

Court File No.: CV12-9616-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BANK OF MONTREAL

Applicant

-and-

**NFC ACQUISITION GP INC., NFC ACQUISITION CORP. NFC ACQUISITION L.P.,
NEW FOOD CLASSICS AND NFC LAND HOLDINGS CORP.**

Respondents

**FIFTH REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS RECEIVER**

BACKGROUND

1. On January 17, 2012, NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp. (collectively, the “**Applicants**” and together with NFC Acquisition L.P., and New Food Classics, “**NFC**”) obtained an initial order under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”). The Initial Order under the CCAA in respect of NFC appointed FTI Consulting Canada Inc. as monitor (“**FTI**” or the “**Monitor**”) and granted, *inter alia*, a stay of proceedings against NFC until February 16, 2012. The stay of proceedings was thereafter extended pursuant to a further order by the Court until March 30, 2012. A copy of the Initial Order is attached hereto as **Appendix “A”**.

2. As a result of the failure of the Sales Process in the CCAA proceedings (the particulars of which are set out in the Third Report of the Monitor, a copy of which is attached hereto as **Appendix “B”**), on February 22, 2012, the Court granted: (i) Bank of Montreal (“**BMO**”) leave in the CCAA proceedings to lift the stay of proceedings to allow BMO to bring an application for the appointment of a receiver of the property, assets and undertaking of NFC (the “**NFC Assets**”); and (ii) an Order in these proceedings pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and section 101 of the *Courts of Justice Act*, appointing FTI as receiver of the assets, property and undertakings of NFC (in that capacity the “**Receiver**”) (the “**Receivership Order**”, a copy of which is attached hereto as **Appendix “C”**).

PURPOSE OF THIS REPORT

3. The purpose of this fifth report of the Receiver (the “**Fifth Report**”) is to:
- (a) provide the Court with the background information and Receiver’s recommendation relating to the Receiver’s motion for:
 - (i) the approval of the Court, pursuant to subparagraph 3(l)(ii) of the Receivership Order, for the Receiver to enter into and carry out the terms of an agreement of purchase and sale (the “**Canafric Agreement**”) with Canafric Inc. (the “**Purchaser**”) in respect of the land and buildings having a municipal address of 15 Seapark Drive, St. Catharines, Ontario (the “**St. Catharines Property**”) owned by NFC Acquisition Corp. (the “**Proposed Transaction**”);
 - (ii) an order declaring the Restrictive Covenant (as defined below) unenforceable as against the St. Catharines Property and discharging it from title; and

- (iii) vesting the St. Catharines Property in the Purchaser (the “**Vesting Order**”) effective upon closing of the Proposed Transaction, free and clear of the Restrictive Covenant and all claims and encumbrances other than the permitted encumbrances contemplated by the Canafric Agreement;
- (b) approving the Receiver’s activities, as described in this report; and
- (c) such other relief as counsel may advise and the Court permit.

DEFINED TERMS

4. Capitalized terms not otherwise defined herein have the meanings set out in the Monitor’s Prefiling Report, the Monitor’s Third Report, the Receivership Order, the Receiver’s Second Report and the Receiver’s Third Report.

THE ST. CATHARINES FACILITY

5. As more particularly described in the Pre-Filing Report of FTI filed in the CCAA Proceedings (a copy of which, without appendices, is attached hereto as **Appendix “D”**), until 2010, two of NFC’s food processing facilities were located in Calgary, Alberta. NFC’s third food processing facility was located in Saskatoon, Saskatchewan.

6. The St. Catharines Property was acquired by NFC Acquisition Corp on or about September 16, 2010, pursuant to a purchase and sale agreement (the “**Pinty’s Sale Agreement**”) dated August 18, 2010, with Pinty’s Delicious Foods (“**Pinty’s**”) for a stated purchase price of \$2,000,000. A copy of the Pinty’s Sale Agreement is attached hereto as **Appendix “E”**. In early 2011, NFC relocated its Calgary food processing operations to the St. Catharines Property and

ceased operations in Calgary. NFC also moved its head office operations from Calgary to Burlington, Ontario at or about the same time.

7. Pursuant to the Sale Agreement, NFC covenanted and agreed that the St Catharines Property would not be used for the processing of “chicken products” for a period of five years from the closing date and that a restrictive covenant be registered on title to the St. Catharines Property. A restrictive covenant was registered by Pinty’s on title to the St Catharine’s Property on September 16, 2010 as instrument number NR250763, a copy of which is attached hereto as **Appendix “F”** (the “**Restrictive Covenant**”), purporting to restrict the processing and/or packaging any edible food product containing any component of chicken or fowl as one of the ingredients on the St Catharines Property for a period of five years.

