Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

FACTUM OF THE APPLICANT
(returnable August 15, 2014)

AUGUST 14, 2014

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PART I - INTRODUCTION

1. Hanfeng Evergreen Inc. ("**Hanfeng**") brings this application seeking the appointment of a receiver and manager over Hanfeng (hereafter, a "**Receiver**") to preserve and realize value for all of its stakeholders, including its shareholders.

2. Hanfeng's board of directors (the "**Board**") has determined that the sale of Hanfeng's principal assets, which are described below, and a wind-up of Hanfeng are the only viable options for potentially providing remaining value to shareholders and permitting all stakeholders to receive the highest possible amounts for their claims. To this end, the Board has authorized Hanfeng to enter into a binding agreement of Share Transfer Agreement with an arm's length Purchaser (as those capitalized terms are defined below). For the reasons set out below, the Board considers the appropriate course to be for the sale contemplated in the Share Transfer Agreement to be closed under court supervision and the proceeds distributed in the same manner.

3. Accordingly, Hanfeng seeks orders substantially in the forms of the draft orders include at Tabs 3 and 4 of the Application Record:

(a) Appointing Ernst & Young Inc. ("**E&Y**") as Receiver;

(b) Approving the Share Transfer Agreement and the Share Transfer Transaction (as these terms are defined below); and

(c) Vesting the shares of Hanfeng's subsidiary (the "**Heilongjiang WFOE**") in the Purchaser free and clear of any encumbrances.

PART II - THE FACTS[1]

A. Hanfeng

4. Hanfeng, through its wholly-owned subsidiaries, was a leading developer and producer of value-added fertilizers[2] in the People's Republic of China ("**China**"). Hanfeng is incorporated under the laws of Ontario with its registered head office in Toronto. Hanfeng is a reporting issuer in each of the provinces of Canada and until recently had its common shares listed on the TSX, but the TSX delisted Hanfeng's shares in June.

Pollack Affidavit at para. 6.

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[1] Capitalized terms used but not defined herein have the meanings given to them in the Affidavit of Jonathan Pollack sworn August 13, 2014 (the "**Pollack Affidavit**")

[2] Value-added fertilizers include a variety of advanced fertilizer products manufactured using proprietary techniques. Examples of value-added fertilizers include slow-release, nutrient-enhanced or specially-coated fertilizers. Although value-added fertilizers are commonly used in Canada, their adoption in China remains relatively limited. Any references to fertilizer in this affidavit are to value-added fertilizers.

5. Hanfeng has no independent operations and has always existed solely as a holding company for certain entities located in China, which are described in greater detail below. As such, it has necessarily relied on cash flow generated by these Chinese entities to fund its liabilities.

Pollack Affidavit at para. 7.

(i) Shareholder Structure

6. As at the date of this affidavit, Hanfeng's shareholding structure is as follows:

Shareholder	Percent of Issued and Outstanding Shares Beneficially Owned
Xinduo Yu	20.4%
Agrium Inc.	20.0%
Beidahuang Agriculture Development Limited	7.0%
Various shareholders	52.6%

Pollack Affidavit at para. 9.

B. WFOEs

7. Prior to May 2014, Hanfeng owned all of the issued and outstanding shares of two Chinese business entities known as "wholly foreign-owned entities" (commonly abbreviated as "WFOEs"). A wholly foreign-owned entity (as previously defined, the "**Heilongjiang WFOE**") owned a fertilizer production facility in Heilongjiang Province in northeast China. The other wholly-owned foreign entity (the "**Jiangsu WFOE**") owned a fertilizer production facility in Jiangsu Province. As described in greater detail below, Hanfeng sold the Jiangsu WFOE in May 2014.

Pollack Affidavit at para. 10.

8. Control of the Heilongjiang WFOE, and of its corporate seals and "chops" that are used to authorize corporate action, is exercised by a management team located in Heilongjiang. This management team takes direction from Xinduo Yu, who is the founder, President and Chief Executive Officer and a director of Hanfeng and who owns or controls 20.4% of the issued and outstanding shares of Hanfeng. Mr. Yu, in his capacity as the legal representative for the Heilongjiang WFOE, takes direction from the Board.

Pollack Affidavit at para. 11.

