

1 THE COURT: A bit of background: In 2002
2 Mr. Denny and his partner, Bob Ross, incorporated
3 a company, 60300009 Canada incorporated, also
4 known as Surly Bob's, in order to open a
5 restaurant. In January of 2003 they obtained
6 loans from, what was at that point the Business
7 Credit Corporation, in the amount of \$174,000.
8 There are actually four loans at issue. The
9 initial loan was for \$174,000 and was guaranteed
10 by all the parties personally and, with respect
11 to Mr. Denny, with a \$70,000 limited mortgage
12 against his home. There was a second loan of
13 \$40,000 in August of 2003, which did not contain
14 a security clause with respect to the home, but
15 was essentially part of the same process.

16 In April of 2003, the BDIC
17 replaced the BCC. The Government credit
18 organization that was previously called the
19 Business Credit Corporation became The Business
20 Development and Investment Corporation (BDIC).

21 MR. DENNY: I didn't really feel
22 appropriate interrupting you, Your Honour, but it
23 was 2005 when the BDIC was incorporated. April
24 2005.

25 THE COURT: Did I say 2003?

26 MR. DENNY: Yes.

27 THE COURT: I meant to say 2005.

1 MR. DENNY: Thank you.

2 THE COURT: I was looking at 2005 and said
3 2003.

4 MR. DENNY: I will sit down unless
5 something comes up.

6 THE COURT: I invite any of the three of
7 you to interject at any point in time, about any
8 particular item with respect to amount or with
9 respect to any other matter. I do not want to
10 have to correct it after by way of an
11 application. The spirit of the judgment will
12 remain the same. This is an extremely
13 complicated fact situation and I have done my
14 best to get as solidly on top of all of the facts
15 as I can, but I am not going to pretend that it
16 is not conceivable that I might make an error.

17 The BDIC took over the BCC's
18 obligations and responsibilities in 2005. In
19 2006, Mr. Denny refinanced his house with, I
20 believe, the Charter Dominion Bank. In 2009 that
21 mortgage was paid off through a process by which
22 Mr. Denny transferred the ownership of his home
23 to Surly Bob's and took a mortgage back on the
24 home through his RRSP. His RRSP was part of a
25 locked in RRSP that he had gained through his
26 employment. At the termination of his employment
27 he was able to take it as a locked in RRSP as

1 place prior to finalizing that \$55,000 loan
2 simply as a matter of due diligence and looking
3 into the file. In late 2012, Surly Bob's ceased
4 to operate as a business and was struck from the
5 registry. Towards the latter part of this span
6 of time, Mr. Denny's business partner essentially
7 abandoned him and his business. Mr. Denny became
8 gravely ill, and did the best he could to carry
9 the business on. What I see between the lines is
10 a sad story of a 10 or 11 year process of
11 attempting to make a business work, which in the
12 end, did not.

13 The BDIC has applied for
14 summary judgment. They sought originally a
15 declaration, basically, with respect to the
16 amounts owing under the four loans as well as two
17 other issues. One being an application to find a
18 fraudulent conveyance as between Mr. Denny and
19 Surly Bob's and a fraudulent preference with
20 respect to the incorporation of the mortgage
21 under Mr. Denny's own RRSP, essentially giving
22 Mr. Denny the benefit of the loan and preference
23 with respect to any other creditors. Mr. Denny,
24 unlike Surly Bob's and Bob Ross, was not found as
25 a creditor by default judgment. Those two
26 entities are, in fact, judgment debtors.
27 Mr. Denny has filed substantial documentary

1 responses to the issues.

2 I know that there were a
3 significantly greater number of issues brought up
4 in the Statement of Claim and the Statement of
5 Defence, but essentially the way I see it there
6 are three issues: the validity of the debt; the
7 validity of the transfer to Surly Bob's; and the
8 legitimacy of the RRSP transaction with respect
9 to the mortgage. Those are the three issues.

10 I will deal first with the
11 legitimacy of the debts. Mr. Denny raises a
12 number of issues with respect to these debts.
13 The first argument that he makes is that there
14 was a fiduciary relationship between himself and
15 the BCC or the BDIC. His argument essentially
16 is, and I am trying to summarize what was a very
17 long argument, that because the BDIC operates
18 under the umbrella of Government it has a
19 fiduciary relationship and duty of care to its
20 borrowers that goes beyond that between a bank
21 and its customers. In support of this argument,
22 he refers to the Supreme Court of Canada case,
23 *Hodgkinson v. Simms*, 1994 SCR 377, which I
24 reviewed. The case concerns the relationship
25 between a financial adviser and his client. I
26 find that there was no fiduciary relationship
27 between BDIC and its clients. There is an

1 obligation to deal fairly and honestly and I see
2 every indication that this was done. I do not
3 find that this argument raises any real concern.

4 There was also an argument
5 raised with respect to independent legal advice.
6 Mr. Denny suggests that because BDIC, and its
7 predecessor BCC, did not provide truly
8 independent legal advice to Mr. Denny, these loan
9 agreements and guarantee should not be
10 enforceable. Specifically, this is argued in
11 reference to the use of the same lawyer for both
12 sides of the transaction in several instances.
13 Mr. Denny is an obviously sophisticated person
14 who knew exactly what he was getting into. There
15 is insufficient merit to this argument to require
16 a trial.

17 Mr. Denny also raises concerns
18 arising from the fact that the Business Credit
19 Corporation was subsumed under the Business
20 Development Investment Corporation in 2005. This
21 is essentially a reconstitution of the same
22 organization. Mr. Denny claims that not being
23 formally advised of this was both material non
24 disclosure and a fraudulent concealment. Apart
25 from the change in name, there was no impact on
26 the relationship between the various parties and
27 there is no merit to either of these arguments.

1 Likewise, the reconstitution of the BCC as the
2 BDIC does not engage limitations of action
3 considerations.

4 Mr. Denny also claims that the
5 impact of the subsequent loans and subsequent
6 agreements constitutes a material variance with
7 respect to the obligations anticipated in the
8 earlier loans. The taking on of a further loans
9 which incorporated indebtedness for earlier loans
10 by virtue of cross default terms is not a
11 material variance, but simply a mutually agreed
12 upon expansion of a previously contemplated fluid
13 debtor, creditor relationship. There was nothing
14 untoward about any of these terms and no
15 potentially successful argument flows from this
16 issue.