8. Immediately to the west of the St Catharines Property is a 12.6 acre parcel of vacant lands owned by Pinty’s which does not have visible buildings or improvement thereon (the “**Adjacent Property**”). Pursuant to the Pinty’s Sale Agreement, Pinty’s was to grant NFC a right of first right of refusal to purchase the Adjacent Property for a period of seven years. The Receiver understands that the Adjacent Property is actively being marketed for sale by Pinty’s. A photograph of the “for sale” sign currently on the Adjacent Property is attached hereto as **Appendix “G”**.

THE FAILED CCAA SALES PROCESS

9. In January 2012, upon commencement of the CCAA Proceedings, NFC and the Monitor implemented the Court approved Sales Process for all of the property, assets and undertaking of NFC on a going-concern basis, including the St. Catharines Property. The principal steps of the Transaction Process are outlined in paragraph 36 of the Prefiling Report.

10. In accordance with the Sales Process, the NFC Assets were offered both *en bloc* and as the following separate parcels:

- (i) The Saskatoon Property (including the associated equipment, inventory and accounts receivable);
- (ii) The St Catharines Property (including the associated equipment (the “**St. Catharines Equipment**”), inventory and accounts receivable);
- (iii) The Calgary 13A Street Property; and
- (iv) The Calgary Brandon Street Property.

11. The Monitor received Phase 1 Expressions of Interest from eleven interested parties, four of whom included the St. Catharines Property in their Expressions of Interest (the “**St. Catharines Bidders**”). Of the four St. Catharines Bidders, only two submitted Expressions of Interest for all of the NFC assets on an *en bloc* basis (the “**En Bloc Parties**”). Three of the St. Catharines Bidders, including the two En Bloc Parties, were among the group of “Selected Parties” who were invited to participate in Phase 2 of the Sales Process.

12. As more particularly described in the Third Report of the Monitor, the Selected Parties invited to participate in Phase 2 of the Sales Process were provided with access to more detailed information through the Data Room. By the CCAA Sales Process bid deadline, NFC had received only one binding proposal which included the purchase of the St. Catharines Property, and two others offering to acquire only the Saskatoon Facility.

13. Following a comparative review of the three binding proposals received, the Monitor proceeded to work with two final bidders, one of whom included in their bid, the

purchase of the St. Catharines Property (the “**Final St. Catharines Bidder**”). However, as more fully outlined in the Monitor’s Third Report to the Court, the Final St. Catharines Bidder withdrew its bid on February 17, 2012, as a result of *inter alia* failed negotiations between the Final St. Catharines Bidder and NFC’s Major Customer. As set out in the Monitor’s Third Report, on February 20, 2012, BMO delivered a Sales Process Default Notice under the DIP Credit Agreement and thereafter commenced these Receivership Proceedings.

SALES PROCESS IN THE RECEIVERSHIP PROCEEDINGS

14. Following the making of the Receivership Order, the Receiver engaged Colliers International (“**Colliers**”), to market the St. Catharines Property. The marketing campaign by Colliers in respect of the St. Catharines Property included the following principal activities (i) post-card glossy mailer sent to 3,700 industrial users; (ii) ads in the Colliers Food Advisory Services Group newsletter in Q2 and Q3 of 2012; (iii) html email broadcast; (iv) publication on the Colliers national website; (v) publication on the Colliers Food Advisory Services Group Website as well as dissemination of listing information at the Colliers Food Advisory Services Group monthly conference calls; (vi) LoopNet Posting; (vii) publication in the International Association of Refrigeration Warehouse eNewsletter in May and August of 2012; (viii) an ad in the Globe & Mail on April 17, 2012; (ix) posting on the Multiple Listing Service (MLS); (x) dissemination of listing information with the Ontario Ministry of Agriculture, Food and Rural Affairs in April 2012 and with St. Catharines Economic Development & Customer Service in August 2012; (xi) for sale signage placed on the St. Catharines Property; and (xii) cold calling campaign to Colliers Food Advisory Services database of food companies in southern Ontario. In addition to the foregoing, Colliers conducted numerous tours of the St. Catharines Facility with potential purchasers.

