

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

FARM CREDIT CANADA

Applicant

- and -

**WHYTE'S FOODS INC./LES ALIMENTS WHYTE'S INC., MAISON GOURMET INC.,
TRIAK CAPITAL INC./CAPITAL TRIAK INC., AND MARIO SAROLI SALES INC.**

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED; AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS
AMENDED**

FACTUM OF THE RECEIVER

March 25, 2024

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solely in its capacity as Court-appointed
Receiver*

TO: THE SERVICE LIST

FACTUM OF THE RECEIVER

PART I: OVERVIEW

1. On October 6, 2023 this Court granted an order (the “**Receivership Order**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended, (the “**CJA**”) appointing FTI Consulting Canada Inc. as receiver and manager (in such capacity, the “**Receiver**”), without security, of all of those assets that constitute the Property (as defined below) of Whyte’s Foods Inc./Aliments Whyte’s Inc. (“**Whyte’s**”), together with its affiliated and subsidiary entities, Triak Capital Inc./Capital Triak Inc. (“**Triak**”), Maison Gourmet Inc. (“**Gourmet**”), and Mario Saroli Sales Inc. (“**Saroli**”, and together with Whyte’s, Triak, and Gourmet, the “**Debtors**”).

2. This factum is filed in support of a motion by the Receiver for, among other things:

- (a) an order (the “**Approval and Vesting Order**”), approving the sale transaction (the “**Transaction**”) contemplated by an asset purchase agreement (the “**Wallaceburg APA**”) between the Receiver and Select Property Holdings (Ontario) Inc., as subsequently assigned to 1000837498 Ontario Inc. (the “**Purchaser**”) and sealing the purchase price contemplated by Wallaceburg APA until the Transaction has been completed; and
- (b) an order (the “**Discharge and Ancillary Relief Order**”), among other things:

- (i) authorizing and directing the Receiver to distribute the Putters Adjustment Amount to 9498-8995 Québec Inc. and 9498-8938 Québec Inc. (together, “**Putters**”);
- (ii) approving the Second Report of the Receiver and the activities described therein;
- (iii) approving the fees and disbursements of the Receiver and its legal counsel, Bennett Jones LLP, in connection with these proceedings; and
- (iv) upon the filing of a certificate in the form appended to the proposed Discharge and Ancillary Relief Order (the “**Receivers Certificate**”), discharging the Receiver and releasing the Receiver from any and all liability in connection with carrying out its mandate as Receiver;

3. As further detailed below, the Transaction is the result of extensive marketing and solicitation efforts by the Debtors, the Receiver and their financial advisors. Accordingly, the Receiver believes that the Transaction is fair and reasonable in the circumstances and presents the best available option for the sale of the assets (the “**Purchased Assets**”).

4. Following the Transaction’s close and the completion of the Remaining Activities (as defined below), the Receiver believes that its mandate will be complete. As such, the Receiver submits that the relief proposed in the Discharge and Ancillary Relief Order represents the appropriate and last significant step in these receivership proceedings (the “**Receivership Proceedings**”).

PART II: FACTS

5. The facts underlying this motion are fully set out in the Second Report.¹ Capitalized terms used but not defined herein have the meanings given to them in the Second Report.

6. All references to monetary amounts herein are in Canadian dollars unless noted otherwise.

A. Background and Appointment of Receiver

7. The Debtors conducted business as a leading producer of pickled and fermented food products in Canada.² They did so through the operation of two manufacturing facilities located at 6800 Base Line Road, Wallaceburg, Ontario (the “**Wallaceburg Facility**”) and Saint-Louis, Quebec (the “**St. Louis Facility**”), as well as a distribution facility located in Sainte-Thérèse, Quebec (the “**St. Therese Facility**”).³

8. On August 23, 2023, following the delivery of demand and default letters and notices of intention to enforce security by their primary creditors Farm Credit Canada (“**FCC**”) and Wells Fargo Capital Financing Corporation Canada (“**Wells Fargo**”), the Debtors filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to subsection 50.4(1) of the BIA (such proceedings, the “**Proposal Proceedings**”).⁴

9. As a result of the Proposal Proceedings’ failure to result in a comprehensive going concern transaction for the Debtors’ business, both FCC and Wells Fargo brought separate applications for the appointment of receivers over the security they held in the Debtors.