17 With respect to the form of
18 the agreements: All are challenged by Mr. Denny
19 for similar reasons, including the reasons I have
20 mentioned above. Further, they are claimed to be
21 vague, unclear on their terms, limited by the
22 lack of independent legal advice, unenforceable
23 by virtue of the *Limitations Act* or already
24 satisfied due to the poor wording of their terms.
25 One of the more original claims is that by virtue
26 of having already made payments to the extent of
27 the limited liability, the rest of the loan is

1 unenforceable against Mr. Denny personally. This
2 is interesting, but clearly not a valid argument.

3 Mr. Denny advances long,
4 complicated, and sophisticated arguments for the
5 proposition that the agreements do not mean what
6 they say they mean and that he does not owe what
7 he clearly understood he would owe when he signed
8 them. I am not convinced that there is any
9 properly triable merit to any of these arguments.

10 With respect to summary
11 judgment. The application was made under Rule
12 174(1) which reads that a plaintiff may, after a
13 defendant has delivered a Statement of Defence,
14 apply with supporting affidavits or other
15 evidence for summary judgment against the
16 defendant on all or part of the claim in the
17 Statement of Claim. Summary judgment was
18 considered by the Supreme Court of Canada in the
19 *Hryniak* decision, 2014 1RCS. I am referring now
20 to page 89, the second full paragraph. A summary
21 judgment must be granted whenever there is no
22 genuine issue requiring trial. There will be no
23 genuine issue requiring trial when the judge is
24 able to reach a fair and just determination on
25 the merits, on the motion for summary judgment.
26 This will be the case when the process, one,
27 allows the judge to make the necessary findings

1 of fact, two, allows the judge to apply the law
2 to the facts, and three, is proportionate or
3 expeditious and the less expensive means to
4 achieve a just result.

5 The *Hryniak* decision was
6 considered by the Northwest Territories Superior
7 Court, by Justice Shaner. In the *Leishman v.*
8 *Hoechsmann et al* decision, 2016 NWT SC 27 at
9 paragraph 40, taking the approach set out in
10 *Hryniak*, the question is not whether there is a
11 genuine issue for trial, but rather whether there
12 is a genuine issue requiring trial and tools such
13 as cross-examination available in the trial
14 process to allow a court to reach a fair and just
15 result.

16 I have found that summary
17 judgment is available with respect to the
18 validity of the loan documents and the cross
19 application of the loan debt agreements.

20 I believe, Mr. McNiven, that
21 you had a list with respect to exactly what you
22 believe those numbers to be. I do not believe
23 that Mr. Denny substantially argued against the
24 numbers; what he was arguing about was whether or
25 not those numbers applied to him. To that extent
26 what I would suggest, Mr. McNiven, is that when
27 you take out the order you specify exactly how

1 you have arrived at the numbers in question with
2 respect to Mr. Denny's status as a judgment
3 debtor. I will review that to make sure that I'm
4 in agreement with how the numbers were arrived
5 at. I believe it was an amount of roughly
6 \$180,000 of total debt. The same debt that was
7 applied against the other two co-defendants.

8 MR. MCNIVEN: Yes.

9 THE COURT: Moving on to the other issues.
10 These issues are perhaps easier to describe but
11 harder to wrestle with. The plaintiff alleges
12 that the transaction transferring ownership of
13 the home to Surly Bob's as well as the taking on
14 of the debt associated with that transfer within
15 Mr. Denny's RRSP constitutes both a fraudulent
16 transfer and a fraudulent preference. I have
17 reviewed the law on those issues. There are
18 troubling aspects to the transfer. But I am
19 dealing with this in an application for summary
20 judgment. I am not dealing with this as the
21 trial judge. I had to keep reminding myself of
22 that. You have all seen during the course of
23 these proceedings that I do the best that I can
24 to try to get the parties to recognize each
25 other's obligations and responsibilities and do
26 the best I can as well to bring matters to
27 conclusion. But I am not the trial judge. I am

1 a judge hearing an application for summary
2 judgment.

3 There were two issues that
4 troubled me about these transactions. The first
5 was timing. The transactions took place in
6 February of 2009. There were further loans in
7 both August of 2010 and August of 2011. The
8 business only became defunct towards the end of
9 2012. So there was two-and-a-half years of time
10 between the transfers and the debt and the
11 eventual collapse of the business. It is beyond
12 the evidence before me to make a firm ruling with
13 respect to credibility and issues of a fraudulent
14 conveyance.

15 Further to that, there were
16 possible legitimate reasons for those transfers.
17 Mr. Denny's ability to tap into his RRSP money
18 was limited by the fact that it was a locked in
19 RRSP and therefore there had to be some form of
20 equity taken on in order to access those funds.
21 During submissions I raised the possibility that
22 this was simply done in order to free up funds to
23 carry on the business and also to allow for
24 further financing. Mr. Denny agreed. I am not
25 suggesting that I think that is the only reason
26 it was done. I am not suggesting that at a trial
27 a different result might obtain. I just find it

1 impossible at this stage to rule conclusively
2 that the taking on of the debt was a fraudulent
3 preference. I will have some comments for
4 everybody at the conclusion of these remarks and
5 I want to have some further discussion, but I am
6 not going to do that during the course of the
7 decision.

8 Some of the same concerns
9 apply to the transfer of the property to Surly
10 Bob's. There are other reasons this could have
11 been done rather than simply a desire to protect
12 assets from creditors. There are tax
13 implications, for one. Mr. Denny, as the owner
14 of a home, is not able to deduct interest
15 payments or other payments with respect to his
16 principal residence. Surly Bob's would be able
17 to deduct those charges. This is just one
18 example.

19 The other issue arises in
20 terms of the benefit that Mr. Denny was able to
21 obtain by way of free rent during this entire
22 time. Again, I am not suggesting that at trial I
23 would necessarily find these were not fraudulent
24 conveyances, but there is simply insufficient
25 evidence before me to make that finding at this
26 point in time.

27 I do not find for the purposes

1 of the application for summary judgment that a
2 fraudulent conveyance or fraudulent preference is
3 made out to the extent necessary. Because of the
4 nature of my findings in this case, no one side
5 is conclusively the victor. I will therefore
6 make an order for costs.

