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(Winnipeg Centre)

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## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

JAMESON, GILROY &	)	<u>John B. Martens</u>
B. & L. LIVESTOCK LTD.	)	<u>Kelsey L. Schade</u>
	)	for the plaintiff
	)	
plaintiff,	)	
	)	
- and -	)	
	)	
DAVID JASON BORNE, DAVID PETER	)	<u>No One Appearing</u>
BORNE, CARLA RUTH BORNE, ROBIN	)	for the defendants
MARY BORNE, BORNE FARMS, ROCKING	)	
B CATTLE CO. LTD., 7244496	)	
MANITOBA LTD. DNR FARM LTD. and	)	
GREGORY WILLIAM FEDAK,	)	
	)	
defendants.	)	
	)	JUDGMENT DELIVERED:
	)	JULY 15, 2024

### **OTHER INTERESTED PARTIES**

Kalev A. Anniko  
for Royal Bank of Canada

Ross A. McFadyen  
for Fusion Credit Union Limited

Trevor Yakimchuk  
for Titan Livestock Inc. and  
Bear Spring Ranch Ltd.

Amanda E. Verhaeghe  
for Ste. Rose & District Cattle  
Feeders Co-Op Inc. and  
Township 20 Beef Breeders  
Co-Operative Incorporated

Stephen K. Branigan  
for Martin Livestock Ltd.

## **PERLMUTTER A.C.J.**

### **INTRODUCTION**

[1] This is a determination of the entitlement to proceeds from an auction sale of cattle based on each party's interest in these cattle as owner or secured creditor. The parties claiming these proceeds are the plaintiff Jameson, Gilroy & B. & L. Livestock Ltd. (JGL) and the other interested parties<sup>1</sup>:

- Ste. Rose & District Cattle Feeders Co-Op Inc. (Ste. Rose) and Township 20 Beef Breeders Co-Operative Incorporated (Township 20) (collectively, the Co-Ops);
- Royal Bank of Canada (RBC) and Fusion Credit Union Limited (collectively, the secured creditors);
- Martin Livestock Ltd.;
- Titan Livestock Inc.; and
- Bear Spring Ranch Ltd.

[2] This auction sale came about following the execution of a "Mareva"<sup>2</sup> injunction freezing the defendants' assets, which included cattle. None of the defendants take any position on the allocation of these proceeds.

### **BACKGROUND**

#### ***Parties***

[3] The defendants David Jason Borne (Jason Borne), Carla Ruth Borne, David Peter Borne (David Borne), Robin Mary Borne, their related partnership Borne Farms, and their

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<sup>1</sup> Unless otherwise indicated, for the purposes of the adjudication herein, JGL is included in the "interested parties".

<sup>2</sup> ***Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*** (1975), [1980] 1 All E.R. 213 at 215; ***Clark v. Nuicare PLC***, 2006 MBCA 101, para. 31

companies carried on a beef cattle operation (collectively, the "Bornes"). Each of the Bornes granted RBC general security over all of their present and after-acquired personal property. Jason and Carla Borne also granted Fusion Credit Union a priority security interest in their personal property<sup>3</sup>.

[4] JGL is a licensed livestock dealer. As a livestock dealer, JGL buys and sells cattle. JGL entered into various purchase and sale contracts with the defendants for cattle which were, or came, within the Bornes' possession or control as well as for cattle which, as it turned out, never existed. Martin Livestock, Titan Livestock, and Bear Spring Ranch also purchased cattle from one or more of the Bornes which were, or were to be, in the Bornes' possession or control. The Co-Ops entered into breeder and feeder agreements with the defendants for cattle that were to be in the Bornes' possession which agreements provide that the particular Co-Op retains title and ownership of the cattle and all progeny until they are sold on the Co-Op's behalf.

### ***Dispute***

[5] This dispute arose following transactions between JGL and the defendants in August 2022 (the "August 2022 transactions"), wherein cattle were purportedly bought by JGL from a defendant or third parties for the purpose of their sales to other defendants. The August 2022 transactions were undertaken as part of the Bornes' asserted expansion and restructuring of their operations. Jason Borne has since admitted that most of the

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<sup>3</sup> No evidence was filed of credit facilities agreements beyond Jason Borne, Carla Borne, David Borne, Robin Borne and Borne Farms, but there is no indication that this impacts the secured creditors' position herein. As well, the secured creditors have come to terms such that for the purposes of the issues herein, the question of priority as between them need not be determined.

August 2022 transactions purporting to involve the sale of cattle from the defendants to JGL were for cattle that, in fact, did not exist.

***Mareva, Auction, and Onus***

[6] In October 2022, JGL obtained a Mareva injunction freezing the defendants' assets, including all cattle owned by the Borne or in their possession or control. Thereafter, by consent of the other interested parties, JGL obtained an order allowing for an organized process for the rounding up and sale of the cattle at auction. This auction sale in December 2022 resulted in the sale of 1,265 head of cattle with net proceeds of about \$1.2 million. Also, by consent, it was ordered that for the purpose of the adjudication at hand, the onus is upon the various interested parties to establish, on a balance of probabilities, any ownership or other entitlement to the auction proceeds which shall be determined on a summary basis and considered as if the auction proceeds had been paid into court by the defendants on an "interpleader" basis.

[7] For the purpose of the present adjudication, the record consisted of affidavits and transcripts of cross-examinations on affidavits. In addition, as provided in the most recent consent order, Jason Borne was examined for discovery by several interested parties with them permitted to make use of evidence obtained from these examinations at this adjudication in accordance with ***King's Bench Rules*** 31.11 and 39.04.

***Disputed Cattle***

[8] JGL claims proceeds from the auction sale of the cattle (that existed) on the basis of the August 2022 transactions and each of Martin Livestock, Titan Livestock, and Bear Spring Ranch claims proceeds from the auction sale of other cattle that were in the

Bornes' possession or control on the basis that they owned these cattle. With the exception of calves, there are little to no competing ownership claims to the same cattle by any of JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch. In turn, the Co-Ops claim the proceeds of auction sale based on their asserted ownership of all cattle that were in the Bornes' possession or control with the exception of 116 cattle purchased by JGL from third parties as part of the August 2022 transactions (also referred to as the "third party cattle"). The secured creditors oppose the Co-Ops' claim and take issue with some aspects of the claims advanced by the other interested parties. It is the secured parties' position that except for the cattle which they concede are specifically and reliably identified by JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch as owned by them prior to the auction sale, the secured creditors are entitled to the proceeds of sale from all other cattle as having been owned by the Bornes.