¹ Second Report of FTI Canada Consulting Inc. dated March 20, 2024 [Second Report], Motion Record of FTI Consulting Canada Inc. dated March 20 [Motion Record] at Tab 2.

² *Ibid* at para 6, Motion Record at Tab 2.

³ *Ibid* at para 6, Motion Record at Tab 2.

⁴ *Ibid* at para 7, Motion Record at Tab 2.

10. On October 6, 2023, the Court issued the Receivership Order, among other things, appointing the Receiver over the Non-Trade Personal Property and real property of the Debtors, including the land and buildings at the Wallaceburg Facility (the “**Property**”).⁵

11. Separately, on October 6, 2023, the Court issued an order appointing Ernst & Young Inc. as receiver and manager of the Trade Personal Property subject to the security package of Wells Fargo (in such capacity, the “**Wells Receiver**” and such proceedings, the “**Wells Receivership Proceedings**”).⁶

B. Marketing Efforts and the Wallaceburg APA

1. Marketing Efforts and THS Transaction

12. Prior to the commencement of the Proposal Proceedings, the Debtors, with the assistance of their financial advisor, engaged in a broad sale and marketing process (the “**Pre-Filing Sale Process**”) in which 156 interested parties were approached and 72 parties were granted access to a virtual data room.⁷ While two parties submitted letters of intent by the prescribed deadline the Debtors were ultimately unable to complete a going-concern transaction for their business through the Pre-Filing Sale Process.⁸

13. Following the commencement of NOI proceedings, the Debtors undertook a second sale and marketing process assisted by their advisors (the “**NOI SISP**”), pursuant to which the Debtors were in contact with 42 interested parties.⁹ On reaching the bidding deadline, four offers were

⁵ *Ibid* at para 9, Motion Record at Tab 2.

⁶ *Ibid* at para 11, Motion Record at Tab 2.

⁷ First Report of FTI Canada Consulting Inc. dated October 30, 2023 at para 33 [the First Report], Motion Record at Tab 2A.

⁸ *Ibid* at paras 33-34, Motion Record at Tab 2A.

⁹ *Ibid* at para 36, Motion Record at Tab 2A.

received.¹⁰ Despite these offers, the parties were unable to agree on acceptable terms for a comprehensive and executable going concern transaction for the Debtors' business.¹¹

14. The NOI SISP did result in a sale of the St. Louis Facility and the Non-Trade Personal Property located thereon (the "**St. Louis Transaction**").¹² The St. Louis Transaction closed on October 12, 2023, and the proceeds therefrom (the "**St. Louis Proceeds**") were transferred to the Receiver in accordance with the Receivership Order.¹³

15. The NOI SISP also resulted in the identification of THS Foods Canada Ltd. ("**THS**") as a potential buyer for certain of the Debtors' Non-Trade Personal Property (the "**THS Purchased Assets**"), culminating in the execution of an asset purchase agreement (the "**THS APA**") on October 23, 2023.¹⁴ On November 6, 2023 the Court granted an order, among other things, approving the THS APA and vesting in THS the title and interest in and to the THS Purchased Assets.¹⁵

16. Pursuant to an occupancy agreement (the "**Occupancy Agreement**") dated February 1, 2024 between THS, as licensee, and the Receiver, the Receiver granted THS a temporary right to periodically access and occupy the Wallaceburg Facility to facilitate the removal of the THS Purchased Assets from the Wallaceburg Facility, on the terms and conditions contained therein.¹⁶

¹⁰ *Ibid* at para 37, Motion Record at Tab 2A.

¹¹ *Ibid* at para 37, Motion Record at Tab 2A.

¹² Second Report, *supra* note 1 at para 39, Motion Record at Tab 2.

¹³ *Ibid* at para 12, Motion Record at Tab 2.

¹⁴ *Ibid* at para 37, Motion Record at Tab 2.

¹⁵ *Ibid* at para 38, Motion Record at Tab 2.