9. Hanfeng was previously involved in a joint venture to produce fertilizer in Indonesia, and owned a WFOE in Jiangsu Province. Hanfeng sold its interests in that joint venture and that WFOE in March and May 2014, respectively. Accordingly, at this time, the Heilongjiang WFOE is Hanfeng's principal asset and its only operating subsidiary. As a result of various challenges experienced by the Heilongjiang WFOE, which are described below, the Heilongjiang's WFOE's operations have been severely hampered and its prospects have dramatically decreased since 2013.

Pollack Affidavit at paras. 10, 12 and 13.

C. Consolidated Financial Status

(i) Liquidation Analysis of the Heilongjiang WFOE's Assets

10. Deloitte LLP ("**Deloitte**") has provided the Board with an opinion (the "**Opinion**") that, among other things, includes a determination of the fair market value of the Heilongjiang WFOE's assets on the basis of the liquidation approach. Following various assessments, site visits and discussions with management, Deloitte has estimated the fair market value of the Heilongjiang WFOE's assets as at August 7, 2014 as follows:

Asset	**Fair Market Value (RMB)**
Working capital	211,784,591
Cash	98,555,064
Receivables (based on collectability assessment)	88,319,796
Prepayments (based on collectability assessment)	25,325,588
Inventory	Nil
Accounts Payable	(272,321)
Tax Payable	(143,536)
Machinery and equipment	Nil
Land use rights	42,925,376
Building and rail assets	179,513,218
Total liquidation costs	(229,279,013)
Net asset value after liquidation costs	**204,944,172**

Pollack Affidavit at para. 14.

11. Hanfeng is currently unable to prepare audited financial statements and its most recent unaudited consolidated interim financial statements are for the three month period ending September 30, 2013. Hanfeng's management has prepared draft financial statements for the year ending June 30, 2014 (the "**Draft FY2014 Statements**"), but these have not yet been reviewed or approved by the Board. Although the Draft FY2014 Statements contain all the liabilities of which the Board is aware, the history of Hanfeng could potentially lead to litigation in various ways.

Pollack Affidavit at paras. 15-16.

(ii) Customers

12. Between 2011 and 2013, Heilongjiang WFOE's most significant customers were certain subsidiaries and affiliates of the Beidahuang Agricultural Company Limited (collectively, "**Beidahuang**"). Beidahuang is one of the largest agricultural state-owned enterprises in China. Sales to Beidahuang had increased from $155 million or approximately 62.7% of Hanfeng's annual sales in 2011, to

$181 million or nearly 85.3% of Hanfeng's annual sales in 2012, and $106 million or 64.6% of Hanfeng's annual sales in 2013.

Pollack Affidavit at para. 17.

13. Hanfeng's significant sales to and purchases from Beidahuang had made Beidahuang one of Hanfeng's key commercial partners. The termination of the business relationship with Beidahuang (described below) has had a significant adverse effect on the operations and prospects of Hanfeng.

Pollack Affidavit at para. 18.

D. Proposed Privatization Transaction

14. In 2011, Beidahuang contacted Mr. Yu (who, as indicated above, was the President and Chief Executive Officer of Hanfeng at the time) about a potential acquisition of approximately 30% of Hanfeng's issued and outstanding shares. The stated reason for Beidahuang's interest in a potential acquisition was ensuring that it had adequate control over the supply of fertilizer from one of its key commercial partners.

Pollack Affidavit at para. 19.

15. Following discussions between the Board, Beidahuang and Mr. Yu, it was determined that Beidahuang would acquire 30% of Hanfeng's shares in a two-step transaction: first, a corporation owned and controlled by Mr. Yu (the "**Yu Purchaser**") would acquire all of the issued and outstanding shares of Hanfeng; second, the Yu Purchaser would sell approximately 30% of those shares to Beidahuang at the same price. These steps were to be implemented by way of a court-approved plan of arrangement pursuant to the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("**OBCA**") (the "**Plan of Arrangement**").

Pollack Affidavit at para. 21.

16. On February 11, 2013, Hanfeng and Mr. Yu entered into an arrangement agreement pursuant to which the Yu Purchaser would acquire all of the issued and outstanding shares of Hanfeng (other than those shares held by Mr. Yu) for cash consideration of approximately $107 million. A special committee (the "**Special Committee**") of the Board comprised of three independent directors was struck to evaluate the offer from and negotiate with the Yu Purchaser.