7 With respect to the RRSP: One
8 of the comments that was made by the plaintiff in
9 their materials was that there is no clear
10 indication of money changing hands, but there is
11 a clear indication of the use of Mr. Denny's
12 retirement funds to further fund this business,
13 the process of taking that \$215,000 out of the
14 security investment and attempting to secure that
15 investment against the property. There are two
16 ways of characterizing this. It may have been an
17 attempt to protect the property from creditors,
18 in which case the fraudulent conveyance issue may
19 well arise. It may also have simply been a way
20 of protecting the RRSP amounts or pension through
21 the use of property. There are two ways of
22 looking at it. One of which may involve a
23 fraudulent conveyance or preference, the other of
24 which would not.

25 That concludes my remarks
26 with respect to the decision in this case. I
27 will have some further remarks with respect to

1 other issues, which I wish to raise at this point
2 in time.

3 Mr. McNiven, do you have a
4 sufficient amount of information to draw up the
5 order?

6 Is there anything else you
7 need from me at this point?

8 MR. MCNIVEN: No, I think that's fine.

9 THE COURT: Thank you.

10 First, let me ask all of you,
11 do you want further comments from me at this
12 point in time with respect to this matter?

13 Mr. Denny.

14 MR. DENNY: No, I've understood what you
15 said.

16 THE COURT: All right.

17 MR. DENNY: There isn't.

18 THE COURT: Mr. McNiven?

19 MR. MCNIVEN: The cost is reasonable and one
20 issue that is on my mind because had we not had
21 to deal with Mr. Denny's voluminous documentation
22 and complicated and confusing arguments on the
23 first (indiscernible) of this, which we spent a
24 lot of time dealing with. And the fact that the
25 mortgage and all of the loan documents clearly
26 spells out that solicitor client cost of
27 enforcement or view in payable. That is an issue

1 that I would argue is not really fair to the BDIC
2 considering that we did get some prejudgment on
3 the first part and we did have to argue about it.

4 THE COURT: What breakdown would you
5 suggest in terms of costs with respect to that
6 argument versus the fraudulent conveyance
7 argument?

8 MR. MCNIVEN: In terms of proportionality I
9 would say 50/50, really.

10 THE COURT: What kind of amount are we
11 talking about?

12 MR. MCNIVEN: I don't actually know at this
13 point, Your Honour.

14 THE COURT: Mr. Denny, what do you say
15 about that?

16 MR. DENNY: I disagree, obviously. I
17 agree with what you said. Again, there may --
18 they've extended this a long time themselves
19 through their deals. They came up with the
20 fraudulent conveyance a year into this case -- or
21 six months into the case and that all had to be
22 dealt with. They've re-filed an amended
23 Statement of Claim that had to be addressed as
24 well. So, again, they've extended it as long as
25 anything that I've done even though my stuff was
26 voluminous (indiscernible). Again, I'm
27 self-represented, I had no choice in that matter.

1 I cannot get somebody to represent me in the
2 Territories.

3 THE COURT: Fair enough.

4 MR. DENNY: So I agree with what you said
5 that there shouldn't be any costs.

6 THE COURT: I am going to make some
7 further comments before I deal with that issue.

8 One of the aspects of this
9 case that I have struggled with was that, despite
10 my reservations about whether or not the transfer
11 and the preference were fraudulent, there really
12 is no question that there has been an unjust
13 enrichment since the collapse of the business in
14 allowing the debt owing to the RRSP to swell to
15 the point that it has subsumed any of the
16 available equity.

17 MR. MCNIVEN: I understand that.

18 THE COURT: As well, Mr. McNiven, I find
19 it hard to believe that creditors have never had
20 to confront a situation where security was held
21 by a now defunct corporation and that it would
22 require the debtor to reinstate that corporation
23 in order to auction the property. There must be
24 ways of going about this. I invite you to
25 consider that in terms of where we go from here.
26 Clearly businesses that are healthy do not go out
27 of business, businesses that are unhealthy do.

1 And at that point in time the action on security
2 is going to require some ability to access the
3 corporation's assets.

4 The debt right now is about
5 \$180,000. The two credit instruments that
6 reference the property were limited in their
7 amounts to \$70,000 and \$55,000 for a total of
8 \$125,000, plus interest and cost to realize the
9 debt. There is a clear problem with respect to a
10 supposedly hands-off or arms length relationship
11 between Mr. Denny and the trust company that is
12 holding the mortgage for that property. This is
13 challengeable but not challengeable in this
14 format and through these materials.

15 If you are able to reach an
16 agreement with respect to the amounts owing and
17 you require a judge's order to allow a sale or
18 you require a judge's order to free up some funds
19 that would otherwise be funds within an RRSP, I
20 am happy to continue on with the file to that
21 extent. Clearly, Mr. Denny, if this matter does
22 have to go to trial it could go either way. In a
23 trial situation, dealing with those amounts
24 characterized properly, there is a risk of a
25 finding of fraudulent conveyance and fraudulent
26 preference. There is an even greater risk that
27 any of the increase in the value of the mortgage

1 that was generated by interest would be
2 challengeable even if caveats were filed against
3 the mortgage. There would be a question of the
4 arms length relationship that you are supposed to
5 have with the trust company that is holding the
6 mortgage.

7 With respect to costs given, I
8 think I need to know a little bit more about what
9 you are suggesting, Mr. McNiven.

10 MR. MCNIVEN: Can I?

11 THE COURT: I have heard Mr. Denny on the
12 issue. What do you have to say?

13 MR. MCNIVEN: At this point in time I'd
14 suggest that maybe I could provide a short
15 written submission because I could find out
16 exactly what the costs are. And that may be the
17 more efficient way to deal with it because we
18 could do it on a considered basis that way.

19 THE COURT: Very good.

20 MR. MCNIVEN: And I did have one other thing
21 that comes to mind. This is a foreclosure
22 application and if we have an order declaring
23 what the debt is, which we do now, my question is
24 in terms of the order I would be applying for an
25 order *sine die* and --

26 THE COURT: I think you may -- I will
27 leave that with you for the next two weeks in

1 terms of what applications you can make as a
2 result of this order. A foreclosure would be
3 against Surly Bob's.