THE TRANSACTION

15. On or about May 7, 2012, the Purchaser submitted an offer to the Receiver to purchase the St. Catharines Property and the St Catharines Equipment located thereon (the “**Initial Canafric Offer**”). However, the Receiver had entered into an agreement dated April 12, 2012 (which was thereafter approved by the Court on April 19, 2012) to sell all of NFCs equipment, including the St Catharines Equipment to Counsel McIntyre Ltd. As a result, the Receiver could not accept the Initial Canafric Offer.

16. On June 4, 2012, Canafric submitted a second offer for the purchase of the St. Catharines Property (the “**Second Offer**”), which was conditional upon (i) Canafric successfully acquiring certain major pieces of the St. Catharines Equipment from Counsel McIntyre, and (ii) the discharge of the Restrictive Covenant from title to the St. Catharines Property. Canafric carries on business under the name “Mortimers Fine Foods” and makes meat pies, including chicken pot pies, and similar English style foods. A print-out of the Purchaser’s chicken product selection from its website is attached hereto as **Appendix “H”**. On June 7, 2012, Canafric withdrew its Second Offer based upon their determination that there would be insufficient time in which to obtain a discharge of the Restrictive Covenant prior to the date set by Counsel McIntyre for the public auction of the St. Catharines Equipment.

17. Following the withdrawal of the Second Offer, and in the event that other potential purchasers may also require, as a condition of their offers, the discharge of the Restrictive Covenant, the Receiver through its then counsel, Fasken Martineau DuMoulin LLP (“**Fasken**”) wrote a letter to Pinty’s (the “**Fasken Letter**”, a copy of which is attached hereto as **Appendix “I”**) requesting that Pinty’s discharge the Restrictive Covenant. The Fasken Letter provided that, based on a review of the relevant case law, the Restrictive Covenant would likely

be unenforceable as against a future successor given that a restriction on the processing of chicken did not benefit or intrinsically enhance the value of the adjacent dominant lands owed by Pinty's, being a vacant field a portion of which is used as a parking lot and that the Restrictive Covenant constituted an unpermitted restraint on trade.

18. On July 5, 2012, Fasken's received a responding letter from Thane Mackenzie, chief financial officer of Pinty's (the "**Pinty's Letter**", a copy of which is attached hereto as **Appendix "J"**). The Pinty's Letter stated that Pinty's disagreed with the determination that the covenant is unenforceable and that the Restrictive Covenant did not benefit the lands. The Pinty's letter further stated that Pinty's would not discharge the Restrictive Covenant, however, it would be willing to entertain offers from any purchasers of the St. Catharines Property or any fair offer to remove the Restrictive Covenant depending on the purchaser.

19. During the autumn of 2012, the Purchaser's counsel re-contacted the Receiver and after a series of negotiations, the Receiver and the Purchaser executed the Canafric Agreement on or about December 21, 2012. The two principal closing conditions in the Canafric Agreement are: (i) approval by the Court; and (ii) the discharge of the Restrictive Covenant from title to the St Catharine's Property. The Purchaser has delivered to the Receiver a deposit in the sum \$100,000.00 in accordance with the Canafric Agreement. A redacted copy of the Canafric Agreement is attached hereto as **Appendix "K"**. An unredacted copy of the Canafric Agreement is filed but not attached hereto, as **Confidential Appendix "A"**).

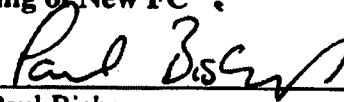
20. The Receiver has reviewed the principal terms of the Canafric Agreement with the parties having an economic interest in the St. Catharines facility including, BMO, the first ranking secured creditor and TD Capital Mezzanine Partners Management Ltd. ("**TD**"), the

second ranking secured creditor behind BMO. The Receiver has been advised of both BMO and TDs support and approval for the proposed Transaction sought herein.

21. The Receiver is of the view that the market for the St. Catharines Property has been fully and duly canvassed given the lengthy duration of marketing efforts during both the CCAA Sales Process and by Colliers and the Receiver during the Receivership Proceedings. In addition, the secured creditors of NFC who are the only parties with an economic interest in the St. Catharine's Property have approved the proposed purchase price. Based on the foregoing, the Receiver respectfully recommends that the Court approve the Canafric Agreement, order the discharge of the Restrictive Covenant from title to the St Catharines Property, and grant the Vesting Order.

All of which is respectfully submitted this 6th day of February, 2013.

FTI Consulting Canada Inc.
Receiver of the property, assets and
undertaking of New FC



Name: Paul Bishop
Title: Senior Managing Director,
FTI Consulting Canada