¹⁶ *Ibid* at para 38, Motion Record at Tab 2.

2. Wallaceburg APA

17. Following the execution of the Occupancy Agreement and the establishment of a timeframe for the removal of the THS Purchased Assets from the Wallaceburg Facility, the Receiver advanced efforts to pursue a sale of the Wallaceburg Facility.¹⁷ As a part of these efforts, the Receiver engaged with several brokerages to provide formal marketing proposals regarding the sale of the Wallaceburg Facility.¹⁸ The timelines for sale presented by brokerages ranged between approximately 12 to 18 months from the date of their engagement.¹⁹

18. Around this time, the Receiver was contacted by certain third parties inquiring as to the status of the Wallaceburg Facility.²⁰ While discussions with one party fell through, discussions with the other party (the Purchaser), continually progressed.²¹ Eventually, the Receiver, in consultation with FCC, determined that the best course of action would be to complete the sale with the Purchaser, given the lengthy timelines contemplated by brokerage-led sales processes and the considerable costs such processes would thus necessitate.²²

19. A summary of the Transaction is as follows:

- (a) Purchaser: Select Property Holdings (Ontario) Inc., as assigned to 1000837498 (the “**Purchaser**”);
- (b) Structure: Asset purchase agreement pursuant to an approval and vesting order;

¹⁷ *Ibid* at para 40, Motion Record at Tab 2.

¹⁸ *Ibid* at para 41, Motion Record at Tab 2.

¹⁹ *Ibid* at para 41, Motion Record at Tab 2.

²⁰ *Ibid* at para 42, Motion Record at Tab 2.

²¹ *Ibid* at para 42, Motion Record at Tab 2.

²² *Ibid* at para 43, Motion Record at Tab 2.

- (c) Purchase Price: Cash in an amount specified in the Wallaceburg APA (the “**Purchase Price**”). As set out below, information relating to the Purchase Price is requested to be sealed until the closing of the transaction;
- (d) Purchased Assets: (i) the lands and premises identified in Schedule “A” attached thereto together with all fixtures, buildings, structures and improvements now or hereafter located thereon and together with all easements, rights of way, privileges and appurtenances attaching thereto and enuring to the benefit thereof; and (ii) the chattels identified in Schedule “B” attached thereto;
- (e) Deposit: 1.38% of Purchase Price, which has been paid to the Receiver in escrow pending closing;
- (f) Outside Date: April 1, 2024, or such later date as may be agreed;
- (g) Material Conditions: the only remaining material condition is issuance by the Court of the Approval and Vesting Order;
- (h) Termination: the Wallaceburg APA is terminable (i) by the Receiver or Purchaser if the Approval and Vesting Order is not issued prior to the Outside Date; or (ii) by either party in the event of material breach by the other party that is not cured prior to the Outside Date.²³

C. Proposed Putters Adjustment Amount Distribution

20. As previously outlined, the Receiver is seeking authorization to make a distribution in the amount of \$40,313.90 (the “**Putters Adjustment Amount**”) to Putters within the Discharge and

²³ *Ibid* at para 45, Motion Record at Tab 2.

Ancillary Relief Order.²⁴ Such amount relates to routine closing adjustments from the sale of the St. Louis Facility relating to municipal sales taxes that had not been affected at the time of closing due to an omission on the part of both the parties.²⁵

21. The Receiver has been informed that it is the successor to Whyte's in liability for the Putters Adjustment Amount, given their receipt of the St. Louis Proceeds and their appointment as Receiver over the Property.²⁶ As such, the Receiver has advised counsel to Putters that it supports the distribution of the Putters Adjustment Amount.²⁷

D. The Receiver's Activities

22. Since the last appearance in this Court, the Receiver with the assistance of its counsel, has diligently advanced these Receivership Proceedings in the interests of the Debtors and their stakeholders, including by, *inter alia*:

- (a) selling certain miscellaneous items of personal property to employees;
- (b) creating new utilities accounts for the Debtors' remaining locations;
- (c) engaging in discussions with the Wells Receiver regarding the settlement of certain costs, due to payments made by the Receiver pertaining to the Debtors' Trade Personal Property and payments made by the Wells Receiver pertaining to the Property;
- (d) engaging in discussions with Revenu Quebec regarding goods and services tax ("GST") and Quebec sales tax ("QST") owing pursuant to several asset sales and purchases made over the course of the Receivership;
- (e) the disclaimer of certain agreements for leased property;

²⁴ *Ibid* at paras 51 and 53, Motion Record at Tab 2.

