

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FARM CREDIT CANADA

Applicant

and

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

Respondents

**APPLICANT'S FACTUM
(Receivership Appointment)**

October 5, 2023

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Tel: 416-862-7525
Fax: 416-862-7661

Haddon Murray (LSO#61640P)

Tel: 416-862-3604
Fax: 416-862-7661
haddon.murray@gowlingwlg.com

Heather Fisher (LSO#75006L)

Tel: 416-369-7202
Fax: 416-862-7661
heather.fisher@gowlingwlg.com

Lawyers for the Applicant

TO: THE SERVICE LIST

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

FARM CREDIT CANADA

Applicant

and

WHYTE'S FOODS INC./LES AILMENTS WHYTE'S INC.,

Respondent

**APPLICANT'S FACTUM
(Receivership Appointment)**

OVERVIEW

1. This Factum is filed in support of an Application by Farm Credit Canada ("**FCC**") for an order appointing FTI Consulting Canada Inc. ("**FTI**") as receiver and manager (in such capacity, the "**Receiver**"), without security, of the FCC Secured Property (as defined below) of Whyte's Foods Inc./Les Ailments Whyte's Inc. ("**Whyte's**") pursuant to section 243 of the *Bankruptcy and Insolvency Act* (Canada)¹ (the "**BIA**") and section 101 of the *Courts of Justice Act* (Ontario).²

SUMMARY OF FACTS

2. The facts with respect to this Application are summarized below, and are set out in more detail in the Affidavit of Dale Snider sworn October 4, 2023³ (the "**Snider**

¹ [Bankruptcy and Insolvency Act \(Canada\), RSC 1985, c B-3 \["BIA"\]](#).

² [Courts of Justice Act \(Ontario\), RSO 1990, c C43 \["CJA"\]](#).

³ [Affidavit of Dale Snider](#) sworn October 4, 2023, Application Record of Farm Credit Canada dated October 4, 2023 ["**Application Record**"], Tab 2 ["**Snider Affidavit**"].

Affidavit”). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Snider Affidavit.

Background

3. Whyte’s is a company that carried on business in Ontario and Québec primarily as a producer of pickled and other fermented food products. It owned two production facilities, one in Wallaceburg, Ontario (the “**Wallaceburg Facility**”) and the other in Saint-Louis, Québec (the “**St-Louis Facility**”).⁴

4. Whyte’s is indebted to FCC pursuant to a credit agreement dated May 20, 2020⁵, as amended and restated⁶ (the “**FCC Credit Agreement**”). As of October 3, 2023, the aggregate outstanding Indebtedness owed by the Debtors is \$34,695,269.77, excluding professional fees, disbursements and accruing interest (the “**Indebtedness**”).

5. Whyte’s has two primary secured creditors – each with first ranking security interests over different asset pools: FCC and Wells Fargo Capital Finance Corporation Canada (“**Wells Fargo**”).

6. Wells Fargo has a first ranking security in respect of all “Trade Personal Property” which is defined as:

all of the present and future accounts receivables, monetary claims, cash, deposit accounts, inventory and Operational Financing Purchased Equipment of the Debtors and the Guarantors, together with all claims, documents of title, chattel paper, instruments, books

⁴ [Snider Affidavit at paras 5 and 6](#), Application Record, Tab 2.

⁵ [Snider Affidavit at para 14](#), Application Record, Tab 2.

⁶ [Snider Affidavit at paras 15 and 16](#), Application Record, Tab 2.

and records, customer lists, credit files, computer files, programs, printouts and other computer materials and records relating to the foregoing, and all accessions to, substitutions for and replacements, and products of the foregoing or relating to the foregoing, including cash and other proceeds thereof, including, without limitation, proceeds of insurance and insurance indemnities and the right to receive proceeds of insurance on account of any of the foregoing.⁷

7. FCC holds the first ranking security in respect of all other present or after-acquired personal property of Whyte's ("**Non-Trade Personal Property**") as well as the Wallaceburg Facility and the St-Louis Facility (together with the Non-Trade Personal Property, the "**FCC Secured Property**").⁸

Defaults, Forbearance and Demands

8. Whyte's began experiencing financial distress in 2020 which continued through to 2023. This resulted in Whyte's repeatedly defaulting on the terms of the credit agreements with FCC and Wells Fargo.⁹

9. On April 19, 2023, Whyte's entered into forbearance agreements with each of FCC and Wells Fargo. The Wells Fargo Second Amendment and Forbearance Agreement required that Whyte's, among other things, undertake a sale process (the "**Pre-NOI Sale Process**") to be carried out by Kroll Corporate Finance Canada ("**Kroll**").¹⁰

⁷ [Snider Affidavit at para 29](#), Application Record, Tab 2.

