense involved in obtaining expert evidence, especially where, as here, the opposing party is responsible for the lack of reliable evidence.

[315] There is no dispute that Spirit Bay has struggled to generate cash from its operations which have been mismanaged, and there has been a lack of development expertise since Mr. Butterfield's death and a failure to attract investment and another developer. It is also evident that sewage and water infrastructure issues need to be addressed before substantial additional development can take place. Clearly, Spirit Bay faces serious challenges. What is not clear is that Spirit Bay's continuation is necessarily futile.

[316] Addressing Sc'ianew's presentation of the equities, Scala makes the point that its many simultaneous roles must be considered. When Sc'ianew submits that its right to a carefree lease has been violated, resulting in material breaches of the headleases and significant hardship, it invokes only its role as lessor. At the same time, however, Sc'ianew was the sole shareholder of Beecher Bay GP (and the indirect owner of TSD GP since 2022), and its roles included appointing directors who would ensure Spirit Bay was complying with the headleases. As a government, Sc'ianew applied for and made available to Spirit Bay federal funding and provided infrastructure services to Spirit Bay without pursuing the options for contribution or reimbursement provided by the *Land Code* and perhaps the headleases. As creditor, it chose to lend funds to Spirit Bay.

[317] Similarly, the general partners' position regarding the petition to dissolve Spirit Bay and terminate the headleases does not by itself weigh in favour of finding that refusing to appoint a receiver in favour of granting the dissolution petition would be just and equitable, given both general partners are now controlled by Sc'ianew.

[318] On the issue of conduct, Scala emphasizes that Sc'ianew chose to engage in the creation of the Spirit Bay development by enacting amendments to the *Land Code*, entering into the LPA and granting the headleases, for the economic and social benefit of the community and its members. Scala dedicated substantial resources and accrued substantial arrears building houses for the development. Despite selling those houses, Spirit Bay did not pay Scala for its work. At significant cost, Scala was successful in arbitration, and the appeals to the Supreme Court and

the Court of Appeal. After the Housing Contract litigation concluded and Scala filed its amended receivership petition, Sc'ianew responded by filing the dissolution petition based on newly asserted material breaches of the headleases by Spirit Bay, rooted in what I accept were longstanding infrastructural, financial and operational issues. With its dissolution petition, Sc'ianew proposed that Spirit Bay's only significant assets, the headleases, be terminated for no value and returned to Sc'ianew, effectively rendering the general partners of Spirit Bay judgment proof.

[319] In relation to conduct, Scala also points to Sc'ianew and Spirit Bay's lack of transparency in both proceedings. Spirit Bay has provided no evidence of a dissolution plan while asserting there is no purpose in keeping Spirt Bay alive and refusing dissolution would be detrimental. Apart from Chief Chipps' very brief and vague evidence from July 28, 2023, neither Spirit Bay nor Sc'ianew deal with how the interests of the many tenants and any other creditors will be addressed. Instead, Sc'ianew asks for time to negotiate "suitable replacement leases".

[320] I note Scala's additional suggestion that Sc'ianew has other options to wind up Spirit Bay that would involve accounting for its creditors and not attempting to remove its assets for no value. For example, if Sc'ianew believes Spirit Bay is insolvent, it could request that the general partners assign Spirit Bay into bankruptcy or carry out a restructuring.

[321] In this context, Scala has continued to suffer from not only the financial but also the reputational effects from Spirit Bay's non-payment, described by Mr. Cota.

[322] The benefit of appointing a receiver, or the likelihood that the receiver would be capable of realizing on otherwise shielded assets, is another relevant consideration.

[323] I accept there are at least several subleases available to pay Scala's judgment. While Sc'ianew says these "subleases" are in fact subdivided lots that have not been subleased and the headleases provide their tenure, lots can be

subleased without the consent of Council by a receiver controlling assets held by the general partners of Spirit Bay.

[324] The limits of the evidence do not allow me to make findings about the precise number and nature of the subleases and/or unregistered lots held by the general partners or their particular value. In my view, however, precise findings are unnecessary. The out of court statements show an undisputed range in the potential number, and if not a potential range in value, what Ms. Sauder identified as their earlier list prices. The evidence also demonstrates various serviced lots were listed for sale as recently as 2021. And in 2022, Spirit Bay transacted with the Butterfields to buy them out of the development project in exchange for subleases. While drawing inferences based on this transaction must be approached cautiously, I am able to accept there are lots available to be sold and the subleases have value and are marketable.

[325] Further, Mr. Cota's evidence about Scala's willingness to accept sublease interests indicates at least part of the judgment could be paid through a similar transaction.

[326] Ultimately, I am satisfied that Spirit Bay has more than sufficient exigible assets to satisfy Scala's judgment and there is a substantial likelihood that an appointed receiver could recover and use those assets to pay the debt, which would otherwise remain sheltered.