²⁵ *Ibid* at para 51, Motion Record at Tab 2.

²⁶ *Ibid* at para 55, Motion Record at Tab 2.

²⁷ *Ibid* at para 52, Motion Record at Tab 2.

- (f) executing the Occupancy Agreement;
- (g) coordinating the removal of the THS Purchased Assets from the Wallaceburg Facility;
- (h) negotiating the Wallaceburg APA and facilitating the due diligence requests and the site tours in connection therewith;
- (i) distributing approximately \$12,200,000 to FCC on December 13, 2023, from funds held in trust by the Receiver; and
- (j) selling certain of the Non-Trade Personal Property located at the St. Therese Facility and St. Louis Facility pursuant to two separate bills of sale in the amounts of \$132,221.25, inclusive of GST and QST and USD \$5,748.75, inclusive of QST and GST respectively.²⁸

E. The Fees and Disbursements of the Receiver and its Counsel

23. The Receivership Order provides that the Receiver and its counsel, Bennett Jones LLP (“**Bennett Jones**”) are to be paid their reasonable fees and disbursements and shall pass their accounts from time to time.²⁹

24. Pursuant to the proposed Discharge and Ancillary Relief Order, the Receiver is seeking the approval of its fees and disbursements incurred up to March 17, 2024 and the fees and disbursements of Bennett Jones incurred up to February 29, 2024.³⁰ In addition, the Receiver is seeking the approval of estimated fees and disbursements in the amount of \$150,000 from March 18, 2024 and estimated fees in the amount of \$75,000 from March 1, 2024 for Bennett Jones.³¹ The fees and disbursements of the Receiver and Bennett Jones are set out in the affidavits of Jeffrey

²⁸ *Ibid* at para 23, Motion Record at Tab 2.

²⁹ [Order Appointing Receiver](#) dated October 6, 2023 at para 18.

³⁰ Second Report, *supra* note 1 at paras 61 and 63, Motion Record at Tab 2.

³¹ *Ibid* at paras 62 and 64, Motion Record at Tab 2.

Rosenberg and Sean Zweig attached to the Second Report as Appendices “G” and “H” (together the “**Fee Affidavits**”), respectively.³²

F. Proposed Discharge and Release

25. The proposed Discharge and Ancillary Relief Order contemplates the Receiver’s discharge upon the filing of the Receiver’s Certificate.³³ Such notice is to be filed following the completion of certain remaining activities in these Receivership Proceedings including, *inter alia*: (i) distributing the Putters Adjustment Amount; (ii) remitting GST and QST to Revenu Quebec; (iii) completing the Wallaceburg Transaction, and (iv) effecting a final distribution to FCC (collectively, the “**Remaining Activities**”).³⁴

26. The proposed Discharge and Ancillary Relief Order also provides, *inter alia*, that the Receiver shall not be liable for any act or omission on its part, or any reliance thereon, including without limitation, any act or omission pertaining to the discharge of its duties in the Receivership Proceedings, and releases the Receiver and its legal counsel from potential future claims in connection with their performance of duties.³⁵

PART III: ISSUES

27. The issues in this motion are twofold:

- (a) Should this Court grant the Approval and Vesting Order?
- (b) Should this Court grant the Distribution and Ancillary Relief Order?

³² *Ibid* at paras 62 and 64, Motion Record at Tab 2.

³³ *Ibid* at para 17, Motion Record at Tab 2.

³⁴ *Ibid* at para 66, Motion Record at Tab 2.

³⁵ Proposed Discharge and Ancillary Relief Order at para 7, Motion Record at Tab 5.