Pollack Affidavit at paras. 22 and 24 .

17. Thereafter, Hanfeng sought and obtained an interim order of the Ontario Superior Court of Justice approving the process for seeking shareholder approval of the Plan of Arrangement, as well as that shareholder approval.

Pollack Affidavit at para. 25.

18. The closing date contemplated in the Arrangement Agreement was extended twice in order for the closing conditions set out in the Arrangement Agreement to be satisfied. One such extension was conditional upon the removal of a "no-shop" clause contained in the Arrangement Agreement that had prevented Hanfeng from exploring potential alternative acquisition transactions.

Pollack Affidavit at para. 27.

19. Following the Special Committee's subsequent efforts to explore such potential alternative acquisition transactions, it became apparent to the Board and to Mr. Yu that there was very little serious interest in Hanfeng as a going concern. Eventually, these efforts were abandoned.

Pollack Affidavit at para. 28.

20. On January 7, 2014, Hanfeng terminated the Arrangement Agreement. Unfortunately, by that time, the relationship between Mr. Yu and the Special Committee grew increasingly acrimonious, culminating in a proxy battle described in greater detail below and at paragraphs 34-38 of the Pollack Affidavit.

Pollack Affidavit at paras. 34-38.

E. Termination of Mr. Yu, Cease-Trade and Proxy Battle

21. The failure to close the Privatization Transaction exacerbated the difficulties in the relationship between the Board and Mr. Yu.

Pollack Affidavit at para. 30.

22. On January 7, 2014, the Hanfeng Board terminated Mr. Yu's employment relationship. In terminating Mr. Yu, the Hanfeng Board alleged (among other things) that Mr. Yu's many conflicts of interests made it improper for him to continue as President and CEO of Hanfeng and that Mr. Yu had been unwilling to accept direction from the Board.

Pollack Affidavit at para. 31.

23. On January 15, 2014, following Hanfeng's adoption of a shareholder rights plan and a related advance notice by-law, the TSX announced that it was suspending trading of Hanfeng's common shares pending clarification of Hanfeng's status and plans.

Pollack Affidavit at paras. 32-33.

24. Thereafter, Mr. Yu commenced a proxy battle to replace all directors of Hanfeng. In response to the dissident proxy circular circulated by Mr. Yu, the Board announced on February 6, 2014 that it would delay the holding of Hanfeng's annual shareholder meeting. On February 19, 2014, the OSC issued a temporary

cease-trade order in respect of shares of Hanfeng. On March 3, 2014, the OSC issued a permanent issuer cease trade order (the "**Cease-Trade Order**"). The securities commissions of British Columbia, Quebec, Manitoba and Alberta issued cease-trade orders in February, March, April and June 2014, respectively.

Pollack Affidavit at paras. 34-36.

25. On February 20, 2014, Hanfeng announced that the TSX had determined not to grant Hanfeng's request for approval of the deferral of the annual shareholders' meeting date. Hanfeng also announced on that date that Mr. Yu filed an application in the Ontario Superior Court returnable on February 24, 2014 for, among other things, an order for direction with respect to the holding of a shareholders' meeting at the earliest practicable date. In response, Hanfeng sought certain relief at the return of that application, including with respect to the timing of the meeting and the manner in which directors would be elected.

Pollack Affidavit at para. 37.

26. On February 24, 2014, prior to the commencement of the hearing of Mr. Yu's application, all members of the Board (other than Mr. Yu) resigned. The slate of proposed directors named in the Proxy Circular was appointed to the Board effective that date. Mr. Yu was appointed Chairman. He was also re-appointed as President and CEO of Hanfeng and as legal representative of the Heilongjiang WFOE and the Jiangsu WFOE.

Pollack Affidavit at para. 38.

F. Ongoing Challenges to Efforts to Normalize Hanfeng's Business and Operations

27. Since the reconstitution of the Board, the Board (including Mr. Yu) has made extensive efforts to repair the damage caused by (amongst other things) the proxy battle and to normalize Hanfeng's business, operations and reporting obligations, but had limited or no success because of a number of ongoing challenges, which are described below.