[9] Based on the interested parties' various claims, the cattle in dispute that were in the Bornes' possession or control (as now reflected by the auction proceeds) are practically described as follows:

- Cattle subject to the August 2022 transactions:
  - Cattle (that existed) sold by the defendants to JGL; and
  - The third party cattle;
- Martin Livestock cattle with brands and with no visible brand (NVB);
- Titan Livestock cattle with brands and calves with NVB;
- Bear Spring Ranch cattle with brands and with NVB;
- The Co-Ops: all cattle except for the third party cattle; and

- Secured creditors: all cattle except for cattle to which other interested parties have established ownership by way of *in rem* claims.

### ***Calves***

[10] Of the 1,265 cattle sold at auction, about 263 were calves born in 2022. Determining with certainty how many of the calves claimed by the interested parties were alive at the time of auction is not possible. Nevertheless, as is consistent with the submissions of several interested parties and the terms of the consent order that ownership or other entitlement to the auction proceeds shall be determined on a balance of probabilities and on a summary basis, I have provided my view below on the approach to be undertaken in determining the interested parties' claims to the auction sale proceeds from these calves.

### **ANALYSIS**

#### ***Onus***

[11] I agree with the secured parties' submission that the onus is on the party asserting an ownership claim to make out a cogent claim to specific cattle that existed (now reflected by the cattle auction sale proceeds), on evidence sufficient to identify these cattle (an *in rem* claim). Where they have not done so, their claims may be later advanced *in personam*.

#### ***Jason Borne's Evidence***

[12] Somewhat unique in this case is Jason Borne's knowledge of the cattle sales to the interested parties (including as part of the August 2022 transactions) and the locations of the cattle that existed, while at the same time he is not asserting a claim to the auction

proceeds based on the Bornes' cattle ownership and he has admitted to the sale of nonexistent cattle. Nevertheless, Jason Borne's evidence is relied upon by the interested parties in advancing their claims to the cattle that existed. While the secured creditors submit that Jason Borne's evidence regarding sales and locations of the cattle is to be treated with suspicion, they too rely on his evidence of having owned certain cattle (given that under their security facilities with the Bornes, the secured creditors claim entitlement to cattle owned by the Bornes).

[13] I recognize the import of Jason Borne's admission of sales of nonexistent cattle. However, for the purpose of adjudicating the issues at hand, having made this admission (which admission is clearly against his interest), I have no basis to find that it necessarily follows that the whole of Jason Borne's examination testimony is to be rejected. More specifically, in my view, having admitted to transacting sales of nonexistent cattle, there is no reason to wholly disregard his evidence regarding cattle that did exist. There is no apparent motive for Jason Borne to intentionally give misleading evidence regarding cattle that did exist, including as part of the August 2022 transactions. Indeed, to the extent that Jason Borne has given evidence that particular cattle are properly claimed as owned by an interested party (other than the secured creditors who claim through their security the cattle owned by the Bornes), this evidence is presumably against his interest as it increases his debt to the secured creditors.

[14] As will be seen, I nevertheless have concerns about the reliability of parts of Jason Borne's evidence. While not required, in many instances, I have considered whether corroborative evidence exists regarding Jason Borne's evidence.

***Livestock Services of Saskatchewan***

[15] Livestock Services of Saskatchewan (LSS), described in JGL's affidavit evidence as a specialist in cattle identification, inspected and reported on the locations, types, and branding of the cattle in the Bornes' possession or control (no objection was raised to the admissibility of this reporting and in fact several interested parties, including the secured parties, rely on some of this reporting). This reporting included the location origins of cattle delivered to auction as described to LSS inspectors. Unless I have indicated otherwise, where there is a conflict between LSS reporting and other evidence, given the experience and role of LSS, I prefer the LSS reporting.

***Co-Ops' Claim***

[16] The Co-Ops claim ownership of all the cattle that were in the Bornes' possession or control with the exception of the 116 cattle purchased by JGL from third parties. As such, they claim the full amount of the auction proceeds less the value of these 116 cattle.

[17] The purpose of the Co-Ops is to assist Manitoba cattle producers by securing financing in the case of Township 20 so the producer can purchase breeding stock through a breeder agreement and in the case of Ste. Rose so the producer can purchase cattle to feed and finish for sale through a feeder agreement. All of the defendants are, or were, members of the Co-Ops. In practical terms, a member provides either Township 20 (if it is breeding stock) or Ste. Rose (if it is feeding stock) with details of cattle it wants to source. Applications are submitted first to the Co-Op for approval and then to the Co-Op's lender for financing. If both approve, the Co-Op purchases the cattle



and the member arranges for the cattle to be delivered to its designated pasture. Both the breeder and feeder agreements contain the following terms:

- The Co-Op purchasing the cattle ("livestock") on behalf of the member retains title to and ownership of the livestock and all progeny, until the livestock is sold;
- The member must notify the Co-Op when livestock is being sold and ensure all payments received are made payable directly to the Co-Op;
- The Co-Op pays to the member any amount net of the member's loan obligations;
- The member is not entitled to, nor does it have the right to use, the livestock as collateral or encumber it in any manner whatsoever; and
- The member is required to brand all livestock with the relevant Co-Op's brand immediately upon the livestock being delivered to the location designated by the member.

[18] In addition, members are required to sign a demand promissory note and grant security in the form of a purchase money security interest in favour of the Co-Op over the livestock and all progeny each time they enter into a new breeder or feeder agreement.

[19] Based on the several breeder and feeder agreements between the defendants and each of the Co-Ops, in 2021-2022, 5,327 head of cattle were put into the Bornes' possession. In advancing their claims, the Co-Ops argue that based on the breeder and feeder agreements and the Bornes' poor financial position, the only available inference is that all the cattle in the Bornes' possession in 2021 and 2022 (except for the third party cattle) up to the date of auction were placed by the Co-Ops. They say the Bornes were not in a position to have purchased the cattle in their own names given that in 2020, as a result of their banks' positions with them, the Bornes were working on a cash basis.

[20] The Co-Ops also argue that purported sales of cattle by the Bornes in their own names to each of JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch with payment to the Bornes were in violation of the breeder and feeder agreements which required notice of sale to the Co-Ops, sale in the Co-Ops' name, and payment from the buyers directly to the Co-Ops. As a result, it is the Co-Ops' position that these sales were not in the ordinary course of business such that none of the buyers took title free of the Co-Ops' ownership. The Co-Ops argue that all of JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch knew or ought to have known that there was at least a chance that these cattle were not owned or completely unencumbered because, as long-time sophisticated cattle industry participants, they would have understood that the Bornes would finance the purchase of cattle and the Co-Ops bought the cattle possessed by them. It is the Co-Ops' position that in the unique circumstances of this industry, it was incumbent upon JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch to investigate whether the Bornes had title to the cattle they were purporting to sell.