PART IV:

LAW AND ARGUMENT

A. The Approval and Vesting Order

1. The Transaction Should be Approved

28. Section 100 of the *CJA*, as amended, authorizes this Court to grant an order vesting “in any person an interest in real or personal property that the Court has authority to order be conveyed”.³⁶

Similarly, section 243(1) of the *BIA*, vests this Court with jurisdiction to “grant a vesting order vesting property in a purchaser”.³⁷

29. The principles to be applied when determining whether to approve a sale transaction are well known to this Court and were articulated by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.* (“*Soundair*”):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.³⁸

30. The Transaction satisfies the *Soundair* principles given that:

³⁶ *Courts of Justice Act*, RSO 1990, c. C.43 s 100; *Elleway Acquisitions Limited v 4358376 Canada Inc.*, 2013 ONSC 7009 at para 30 [*Elleway*].

³⁷ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 87 [*Third Eye*]; *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 243(1) [*BIA*].

³⁸ *Royal Bank of Canada v Soundair Corp.*, [1991] 46 OAC 321 at para 16 [*Soundair*]; *Elleway* at para 31; *Home Trust Co v 2122775 Ontario Inc.*, 2014 ONSC 1039 at para 11; *Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727 at para 18 [*Romspen*].

- (a) the Purchased Assets were subject to multiple broad marketing efforts through the Pre-Filing Sale Process and NOI SISP;
- (b) the Receiver's subsequent solicitation of brokerage-led sales processes yielded much less favorable timelines and significantly higher costs than the Transaction, with no certainty that a better outcome would be achieved;
- (c) the Purchaser is the only party with whom negotiations reached a stage wherein a reasonable agreement was capable of being reached;
- (d) the Receiver believes the consideration provided for in the Wallaceburg APA represents the best recovery in respect of the Purchased Assets in the circumstances; and
- (e) FCC, the only party with an economic interest in the Purchased Assets and proceeds of the sale, is supportive of the Transaction.³⁹

2. The Court has Jurisdiction to Grant the Approval and Vesting Order

31. In *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, the Ontario Court of Appeal clarified that a court's jurisdiction under section 243(1) of the BIA to authorize a receiver to "take any other action that the court considers advisable" includes the authority to grant a vesting order vesting property in a purchaser free and clear of encumbrances and extinguishing liabilities.⁴⁰

³⁹ Second Report, *supra* note 1 at paras 32-35, 41-44 and 47-49, Motion Record at Tab 2.

⁴⁰ *Third Eye*, *supra* note 37 at para 87.

32. In granting approval and vesting orders, courts have made clear that the recommendation of the Court-appointed receiver in respect of the proposed sale transaction should only be ignored in exceptional circumstances.⁴¹

3. The Sealing Language is Necessary

33. The Receiver respectfully requests that the Court seal information relating to the Purchase Price of the Wallaceburg APA until the completion of the Transaction.

34. In *Sherman Estate v. Donovan*, the Supreme Court recast the test to be used by a court in considering whether a sealing order should be granted.⁴² The party asking a court to exercise its discretion to grant a sealing order must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁴³

35. Sealing orders relating to transaction economics are regularly granted in receivership and other insolvency proceedings, including in the Receivership Proceedings with respect to the THS APA. Courts have recognized that the disclosure of highly sensitive commercial information, including purchase prices, can be “harmful to stakeholders by undermining the integrity of the sale process”.⁴⁴ Courts have also recognized that there is a broader public interest in maintaining the confidentiality of sensitive commercial information, including key business terms of sale purchase agreements.⁴⁵

⁴¹ *Soundair*, *supra* note 38 at para 58; *Romspen*, *supra* note 38 at para 18.

⁴² *Sherman Estate v. Donovan*, 2021 SCC 25 at para 38. [*Sherman Estate*]

⁴³ *Ibid.*

⁴⁴ *Elleway*, *supra* note 38 at para 48. See also: *Ontario Securities Commission v Bridging Finance Inc. et al.* (July 17, 2023) Toronto CV-21-00661458-00CL, (ONSC)(Approval and Vesting Order) para 7.

