Court File No.: SJM-46-2020

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF SAINT JOHN

IN THE MATTER OF THE RECEIVERSHIP OF:

HILLSPRING FARMS LTD., HSF FOODS LTD. and HILLSPRING WAREHOUSE & LOGISTICS INC.

-and-

PURSUANT TO Section 33 of The *Judicature Act*, R.S.N.B. 1973, Ch. J-2, Rule 41, *Rules of Court*, New Brunswick and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

BETWEEN:

FARM CREDIT CANADA, a Federal Crown Corporation

-and-

HILLSPRING FARMS LTD., HSF FOODS LTD. and HILLSPRING WAREHOUSE & LOGISTICS INC., each a New Brunswick Corporation

APPLICANTS,

HILLSPRING FARMS LTD., HSF FOODS LTD. and HILLSPRING WAREHOUSE & LOGISTICS INC., each a New Brunswick Corporation

RESPONDENTS

BRIEF ON LAW
Submitted on Behalf of Farm Credit Canada
(for the Application scheduled for June 26, 2020 at 10:00 a.m.)

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Part I – Facts

Background

1. Hillspring Farms Ltd. ("**Hillspring**"), HSF Foods Ltd. ("**HSF**") and Hillspring Warehouse & Logistics Inc. ("**Logistics**" and collectively with Hillspring and HSF, the "**Companies** and each a "**Company**") are co-Applicants in this matter as well as the Respondents. The Companies are part of a larger corporate group that has grown since Ben Brake incorporated Hillspring in 1981 (the "**Hillspring Group**").

2. Ben Brake ("**Mr. Brake**") along with his son, Jeremy Brake, operate the Hillspring Group which has two main segments of business; a large potato farming operation through Hillspring ("**Farming**") and a potato flake manufacturing operation through HSF ("**Flakes**").

3. Hillspring and HSF (collectively, the "**Borrowers**") had combined debt levels increase by $67.2 Million from 2016 to 2019 and combined net losses of $17.3 million for the 21 month period of May 1, 2018, to January 31, 2020.

4. Farm Credit Canada ("**FCC**"), a co-Applicant, and the Canadian Imperial Bank of Commerce ("**CIBC**", and collectively with FCC, the "**Secured Lenders**") are the primary lenders to the Hillspring Group. The Companies' indebtedness to the Secured Lenders as of early March was approximately $90 Million.

5. The Companies' financial and operational difficulties have been ongoing for some time and since early 2019 the Secured Lenders have granted various accommodations.

6. As early as the fall of 2019, Mr. Brake carried on discussions with other parties in the Farming and Flakes industry to explore a possible sale or partnership. These efforts were unsuccessful.

Recent Events

7. In February 2020, the Companies and the Secured Creditors were actively attempting to address the Companies' issues. These issues included limited liquidity, an inability to source product for Flakes, breaches by the Companies of their agreements with the Secured Creditors, principal arrears of $2,225,362.95 to FCC, limited ability to pay unsecured creditors or priority payables and the looming 2020 planting season (the "**2020 Crop**"), which required approximately $13.5 Million in additional financing.

8. In February 2020, CIBC retained PricewaterhouseCoopers Inc. ("**PWC**") and FCC retained Ernst & Young Inc. ("**EYI**"), each of whom attended at the Companies' premises, met with representatives of the Companies and attempted to gather pertinent information. In addition, the Companies retained George MacPherson as an external advisor to provide advice and support, and to assist in trying to develop a plan for the future of the Hillspring Group.

9. In February 2020, Mr. Brake determined there was no plan that the Hillspring Group could develop on its own to address the significant issues it faced. He also determined that in order for Farming and Flakes to survive, some form of sale would have to occur.

10. Mr. Brake who had been managing the Hillspring Group for approximately 39 years and had grown it to be a very large operation, approached various parties in the Farming and Flakes

industries and carried on serious discussions with the parties that expressed an interest in Farming.

11. Mr. Brake sought out a sale of Farming as a going concern despite knowing that there was no equity available to him or his son. Mr. Brake understood and pursued a sale that would provide continued benefit to his employees and to the larger rural New Brunswick community.