[21] In summary, it is the Co-Op's position that the ownership claims of JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch must fail because the Co-Ops owned all the cattle in the Bornes' possession or control (except for the third party cattle), and in the circumstances, ownership of this cattle did not transfer to them. As owners of the cattle, the Co-ops are unaffected by the interests of the secured creditors whose interests were granted by the Bornes.

[22] I am unable to accept the Co-Ops' ownership claim because, in my view, the Co-Ops have not sufficiently identified cattle in the Bornes' possession or control as subject to the breeder or feeder agreements.

[23] As indicated, underlying the Co-Ops' claim is that all cattle in possession of the Bornes belong to the Co-Ops based on sales reflected in the breeder and feeder agreements in 2021 and the first part of 2022. However, there is no compelling evidence connecting the cattle placed with the Bornes through breeder and feeder agreements with the specific cattle sold at auction. For example, the Co-Ops have not pointed to any persuasive evidence connecting the cattle placed with the Bornes in 2021 to cattle sold at the December 2022 auction.

[24] The Co-Ops point to the Bornes' financial position to argue that the cattle in the Bornes' possession could only have been financed through the Co-Ops. However, Jason Borne testified on examination for discovery that it was in April 2022, that they were running out of money. A significant number of the breeder and feeder agreements are dated before then. As well, as submitted by RBC's counsel, the Bornes had received millions of dollars from the banks.

[25] The Co-Ops argue that there is no evidence that the Bornes sold all of the Co-Ops' cattle to anyone other than JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch. However, Donna Wildeboer, the secretary/treasurer of the Co-Ops, deposed that as at the end of April or beginning of May 2022, from a visual inspection by a Co-Op livestock supervisor at Jason Borne's feedlot, there appeared to be the correct number of Ste. Rose's livestock with at least 30% of those he could see having the Ste. Rose brand.

However, by the time of auction, based on LSS reporting, there were only 15 Ste. Rose branded cattle, from which I infer that the Bornes disposed of Co-Op cattle to parties outside those whose cattle were sold at auction.

[26] With respect to the 15 Ste. Rose branded cattle that were sold at auction, Ste. Rose has not claimed these cattle based on its brand. This is understandable given that the branding of these cattle on its own is not necessarily proof of ownership because in Manitoba, a cattle brand is only one indicia of ownership (*Vita Credit Union Limited v. South East Livestock Ltd.*, 2000 MBQB 49, para. 37; affirmed 2001 MBCA 121). As is apparent from the inventory of cattle in the case at hand (which is discussed further below), it is undisputed that branded cattle can be sold free and clear.

[27] In summary, it is for the Co-Ops to identify the specific cattle sold at auction that were subject to the breeder or feeder agreements. For the reasons discussed, in my view, they have not done so.

[28] In refuting the Co-Ops' claim, the secured creditors also argue that even if Ste. Rose could identify the specific cattle sold at auction that were subject to its feeder agreements, its claim fails as the Co-Ops were not owners of the cattle but creditors. As creditors, their rights fall to be determined under *The Personal Property Security Act*, C.C.S.M., c. P35 (the *PPSA*). Given the uncontested evidence that Ste. Rose subordinated its security interest in the cattle to RBC, RBC says it would have priority to any such cattle. It is the Co-Ops' position that this same argument was advanced and rejected in *Vita Credit Union*. In turn, the secured creditors argued that *Vita Credit Union* is distinguishable for several reasons, particularly given the wording of the feeder

agreement, a promissory note from the relevant defendant in favour of the Co-Op, and changes to the **PPSA** which focus on the substance of the transaction rather than its form. Given my finding that the Co-Ops have not sufficiently identified cattle in the Bornes' possession or control as subject to the breeder or feeder agreements, I need not determine this question.

***Secured Creditors***

[29] It is the secured creditors' position that all cattle sold at auction were presumptively the property of the Bornes and therefore subject to the secured creditors' rights under their uncontested general security over all of the Bornes' property. As such, it is their position that except for the cattle which they concede are specifically and reliably identified by JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch as owned by them prior to the auction sale, the secured creditors are entitled to the proceeds of sale from all other cattle. In this regard, the secured creditors say the bulk of these other interested parties' claims to the cattle fail to demonstrate *in rem* claims, such that these claims need to be advanced *in personam*.

[30] As well, it is the secured creditors' position that to the extent that cattle sold at auction were part of the August 2022 transactions wherein the Bornes sold existing cattle to JGL (not the third party cattle), these cattle were not sold in the ordinary course of the Bornes' business. As such, they say any ownership interest JGL has in these cattle is not free from the secured creditors' security and therefore the secured creditors are entitled to the proceeds from the auction sale of these cattle.

[31] Below, I have considered each of the cattle ownership claims advanced by JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch, beginning with the question of whether any such cattle to which JGL might establish ownership are free from the secured creditors' security interests in these cattle.

[32] To the extent that these other interested parties have not established ownership claims (*in rem*) to specific cattle, I am satisfied on a balance of probabilities that the secured creditors are entitled to the proceeds of sale from these cattle given that they were owned by the Bornes. I make this finding based on the evidence that these cattle were in the possession or control of the Bornes and several reliable references in the evidence which demonstrate the Bornes' ownership of these cattle. For example, in his examination for discovery, Jason Borne gave evidence that there were cattle at the Isaac Yard (described further below), his farmyard, and David Borne's farmyard that he, David Borne or other Bornes owned. Some of this evidence from Jason Borne is corroborated with respect to specific cattle. For example, as will be further discussed, it is undisputed that 68 Titan branded heifers located at the "Isaac Yard" were purchased by Borne Farms on June 24, 2022, and, for the reasons discussed below, could not have been part of the August 2022 transactions. As well, there is no evidence that steers and bulls possessed by the Bornes belonged to anyone but the Bornes.

***JGL's Claim***

[33] JGL claims auction proceeds from the cattle that existed that were subject to the August 2022 transactions. These cattle consist of the cattle sold by the Bornes to JGL

and the 116 head of cattle purchased by JGL from third parties. The circumstances giving rise to the August 2022 transactions are as follows.

***August 2022 Transactions***

[34] On August 7, 2022, Jason Borne contacted JGL to obtain market pricing of various cattle and to discuss purchase and sale transactions of cattle to further the expansion, reorganization and restructuring of Borne Farms. On Sunday, August 14, 2022, by text message, Jason Borne confirmed to Rick Wright, a licensed livestock broker employed by JGL, certain contracts with JGL, whereby JGL was to purchase cattle from various of the defendants designated by Jason Borne and would then sell those cattle to one of the other defendants. To effect these purchases, on August 15, 2022, JGL made the requisite payments to each of the sellers pursuant to these purchase contracts.