⁸ [Snider Affidavit at paras 19 and 29](#), Application Record, Tab 2.

⁹ [Snider Affidavit at para 36](#), Application Record, Tab 2.

¹⁰ [Snider Affidavit at paras 16 and 41](#), Application Record, Tab 2.

10. On June 15, 2023, Wells Fargo sent Whyte's a demand letter and notice of its intention to enforce its security pursuant to Section 244 of the BIA.¹¹

11. On June 20, 2023, FCC sent Whyte's a demand letter and notice of its intention to enforce its security pursuant to Section 244 of the BIA. FCC also registered a prior notice of the exercise of a hypothecary right for Whyte's on July 4, 2023.¹²

12. The forbearance period expired on July 31, 2023. At that time, Whyte's requested further financing from Wells Fargo to fund working capital requirements. By mid-August, 2023, Wells Fargo was of the opinion that there was no prospect of an acceptable transaction and that an NOI proceeding would be necessary to complete the Pre-NOI Sales Process.¹³

13. Accordingly on August 22, 2023, Whyte's entered into (a) an agreement with Wells Fargo with respect to forbearance and financing through the NOI Proceedings (the "**DIP Facility Agreement**")¹⁴ and (b) a forbearance extension agreement with FCC, amending the terms of FCC's prior forbearance agreement in contemplation of the NOI Proceeding.¹⁵ Pursuant to the DIP Facility Agreement, the Debtors and Wells Fargo agreed, among other things:

¹¹ [Snider Affidavit at para 43](#), Application Record, Tab 2.

¹² [Snider Affidavit at paras 44 and 45](#), Application Record, Tab 2.

¹³ [Snider Affidavit at para 48](#), Application Record, Tab 2.

¹⁴ [Snider Affidavit at para 49](#), Application Record, Tab 2.

¹⁵ [Snider Affidavit at para 50](#), Application Record, Tab 2.

- (a) Whyte's would file an NOI on or about August 23, 2023;
- (b) Whyte's would name A&M as its proposal trustee for the purposes of the NOI Proceedings;
- (c) Wells Fargo would provide a facility up to a maximum availability of \$2,700,000 to be used to fund Whyte's working capital, operating and restructuring processes;
- (d) Whyte's would obtain an initial NOI order no later than August 31, 2023;
- (e) Wells Fargo would forbear against the Debtors until the earlier of (i) October 10, 2023 and (ii) the occurrence of a Terminating Event, as defined in the DIP Financing Agreement; and
- (f) Kroll would complete the Pre-NOI Sales Process no later than October 10, 2023.¹⁶

The NOI Proceeding

14. On August 23, 2023, Whyte's filed a Notice of Intention to make a proposal under the BIA (the "**NOI Proceeding**").¹⁷

15. On August 31, 2023, Whyte's sought and obtained an order, among other things:

¹⁶ [Snider Affidavit at para 49](#), Application Record, Tab 2.

¹⁷ [Snider Affidavit at para 50](#), Application Record, Tab 2.

- (a) approving a sale and investment solicitation process in respect of the assets of Whyte's (the "**NOI SISP**"); and
- (b) granting the following super-priority charges in the following priority:

First - an Administration Charge over all of Whyte's property in the maximum amount of \$250,000;

Second – a Director's Charge over the Trade Personal Property in the maximum amount of \$350,000;

Third – a DIP Lender's Charge over the Trade Personal Property in the maximum amount of \$2,700,000; and

Fourth – a Director's Charge over the Non-Trade Personal Property in the maximum amount of \$350,000.¹⁸

16. The NOI SISP included a timetable with a bid deadline of September 21, 2023 and a sale approval motion to be heard on October 2, 2023. Through the NOI SISP, Whyte's entered into an agreement for the sale of the real property and equipment located at the St-Louis Facility to Ailments Putters Inc. (the "**St-Louis Sale**"), however, the NOI SISP did not result in any going concern transaction for the Wallaceburg Plant.¹⁹

¹⁸ [Snider Affidavit at para 52](#), Application Record, Tab 2; [Order of Justice Cavanagh dated August 31, 2023](#).