12. Mr. Brake's discussions with McCain Foods Limited ("**MFL**") were the most serious and resulted in an amended term sheet on March 13, 2020 (the "**Term Sheet**"). Concurrently with the negotiation of the Term Sheet, the COVID-19 pandemic was developing which only increased the intensity of the discussions and greatly complicated any efforts to address the Hillspring Group's issues.

13. In accordance with the Term Sheet, MFL entered into a management agreement (the "**Management Agreement**") to allow for the continued operation of Farming, including planting the 2020 Crop, while the parties worked at concluding a transaction. The efforts of MFL have maintained the value of Farming as a going concern, have resulted in continued employment for Farming's employees, have provided the resources needed for Farming and have protected Farming's value during the COVID-19 pandemic.

14. The result of the Companies', the Secured Creditors' and MFL's efforts is the final agreement of purchase and sale (the "**Transaction**") dated as of June 11, 2020 (the "**Sale Agreement**") between the Companies and McCain Farms, a division of McCain Produce Inc. ("**McCain**") for the sale of all or substantially all of Farming's assets (the "**McCain Sale Assets**").

15. The Secured Lenders demanded on their advances to the Companies and issued notices of intention in accordance with section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") as well as under section 21 the *Farm Debt Mediation Act* (the "**FDMA**").

16. The Secured Lenders support the Transaction that, if approved by this Court, will result in significant losses for the Secured Creditors. The Companies, along with their principals Mr. Brake and Jeremy Brake, support the Transaction as it is in the best interests of their employees and their community. Neither is aware of any other possible purchaser for the McCain Sale Assets as a going concern on the terms of the Transaction.

17. The completion of the Transaction will result in the continued employment of approximately 74 people in rural New Brunswick and significant benefit to the community from the continued operational spending by McCain.

Professional Assessment

18. PWC has concluded that the Transaction is reasonable and will result in a greater realization on the inventory forming part of the McCain Sale Assets than through a sale by a private receiver.

19. EYI, as the proposed receiver (the "**Proposed Receiver**"), has concluded that:

    a. the purchase price for the assets subject to the Transaction is supported by the appraisals it commissioned;

b. if the Transaction is not approved, MFL will likely terminate the Management Agreement and all arrangements associated with their management of the business would be terminated;

c. there is no certainty that a court appointed receiver would be successful to secure alternative arrangements necessary to facilitate the completion of the 2020 Crop or maintain the lands as potato fields if the Transaction is not concluded;

d. if the Transaction is not approved, a future sales process for the McCain Sale Assets combined with the holding costs would be significant;

e. there is a very limited pool of buyers that would be capable of purchasing the McCain Sale Assets as a going concern;

f. a sale of the McCain Sale Assets on a piecemeal basis in a series of smaller transactions would be unlikely to yield the same consideration as the Transaction or preserve the jobs, customer and supply arrangements offered by the Transaction; and

g. there is no reason to conclude that the results of a future sales process would produce more or the same value currently being offered for the McCain Sale Assets and it is more likely that the value would be less even before any holding costs.

<u>Asset Categories and Interested Parties</u>

20. The proposed receivership proceeding is focused on the assets in which the Secured Creditors hold first priority security. The assets are broken into three categories to achieve this objective:

a. McCain Sale Assets;

b. Excluded Property, as defined in the draft Appointment Order; and

c. Residual Property, as defined in the Notice of Application.

21. The Excluded Property will be comprised of any assets of the Companies subject to the first charge security interest of creditors other than FCC or CIBC except:

    i. assets in which the creditor who holds first charge security has agreed to enter into a new agreement with McCain or whose agreements will be assumed by McCain; and

    ii. assets in which the creditor who holds first charge security has requested their assets be included in the proceeding.

22. The Residual Property are the remaining assets of the Companies subject to the first charge security interest of the Secured Creditors and the Business Development Bank of Canada ("**BDC**"), who requested certain assets be included as Residual Property.