4 MR. MCNIVEN: Right.

5 THE COURT: Right. I do not know that
6 Mr. Denny can even comment on that at this point.
7 He is not Surly Bob's anymore and --

8 MR. MCNIVEN: With respect, Your Honour, he
9 is still the director for Surly Bob's. He can't
10 just ignore it and avoid it completely by
11 allowing it to be dissolved by the registry. So
12 we can serve him and he has to be the voice of
13 Surly Bob's. So there's nothing to stop a
14 foreclosure order against Surly Bob's because
15 that's the only way BDIC is ever going to recover
16 any money out of this.

17 THE COURT: Fair enough.

18 Mr. Denny, any comments on
19 that?

20 MR. Denny: Not at this point.

21 THE COURT: Do you want to deal with that
22 in two weeks?

23 MR. MCNIVEN: I guess what you're suggesting
24 is you make the order today and then we'll
25 adjourn to speak to implementation of the order
26 in two weeks?

27 THE COURT: Why don't we do that. And in

1 terms -- because the implementation of the order
2 is complicated.

3 MR. MCNIVEN: It is, yes.

4 THE COURT: And there may well be other
5 issues that you want to raise in two weeks as
6 well. I have heard you with respect to the
7 costs, I will hear you further in two weeks. You
8 raised a good argument with respect to the costs,
9 but I want to know exactly what kind of money we
10 are talking about. And I will point out when you
11 are looking into that, that while Mr. Denny's
12 materials were voluminous, the response required
13 was not. But I know you had to make sure there
14 was nothing there and that took a significant
15 amount of time. It took me a significant amount
16 of time. Why don't we hold off on that until we
17 come back in two weeks.

18 With respect to the order to
19 the nisi and in respect to the foreclosure, you
20 are asking me to make that order today, right?

21 MR. MCNIVEN: That was the original
22 application. It never changed.

23 THE COURT: Okay. Any comment at this
24 point in time about me making that order about
25 the foreclosure?

26 MR. DENNY: Just time. Who gets what out
27 of the house, that's what I need to know.

1 THE COURT: Well, I think the order for
2 foreclosure, even if I make it today, what kind
3 of a redemption period were you seeking? In your
4 original application you asked for no redemption
5 time.

6 MR. DENNY: And he said six months when we
7 were talking the last time.

8 THE COURT: Well, but that was a different
9 context.

10 MR. DENNY: Yeah.

11 THE COURT: What do you actually suggest
12 at this point?

13 MR. DENNY: I think we'd have to speak to
14 that in two weeks because I think that the whole
15 60,000 foot view is appropriate because in terms
16 of trying to -- trying to suggest a reasonable
17 reduction period, keeping in mind the time that
18 has elapsed since this started, keeping in mind
19 the seasonality of foreclosures and so forth, I
20 think -- and in, again, Mr. Denny's ability to
21 sell the house in the meanwhile. He's had plenty
22 of time since this all started to do something
23 about it.

24 THE COURT: All right. So we will deal
25 with that, then, and we will deal with the issue
26 of costs in two weeks as well.

27 MR. DENNY: Okay.

1 THE COURT: And any other issues that
2 arise in terms of the implementation of this
3 order. You are already in contact with Mr. Denny
4 in any event if things come up, you can let him
5 know what you are going to be looking at?

6 MR. MCNIVEN: Yes.

7 THE COURT: It has been a long road. I
8 will keep the file and we will put it over for
9 two weeks to the 2 of March at 10:00.

10 MR. DENNY: Okay. I have a question for
11 you.

12 THE COURT: Sure.

13 MR. DENNY: Is it all right if I sit?
14 With regards to, again, I understand what you've
15 said so far, again, the property will be sold,
16 that's not an issue. I've been trying for a long
17 time. My health won't let me stay here. It's
18 just too cold.

19 THE COURT: Yes.

20 MR. DENNY: I just need to know who's
21 going to get what from the house. That's what I
22 don't know. I don't understand that yet.

23 THE COURT: Okay. Why don't we -- I don't
24 think there is anything stopping us from having a
25 conversation. Mr. McNiven, do you have any
26 difficulty with that at this point in time? And
27 you are welcome to make comments as well. We

1 have got it on the record. The problem is that
2 the priority of debt insurance is quite an issue,
3 right?

4 MR. DENNY: It is, but the main point of
5 the whole proceeding is to sell the property and
6 turn it into money.

7 THE COURT: Yes.

8 MR. DENNY: The priorities aren't going to
9 change.

10 THE COURT: No, they are not.

11 MR. DENNY: So --

12 THE COURT: There is no reason to sit on
13 the sale pending --

14 MR. DENNY: Exactly.

15 THE COURT: I hear you about that. And
16 once the issue with respect to the order nisi is
17 dealt with, I will make that order next week.

18 MR. DENNY: Because I was just going to
19 say that in the very best case scenario the
20 property sells, BDIC gets paid, and there's money
21 left over -- the BDIC and the RRSP mortgage get
22 paid out and then there's money left over that
23 pays out, you know, the costs or whatever else is
24 out there. And --

25 THE COURT: Obviously you are talking
26 about the original \$215,000 on the RRSP mortgage
27 at this point, right?

1 MR. DENNY: Right.

2 THE COURT: Because that -- you are
3 already up to 400, I think you said the property
4 is worth about 380 or 360.

5 MR. DENNY: I don't know. I don't even
6 know what it would be worth. My point, you never
7 know what you're going to be dealing with until
8 the property is sold. So in -- maybe I'm overly
9 optimistic, but housing property is down in
10 Yellowknife and the foreclosure could be sold for
11 more than the appraised market value.

12 THE COURT: You never know.

13 MR. DENNY: Again, going back to what you
14 said was the priorities. And, like I said, I
15 have no problem with what's going on so far.
16 But, again, I have to stay in the house and I
17 have to maintain the house because you can't
18 leave it abandoned. That's impossible. You can
19 not do that in this town. Everything would
20 freeze. I'm more than willing to leave, that's
21 not an issue either. I just need to know a time
22 frame. If it's going to be two weeks, if it's
23 going to be a month. That's all I'm asking. The
24 priorities of who gets paid what out of the
25 property, that's going to be determined. I
26 understand that. I have no issue with that.