¹⁹ [Snider Affidavit at para 54](#), Application Record, Tab 2.

17. Wells Fargo has brought an application for the appointment of a receiver over the Trade Personal Property of Whyte's bearing court file number: CV-23-00707052-00CL.²⁰

STATEMENT OF ISSUES, LAW & AUTHORITIES

18. The sole issue in respect of this Application is whether it is just or convenient for the Court to appoint FTI as Receiver over the FCC Secured Property?

The Technical Requirements for the Appointment of a Receiver have been Met

19. FCC is a secured creditor of Whyte's in respect of the FCC Secured Property and is therefore entitled to bring an application under section 243 of the BIA.

20. Section 69(2) of the BIA provides that the stay of proceedings under Section 69(1) of the BIA does not apply to any creditor who has given notice of intention to enforce its security under Section 244(1) more than 10 days prior to the filing of an NOI.²¹

21. As set out above, FCC sent the NITES on June 20, 2023, well in advance of the NOI filing on August 23, 2023. Accordingly, the notice period under the NITES has expired and FCC is not stayed from seeking the appointment of the Receiver.²²

22. FTI is qualified to act as Receiver in accordance with the requirements of subsection 243(4) of the BIA and has consented to serving as Receiver in these proceedings.²³

²⁰ [Snider Affidavit at para 54](#), Application Record, Tab 2.

²¹ [BIA, s. 69\(2\)](#).

²² [BIA, ss. 243 and 244](#); [Snider Affidavit, paras 25, 45](#), Application Record, Tab 2.

²³ [BIA, s. 243\(4\)](#); [Snider Affidavit, para 62](#), [Exhibit "I"](#), Application Record, Tab 2.

It Is Just and Convenient To Appoint the Receiver

23. Pursuant to sub-section 243(1) of the BIA, the Court may, on application by a secured creditor, appoint a receiver where it considers it to be just or convenient to do so.²⁴ Section 101(1) of the CJA similarly provides for the appointment of a receiver by interlocutory order where the appointment is “just and convenient”.²⁵

24. In *Freure Village*, Justice Blair (as he was then), found that, in deciding if the appointment of a receiver is just or convenient, the Court must have regard to *inter alia* the nature of the property and the rights and interest of all parties in relation thereto, which includes a secured creditor under its security.²⁶

25. Among other things, the following may be considered by a Court in determining whether or not it is just or convenient to appoint a receiver:

- (a) the potential costs of the receiver;
- (b) the relationship between the debtor and the creditor;
- (c) the likelihood of preserving and maximizing the return on the subject property; and
- (d) the best way of facilitating the work and duties of the receiver.²⁷

²⁴ [BIA, s. 243.](#)

²⁵ [CJA, s. 101\(1\).](#)

²⁶ [Bank of Nova Scotia v. Freure Village on Clair Creek](#), [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List)) at paras 10-12 [“**Freure Village**”].

²⁷ [Elleway Acquisitions Limited v. The Cruise Professionals Limited](#), 2013 ONSC 6866 (Commercial List) at paras 28, 30 and 34 [“**Elleway**”]; [Freure Village](#) at para 12.

26. Where a secured creditor is seeking the appointment of a receiver and its credit documents specifically afford it the right to appoint a receiver, the appointment of a receiver is not an “extraordinary remedy”. In such circumstances, as Justice Morawetz (as he then was), held in *Sherco Properties*: “the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties”.²⁸ Similarly, in *Atlas Healthcare*, this Court held that where a secured creditor has bargained for the contractual right to have a receiver appointed, there must be a good reason to deprive the creditor of that contractual right.²⁹

27. In *Freure Village*, the Court held that an important consideration in deciding whether or not to appoint a receiver is whether an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.³⁰

28. FCC submits that in accordance with the test and factors outlined above, it is both just and convenient to appoint FTI as Receiver over the FCC Secured Property, as:

- (e) Whyte’s has defaulted under the DIP Facility Agreement and the FCC Forbearance Agreement;³¹

²⁸ [Bank of Montreal v. Sherco Properties Inc.](#), 2013 ONSC 7023 (Commercial List) at para 42; [Elleway](#) at para 27.

²⁹ [Romspen Investment Corporation v. Atlas Healthcare \(Richmond Hill\) Ltd. et al](#), 2018 ONSC 7382 (Commercial List) at para 100.