[35] Mr. Wright deposed that in this timeframe, Jason Borne verbally represented to him that the Bornes would purchase an additional approximately 100 cattle from JGL upon JGL procuring sales from third party sellers. This led to JGL purchasing the 116 third party cattle on August 15, 2022.

[36] Also on August 15, 2022, JGL entered into various contracts for the sale of cattle to the defendants. However, the defendants did not make any payment to JGL. Accordingly, it is JGL's position that it continues to hold title to these cattle.

***Ordinary Course of Business***

[37] The secured creditors' position that the cattle sold by the Bornes to JGL were not sold in the ordinary course of the Bornes' business, and, therefore, are not free from their security is grounded in s. 30(2) of the ***PPSA***, which provides as follows:

**A buyer of goods** or lessee of goods sold or leased **in the ordinary course of business of the seller** or lessor **takes free of any perfected or unperfected security interest given by the seller** or lessor or arising under section 28 or 29, **whether or not the buyer of goods** or lessee **knows of it**, unless the buyer of goods or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

[Emphasis added]

[38] In *Paccar Financial Services Ltd. v. Chubey* (1992), 79 Man. R. (2d) 193 (Q.B.), Morse J. discussed the notion of "ordinary course of business" as follows (para. 21):

It is a question of fact in each case whether a sale is in the ordinary course of business. In *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 at 222 (Ont. H.C.), it was stated:

Thus in deciding whether a transaction is one that is in the ordinary course of business, the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact. ... The usual, or regular type of transaction that people in the seller's business engage in must be evaluated. If the transaction is one that is not normally entered into by people in the seller's business, then it is not in the ordinary course of business. If those in the seller's business ordinarily do enter into such agreements, then, even though it may not be the most common type of contract, it may still be one in the ordinary course of business.

[39] In *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307, Fruman J.A. discussed the nature of the analysis to determine whether a transaction was in the ordinary course of business, as follows (paras. 21-22) (citations omitted):

Courts are required to undertake a broad and case-specific analysis of the ordinary course of a particular company's business, for it is considered unwise to attempt a comprehensive definition: ... The analysis is to be achieved through an objective examination of the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. The transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation":...

In order to determine whether a transaction was in the ordinary course of a company's business, a court must consider all the circumstances which were known, or ought reasonably to have been known, by the parties at the time: ... Courts have identified a number of factors which may be taken into account:



(i)The nature and significance of the transaction: it ought to be one that a manager might reasonably be expected to carry out on the manager's own initiative without making prior reference back or subsequent report to superior authorities, such as the board of directors or the shareholders: ...;

(ii)The value of any asset sold: the disposition should have been made with proper regard to its value: ...;

(iii)The quantity of assets sold: the transaction ought not to resemble a liquidation of assets: ...;

(iv)The reason for the transaction: it ought not to have occurred as a response to financial difficulties or in suspicious circumstances: ...; and

(v)The intent of the transaction: neither its intent nor its effect should have been to undermine bank security: ...

To this list I would add:

(vi)The frequency of the type of transaction: an unusual or isolated transaction might be viewed differently from a routine one; and

(vii)The arm's length nature of the transaction: a transaction between a company and a party with whom it is related should receive careful scrutiny.

[40] In support of the secured creditors' position that the cattle sales by the Bornes to JGL were outside of the Bornes' ordinary course of business, they point out that the August 2022 transactions were significant as the Bornes were selling all of their cattle as part of a scheme to "roll" nonexistent cattle wherein cattle were being immediately resold to other Bornes (non-arm's length) at a loss to them (given JGL's commissions).

[41] I find that these sales by the Bornes to JGL were in the Bornes' ordinary course of business because they were undertaken to perpetuate their business and were aimed at permitting the Bornes' business to continue in the ordinary course. My finding is supported by my careful weighing of all the circumstances including the factors that may be taken into consideration as enumerated above.

[42] It is undisputed that the Bornes were regularly involved in the buying and selling of cattle. It is also undisputed that for a significant period before the August 2022 transactions, the Bornes were attempting to undertake a restructuring and expansion as part of their business. As discussed below, the August 2022 transactions were consistent with this undertaking.

[43] Mr. Wright deposed that in about late 2020, Jason Borne first discussed with him that his intention and that of his family was to expand their cattle operations by restructuring on the advice of their accountants. The impetus included the pending retirement of David Borne, expansion as a result of a potato waste contract, and the potential to increase sales to packing plants and the local abattoir. Mr. Wright, who has operated as a licensed livestock broker, dealer and agent in Manitoba for 43 years, primarily dealing with the cattle industry, deposed that such type of restructuring of farming operations is not uncommon in this industry.

[44] On their face, there was nothing unusual about the August 2022 transactions. Mr. Wright deposed that the transactions relating to the business reorganization and restructuring started in early 2021, and the bulk/volume of those transactions occurred in late 2021 to mid-2022. In the 18 months prior to the Mareva injunction, Mr. Wright assisted Jason Borne, his family members and companies with the purchase and sale of thousands of cattle through a variety of transactions. Mr. Wright deposed that by late 2021, Jason Borne was conducting a considerable volume of cattle dealings with JGL, and on average there were transactions of approximately \$1,000,000 to 2,000,000 per week for the six months prior to August 2022.

[45] Proper regard was had to the value of the cattle. Mr. Wright deposed that Jason Borne would regularly engage JGL either on his own behalf or on behalf of the other Borne to provide the fair market value of certain types of cattle. He would then either instruct JGL to purchase cattle from third parties that he would buy from JGL, or to purchase cattle from various of the Borne that would be resold usually to Borne Farms, Rocking B Cattle Co. Ltd., David Borne or to himself personally.

[46] On the face, there was also nothing unusual about the manner in which the Borne proceeded with the August 2022 transactions. Mr. Wright deposed that in his experience with Jason Borne over the past several years, he would typically speak by telephone and exchange text messages with Jason Borne through the week about the market price of various cattle. Following those exchanges, he would receive a text from Jason Borne, usually on a Sunday. His text would detail the cattle he, his family, or the family companies were selling, the proposed number of cattle, their weight, and price. Based on the text messages and phone calls, JGL would proceed to make the purchases from the designated seller. Generally, when the Borne were purchasers or sellers, Jason Borne would arrange transportation of the cattle. For transactions involving third parties, JGL would arrange for the transportation of these cattle to the delivery locations specified by Jason Borne. It is also undisputed that JGL, as a livestock dealer, was required to determine the price and make payment to the seller within one business day. Moreover, it is undisputed that often JGL buys and sells cattle without taking possession.