Pollack Affidavit at para. 39.

(i) Resignation of Auditor

28. Effective February 26, 2014, KPMG resigned as auditor of Hanfeng. Since that time, Hanfeng has sought to find a replacement auditor with no success. In the view of the Board, it is unlikely that Hanfeng will ever be able to find a replacement auditor because of, among other things, concerns relating to the continuing circumstances of Hanfeng. As a result of KPMG's resignation, Hanfeng has been unable to comply with its obligations under the OBCA and applicable securities laws and regulations with respect to finding a replacement auditor and preparing, filing and sending unaudited and audited financial statements to its shareholders.

Pollack Affidavit at para. 40.

(ii) Hanfeng Shares Delisted

29. On or about May 12, 2014, the TSX delisted Hanfeng's common shares effective at the close of market on June 9, 2014. The stated reason for the delisting was Hanfeng's failure to meet the continued listing requirements of the TSX.

Pollack Affidavit at para. 41.

(iii) Termination of the Relationship with Beidahuang

30. On December 20, 2013, Hanfeng issued a press release announcing that it had received a notice from Beidahuang (which as described above represented 75% of the Heilongjiang WFOE's sales in 2012) that Beidahuang had decided to terminate its business relationship with Hanfeng and to discontinue any further product purchases from Hanfeng. In further discussions between Beidahuang and representatives of Hanfeng, Beidahuang confirmed: (a) that it had already secured a supply of fertilizer for the 2014 growing season from suppliers other than Hanfeng; (b) it was not prepared to do business with Hanfeng unless it owned a 30% stake in Hanfeng; and (c) it was not prepared to acquire such a stake at the present time. The Board has concluded that, in light of the difficulties facing Hanfeng, it is unlikely that a business relationship with Beidahuang will ever be restored. Moreover, it is unlikely that Hanfeng will ever be able to replace the revenues lost as a result of the termination of the Hanfeng-Beidahuang business relationship by entering into new supply arrangements with other customers, particularly as Hanfeng has been unable to attract such customers over the past months.

Pollack Affidavit at paras. 42-44.

(iv) Sale of Assets

31. As indicated above, in March and May of 2014, respectively, Hanfeng terminated its involvement in the Indonesia JV and sold the Jiangsu WFOE. Hanfeng did so in order to generate cash flow and to reduce its potential liabilities, and in light of the eroding value of these assets.

Pollack Affidavit at para. 45.

(v) Operational Challenges at Heilongjiang WFOE

32. The Heilongjiang WFOE is not operating at the present time and is not producing any fertilizer because of a lack of short-term prospects for customer orders. Buildings, machinery and equipment at the Heilongjiang WFOE's facilities are not being maintained and serviced because of limited cash flow into the Heilongjiang WFOE. As a result, their value is depreciating rapidly, and the rate of depreciation will likely increase as a result of harsh conditions that are typically experienced in the northeast of China. Moreover, the Board has serious concerns about the high levels of inventory held by the Heilongjiang WFOE, much of which will soon be unsaleable.

Pollack Affidavit at paras. 48-49.

33. In addition, in early 2014, the Heilongjiang WFOE's management team resigned or was terminated due to ongoing internal control issues. Hanfeng has been unable to recruit and retain experienced replacement personnel.

Pollack Affidavit at para. 50.

(vi) Concerns Regarding Operating through WFOE in China

34. Exercising control over the Heilongjiang WFOE from Toronto has been challenging because of, among other things, language and cultural differences. As a result, the Board has had limited success in implementing adequate and effective control and financial reporting mechanisms in respect of the Heilongjiang WFOE. As described in greater detail in paragraphs 52 to 54 of the Pollack Affidavit, an evaluation of the effectiveness of Hanfeng's internal control over financial reporting as at June 30, 2010 disclosed certain material weaknesses that have not been remediated to date. These material weaknesses have given

rise to concerns about the Board's ability to adequately or responsibly supervise the Heilongjiang WFOE's ongoing business and affairs.

Pollack Affidavit at paras. 51-54.