<u>Distribution to Secured Creditors</u>

23. The Proposed Receiver has obtained independent legal opinions in relation to the Secured Creditors' loan and security documents with the Companies. The opinions have verified the priority ranking of the Secured Creditors in and to the real property forming part of the McCain Sale Assets.

24. As well, the opinions confirm the prior charge of the Secured Creditors in personal property by date of registration. By the exclusion of assets charged to other secured creditors from the Transaction, the Secured Creditors are the only creditors with a secured interest in the proceeds from the Transaction.

25. The Proposed Receiver has assessed the position of the various parties, obtained independent security reviews and has recommended that the distribution (the "**Distribution**") as set out in the Proposed Receiver's report (the "**Report**") be approved.

Sale of Residual Property

26. The Proposed Receiver has assessed the various assets forming part of the Residual Property and, as set out in the Report, has concluded that the proposed sales process is appropriate in the circumstances.

Part II – Issues

27. The issues are as follows:

    a. Should this Court grant an order for the abridgement of time for service of this application, excusing the lack of service of this application, or excusing the lack of service of the Applicants' record on application?

    b. Should this Court appoint EYI as receiver and receiver manager of all real and personal property of the Companies except the Excluded Property?

    c. Should the Court approve the Transaction contemplated by the Sale Agreement with McCain?

    d. Should the Court approve the proposed distributions?

    e. Should the Court approve the sales process as requested in the Notice of Application?

    f. Should the Court authorize and direct the Proposed Receiver to make an assignment in bankruptcy in the name of and on behalf of the Companies?

    g. Should this Court grant an order sealing certain confidential information?

Part III – Law & Argument

Issue A - Should this Court grant an order for the abridgement of time for service of this application, excusing the lack of service of this application, or excusing the lack of service of the Applicants' record on application?

28. This Court has the discretion to abridge the time for service of this application, to excuse the lack of service of the application, or to excuse the lack of service of the Applicants' record on application. The ***Rules of Court***, N.B. Reg. 82-73 (the "***Rules of Court***") provide as follows:

> 2.01 The Court Dispensing with Compliance
>
> The court may at any time dispense with compliance with any rule, unless the rule expressly or impliedly provides otherwise.
>
> 2.02 Effect of Non-Compliance
>
> A procedural error, including failure to comply with these rules or with the procedure prescribed by an Act for the conduct of a proceeding, shall be treated as an irregularity and shall not render the proceeding a nullity, and all necessary amendments shall be permitted or other relief granted at any stage in the proceeding, upon proper terms, to secure the just determination of the matters in dispute between the parties. In particular, the court shall not set aside any proceeding because it ought to have been commenced by an originating process other than the one employed.
>
> 3.02 Extension or Abridgment
>
> (1) Subject to paragraphs (3) and (4), the court may, on such terms as may be just, extend or abridge the time prescribed by an order or judgment or by these rules.

29. The Court's discretion under Rules 2 and 3 to abridge the time for service, if necessary, is wide and permits the Court to dispense with

strict adherence to any rule in appropriate circumstances. These Rules should be used when the Court deems just and not just in cases of the most compelling reasons. As the Court of Appeal stated in ***Newman v Tibbetts***, 2005 NBCA 37, 283 N.B.R. (2d) 63 at paragraph 12: "[t]oo technical an application of strict rules can result in injustices."

30. In the insolvency context, the notice provided is appropriate in the circumstances. It is submitted that it is appropriate for this Court to exercise its discretion and grant an order for the abridgement of time for service of this application, excusing the lack of service of this application, or excusing the lack of service of the Applicants' record on application.

Issue B - Should this Court appoint EYI as receiver and receiver manager of all real and personal property of the Companies except the Excluded Property?

31. The Applicants seek an order appointing EYI as receiver and receiver manager of all real and personal property of the Companies except the Excluded Property, as more particularly set out in the draft Appointment Order attached as Schedule "A" to the Notice of Application. The Applicants rely on:

    a. Section 33 of the *Judicature Act*, R.S.N.B. 1973, c. J-2 (the "***Judicature Act***");
    b. Rule 41 of the *Rules of Court*, namely: Rule 41.02(1)(a) and Rule 41.02(1)(c) of the *Rules of Court*; and
    c. Section 243 of the *BIA*.