[47] It has not been demonstrated that the August 2022 transactions in themselves appeared distinguishable from previous transactions. Rather, the preponderance of

evidence is that they appeared common and routine in both their nature and frequency, and there was no apparent reason for JGL to pay special attention to them. In addition, it is undisputed that JGL's working relationship with the Borne family went back five or six years and JGL previously had no concerning issue with payment.

[48] While it is now clear that the ordinary course of business was used to hide the sales of the nonexistent cattle, in my view this does not outweigh my reasons (above) as to why the sales from the Borne family to JGL as part of the August 2022 transactions were in the ordinary course of the Borne family's business.

### ***JGL's Cattle Claim***

[49] I now turn to the question of whether JGL has sufficiently identified the cattle in which it asserts ownership so as to maintain an *in rem* claim.

[50] Based on Jason Borne's evidence, the cattle that did exist (excluding the 116 third party cattle) and were sold to JGL pursuant to the August 2022 transactions are:

- 87 cow/calf pairs owned by Borne Farms totaling 174 cattle;
- 83 out of 90 cow/calf pairs owned by Robin Borne totaling 166 cattle; and
- 78 cow/calf pairs owned by him totaling 156 cattle.

[51] Accordingly, with the 116 third party cattle, JGL's total claim is for 612 cattle. However, during the course of the submissions by JGL's counsel, JGL's ownership claim to cattle (that existed) sold by the Borne family to JGL and the 116 third party cattle was refined to the following:

- Isaac Yard:

LSS identified 232 head of cattle originating from Greg Isaac's farm (the "Isaac Yard"). From these cattle (which include the third party cattle), JGL

claims the following 209 cattle (JGL is not making an ownership claim regarding the remaining of the 232 cattle which were a bull and steers):

- 1 heifer;
  - 68 heifers (with Titan Livestock brand that was released – discussed below);
  - 5 heifers;
  - 31 mixed 1-2 year old heifers;
  - 2 head, a cow/calf pair;
  - 82 cows NVB;
  - 17 mixed sex 2022 born calves NVB;
  - 1 heifer; and
  - 2 head, a cow/calf pair NVB.
- From the Jason Borne Yard, JGL claims:
    - 117 mixed cows and mixed yearlings NVB; and
    - 61 mixed sex 2022 born calves NVB.
  - From Reedy Creek Pasture, JGL claims 20 out of 63 cows NVB.
  - JGL claims 60 additional calves pursuant to an answer to undertaking by Jason Borne.

***Isaac Yard***

[52] As indicated, JGL claims the 209 cattle including 19 calves from the Isaac Yard, as detailed above.

[53] It is JGL's evidence that pursuant to the August 2022 transactions, JGL purchased 116 cattle from third parties for sale to the Borne, they were delivered to the Isaac Yard, and were located at the Isaac Yard prior to auction. It is the secured creditors' position that the most JGL can claim are 56 of these third party cattle based on their challenges to the balance of the 116 cattle as articulated below. The secured creditors claim

entitlement to the rest of these 116 cattle as they say JGL has not reliably identified them so as to maintain an *in rem* claim.

[54] The 116 third party cattle purchased by JGL are described as follows:

- 29 mixed;
- 8 heifers;
- 13 cows;
- 16 cows and 16 calves; and
- 34 cows.

[55] It is undisputed that 99 cattle were delivered to the Isaac Yard, namely 59 mixed colored cows and heiferettes, 8 yearling heifers, and 16 cow/calf pairs. This is substantiated by a letter from Mr. Isaac (the admissibility of which was not challenged and relied upon by the secured creditors and JGL) indicating that these cattle were delivered to his farm by JGL for the account of Jason Borne or Borne Farms. However, the secured creditors dispute that JGL has demonstrated that 29 of these mixed colored cows were part of the August 2022 transactions given that Mr. Isaac's letter indicates these 29 cows were delivered to the Isaac Yard on August 13, 2022, which is prior to the text message from Jason Borne to Mr. Wright confirming the August 2022 transactions on August 14, 2022 and the related purchases on August 15, 2022.

[56] I find that these 29 mixed colored cows were part of the August 2022 transactions given Mr. Wright's affidavit evidence, which was not challenged on the cross-examination on his affidavit, that his contact with Jason Borne leading to the August 15, 2022 purchases began on August 7, 2022, and that Jason Borne verbally represented to him that the Borne defendants would purchase approximately 100 cattle from JGL upon JGL

procuring sales from third party sellers. Mr. Wright deposed that he procured these sales from the third parties. This evidence, along with the evidence that the text message of August 14, 2022 regarding the August 2022 transactions does not mention any of the cattle purchased from third parties, lead me to infer that these 29 cows were sourced on or prior to August 13, 2022 (when they were delivered to the Isaac Yard), from the third parties for the purpose of the August 2022 transactions.

[57] The secured creditors also challenge JGL's claim to 17 other cattle that JGL says were located at the Isaac Yard as part of its third party purchases. This challenge is based on Mr. Isaac's letter describing the delivery of only 99 cattle. I find that these 17 cattle were also part of the August 2022 transactions and thus owned by JGL. I make this finding based on the cross-examination of Mr. Wright on his affidavits wherein he testified that the 17 cattle purchased from the third parties that were not part of Mr. Isaac's letter could have been cattle that went to Borne Farms originally and then there was a large consignment of cattle that were taken from Jason Borne's home location and were delivered to Mr. Isaac's yard. Mr. Wright testified that "from our visual inspection of the cattle, there were cattle in that consignment that came from the Borne Yard to the Isaac Yard [that] were cattle that we purchased...". There is nothing in the examination for discovery of Jason Borne which is inconsistent with this testimony from Mr. Wright.

[58] The secured parties dispute JGL's ownership of 14 of the 16 calves that are part of the third party cattle as they say that 14 cows were no longer paired with calves (of the 16 cows and 16 calves). I find that all 16 of the calves at the Isaac Yard were part

of the third party cattle and thus owned by JGL. I make this finding based on Mr. Isaac's letter that 16 cow/calf pairs were part of a delivery to his farm on August 17, Jason Borne's examination for discovery testimony confirming the accuracy of the delivery of these 16 calves to Mr. Isaac's yard, and LSS reporting of the cattle at the Isaac Yard.

[59] I have considered JGL's claim to all of the additional cattle originating from the Isaac Yard as identified above (over and above the 116 third party cattle). The secured creditors challenge JGL's claim to these cattle. I am not satisfied that JGL has demonstrated their ownership of these other cattle.