27 THE COURT: Well, that is something that

1 you and Mr. McNiven on behalf of BDIC can talk
2 about. If you come up with numbers that you can
3 both live with, I mean, obviously that has always
4 been on the table from the beginning. But I
5 should think at this point in time now that the
6 issue of the debt has been clarified those
7 discussions might be more fruitful.

8 So, anyway, I can have no part
9 in that unless you want me to have a part in it.
10 So I will leave that with you. But, yes, two
11 weeks and we will deal with the issue of costs
12 and any other issues that arise. My expectation
13 is that I will be signing an order nisi in two
14 weeks.

15 MR. DENNY: That's March 2nd?

16 THE COURT: March the 2nd at 10:00.

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18 **ADJOURNED TO MARCH 2, 2018, AT 10:00 A.M.**

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1 **(PROCEEDINGS CONTINUED ON MARCH 2, 2018)**

2 THE COURT: The Lyle Gordon Denny matter.

3 Mr. McNiven, are you in possession of a
4 transcript of the last --

5 MR. MCNIVEN: No, Your Honour, we did order
6 a transcript but it has not yet been received.

7 THE COURT: I believe it was not sent yet
8 because there was a bit of a miscommunication
9 between the management of the court order's
10 office and the transcript was filed before I had
11 the opportunity to edit it. I think I indicated
12 when we were doing this that I may actually
13 substantially edit this.

14 MR. MCNIVEN: And, in fact, that was one of
15 the -- one of the potential hiccups that I had in
16 terms of preparing for today, because although I
17 do take notes, they're not always that well
18 detailed.

19 THE COURT: Well, I can do what I can do,
20 I do have a rough transcript. Maybe what I can
21 do, if I have your solicitors undertaking to
22 destroy the transcript after we've finished
23 dealing with it.

24 MR. MCNIVEN: Right.

25 THE COURT: What I can do is direct the
26 clerk to provide a copy of my copy to you.

27 MR. MCNIVEN: Thank you.

1 THE COURT: I'll get you a copy of it.

2 MR. MCNIVEN: Your Honour, I haven't even
3 seen the transcript.

4 THE COURT: I know you haven't seen it.
5 The transcript might help you in terms of putting
6 together the order.

7 MR. MCNIVEN: Yes. If I got the edited
8 transcript, that was what I'm saying. I don't
9 need to see anything before that.

10 THE COURT: Which means I have to edit it.

11 MR. MCNIVEN: Okay.

12 THE COURT: We'll figure that out.

13 MR. MCNIVEN: A chicken and egg thing here.

14 THE COURT: So in terms of today's
15 appearance, I think the main reason for today's
16 appearance was the confirmation that was
17 (indiscernible) directly seeking in relation to
18 this motion.

19 MR. MCNIVEN: Now, again, Your Honour, I did
20 two things. And I may have overstepped this, but
21 I also prepared a draft order and organized that.
22 And I know I can't rely on that until you've
23 actually formally edited the transcript and so
24 forth. So I could provide a draft at least.

25 THE COURT: Well, I think you can rely on
26 that in the sense of when I gave a ruling nothing
27 is going to change.

1 MR. MCNIVEN: Right.

2 THE COURT: All that is going to change
3 are the words that I might have used at the time.

4 MR. MCNIVEN: Okay. But --

5 THE COURT: So the order was the order the
6 last time we were in court and that's the date of
7 the order.

8 MR. MCNIVEN: That's better, then, if my
9 order works. So, Your Honour, I did prepare an
10 affidavit and I'll give a copy to my friend. My
11 client had not actually prepared and provided us
12 with the calculation of the outstanding interest
13 until late yesterday. That's the reason why I
14 wasn't able to get the -- get that number. And
15 it's attached to this affidavit, so if I might
16 just provide this to the Court.

17 THE COURT: Sure.

18 MR. MCNIVEN: And that will help explain
19 things.

20 THE COURT: Thank you.

21 MR. MCNIVEN: Now, before I get into the
22 order obviously I need to deal with the issue
23 about cost. So what I did in terms of that is I
24 have provided the Court with a summary of the
25 costs, the actual costs and the amount of costs
26 that we're seeking. The actual costs are in
27 Exhibit B and the memorandum of calculations that

1 shows the amount that we have reduced is in
2 Exhibit A -- I'm sorry, that's the other way
3 around. Exhibit A is the memorandum of
4 calculations, Exhibit B is a copy of the
5 calculation of costs, and Exhibit C is a copy of
6 the backup for the calculation of costs.

7 THE COURT: You're simply taking that
8 amount and dividing it in two to be --

9 MR. MCNIVEN: Not quite, Your Honour. I
10 actually went through the invoices to see if I
11 could determine what time was spent on the -- as
12 Your Honour had directed or indicated, I tried to
13 break it down into the time on the summary
14 judgment that was granted versus the part that
15 was not granted. And I was pretty close because
16 it was almost half -- it was less than half,
17 though. Slightly less than half. So the cost
18 that we're claiming would be \$23,643.50. And the
19 reason -- the reason I say that is if we refer to
20 the invoices themselves and the calculation, it
21 shows the costs that were deducted from the
22 actual -- from the actual solicitor client
23 invoices.

24 THE COURT: Okay.

25 MR. MCNIVEN: And then as I had already
26 indicated, there is clearly a provision in all of
27 the loan documentation that is the contractual

1 costs that are relied on for the solicitor client
2 cost.

3 THE COURT: It's typical.

4 MR. MCNIVEN: Yes.

5 THE COURT: Mr. Denny, apart from your
6 earlier statement and in reference to my initial
7 analysis, do you have anything you want to add to
8 the cost?

9 MR. DENNY: I do and I don't. It might be
10 just one point. Because it's just being added to
11 what's owed under the guarantees any way, which
12 more than likely will not be paid any ways
13 because I don't have the money. So it basically
14 forces me (indiscernible) which costs become
15 irrelevant because I don't have the money to pay
16 it in the first place. So I can come up with a
17 bunch of stuff, but it's really a waste of
18 everybody's time.