32. EYI has consented to act as receiver and receiver manager.

<u>Section 33 of the Judicature Act</u>

33. This Court has the authority under section 33 of the *Judicature Act* to appoint a receiver where it considers it to be just and convenient. The relevant portion of section 33 of the *Judicature Act* states:

> ...[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 any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just[.]...

<u>Rule 41 of the *Rules of Court*</u>

34. This Court also has jurisdiction to appoint a receiver under Rule 41.02 of the *Rules of Court*, which states:

> 41.02 Appointment of Receiver
>
> (1) Where
>
> <u>(a) an instrument, other than an order of the court, provides for the appointment by the court of a receiver,</u>
>
> (b) it is necessary to appoint a person as receiver to carry out a judgment or order of the court, or
>
> <u>(c) where the court is satisfied that a receiver should be appointed,</u>
>
> the court may appoint a suitable person accordingly or make such other order as may be just.
>
> [Emphasis added]

<u>*BIA*</u>

35. The *BIA* provides further authority for the appointment of a receiver in section 243 which states.

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.

36. The Applicant, FCC, provided the Companies with Notices of Intention to Enforce Security pursuant to section 244(1) of the *BIA* and have satisfied the precondition of section 243(1.1) of the *BIA*. Pursuant to section 243(1) of the *BIA*, the Court may appoint a receiver if the Court considers it just or convenient to do so.

Analysis

37. In L§3 – Appointment of Receiver and Manager of *Houlden and Morawetz Bankruptcy and Insolvency Analysis* ("**Houlden & Morawetz**"), the authors set out factors to consider in the determination of whether it is appropriate to appoint a receiver. This section of Houlden & Morawetz refers to the decision by Justice Wilcock in ***Textron Financial Canada Ltd v Chetwynd Motels Ltd***, 2010 BCSC 477 ("***Textron***"). The factors set out in Houlden & Morawetz are substantially similar to those set out by Justice Masuhara, citing *Bennett on Receivership, 2d ed.* (Toronto: Carswell, 1999), in ***Maple Trade Finance Inc. v CY Oriental Holdings Ltd***, 2009 BCSC 1527 ("***Maple Trade***") which were referred to by Justice Wilcock in *Textron* at paragraph 50:

a. whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i. the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties;

p. the goal of facilitating the duties of the receiver.

(collectively, the "**Maple Factors**")

38. In *Textron*, Justice Willcock considered an application for the appointment of a receiver/manager of all of the assets, undertakings and properties of the respondent, pursuant to the *Rules of Court* (British Columbia), Section 39 of the *Law and Equity Act*, RSBC 1996, c 253, and Section 66 of the *Personal Property Security Act*, RSBC 1996, c 359. The applicant in this case had lent money to the respondent for the construction of an Inn. The respondent had entered into a general security agreement, mortgage and collateral general security agreement; all of which provided that the applicant was entitled to seek to appoint a receiver by court order.

39. Justice Willcock considered the competing lines of authority as to the test a court ought to consider with respect to appointment of a receiver. One line of authority has been that the court should only exercise discretion to not appoint a receiver where the debtor can show compelling commercial reasons why such an order should not be made. The other line of authority suggests that it is necessary for the creditor to show that it is just or convenient to make the appointment, but the existence of the right to such appointment in the security agreement is a strong factor for consideration as in the case of *Maple Trade*. After an extensive review of the authorities, Justice Willcock favored the latter approach.

40. The respondent in *Textron* had failed to make required payments of principal and interest for four months, did not maintain the required debt service coverage ratio and failed to provide the financial reporting that was required under the loan agreement. The applicant demanded payment of the amount then owing and issued a Notice of Intention to Enforce Security pursuant to the provisions of Section 244(1) of the *BIA*. The respondent failed to remedy the default.