[60] In support of their position of ownership of these additional cattle located at the Isaac Yard, JGL largely relies upon the fact that these cattle were located at the Isaac Yard and their argument that these fit within the description of the "cow/calf pairs" described by Jason Borne in his examination for discovery evidence as cattle that existed and were sold to JGL pursuant to the August 2022 transactions. However, there is no persuasive evidence that these other cattle at the Isaac Yard were the actual cattle sold to JGL as part of the August 2022 transactions.

[61] On examination for discovery, Jason Borne's evidence regarding JGL's ownership of the cattle at the Isaac Yard was limited to his confirmation that these cattle purchased by JGL were those described by Mr. Isaac in his letter (which total 99) and ownership of those listed in an inventory by Jason Borne in October 2022 which refers to "70 mixed cull cows heiferettes" and "20 to 25 pairs of cows", with the owner as "Jason Borne/JGL". Moreover, the 68 heifers with the Titan Livestock brand obviously cannot be described as cow/calf pairs (as a heifer by definition has not yet given birth to a calf). It is undisputed



that Titan Livestock released its brand over 197 cattle on July 28, 2022, which were heifers purchased by Borne Farms on June 24, 2022 (as also discussed above).

[62] In sum, JGL has demonstrated its ownership of the 116 third party cattle located at the Isaac Yard as described above.

***Jason Borne Yard and Reedy Creek Pasture***

[63] During Jason Borne's examination for discovery, when directed to the specific categories of cattle identified in LSS reporting, he identified the following additional cattle as owned by the Borne, existing, and sold to JGL pursuant to the August 2022 transactions:

- "133 mixed cows/bulls/mixed yearlings" identified as NVB from the "Jason Borne Yard";
- "61 mixed sex 2022 born calves" identified as NVB from the "Jason Borne Yard"; and
- Out of the "63 cows NVB" identified from the Reedy Creek Pasture, approximately 20 of those cows were JGL cows.

[64] JGL is not claiming the 16 bulls referenced as part of the "133 mixed cows/bulls/mixed yearlings" from the Jason Borne Yard. It is the secured parties' position that JGL's claim to the remaining 117 mixed cows/mixed yearlings at the Jason Borne Yard and the 20 cows at Reedy Creek Pasture is irreconcilable with the August 2022 transactions and to the extent it is supported by Jason Borne's evidence, his evidence must be treated with suspicion.

[65] I find that JGL has demonstrated its ownership of these cattle based on the examination for discovery evidence of Jason Borne that these cattle were sold by the

Bornes to JGL pursuant to the August 2022 transactions, which evidence is consistent with LSS reporting as at December 2022. While the secured creditors argue that "133 mixed cows/bulls/mixed yearlings" is inconsistent with the "cow/calf pairs" described by Jason Borne as existing cattle sold to JGL pursuant to the August 2022 transactions, in my view, such an inconsistency is not apparent. For example, it may be that the calves that formed part of the "cow/calf pairs" included in the August 2022 sales from the Bornes to JGL are identified as "yearlings" at the time of the December 2022 LSS reporting. This is not like the 68 heifers with the Titan Livestock brand located at the Isaac Yard that I concluded were not part of JGL's cattle because clearly they are neither cows (as they have not had calves), nor calves. To the extent that Jason Borne gave evidence that the bulls were sold to JGL, I find this evidence to be unreliable (as bulls cannot be part of cow/calf pairs). However, in my view, this unreliable evidence by Jason Borne does not detract from my other findings.

[66] JGL's ownership claim to the calves mentioned above and an additional 60 calves identified by Jason Borne in an answer to undertaking as also covered by the August 2022 transactions are discussed below.

***Summary of JGL's Cattle Ownership***

[67] In sum, I find that JGL has demonstrated its ownership of the 116 third party cattle at the Isaac Yard, 117 mixed cows/mixed yearlings all identified as NVB at the Jason Borne Yard, and 20 of the cows identified as NVB from the Reedy Creek Pasture. The question of JGL's claim to proceeds from the sale of other calves is further discussed below.

***Martin Livestock***

[68] Martin Livestock claims ownership of 180 branded cows, 74 calves from these cows, and 129 unbranded heifers. The secured creditors take no issue with Martin Livestock's claim to 141 of the cattle with its brand. With respect to Martin Livestock's claim to unbranded cattle, it is the secured parties' position that only seven cattle were identifiable based on their ear tags.

[69] It is undisputed that:

- Martin Livestock purchased a total of 330 head of cattle from Jason Borne or Borne Farms in two transactions: 200 heifers on June 26, 2021 and 130 heifers on August 8, 2021, one of which died;
- The 200 heifers were branded with Martin Livestock's brand;
- On March 30, 2022, 20 head were sold from the group of 200 branded heifers to Borne Farms; and
- LSS reported that there were 162 cattle branded with the Martin Livestock brand, being 161 cows and one heifer.

[70] To begin, I agree with RBC's position that 20 of 162 branded cattle would as reasonably as not be the 20 branded cattle Borne Farms purchased from Martin Livestock. Of course, the onus is on Martin Livestock to prove its ownership claim on a balance of probabilities. With these cattle as reasonably as not, the 20 cattle Borne Farms purchased from Martin Livestock, Martin Livestock has not proven its ownership of these 20 cattle to the requisite standard. With respect to the other 142 branded cattle, given the evidence that Martin Livestock purchased cattle fitting their description and branded them, I am satisfied that Martin Livestock has demonstrated its ownership of these cattle.

With respect to the remaining 129 unbranded heifers, I find that they were in the 89 unbranded heifers which were reported by LSS as in the Walker Pasture. I make this finding based on Jason Borne's text message of August 10, 2022 to Mr. Martin indicating that Mr. Martin owned 90 heifers located in the Walker Pasture as well as Jason Borne's evidence on examination for discovery that as at the summer of 2022, there were some of Martin Livestock's cattle in the Walker Pasture mixed with another group.

[71] I also find Mr. Martin's evidence to be compelling. Mr. Martin deposed that he checked on the cows he purchased from Jason Borne a number of times, including in January, February, and August 2022. On the cross-examination on his affidavit evidence, Mr. Martin testified that with respect to his checks on the 130 unbranded heifers, he saw them and he knew which ones they were by looking at them. He testified that every time he stopped in and looked at them, he got a rough count and verified they were still there and getting looked after. He testified that in August 2022, he saw the 90 in the Walker Pasture. Mr. Martin also testified on the cross-examination on his affidavit evidence that he attended the auction yard the night prior to sale to verify that his cattle were or were not there and he was also at the auction house the day of the sale, where they showed throughout the different sales.