19 THE COURT: Well, and either way you're
20 going to be forced to bankruptcy.

21 MR. DENNY: Probably.

22 THE COURT: Can I see the draft order
23 next, please? Mr. McNiven, perhaps you can help
24 me with the information of amounts to owe. The
25 application for summary judgment was denied, so I
26 need you to talk me through this. The \$215,000
27 plus interest that you were seeking is the total

1 amount of all indebtness under all of the
2 instruments?

3 MR. MCNIVEN: Yes.

4 THE COURT: The mortgage is only referred
5 to two and there were only two mortgages,
6 correct?

7 MR. MCNIVEN: Yes.

8 THE COURT: The order -- explain to me,
9 you're not claiming priority with respect to the
10 debt, you're simply claiming the debt as against
11 the property, correct?

12 MR. MCNIVEN: Yes. And my understand -- and
13 I anticipated this, Your Honour, and I was going
14 to raise this. My understanding was that on
15 November 23rd, I think it was, or 24th we had
16 reviewed the mortgage and the cross default
17 clause in the mortgage and the cross default
18 agreement. Now, that cross collateralized all of
19 the security and that's why we've got that amount
20 in the declaration. So that's basically why the
21 declaration is worded the way that it is. And
22 this is another thing that I wanted to read from
23 the transcript to see if there was -- if that
24 would help me. But my understanding in any notes
25 from chambers on that date indicated that the
26 Court had agreed with that argument.

27 THE COURT: What I had agreed with is the

1 argument that Mr. Denny owed what he owed. In
2 terms of -- under the four -- was it four or five
3 loan documents? It was five, I believe.

4 MR. DENNY: Four loans and four
5 guarantees.

6 THE COURT: Okay. So it was four loans,
7 four guarantees. And that was the amount that he
8 is now a judgment debtor owner, correct?

9 MR. MCNIVEN: Yes.

10 THE COURT: In terms of the order nisi I
11 think you're -- you're certainly not limited in
12 terms of making a greater claim against whatever
13 comes out of the proceeds, but in terms of
14 establishing the order nisi and a potential
15 argument for priority, I think you've got an
16 undisputed debt. And this is only with respect
17 to summary judgment. It's not what I think would
18 happen after trial, it's how far I'd be willing
19 to go on summary judgment. I think as far as the
20 summary judgment goes, the two mortgage debts,
21 was it 70,000 and 55,000?

22 MR. MCNIVEN: Yes.

23 THE COURT: So for a total of \$125,000.
24 That's the amount that was capped as mortgage
25 land billing against the property. Now, I think
26 that you would likely be successful with respect
27 to the cross collateral claims, but as far as

1 which loans would then take priority over the
2 secured amount with respect to the Denny mortgage
3 that's being held by Canada Trust, that's an
4 issue that's going to have to be sorted out.
5 It's not an issue that I can make a determination
6 on at this point in time. As you indicated last
7 time, the priorities are not going to change.
8 The fact is the property has to get sold.

9 MR. MCNIVEN: And there's -- I mean, at that
10 point in time there is a postponement agreement
11 as far as the Canada Trust mortgage goes, so...

12 THE COURT: There is a postponement
13 agreement with respect to the 70 and the \$55,000.

14 MR. MCNIVEN: Okay.

15 THE COURT: Right? That's what the
16 agreement was.

17 MR. MCNIVEN: Right. Okay. I'm with you.
18 So what I need to do, then, is change the --
19 change the interest amount. Because the claim
20 amount isn't going to -- isn't going to change.
21 And my friend had actually provided a backup
22 calculation that deals with that amount. I'll
23 give a copy to my friend. So we have the 70,000
24 and \$55,000 mortgage and we have calculated the
25 interest on both of those as well.

26 THE COURT: And I think the issue is how
27 far I was willing to go in the summary judgment

1 ruling. You're referring to everything as
2 mortgages?

3 MR. MCNIVEN: Right.

4 THE COURT: I think you're going to need
5 to divide the two. The application for the order
6 nisi is with respect to the two mortgages, right?

7 MR. MCNIVEN: Yes.

8 THE COURT: That amount -- you've already
9 got a ruling -- I think there was a separate
10 ruling with respect to the establishment of
11 Mr. Denny's --

12 MR. MCNIVEN: So what I would anticipate
13 doing, Your Honour, and I think I can do this
14 relatively quickly is under paragraph 1 where it
15 refers to the summary judgment I can clarify the
16 amount there and refer to the guarantee. And
17 then the declaration with reference to the
18 mortgages and that will split it into the two
19 bits that need to be reflected in the order.

20 THE COURT: Well, I believe as well, the
21 mortgage guarantees with respect to the personal
22 indebtedness Mr. Denny was signing off on. I don't
23 believe that those capped amounts, the 70 and the
24 \$55,000, did they carry -- were they specifically
25 plus interest or were they simply limited
26 liability to that amount?

27 MR. MCNIVEN: They include interest from the

1 date of demand and that's the --

2 THE COURT: Okay, thank you.

3 MR. MCNIVEN: -- amount in the calculation.

4 THE COURT: Okay. So that's the

5 escalation you're going to have to come up with?

6 MR. MCNIVEN: Yes. And I do have that, if I

7 can provide it to the Court you can see what I'm

8 referring to. The difference comes out to --

9 that amount would be \$145,032.76 for the

10 mortgages.

11 THE COURT: Total.

12 MR. MCNIVEN: Right.

13 THE COURT: Okay.

14 MR. MCNIVEN: And then the guarantee would

15 be the higher amount that I'd put in this -- in

16 this draft.

17 THE COURT: Right. So the -- so you'll

18 (indiscernible) two orders with respect to

19 Mr. Denny's personal indebtedness, which is the

20 total amount.

21 MR. MCNIVEN: Right.

22 THE COURT: And then you're going to have

23 the order nisi with respect to the property,

24 which is only going to encompass the two

25 mortgages and the interest component of the two

26 mortgages.

27 MR. MCNIVEN: Right. And what I -- what I

1 was trying to articulate is I could put that in
2 one order as long as I split it into two
3 sections.

4 THE COURT: Okay. What I don't mind is a
5 mischaracterization of the entire debt as being
6 decided at the summary judgment --

7 MR. MCNIVEN: Right.

8 THE COURT: -- as the mortgage debt. And
9 I haven't.

10 MR. MCNIVEN: And this was what I -- I was
11 hoping I could -- I'm pretty sure the transcript
12 didn't deal with the cross default and the
13 implications of that.