[Bridging]

⁴⁵ *U.S. Steel Canada Inc. et al. v The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2023 ONSC 2579 at para 54 [*U.S. Steel*]; and *American General Life Insurance Company et al. v Victoria Avenue North*

36. The proposed sealing language has been narrowly tailored to only redact the purchase price, with such information only to be sealed until the Transaction closes. The Wallaceburg APA with the purchase price redacted has been made publically available. In the event that the Transaction fails to close, the disclosure of this information could cause material harm to the value of the Purchased Assets, and therefore prejudice to FCC. This court has previously held that such narrowly tailored sealing orders greatly outweigh any deleterious effects that such sealing may cause.⁴⁶

37. If the requested Approval and Vesting Order is granted, it is expected that the Transaction will close as early as the day following the hearing. Therefore, as a matter of proportionality, the benefits of sealing the Purchase Price and thereby preserving the value of the Purchased Assets should closing not occur outweigh the negative effects, and the sealing order should be granted.

B. The Distribution and Ancillary Relief Order

1. The Receiver's Activities Should be Approved

38. The activities of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the FCC Receivership Order and subsequent Orders issued in these proceedings, and were in each case in the best interests of the Debtors and their stakeholders generally.

2. The Fees and Disbursements of the Receiver and its Counsel are Fair and Reasonable

39. The Receiver is seeking approval of the professional fees incurred by it and its legal counsel as described in the Fee Affidavits. Pursuant to paragraph 18 of the Receivership Order, the

[Holdings Inc. et al.](#), 2023 ONSC 3322 at para 30.

⁴⁶ [U.S. Steel](#) at para 54; [Ontario Securities Commission v Bridging Finance Inc. et al.](#), 2023 ONSC 4203 at para 29.

Receiver and its counsel are entitled to be “paid their reasonable fees and disbursements, in each case at their standard rates and charges.”⁴⁷

40. The standard to be applied is whether the compensation sought is “fair and reasonable”, with an emphasis on the value provided and what was accomplished.⁴⁸ Given the complexity of this insolvency matter, the fees of the Receiver and the fees of its counsel are within an appropriate range for insolvency services of this nature rendered by other firms in the City of Toronto.

3. The Proposed Putters Distribution is Fair and Reasonable

41. The Receiver is seeking the authorization and direction to make a distribution of the Putters Adjustment Amount to Putters. Orders authorizing distributions with a reserve are routinely granted by courts in insolvency proceedings, including receiverships and the Court’s authority to grant such distributions is well established.⁴⁹

42. The Putters Adjustment Amount is comprised of typical real-estate tax adjustments in the Province of Quebec and accords with the tax records of the subject property in the province.⁵⁰ Furthermore, the Receiver is supportive of distributing the Putters Adjustment Amount to Putters given that: (i) the sale proceeds of the St. Louis Transaction constitute a portion of the Property; and (ii) the Receiver is the successor of the St. Louis Proceeds.⁵¹ As such, the Receiver respectfully submits that it be granted the authority to distribute the Putters Adjustment Amount.

⁴⁷ [Order Appointing Receiver](#) dated October 6, 2023 at para 18.

⁴⁸ [Bank of Nova Scotia v. Diemer](#), 2014 ONCA 851 at paras [44-45](#).

⁴⁹ [Re Windsor Machine & Stamping Ltd.](#), 2009 CanLII 39772 (ONSC) at paras [8 & 13](#); [Abitibowater Inc. \(Re\)](#), 2009 QCCS 6461 at paras [70-75](#) [[Abitibowater](#)].

⁵⁰ Second Report *supra* note 1 at para 54, Motion Record at Tab 2.

⁵¹ *Ibid* at para 52, Motion Record at Tab 2.