[72] Mr. Martin acknowledged that it is a possibility that the ones from the Kinasota Pasture (which consists of Reedy Creek Pasture, Tommy Pasture, and Trail Ride Pasture) went missing (he did not go see them when he saw the 90 in the Walker Pasture in August 2022). While in a text message dated August 10, 2022, from Mr. Borne to Mr. Martin, Mr. Borne wrote "Heifers are here there are 39 out on a little

pasture in kinasota”, this same text message says “they are coming home next week...”. In these circumstances, I am not satisfied that Martin Livestock has demonstrated its ownership claim to more than the 89 unbranded heifers in the Walker Pasture.

[73] In sum, I find that Martin Livestock has demonstrated ownership of its 142 branded cattle and 89 unbranded heifers. The question of Martin Livestock’s claim to proceeds from the sale of calves is further discussed below.

***Titan Livestock***

[74] Titan Livestock claims 120 bred cows, two calves that were paired with their respective mothers, and along with Bear Spring Ranch, collectively claim an interest in 125 calves with NVB.

[75] The secured creditors take no issue with Titan Livestock’s claim over their branded cattle.

[76] It is undisputed that:

- In November 2021, Titan Livestock purchased 120 bred cows from Jason and Carla Borne;
- In early November 2021, each of these cows was branded with Titan Livestock’s brand;
- Based on a text message from Jason Borne as of July 19, 2022, of the 120 Titan cows, 119 cows remained alive; and
- LSS reports 124 Titan branded cattle as delivered to auction. However, Titan Livestock concedes that this is an accounting error.

[77] Given the undisputed evidence that Titan Livestock purchased these cattle, they were branded with the Titan brand, as at July 19, 2022, 119 cows remained alive, and at least this number of branded cattle were sold at auction, I am satisfied that

Titan Livestock has demonstrated its ownership of these 119 branded cattle. The question of Titan Livestock's claim to proceeds from the sale of calves is further discussed below.

***Bear Spring Ranch***

[78] Bear Spring Ranch claims 125 bred cows.

[79] The secured creditors take no issue with Bear Spring Ranch's claim over their Morison branded cattle.

[80] It is undisputed that:

- In November 2021, Titan Livestock, on behalf of its customer Bear Spring Ranch, purchased a total of 125 cows from Jason and Carla Borne;
- Based on a text message from Jason Borne as of July 19, 2022, all 125 cows remained alive; and
- LSS identified 43 cows and one heifer with the Rod and Cheryl Morison brand.

[81] Based on the foregoing evidence, I am satisfied that Bear Spring Ranch has demonstrated its ownership of these 44 branded cattle.

[82] With respect to Bear Spring Ranch's claim to the balance of the 125 cattle, these 81 cows were unbranded. Based on Jason Borne's inventory he provided in October 2022, and as confirmed in his examination for discovery evidence, there were to be 65 Bear Spring Ranch unbranded cows at Tommy Pasture and 15 Bear Spring Ranch unbranded cows at David Borne Yard. However, according to LSS reporting, there were only 16 unbranded cows at Tommy Pasture and 18 unbranded cows at David Borne Yard. To the extent that the LSS reporting corroborates Jason Borne's evidence, I am satisfied that Bear Spring Ranch has demonstrated its ownership of these unbranded cattle, which

total the 16 unbranded cows at Tommy Pasture and 15 unbranded cows at David Borne Yard. To the extent that there is no such corroboration, and with no other compelling evidence which supports Jason Borne's examination for discovery testimony, I am not satisfied that the evidence is sufficient to identify other unbranded cattle as owned by Bear Spring Ranch.

[83] In sum, I find that Bear Spring Ranch has demonstrated ownership of its 43 branded cows, one branded heifer, 16 unbranded cows at Tommy Pasture, and 15 unbranded cows at David Borne Yard. The question of Bear Spring Ranch's claim to proceeds from the sale of calves is further discussed below.

### ***Calves***

[84] Of the 1,265 cattle sold at auction, about 263 were calves born in 2022. To the extent that I have not already addressed JGL's calf ownership (above), I now address JGL's remaining claim to calves and the claims of the other interested parties to the remaining calves. As discussed below, JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch submit that at one time many more calves owned by them were in the Borne's possession or control. It is undisputed that many calves died and due to a lack of recordkeeping, determining with certainty how many of each of the calves they claim were alive at the time of auction is not possible. For these reasons, it is the secured creditors' position that essentially ownership to the calves has not been established by any of the other interested parties, and as such, the secured parties are entitled to the calves.

[85] In my view, there is compelling evidence that cows which I found to be owned by JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch were either paired with a calf at the time of purchase by them or gave birth to a calf and that some of these calves remained alive up to the auction date. However, it is also apparent that the number of calves sold at auction is less than the number of calves in which each of these interested parties have demonstrated their ownership and it is not always apparent which specific calves are owned by each of these interested parties. In light of these circumstances, below I have provided my view on the approach to be undertaken in determining the interested parties' claims to the auction sale proceeds from these calves.

***JGL***

[86] On examination for discovery, Jason Borne testified that the 83 cow/calf pairs that he believed existed as well as the 78 cow/calf pairs (relating to the August 2022 transactions) would have been part of the 370 cattle at his yard. LSS reported that 63 calves with NVB were located at the Jason Borne Yard. On this basis, I find that JGL has established ownership interests in 63 calves with NVB located at the Jason Borne Yard. However, as will be seen, there were fewer calves located at the Jason Borne Yard than those I find to be owned by all the interested parties. How to address this issue is discussed below.

[87] There is no other persuasive evidence as to additional specific calves owned by JGL. In answer to an undertaking, Jason Borne indicated that upon his review of the LSS report, in addition to the cattle reported during his examination, "approximately 60 calves on the Jason Borne home parcel...were the calves of those 'JGL' cows". However, at the



Jason Borne Yard, LSS only refers to "61 mixed sex 2022 born calves, NVB" along with two calves that are part of cow/calf pairs, both NVB. These calves are all already accounted for in my finding regarding JGL's ownership interests in the 63 calves discussed in the preceding paragraph. I see no compelling evidence that additional calves are owned by JGL.

[88] In sum, I find that JGL has demonstrated ownership interests in an additional 63 calves with NVB located at the Jason Borne Yard (which 63 calves are to be allocated based on the approach below).

***Titan Livestock and Bear Spring Ranch***

[89] Titan Livestock claims ownership of two calves that were paired with two of their bred cows and Titan Livestock, along with Bear Spring Ranch, collectively claim ownership interests in 125 calves with NVB.