(vii) Inability to Appoint a Replacement Auditor and Resume Trading

35. As indicated above, because Hanfeng has no auditor at present, it has not filed or sent to its shareholders unaudited interim financial statements for the six months ended December 31, 2013 or the nine months ended March 31, 2014. It is, therefore, in violation of its continuous disclosure obligations under applicable securities laws. In addition, the lack of an auditor has inhibited Hanfeng's ability to hold an annual meeting of shareholders as it would be unable to present audited financial statements to its shareholders at any such annual shareholders meeting. Moreover, the Cease Trade Order relates, in part, to Hanfeng's failure to file financial statements within the prescribed statutory time frame and that the OSC will not lift the Cease Trade Order in the absence of Hanfeng filing its outstanding annual and interim financial statements. Hanfeng will not be able to do so unless it is able to engage a qualified auditor.

Pollack Affidavit at paras. 55-59.

36. Because there is no realistic possibility of Hanfeng ever engaging an auditor in the short or medium term, there is no real likelihood in such time horizon of the shares of Hanfeng ever resuming trading or for Hanfeng to have access to financing on commercial terms, whether through a credit facility from a financial institution, access to the capital markets, or otherwise. Moreover, there is no reasonable prospect of Hanfeng's shareholders liquidating their investment in Hanfeng, other than through dividends or other distributions paid to them by Hanfeng in respect of their shares.

Pollack Affidavit at para. 57.

(viii) Outlook for Hanfeng's Business

37. In light of the complexity of the issues presently facing Hanfeng and the Heilongjiang WFOE, the Board believes that Hanfeng will be unable to continue as a going concern, particularly in the long-term. With the termination of the Beidahuang business relationship and the lack, for the foreseeable future, of any other meaningful sales to other customers, the Board has serious concerns about whether the Heilongjiang WFOE will resume operations and achieve positive cash flow.

Pollack Affidavit at para. 58.

38. Hanfeng has never generated revenue (other than indirectly through its subsidiaries). It now relies on the Heilongjiang WFOE to defray its expenses, although transferring available cash to Hanfeng from China has proven challenging. Over the last few months, Mr. Yu has loaned money to Hanfeng to assist Hanfeng in paying expenses incurred in Canada given the difficulties in obtaining funds from the Heilongjiang WFOE. If Hanfeng's circumstances do not materially improve in the near term (which is very unlikely), the cash resources of Heilongjiang WFOE will eventually be exhausted and the solvency of Hanfeng, on a consolidated basis, will inexorably and inevitably be eroded so that there will be no prospect of any return for Hanfeng's shareholders through a distribution.

Pollack Affidavit at para. 59.

39. As a result, the Board has entered into a share purchase agreement with respect to its shares in the Heilongjiang WFOE (described below) and commenced this application to appoint a receiver to implement the sale, run a claims process and distribute the proceeds of sale and any other assets to Hanfeng's stakeholders.

Pollack Affidavit at para. 60.

G. The Share Transfer Transaction

40. In early June, 2014, Heilongjiang Harbin Pengcheng Fertilizer Co., Ltd. (as previously defined, the "**Purchaser**") contacted local management of the Heilongjiang WFOE to express interest in potentially acquiring the Heilongjiang WFOE from Hanfeng. Management of the Heilongjiang WFOE reported this contact to Mr. Yu, who notified the Board of the Purchaser's potential interest on or about June 16, 2014. Following preliminary discussions with the Purchaser, the Purchaser's proposal for acquiring the Heilongjiang WFOE was delivered to the Board on June 18, 2014.

Pollack Affidavit at para. 61.

41. On August 8, 2014, following negotiations between the parties, Hanfeng and the Purchaser entered into a share transfer agreement (the "**Share Transfer Agreement**") and certain related agreements (collectively, the "**Transaction Documents**") pursuant to which Hanfeng agreed to transfer all its equity shares of the Heilongjiang WFOE (the "**Shares**") to the Purchaser in consideration for payment of RMB 248,000,000 (approximately C$43.3 million) (the "**Purchase Price**" and the transaction, the "**Share Transfer Transaction**"). Pursuant to the Share Transfer Agreement, all of the liabilities of the Heilongjiang WFOE will remain with Heilongjiang WFOE once it is owned by the Purchaser. As a result of the Share Transfer Transaction, the Heilongjiang WFOE will no longer qualify as a WFOE.

Pollack Affidavit at para. 62.