41. Justice Willcock then considered certain of the Maple Factors and concluded that it was just and convenient to appoint a receiver at paragraphs 75-81:

- the parties stipulated in their contracts that the applicant would be entitled to apply for a court-appointed receiver in the event of default, thus the relief sought by the applicant was not extraordinary;

- there was no imminent prospect of repayment;

- the respondent did not fully disclose its restructuring plan;

- the interim payment plan would not indemnify the applicant against interest accumulating on the principal and arrears in the interim;

- there were no assurances that the interim payments would be made; and

- there was a real risk to the applicant's equity and real doubt with respect to the prospect of recovery of principal.

42. As in *Textron*, matters decided subsequent to *Textron* illustrate that not all of the Maple Factors are considered or have to be applicable to a matter in order to determine that it is just or convenient to appoint a receiver.

43. In ***Bank of Montreal v Sherco Properties Inc.***, 2013 ONSC 7023 (Ont SCJ [Commercial List]), Justice Morawetz granted an application by Bank of Montreal ("**BMO**") for the appointment of a receiver in respect of Sherco Properties Inc. ("**Sherco**") and Sherk Farm Limited ("**Sherk Farm**"), pursuant to Section 101 of the *Courts of Justice Act*, RSO 1990 c C 43 (the "**CJA**") and Section 243 of the *BIA*, which provide that a receiver may be appointed where it is just or convenient to do so.

44. Sherco was the principle debtor in connection with a series of credit facilities extended by BMO for a development project. Sherco and Sherk Farm had granted general security agreements to BMO. Mr. Sherk (owner of Sherco and Sherk Farm) and another company had also executed guarantees. As additional security, Mr. Sherk granted two collateral demand mortgages in support of his guarantee.

45. Justice Morawetz, citing ***Bank of Nova Scotia v Freure Village on Clair Creek*** (1996), 40 CBR (3d) 274, 40 CBR (3d) 274, stated that in determining whether it is just or convenient to appoint a receiver

under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property.

46. Justice Morawetz, proceeded to state the following at para 42:

> 42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. <u>While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties</u>. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, 2011 ONSC 1007.
>
> [Emphasis added.]

47. Justice Morawetz offered the following reasons for concluding that it was both just and convenient to appoint a receiver in the circumstances at paras 47 – 48:

a) the terms of the security held by BMO in respect of Sherco and Sherk Farm permit the appointment of a receiver;

b) the terms of the mortgages permit the appointment of a receiver upon default;

c) the value of the security continues to erode as interest and tax arrears continue to accrue;

d) over the past two years Mr. Sherk was unable to accomplish a refinancing or a sale of the lands; and

e) the involvement of the court officer would minimize the fallout of litigation between the parties, which could result in further delay.

48. The analysis set out above is consistent with ***Business Development Bank of Canada v 2197333 Ontario Inc.***, 2012 ONSC 965 and ***GE Canada Equipment Financing GP v Barber Group Rentals Inc.***, 2011 ONSC 3459, which are summarized in Schedule "B" to this brief. In each of these cases the Court also found that the appointment of a receiver was just and convenient after finding that only certain of the Maple Factors were present.

Present Application – Just or Convenient

49. In the present application, the Applicants submit that the following factors establish that it is both just and convenient to appoint a receiver over the Property (as defined below in paragraph 50), pursuant to Section 33 of the *Judicature Act*, Rule 41.02(1)(c) of the *Rules of Court* and Section 243 of the *BIA*:

a. there has been a default under the loan and security agreements between the Companies and the Secured Lenders;

b. FCC has not received any payments of principal from the Companies since March 2019 and there is no prospect of repayment;

c. there is a contractual remedy provided for in the security of the Secured Creditors that permits the appointment of a receiver, upon an event of default, over the Companies' Property (thus, the relief cannot be seen to be extraordinary in nature);

d. the Secured Creditors have issued all required notices under the *BIA* and FDMA;

e. property taxes with respect to the real property are in arrears and the Companies have no means to pay the property tax arrears;

f. the value of Secured Creditors security continues to erode as interest and the property tax arrears continue to accrue;

g. the Companies:

   i. do not have the necessary liquidity to carry on operations;

   ii. would not have been able to carry on Farming operations without the assistance of MFL since the Management Agreement was entered into;

   iii. do not have any prospect of resuming operations on their own in the future;

   iv. are in default of their obligations to FCC, CIBC and other parties;

   v. have no ability to complete the Transaction without these proceedings; and

   vi. have joined in these proceedings seeking the relief set out herein.