³⁰ [Freure Village](#) at para 11.

³¹ [Snider Affidavit at paras 38 and 40\(a\) and \(b\)](#), Application Record, Tab 2.

- (f) FCC at all times has acted reasonably, in this respect, it provided Whyte's with additional time to repay the Indebtedness, including entering into the FCC Forbearance Agreement and supporting the NOI SISP;³²
- (g) the Indebtedness is due and owing to FCC and the NOI SISP has failed to result in a transaction that would pay FCC in full;³³
- (h) Wells Fargo has brought a Receivership Application in respect of the Trade Personal Property;
- (i) FCC's credit documents specifically provide FCC with the right to seek the appointment of the Receiver;³⁴ and
- (j) the appointment of FTI will permit the Receiver to realize on the FCC Secured Assets.³⁵

CONCLUSION

29. For the reasons set out above, FCC requests that the Court grant the Receivership Order in the form sought by FCC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2023.

Per:



Haddon Murray

³² [Snider Affidavit at para 50](#), Application Record, Tab 2.

³³ [Snider Affidavit at paras 54 and 60](#), Application Record, Tab 2.

³⁴ [Snider Affidavit at paras 19](#), Application Record, Tab 2.

³⁵ [Snider Affidavit at paras 16 and 64](#), Application Record, Tab 2.

GOWLING WLG (CANADA) LLP

Barristers & Solicitors

1 First Canadian Place

100 King Street West, Suite 1600

Toronto ON M5X 1G5

Tel: 416-862-7525

Fax: 416-862-7661

Haddon Murray (LSO#61640P)

Tel: 416-862-3604

Fax: 416-862-7661

haddon.murray@gowlingwlg.com

Heather Fisher (LSO#75006L)

Tel: 416-369-7202

Fax: 416-862-7661

heather.fisher@gowlingwlg.com

Lawyers for the applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1. **Bank of Nova Scotia v. Freure Village on Clair Creek**, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List))
2. **Elleway Acquisitions Limited v. The Cruise Professionals Limited**, 2013 ONSC 6866 (Commercial List)
3. **Bank of Montreal v. Sherco Properties Inc.**, 2013 ONSC 7023 (Commercial List)
4. **Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al**, 2018 ONSC 7382 (Commercial List)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, RSC, 1985, c. B-3, as amended

Stay of proceedings — consumer proposals

69.2 (1) Subject to subsections (2) to (4) and sections 69.4 and 69.5, on the filing of a consumer proposal under subsection 66.13(2) or of an amendment to a consumer proposal under subsection 66.37(1) in respect of a consumer debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until

- (a) the consumer proposal or the amended consumer proposal, as the case may be, has been withdrawn, refused, annulled or deemed annulled; or
- (b) the administrator has been discharged.

Exception

(2) Subsection (1) does not apply where the consumer proposal, other than an amendment to a consumer proposal referred to in section 66.37, is filed within six months after the filing of a previous consumer proposal in respect of the same debtor.

Idem

(3) Subsection (1) does not apply where an amendment to a consumer proposal is filed within six months after the filing of a previous amendment to the same consumer proposal.

Secured creditors

(4) Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a consumer proposal under subsection 66.13(2) does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows:

- (a) in the case of a security for a debt that is due at the date of the approval or deemed approval of the consumer proposal or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and
- (b) in the case of a security for a debt that does not become due until more than six months after the date of the approval or deemed approval of the consumer

proposal, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or act, or law, creating the security.

Exception

(5) No order may be made under subsection (4) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

...

Court may appoint receiver

243 (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.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

- (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
- (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

Courts of Justice Act, RSO 1990, c C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

FARM CREDIT CANADA
Applicant

-and- WHYTE'S FOOD INC.
Respondent

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

APPLICANT'S FACTUM

GOWLING WLG (CANADA) LLP

Barristers & Solicitors

1 First Canadian Place

100 King Street West, Suite 1600

Toronto ON M5X 1G5

Haddon Murray (61640P)

haddon.murray@gowlingwlg.com

Tel: 416-862-3604

Heather Fisher (75006L)

heather.fisher@gowlingwlg.com

Tel: 416-369-7202

Tel: 416-862-7525

Lawyers for the applicant

Email for party served:

Elizabeth Pillon : lpillon@stikeman.com

File Number: L150180013