42. As described in greater detail at paragraphs 63 to 68 of the Pollack Affidavit, 80% of the Purchase Price is payable in cash and 20% is payable by way of a non-interest bearing promissory note to be issued by the Purchaser in favour of Hanfeng (the "**Promissory Note**"). 5% of the total Purchase Price (approximately $2 million) is payable by August 15, 2014, which amount shall be forfeited by the

Purchaser if it fails to complete the Share Transfer Transaction in accordance with the Share Transfer Agreement. A further 15% of the total purchase price is payable within seven business days of the date of approval of the Share Transfer Transaction by this court. The balance of the purchase price, consisting of cash and the Promissory Note, is payable within 10 business days of closing of the Share Transfer Transaction.

Pollack Affidavit at para. 63.

43. Certain ancillary documents have been executed by Hanfeng, the Purchaser, Mr. Yu, or some combination of the foregoing, in connection with the Share Transfer Transaction. These documents include a guarantee agreement between the Purchaser and Mr. Yu, the practical effect of which is to make Mr. Yu liable for any purchase price adjustments that would be necessitated by a change in the financial conditions of the Heilongjiang WFOE within one year of closing the Share Transfer Transaction. These documents are described in greater detail in the Pollack Affidavit at paragraphs 65 to 68.

Pollack Affidavit at paras. 65-68.

PART III - ISSUES

44. The issues in this application are:

(a) Whether this Court should appoint E&Y as Receiver of Hanfeng pursuant to section 101 of the *Court of Justice Act*, R.S.O. c. C.43 (the "**CJA**"); and

(b) Whether this Court should approve the Share Transfer Agreement and the Share Transfer Transaction and vest the Shares in the Purchaser free and clear of all encumbrances.

PART IV - LAW AND ARGUMENT

A. E&Y Should be Appointed Receiver

(i) CJA Empowers this Court to Appoint a Receiver

45. The CJA provides a method for having a receiver appointed by the court. Section 101(1) of the CJA empowers this Court to appoint a receiver by interlocutory order where the appointment is "just or convenient":

> 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.
>
> CJA, at s. 101

46. In determining whether it is "just or convenient" to appoint a receiver, courts in Ontario frequently apply the test set out in *Bank of Nova Scotia v. Freure Village on Clair Creek*, which requires the Court to have regard to all of the circumstances:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act. . . . In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. . . . It is not essential that the moving party, a secured creditor [in that proceeding], establish that it will suffer irreparable harm if a receiver-manager is not appointed.
>
> *Bank of Nova Scotia v. Freure Village on Clair Creek,* [1996] O.J. No. 5088 (Comm. List) at para. 10, Applicants' Book of Authorities ("**Book of Authorities**"), Tab 1.

47. The "just or convenient" assessment involves a consideration of "whether it is in the interests of all concerned to have the receiver appointed by the court." This, in turn, requires the Court to consider (among other things):

(a) The potential costs of the receiver;

(b) The relationship between the debtor and the creditors (if applicable);

(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.

Elleway Acquisitions Ltd. v Cruise Professionals Ltd., 2013 ONSC 6866 (Comm. List) at para. 28, Book of Authorities, Tab 2.

48. In *YBM Magnex International Inc. (Re)* ("***YBM***"), allegations of criminal misconduct by officers of YBM resulted in, among other things, the resignation of all of YBM's directors and of YBM's auditor, and the imposition of a cease-trade order. As a result, shareholders of YBM were unable to exit their investments. To achieve an orderly liquidation of YBM, YBM applied for an order appointing a receiver over all of its assets, property and undertaking, including its powers and rights with respect to its subsidiaries, pursuant to the Alberta *Business Corporations Act* (the "**ABCA**") and *Judicature Act* (Alberta) over the assets, property and undertaking of YBM Magnex International, Inc. ("**YBM**").

YBM Magnex International Inc. (Re), Court of Queen's Bench of Alberta, Judicial District of Calgary (Court File No. 9801-16691), Transcription of Proceedings (In Chambers) on December 8, 1998 at 35-36, Book of Authorities, Tab 3.

Business Corporations Act, S.A. 1981, c. B-15 (As at December 8, 1998).