[327] Leaving aside Sc'ianew's power to makes laws relating to charging for services under the *Land Code*, having considered the evidence related to the long-standing infrastructure/servicing issues, I am also satisfied that selling or transferring a limited number of subleases to fulfill Scala's judgment is unlikely to place a meaningful additional burden on the sewage or water services and therefore Sc'ianew. As a result, and recognizing the dissolution petition has yet to be decided, I will not consider further or make any other findings about the infrastructure/servicing issues.

[328] For the same reason, I do not intend to wade any further into the legal dispute regarding the alleged material breaches of the headleases. Although I have considered the primary underlying circumstances, a fulsome interpretation of the headlease provisions or their application to the underlying circumstances is not required to determine the equities of appointing a receiver. In my view it is sufficient to observe that: Scala advances cogent arguments in denying the alleged material breaches; Sc'ianew has failed to adequately address how it will deal with the interests of the subtenants; and the troubling timing of Sc'ianew's petition relative to the amended receivership petition and most significantly perhaps the long-standing nature of the underlying grounds.

[329] I would also highlight what seems to me like a very real risk to future development projects for Sc'ianew, which to be economically viable will always require the ability to provide security to investors and a collection remedy for service contractors.

[330] In my view, appointing a receiver offers the benefit of injecting development expertise into the project, which the parties appear to agree has been an ongoing significant barrier.

[331] Scala proposes that Grant Thorton Limited ("GT") be appointed as the receiver, with Mark Wentzell fulfilling the role. He is a chartered professional accountant, licensed insolvency trustee and a chartered insolvency and restructuring professional. He is also the head of GT's corporate recovery and reorganization practice in BC. His curriculum vitae sets out extensive experience in insolvency and restructuring proceedings involving construction and real estate projects.
Mr. Wentzell has specific experience dealing with a construction project located on a First Nation's land, which involved GT being appointed as receiver of a limited partnership and its general partner. Mr. Wentzell oversaw the engagement. That construction project involved a 65-unit townhouse strata project (the "Strata Project").

[332] Mr. Wentzell deposes to working with the First Nation, contractors and professionals to complete the first phase of the Strata Project, market and sell 23 units constructed as part of that phase and subsequently market and sell the balance of the project assets.

[333] Mr. Wentzell's evidence indicates the usual first step for a receiver is to assess a debtor's available assets and circumstances and report to the court. Attached to his affidavit is a report that he prepared regarding his involvement in the Strata Project.

[334] The general partners submit that if a receiver is appointed, they should be limited to an investigatory role concerning the live issues such as available options for sewage and the value of the subleases or lots with and without services.

[335] Again, I agree with Scala that proceeding incrementally toward execution is not consistent with the equities. The broad powers in the proposed order reflect the model order's dual interests of efficiency and effectiveness. The receiver's role as an officer of the court along with the right of any party to apply for directions are sufficient protections for the interests at stake.

[336] Scala has not provided an estimate of the cost of the receiver. Mr. Wentzell has referred to the difficulties involved in providing an accurate estimate. Although the general partners argue the cost will be prohibitively high, I disagree. In my view, the amount of Scala's judgment, combined with the prospect of transferring some sublots to satisfy it, as well as the potential to provide an overall benefit to the project, are more than sufficient to justify the costs.

[337] The general partners also oppose the receiver being granted broad powers to manage existing legal proceedings, submitting that Scala should not "get a receiver" that insulates it from the second arbitration proceeding. Again, a court appointed receiver is not an agent of the judgment creditor. Scala's relationship to the receiver would be solely through this Court's order. The receiver, in its role as an officer of

the court, would be required to assess before continuing, settling or compromising a proceeding brought by the general partners.

[338] In sum, I accept that Scala has demonstrated a receivership order is just and convenient in all the circumstances. Although it is apparent the Spirit Bay development has floundered financially and operationally in the absence of development and managerial expertise, the current state of its financial circumstances is unknown. The evidence does show that, through its general partners, Spirit Bay continues to hold valuable assets which can be transferred or sold. In addition to the likelihood that the appointment would result in recovery for Scala, the intervention of a receiver can be expected to involve some objective assessment of the barriers to advancing the Spirit Bay development and possible options for addressing those barriers.

[339] Scala suggested in the alternative that the receiver be appointed over the subleases and not the headleases held by the general partnership to avoid questions of conflict with the *Land Code* and constitutionality. I have already determined there is no conflict and dismissed the constitutional arguments. At the same time, the appointment of a receiver is extraordinary relief that must be granted not only cautiously but sparingly. Given also the unresolved dispute about whether Spirit Bay has materially breached the headleases in the dissolution proceeding and the requirement in the headleases for “currency” or compliance, I am inclined not to grant the receiver the power to assign the headleases.

[340] Otherwise I would grant the proposed order as sought.

[341] The dissolution petition is adjourned generally.

[342] The parties have leave to schedule an appearance before me, if other modifications to the proposed order flowing from my reasons are required.

“Fleming J.”