50. FCC submits that the foregoing factors are sufficient to demonstrate the need for a receiver in this case and that is both just and convenient to appoint a receiver. As a result of the foregoing, the Applicants request the appointment of the Proposed Receiver over the McCain Sale Assets and the Residual Assets (collectively, the "**Property**"), pursuant to Section 33 of the *Judicature Act,* Rule 41.02(1)(c) of the *Rules of Court* and Section 243 of the *BIA*.

51. Further, the Applicant submits that the existence of the right to seek the appointment of a receiver under the various security held by FCC in accordance with Rule 41.02(1)(a) of the *Rules of Court* further supports the request for the appointment of a receiver.

Conclusion

52. In summary, this Court has authority to appoint a receiver over the Property, assets and rights of the Companies in accordance with:

    i. section 33 of the *Judicature Act* because it is just and convenient to do so;

    ii. Rule 41.02(1)(c) of the *Rules of Court* because the evidence before the Court demonstrates that a receiver is necessary in the circumstances;

    iii. Rule 41.02(1)(a) of the *Rules of Court* because the evidence before the Court demonstrates that the parties agreed by instrument that a receiver may be appointed and granting the relief requested herein is in keeping with the agreement of the parties; and

    iv. section 243 of the *BIA* because the Applicant, FCC, served the Companies with notices under section 244 of the *BIA* and because a court appointed receiver is necessary for the protection of the Applicants' interests.

53. It is submitted that it is appropriate for this Court to exercise its discretion and grant an order for the appointment of the Proposed Receiver who will be an officer of the Court with a duty to all stakeholders and the ability to complete the Transaction, if approved by the Court.

Issue C - Should the Court approve the Transaction contemplated by the Sale Agreement with McCain?

54. In the case of ***Elleway Acquisitions Ltd. v 4358376 Canada Inc.***, 2013 ONSC 7009, the Court considered the appropriate test to be applied to a "quick flip". Justice Morawetz found as follows at paragraph 33:

> 33 Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:
>
> > (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and
> >
> > (b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.
>
> *Fund 321 Ltd. Partnership v. Samsys Technologies Inc.* (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

55. The assessment of a "quick flip" transaction in the context of the "*Soundair* Principles" also occurred in the case of ***Farm Credit Canada v Ocean Legacy Inc.***, 2011 NBQB 194, in which the Honourable Justice Hugh McLellan approved the transaction. Similar to the case at hand, the applicants in that matter were FCC and the respondents as co-applicants who had finalized a sale agreement but lacked the ability to complete the transaction at issue. A "quick flip" transaction was also approved by the Honourable Justice Jean-Paul Ouellette in ***Maoiomi Community Futures LP, by its General Partner, Nogamaoei Inc. and DLC Properties Limited. v. Clamatco***

Home Enterprise Ltd. Court File No. MM-204-18 by his unreported order of January 10, 2019.

56. In ***Royal Bank of Canada v Soundair Corp.*** [1991] O.J. No. 1137, 83 D.L.R. (4th) 76 ("***Soundair***"), the Ontario Court of Appeal considered the receiver's recommendation to sell a regional airline. Justice Galligan reviewed the principles to be considered by a court in deciding to approve a sale recommended by a receiver and set out four criteria for the Court to consider at paragraph 16:

> As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:
>
> > 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
> >
> > 2. It should consider the interests of all parties.
> >
> > 3. It should consider the efficacy and integrity of the process by which offers are obtained.
> >
> > 4. It should consider whether there has been unfairness in the working out of the process.

57. In the present case, each of the factors of the *Soundair* test in context of the economic reality of the Companies have been met and are addressed below.