Judicature Act, R.S.A. 1980, c. J-1 (As at December 8, 1998).

49. Paperny J. (as she then was) granted the order sought after finding that YBM was not insolvent and that it had no secured creditors. Paperny J. granted an order appointing a receiver-manager on the basis of the *Judicature Act* and a separate provision of the ABCA that authorized appointment of a receiver. Paperny J. stated:

> The company at this time does not appear to be insolvent. There are no secured creditors. The evidence before me satisfies me that in these unique circumstances, on an interim basis, it would be just and convenient to appoint a receiver manager on the terms proposed under section 13(2) of the Judicature Act and under section 95 of the Business Corporations Act.

YBM at 35-36, Book of Authorities, Tab 3.

50. The oppression remedy set out in section 248 of the OBCA empowers this Court to appoint a receiver or receiver-manager upon an application made under subsection 248(1). In Hanfeng's submission, Hanfeng qualifies as a "complainant" within the meaning of s. 245(c) of the OBCA. However, In view of Paperny J.'s determination that the *Judicature Act* provides the appropriate statutory framework for appointing a receiver in circumstances similar to those in the within application, Hanfeng has brought this application pursuant to section 101 of the CJA, and not under section 248 of the OBCA.

OBCA at s. 245(c) and s. 248.

YBM at 35-36, Book of Authorities, Tab 3.

(ii) Appointing E&Y as Receiver is Just and Convenient

51. It is both just and convenient to appoint E&Y as Receiver of Hanfeng under the circumstances for the following reasons, among others:

(a) Hanfeng has no operations and no independent ability to achieve cash flow, and the Board has determined that the sale of Hanfeng's principal asset – the Heilongjiang WFOE – is the only viable option for potentially providing remaining value to stakeholders;

(b) The Heilongjiang WFOE's assets are not financially viable for use as a fertilizer manufacturing facility and are depreciating rapidly;

(c) As described above, Hanfeng faces numerous challenges, including the loss of Beidahuang as a customer, the deterioration of assets at the Heilongjiang WFOE, the challenge of recruiting and retaining a strong management team, the difficulty of finding a replacement auditor and the difficulty of complying with its Canadian securities law obligations. As a result, neither Hanfeng nor the Heilongjiang WFOE is a viable business. They cannot continue as going concerns;

(d) If action is not taken now to realize what value can be obtained for the Heilongjiang WFOE, Hanfeng will be insolvent in the near term;

(e) The Board has determined that it is no longer in a position to contribute meaningfully to the preservation of value for Hanfeng's shareholders;

(f) Although Hanfeng has entered into a binding agreement to sell all of its shares of the Heilongjiang WFOE, Hanfeng is unable to conclude the Share Transfer Transaction without the appointment of a receiver. Without an order appointing the receiver, the Share Transfer Transaction (as it is a sale of all or substantially all of the assets of Hanfeng) must be put before Hanfeng's shareholders for approval in accordance with the OBCA. A shareholder vote is not practicable under the circumstances because Hanfeng has no auditor and has therefore been unable to prepare its quarterly and annual financial statements, which would need to be circulated to the shareholders prior to any vote on the Share Transfer Transaction;

(g) There is no commercially reasonable, efficient and practicable method to consummate the Share Transfer Transaction;

(h) E&Y, as Receiver of Hanfeng, will be well positioned to close the Share Transfer Transaction, run a claims process and distribute the proceeds of the Share Transfer Transaction, all under court supervision;

(i) The potential costs of the Receiver are outweighed by the benefits to all stakeholders, including shareholders, of closing the Share Transfer Transaction and achieving realizations on Hanfeng's assets before they are completely devalued;

(j) Hanfeng has sufficient cash on hand to fund the receivership; and

(k) Trading in Hanfeng's shares has been permanently halted pursuant to orders of securities commission in Ontario, British Columbia, Quebec, Manitoba and Alberta. As a result, Hanfeng's shareholders currently hold illiquid shares and are unable to exit their investments in Hanfeng outside of potential distributions by the Receiver.

52. For the foregoing reasons, it is respectfully submitted that it is just and convenient to appoint E&Y as Receiver of Hanfeng.