14 THE COURT: I think the transcript is
15 organic, things kind of growing as we go along.
16 That's one of the reasons why I wanted to edit it
17 as well. But if it wasn't clear the last time,
18 that was my intention --

19 MR. MCNIVEN: Okay.

20 THE COURT: -- is that I wasn't willing
21 to go the full distance. But I certainly
22 accepted your arguments with respect to the
23 indebtedness of Mr. Denny and personal guarantees.
24 I accept that there are mortgages. As to whether
25 or not mortgages are, in fact, a priority, is not
26 my issue.

27 MR. MCNIVEN: Right.

1 THE COURT: But there are those
2 postponement agreements, when they have force,
3 when they don't. And my guess is that when the
4 matter proceeds through after the sale of the
5 home the amount that you're going to come up
6 with, 143 or whatever it is, is going to be
7 successfully high to (indiscernible) the value of
8 the property. But that's not for me to decide
9 here today.

10 MR. MCNIVEN: Would you like me to provide
11 the calculation for the mortgages?

12 THE COURT: No, I'm content with your
13 calculation, it's just the division of it has
14 to --

15 MR. MCNIVEN: Right.

16 THE COURT: -- take place before I'm
17 going to sign off on the orders. Mr. Denny, does
18 that all make sense to you?

19 MR. DENNY: Well, I'll just run it by you,
20 if that's okay.

21 THE COURT: Sure.

22 MR. DENNY: As far as I understand from
23 summary judgment, you're denying the summary
24 judgment against the (indiscernible) and
25 you're --

26 THE COURT: I'm not finding that there's a
27 sufficient threshold for me to make a summary

1 determination. I'm not finding that it didn't
2 happen.

3 MR. DENNY: Right. And you're saying that
4 the guarantees are in force and I owe X amount of
5 dollars?

6 THE COURT: Yes.

7 MR. DENNY: Okay. With regards to the
8 property, which you say there's three mortgages
9 on, I won't even go into that --

10 THE COURT: Two mortgages. It's two
11 mortgages from them and a mortgage from you.
12 Yes.

13 MR. DENNY: Okay. And we need to decide
14 the priorities with respect to that property. So
15 as far as this summary judgment side, I will put
16 it over here, I understand that's not an issue, I
17 need to know what we need to go forward on the
18 property. I guess we'll have to have another
19 hearing or something with regards to deciding the
20 priority on the -- who has priority on the
21 mortgage.

22 THE COURT: Yes. Basically, in the order
23 nisi, there are mortgages and they are making an
24 application for foreclosure. As to what actually
25 happens with the proceeds of that application,
26 that's another issue, right?

27 MR. DENNY: Yes.

1 THE COURT: But at this point at least
2 there's going to be movement, the house will get
3 sold.

4 MR. DENNY: Okay. Because it has to be
5 foreclosed on because technically I don't own the
6 house.

7 THE COURT: Well, and that's -- I wasn't
8 blind to the fact that this isn't necessarily
9 completely contrary to your interests or to the
10 BDIC's interests, right? Neither one of you is
11 able to move forward until something happens,
12 right? So I am going to sign an order nisi.

13 MR. DENNY: Right.

14 THE COURT: I just want to make sure that
15 the order nisi doesn't go beyond -- and I don't
16 fault Mr. McNiven for this, this is a complicated
17 file, we've been trying to work our way through
18 it, but I don't fault him for what's in front of
19 me today. I just want to make it a little bit
20 clearer that the guaranteed debt, the mortgage
21 debt that is driving the order nisi, is there.
22 The cross collateral claims are likely fully
23 enforceable and I just didn't make a ruling on
24 that. The main reason why I didn't make a ruling
25 on it at this point in time is that I believe
26 that the cross collateral agreements came later
27 than the original \$70,000 mortgage.

1 MR. DENNY: Most definitely.

2 THE COURT: Again, I'm not saying that
3 they wouldn't be held up in court. What I'm
4 saying is that I wasn't willing to do that at the
5 level of the summary judgment application, that's
6 all.

7 MR. DENNY: No, and that's fine.

8 THE COURT: And I had to be mindful of
9 that as I went through the file, obviously,
10 because my temptation always is to complete
11 matters and get everything done. But there are
12 limitations. So Mr. McNiven is clear on what the
13 order has to say at this point in time. I don't
14 know that I need to drag you both back to court
15 in order for you to sign off on that. I'm
16 prepared to do that as soon as I get the order.

17 I'm in a jury trial next week
18 and then I'm out for March break. So I presume
19 that -- I mean, I can certainly sign orders if
20 I'm not in a jury trial, that's not an issue, I
21 just can't bring it back to court.

22 MR. MCNIVEN: Now, Your Honour, one final
23 thing that we can deal with today is the
24 redemption period, and my client is seeking a
25 three month redemption period. That will enable
26 the property -- enable Mr. Denny to do what he
27 needs to do to make repairs of whatever and to

1 provide vacant possession so that the property
2 can be sold. Or alternately, you know, when we
3 do sell the property he can vacate the property.

4 THE COURT: I'll hear from you on this as
5 well, Mr. Denny. I'll just let you know what my
6 first thoughts are. The redemption period makes
7 perfect sense to me. I'm assuming there's going
8 to be some cooperation from you, Mr. Denny?

9 MR. DENNY: Well, I will try.

10 THE COURT: So I'm assuming cooperation.
11 If that doesn't happen, I might have to get
12 involved again. But a 90 day redemption period
13 makes sense. I think there should be a caveat
14 that would allow you to remain in the home
15 providing you cooperate with the sale until the
16 closing point.

17 MR. DENNY: Okay. And I --

18 THE COURT: So in 90 days it will be ready
19 for sale.

20 MR. DENNY: That doesn't mean I'm selling
21 the property, that means the court is selling the
22 property?

23 MR. MCNIVEN: You can --

24 MR. DENNY: I don't want to sell the
25 property. I don't think I'm -- it's not my
26 property, it's the company's. The company
27 doesn't exist to me, the court has to sell the

1 property. That's just --

2 THE COURT: What do you suggest,

3 Mr. McNiven?

4 MR. MCNIVEN: I just want to clarify. I'm
5 not going to make a suggestion because it's up to
6 Mr. Denny to decide what he would like to do, but
7 I can pretty well guarantee that if we have to
8 sell the property it's going to cost more. And
9 if Mr. Denny wants to sell the property, the
10 company still owns it up until the final Order
11 for Sale. So if he wants to try to sell it he
12 can have that and we're fine with that.