[90] On examination for discovery, Jason Borne testified that each of the Titan Livestock and Bear Spring Ranch cows gave birth to a calf in the spring of 2022, resulting in a total of 245 calves. He estimates 115 calves died in 2022. Jason Borne also testified on examination for discovery that in an inventory provided on his behalf in October 2022, it is noted that 81 of Titan Livestock's calves were located "West of the Borne yard", 35 of Titan Livestock's cows and possibly some of their calves were located at the "Jason/Carla Borne farmyard", and 65 of the Bear Spring Ranch cows (which I discuss above) and a miscellaneous number of their calves were located at "Tommie's". Jason Borne also gave evidence on discovery that the Titan Livestock and Bear Spring Ranch cows were never separated from their respective calves. In addition,

on examination for discovery, Jason Borne testified that there is no way to find out how many Titan Livestock or Bear Spring Ranch calves remained alive as of December 2022 and their cows and respective calves were kept “all over the place”, in “different pastures”.

[91] From the foregoing evidence, I infer that Titan Livestock and Bear Spring Ranch in fact owned calves at the time of auction. However, it is not possible to conclusively identify the specific calves or total quantity of calves owned by them. In these circumstances, below I discuss the approach to allocating ownership of calves to them.

### ***Martin Livestock***

[92] Mr. Martin’s unchallenged affidavit evidence is that the 180 branded heifers (142 of which I found are owned by Martin Livestock) were expected to be bred in the summer of 2021, which would have calved in the winter or spring of 2022. However, given the stormy weather in April 2022, and combined with conditions at the Borne’s farm, he expects the loss of calves was high. In light of the existence of calves and cows, along with the attention that Mr. Martin paid to his cattle (as reviewed above), I find that calves were owned by Martin Livestock. However, it is not possible to conclusively identify the actual calves owned by them. In these circumstances, Martin Livestock claims the proportion of calves to their branded bred cows in each pasture, which it submits totals 74 calves.

### ***Allocation of Calves***

[93] For the reasons discussed above, each of JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch owned calves. However, the number of calves owned by them

exceeds the number of calves sold at auction. That is, there are competing ownership interests in the same calves. While it is effectively impossible to conclusively identify which of these calves are actually owned by each of the parties, in my view, this does not detract from my findings of calf ownership.

[94] With the evidence that each of JGL, Martin Livestock, Titan Livestock, and Bear Spring Ranch owned calves along with the presence of cows owned by them with calves in the same pastures, I infer that it is these calves that are subject to their ownership interests. It is my view that I would be ignoring the evidence of calf ownership if I conclude (as submitted by the secured creditors) that because of the competing ownership interests in the calves and imprecision about their identities and locations, the secured creditors are entitled to essentially all the calves. In my view, it follows that a practical, fair and equitable approach be applied to assess and determine the allocation of calves to the interested parties (including the secured creditors who are entitled to the proceeds of sale from those cattle that I have not found to be owned by JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch). I recognize that this approach may not lead to perfect results. Nevertheless, in my view, this approach also accords with the evidence and the consent order that ownership or other entitlement to the auction proceeds shall be determined on a balance of probabilities and on a summary basis.

[95] In the circumstances, I accept Martin Livestock's submission about how to allocate the calves. I find that this allocation method accords best with the evidence I have discussed and brings about the desired practical, fair and equitable approach.

Specifically, where a cow is clearly paired with a calf, this calf should be allocated to the owner (as I have found) of this cow. Where such pairing is not clear, in my view, it is fair, equitable, and sensibly reconciles with the evidence and the summary nature of this adjudication to determine the ownership of the calves by proportion to the cows owned (as I have found the owner to be) that are located in the same pasture as the calves.

### ***Secured Parties***

[96] As I indicated above (and for the reasons discussed), I am satisfied on a balance of probabilities that the secured creditors are entitled to the proceeds of sale from those cattle not owned by JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch given that these cattle were owned by the Bornes. For the same reasons I found that the Bornes owned those cattle not owned by JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch, I find that the Bornes were the owners of calves. As such, the same approach to the proportionate allocation of calves (as outlined in the preceding paragraph) is to apply to determine the number of calves to which the secured creditors are to be credited, namely by reference to the cows owned by the Bornes.

### ***Quantum***

[97] The interested parties have all made submissions as to how the cattle they claimed relates to the proceeds generated by the cattle sales at auction. I understand that this may be more challenging with respect to the auction sales of calves. Nevertheless, I would expect that with my findings, they will continue to work cooperatively and practically to use the sales information from the auction to quantify their entitlement to the auction proceeds.

## **CONCLUSION**

[98] In summary, I have arrived at the following conclusions:

- The Co-Ops have not sufficiently identified cattle in the Bornes' possession or control as subject to the breeder or feeder agreements. As such, I dismiss the Co-Ops' ownership claim. In these circumstances, I need not determine whether the Co-Ops are more properly considered owners or secured creditors.
- The sales of cattle from the Bornes to JGL as part of the August 2022 transactions were in the ordinary course of the Bornes' business.
- JGL has demonstrated its ownership of the 116 third party cattle at the Isaac Yard, 117 mixed cows/mixed yearlings all identified as NVB at the Jason Borne Yard, and 20 of the cows identified as NVB from the Reedy Creek Pasture.
- Martin Livestock has demonstrated ownership of its 142 branded cattle and 89 unbranded heifers.
- Titan Livestock has demonstrated ownership of its 119 branded cattle.
- Bear Spring Ranch has demonstrated ownership of its 43 branded cows, one branded heifer, 16 unbranded cows at Tommy Pasture, and 15 unbranded cows at David Borne Yard.
- JGL has demonstrated ownership interests in an additional 63 calves with NVB located at the Jason Borne Yard while the other interested parties have also established ownership of calves in various locations (including at the Jason Borne Yard). However, it is not possible to conclusively quantify or identify the actual calves owned by each of them.
- Given the lack of certainty regarding which calves sold at auction were owned by who, while recognizing the ownership of calves by each of JGL, Martin Livestock, Titan Livestock, Bear Spring Ranch, and the Bornes, the allocation of proceeds from the sale of the calves will be as follows. Where a cow is clearly paired with a calf, this calf should be allocated to the owner (as I have found) of this cow.

Where such pairing is not clear, ownership of the calves will be determined by proportion to the cows owned (as I have found the owner to be) that are located in the same pasture as the calves.

- The secured creditors are entitled to the proceeds of sale from those cattle not owned by JGL, Martin Livestock, Titan Livestock, or Bear Spring Ranch given that these cattle were owned by the Bornes. The same approach to the proportionate allocation of calves (as outlined in the preceding paragraph) is to apply to determine the number of calves to which the secured creditors are to be credited.

[99] I would expect that with my findings, counsel will work cooperatively and practically (as they have already done) to allocate the auction proceeds. Should unresolvable issues arise, counsel may arrange an appointment with me to consider how to next proceed.

[100] If there remain issues of costs that cannot be agreed upon, counsel may provide written submissions.

\_\_\_\_\_ A.C.J.