B. The Sale Should be Approved

(i) Courts Regularly Approve "Pre-Pack" Transactions

53. Courts in Ontario have recognized and given effect to "pre-packaged" sale transactions that are conceived and approved by a company but effected by court order following appointment of a receiver. The Ontario Superior Court of Justice (Commercial List) recently described these transactions, and the applicable tests for approving such transactions, in the following way:

> "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation. In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek* and *Royal Bank v. Soundair Corp.*, respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:
>
>> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the Tool-Plas case:
>>
>>> [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.
>
> The need for such a robust and transparent record is heightened even more where the proposed purchase

> involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.
>
> *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 (Comm. List) at para. 10, Book of Authorities, Tab 4.

54. As indicated above, the factors that a Court will consider in deciding whether to approve a pre-packaged sale transaction are the same factors that a Court will consider in evaluating a proposed sale by a Receiver. These factors were set out in the Ontario Court of Appeal's decision in *Royal Bank of Canada v. Soundair Corp.* ("***Soundair***"). In *Soundair*, the Court of Appeal enumerated four factors:

(a) Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) The interests of all parties;

(c) The efficacy and integrity of the process by which the offers were obtained; and

(d) Whether there has been any unfairness in the working out of the process.

> *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) at para. 16, Book of Authorities, Tab 5.

(ii) The *Soundair* Requirements Are Satisfied

55. It is respectfully submitted that the following factors, among others, support approval of the Share Transfer Agreement and the Share Transfer Transaction:

(a) The market has been thoroughly canvassed: both the prior Board and the reconstituted Board have undertaken to market and sell Hanfeng for a number of years without success, and there have been no offers from third parties to purchase Hanfeng or the shares of the Heilongjiang WFOE or its assets during the preceding 24 months other than the offer made in connection with the Privatization Transaction. Accordingly, the Board has determined that no other prospective purchasers are likely to be found;

(b) The Board believes that further marketing of the Heilongjiang WFOE or its assets will not result in any higher and/or better offers because, among other things:

(i) It is known in the Chinese fertilizer industry that Hanfeng is experiencing serious financial difficulties; and

(ii) The Heilongjiang WFOE and its assets continue to depreciate, which depreciation is accelerating.

(c) The time and expense associated with further marketing will likely result in further erosion of the recoveries achieved by all stakeholders;

(d) The Purchaser is a third party that is unrelated to Hanfeng and the Share Transfer Transaction is being completed on an arm's length basis;

(e) Deloitte has provided the Board with the Opinion, which concludes that the fair market value (net of liquidation costs) of Hanfeng's shares in the Heilongjiang WFOE as at August 7, 2014 is less than the Purchase Price payable under the Share Transfer Agreement. Accordingly, Deloitte has concluded that the Share Transfer Transaction is fair, from a financial point of view, to Hanfeng.

56. For the foregoing reasons, Hanfeng respectfully submits that the Share Transfer Agreement and the Share Transfer Transaction should be approved.

PART V - ORDER REQUESTED

57. For the foregoing reasons, it is respectfully submitted that this Court should grant orders substantially in the forms included as Tabs 3 and 4 of the Motion Record appointing E&Y as Receiver of Hanfeng and approving the Share Transfer Agreement and the Share Transfer Transaction, and vesting the Shares in the Purchaser free and clear of all encumbrances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of August, 2014.

(signed) Stikeman Elliott LLP

Stikeman Elliott LLP

Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Comm. List)
2. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Comm. List)
3. *YBM Magnex International Inc. (Re)*, Court of Queen's Bench of Alberta, Judicial District of Calgary (Court File No. 9801-16691), Transcription of Proceedings (In Chambers) on December 8, 1998
4. *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 (Comm. List)
5. *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.)

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, **R.S.O. 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.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

Business Corporations Act, **S.A. 1981, c. B-15 (As at December 8, 1998).**

Powers of the Court

95. On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(d.1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;

(e) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

***Judicature Act*, R.S.A. 1980, c. J-1 (As at December 8, 1998).**

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

***Business Corporations Act*, R.S.O. 1990, c. B. 16.**

Definitions

245. In this Part,

"action" means an action under this Act; ("action")

"complainant" means,

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. ("plaignant")

Oppression remedy

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)

Court File No. »

AND IN THE MATTER OF HANFENG EVERGREEN INC.

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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