4. FTI Should be Discharged and Released

43. Pursuant to the proposed Discharge and Ancillary Relief Order, FTI will be discharged as the Receiver of the Debtors' Property and released from any and all liability that it has or may have through any reason of, or in any way arising out of, its acts or omissions while acting in its capacity as the Receiver, upon the filing of the Receiver's Certificate.⁵²

44. This Court has inherent jurisdiction to discharge a Court-appointed receiver upon the completion of its mandate.⁵³ When exercising such jurisdiction, this Court has held that a release in favor of the Court-appointed receiver, "should issue", provided that there is no evidence of improper conduct or negligence on the part of the receiver.⁵⁴

45. In these circumstances, the Receiver submits that it is appropriate for this Court to exercise its jurisdiction to discharge and release FTI in the manner proposed given that: (i) upon the completion of the Remaining Activities, the Receiver will have no further mandate in these Receivership Proceedings; (ii) the proposed release is customary and included in the Court's model discharge order; and (iii) approving the Receiver's discharge upon filing of the Receivership Certificate will prevent the need for a subsequent Court attendance, and therefore promotes both fiscal efficiency for the estate as well as the efficient use of the Court's time.⁵⁵ The Receiver therefore respectfully submits that the Receivership Proceedings should be terminated and the Receiver should be discharged and released following the filing of the Receiver's Certificate with the Court, certifying that it has completed the Remaining Activities.

⁵² *Ibid* at para 17, Motion Record at Tab 2.

⁵³ *BIA* supra note 37 s.183(1). *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.* (2009), OJ No. 4265 at paras 8-9 [*Ed Mirvish*]; *Yukon (Government of) v Yukon Zinc Corporation, 2022 YKSC 58* at paras 26-28 [Yukon Zinc]. See also: *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, (February 7, 2024), Toronto CV-22-674810-00CL (Endorsement) (ONSC).

⁵⁴ *Pinnacle Capital Resources Ltd v Kraus Inc, 2012 ONSC 6376* at para 47 [*Pinnacle*]. See also, *Yukon Zinc, ibid* at paras 26-29.

⁵⁵ Second Report, *supra* note 1 at paras 66-69, Motion Record at Tab 2.

PART V:

RELIEF REQUESTED

46. The Receiver requests that this Court grant the proposed form of Approval and Vesting Order and this Discharge and Ancillary Relief Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones LLP

March 25, 2024

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Abitibowater Inc. \(Re\)*, 2009 QCCS 6461](#)
2. [*American General Life Insurance Company et al. v Victoria Avenue North Holdings Inc. et al.*, 2023 ONSC 3322](#)
3. [*Bank of Nova Scotia v. Diemer*, 2014 ONCA 851](#)
4. [*Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.* \(2009\), OJ No. 4265](#)
5. [*Elleway Acquisitions Limited v 4358376 Canada Inc.*, 2013 ONSC 7009](#)
6. [*Home Trust Co v 2122775 Ontario Inc.*, 2014 ONSC 1039](#)
7. [*KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2024 ONSC 919](#)
8. [*Ontario Securities Commission v Bridging Finance Inc. et al.*, 2023 ONSC 4203](#)
9. [*Pinnacle Capital Resources Ltd v Kraus Inc.*, 2012 ONSC 6376](#)
10. [*Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772](#)
11. [*Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727](#)
12. [*Royal Bank of Canada v Soundair Corp.*, \[1991\] 46 OAC 321](#)
13. [*Sherman Estate v. Donovan*, 2021 SCC 25](#)
14. [*Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508](#)
15. [*U.S. Steel Canada Inc. et al. v The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2023 ONSC 2579.](#)
16. [*Yukon \(Government of\) v Yukon Zinc Corporation*, 2022 YKSC 58.](#)

Court Orders

1. Approval and Vesting Order in [*Ontario Securities Commission v Bridging Finance Inc. et al.*](#)

SCHEDULE B – STATUTES RELIED ON

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Section 183

Courts vested with jurisdiction

(1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;

Section 243

Court may appoint receiver

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

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

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

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

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

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

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

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

Definition of receiver — subsection 248(2)

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

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

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

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Courts of Justice Act, R.S.O. 1990, c. C.43

Section 100

Vesting Orders

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

FARM CREDIT CANADA

and

**WHYTE'S FOODS INC./LES ALIMENTS WHYTE'S INC.,
MAISON GOURMET INC., TRIAK CAPITAL INC./CAPITAL
TRIAK INC., AND MARIO SAROLI SALES INC.**

Applicant

Respondents

Court File No.: CV-23-00707205-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced in Toronto

Factum of the Receiver

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*Lawyers for FTI Consulting Canada Inc. solely in its
capacity as Court-appointed Receiver*