13 THE COURT: He would have to then
14 reinstate the company in order to sell it.

15 MR. MCNIVEN: Well, he's going to have to do
16 whatever he needs to do. But I think that would
17 be part of the -- if just for hypothetically if I
18 were acting as a solicitor on that sale, in order
19 to get the company in good standing it would cost
20 a few hundred dollars out of the sale of, you
21 know, 300 some thousand dollars, I would
22 anticipate that's not going to be a big problem
23 for a lawyer to do. So if Mr. Denny wanted to,
24 he could have done that at any point in time, and
25 he still can.

26 THE COURT: Another thing we can do,
27 Mr. McNiven, which would involve less cost is

1 that if Mr. Denny wanted to put the place up for
2 sale, when we get to the point where you're
3 actually dealing with the documents, I could make
4 an Order for Sale and agree on an Order for Sale;
5 then we wouldn't even have to reinstate Surly
6 Bob's.

7 MR. MCNIVEN: Yes.

8 THE COURT: Right?

9 MR. MCNIVEN: That's another way to do it,
10 yes.

11 THE COURT: Mr. Denny is reluctant to
12 reinstate Surly Bob's, I'll leave that to him,
13 but it does seem to be a real reluctance. So if
14 there's a way around that by just providing a
15 simple order for my signature, I'm quite prepared
16 to do that. That would then allow you,
17 Mr. Denny, to try to get back some value from the
18 property and not -- and correct me if I'm wrong,
19 Mr. McNiven, but it's typically about between 10
20 and \$15,000 of costs associated with the sale of
21 a home, right?

22 MR. MCNIVEN: It's a percentage for the
23 realtor so that --

24 THE COURT: Well, there's a percentage for
25 the realtor. I'm talking about the legal costs
26 if the bank actually had to go through the
27 process itself.

1 MR. MCNIVEN: I think that's reasonable.

2 THE COURT: Yes, because that's roughly

3 what I recall seeing on a number of these sorts

4 of cases.

5 MR. DENNY: Right.

6 THE COURT: Does that help?

7 MR. DENNY: That helps there. I have one

8 more question --

9 THE COURT: Sure.

10 MR. DENNY: -- or point that needs to be

11 addressed. Again, the house can be sold,

12 whatever, and the proceeds are going to go

13 wherever, that's fine, I have no issues with that

14 part. But we need to determine the priorities,

15 and how do we do that?

16 THE COURT: That's not for me to say at

17 this point.

18 MR. DENNY: Okay.

19 THE COURT: I think that's something that

20 I would suggest you discuss with Mr. McNiven and

21 that you do so with a very open mind to

22 possibilities. With respect to the order for

23 costs. Mr. McNiven, I did reconsider after your

24 submissions last time, and you're right. The

25 challenges to the loans themselves are very

26 clearly without merit and as such the solicitor

27 client costs that you've now narrowed down are

1 appropriate. I am going to grant the order for
2 costs with respect to that. That order for costs
3 will not attach to the mortgage debt, but will
4 attach to the general indebtedness. In other
5 words, I don't want to see it added to the order
6 nisi.

7 MR. MCNIVEN: I do have a submission.

8 THE COURT: Sure.

9 MR. MCNIVEN: Because those costs are
10 secured by the mortgage. We could not have sold
11 the property without going through all of those
12 exercises to get there. We had -- I counted
13 them, counting today 15 court appearances
14 including all the case management and so forth.
15 So this lasted a very long time because of the
16 defence that was filed. And although it might
17 have seemed simple to the Court, it certainly --

18 THE COURT: It didn't seem simple to the
19 Court, Mr. McNiven.

20 MR. MCNIVEN: On the judgment. On the debt
21 part, though.

22 THE COURT: Okay.

23 MR. MCNIVEN: It was very complicated
24 because Mr. Denny made it very complicated. And
25 we tried to fasttrack it by putting it in case
26 management, and Mr. Denny was cooperative, I'm
27 not faulting him for that, but the reality was

1 when he provided us with an encyclopedia of cases
2 dealing with every single defence you could come
3 up with, it really required a lot of work to go
4 through that. In addition, we had to go through
5 the cross-examination on the affidavit so that we
6 could clarify what was going on. So I tried to
7 help -- in essence, I looked at it as if I was
8 more or less trying to -- in order to assist the
9 Court I was trying to clarify things from
10 Mr. Denny's perspective as a self-represented
11 litigant so that we could cut to the chase as
12 fast as we could, which is unfortunately not very
13 fast.

14 THE COURT: Mr. Denny, any comments beyond
15 the comments you've already made with respect to
16 the impact of the costs? You've convinced me,
17 Mr. McNiven. You're going to have the costs of
18 the order nisi. When do you expect to get those
19 orders for my signature?

20 MR. MCNIVEN: I want to say today, Your
21 Honour. It won't take long because I do have the
22 calculation.

23 THE COURT: Anytime next week is fine.

24 MR. MCNIVEN: And I was going to say, I want
25 to say today, but I think it may be more likely
26 that by the middle of next week at the latest I
27 can get them to you.

1 THE COURT: I look forward to seeing them.
2 MR. MCNIVEN: Thank you.
3 THE COURT: And do we need another court
4 appearance?
5 MR. MCNIVEN: I don't think so. I think
6 we're fine now. I think if we can get on with
7 the next part then hopefully the next time this
8 will be before the Court will be with an order
9 where Mr. Denny has sold the property. And if
10 not we'll be there with an Order for Sale.
11 THE COURT: Mr. McNiven, we'll adjourn
12 *sine die*. Before we do that I want to thank you
13 for your hard work on this file.
14 Mr. Denny, we deal with a
15 fairly large number of self-represented persons.
16 You have conducted yourself as a gentleman and
17 it's appreciated by the Court. I wish you well.
18 We'll sign off.
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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 22nd day of March, 2018.

Certified Pursuant to Rule 723
of the Rules of Court



Allison Willard
Court Reporter