Efforts to get the Best Price and Provident Actions

58. The McCain Sale Assets are collectively a large farming operation comprised of 6300 to 6400 cultivated acres, 22 potato storages, a packing shed building, seed storage buildings, 14 grain tanks and various warehouses or other buildings, a machine repair shop, fabrication buildings, wood chip operation facilities and various related buildings, and hundreds of pieces of farming equipment. Individually any one asset is not unique but the combination of those assets took years for Mr. Brake to assemble through various transactions. EYI has reported to the Court that there is a very limited pool of buyers that would be capable of purchasing the McCain Sale Assets as a going concern.

59. In the fall of 2019, Mr. Brake attempted to find a purchaser or a partner for Farming with no success. Again, in 2020, Mr. Brake pursued the limited market of potential buyers for Farming and McCain was the only serious interested party. The efforts to obtain a buyer must be considered in light of the significant financial pressure on the Companies and the immediate need Hillspring was facing for $13.5 Million to complete the 2020 Crop.

60. The only option to emerge is the proposed Transaction with McCain. If the Transaction is not completed, the Companies will no longer be able to operate and the value of Farming as a going concern will be lost. In addition, the employees and broader community will not benefit from the continued operation of Farming.

61. Comfort can also be taken that the effort to obtain the best possible price has been actively pursued by the Secured Creditors with the assistance of legal advisors, PWC and EYI. Further, both PWC and

EYI have confirmed their conclusion that the purchase price for the McCain Sale Assets is appropriate and supported by the appraisals filed with this Court on a confidential basis.

Interests of all Parties

62. In *Soundair*, Justice Galligan noted that the primary interest is that of the creditors of the debtor, although, in the appropriate case, the interests of the debtor should be taken into account and, where the purchaser bargained at some length and at considerable expense, the interests of the purchaser should also be considered.

63. The Secured Creditors are the principal secured creditors and support the Transaction. The Companies are co-applicants and support the Transaction as there is no other realistic alternative and they see the value of the Transaction to their employees and their community.

64. The Transaction provides a superior realization to that available on a forced liquidation sale. The best outcome for the Companies' stakeholders in the circumstances is the approval of the Transaction.

65. In addition, the efforts of the purchaser, McCain, are also relevant. McCain not only agreed to complete a Transaction that EYI considers reasonable and that is supported by the appraisals, McCain also entered into the Management Agreement which has maintained the value of Farming as an operating entity when the Companies could not and no one else would. This significant investment by McCain was in furtherance of the Transaction and would be lost to McCain if this Court does not approve the Transaction.

Efficacy and Integrity of the Process by which the Offer was Obtained

66. The process under which the Sale Agreement was arrived at was consistent with commercial efficacy and integrity.

67. The Proposed Receiver, an independent third party, has consented to act as receiver and receiver manager in these proceedings (subject to this Court's approval) and has conducted an analysis of the McCain Sale Assets in the same manner as if it had already been appointed as receiver and receiver manager of the Companies. The Proposed Receiver has concluded that the terms of the Sale Agreement are reasonable and has fully set out the process by which the Sale Agreement was concluded, which was fair and reasonable.

Fair Process

68. The Proposed Receiver, along with PWC, has been involved in the negotiation of the Term Sheet, the Management Agreement, the Sale Agreement as well as the equipment lease provided for in the Sale Agreement. Each of the Proposed Receiver and PWC have recommended the completion of the Transaction based on their involvement, their assessment of the overall resulting Transaction and the benefit the Secured Creditors will receive as will 74 employees and various suppliers.

69. In the face of shutting down without $13.5 Million in credit to complete the 2020 Crop while the COVID-19 pandemic was shutting borders and business, there was no other realistic process to follow than what occurred in this matter. In addition, the process included the Management Agreement which has maintained the going concern value while the parties worked to complete the Sale Agreement and seek this Court's approval.

70. There was no unfairness in reaching the Sale Agreement which is evident by the fact that secured creditors with specific charges in personal property are not affected by the Transaction and are free to deal with their security in the manner of their choosing. The interests of any creditors holding specific security in assets in priority to the Secured Creditors have been respected by the manner in which the assets have been categorized and the manner in which the Proposed Receiver recommends they be dealt with.

Conclusion

71. Justice Morawetz stated in ***Re Tool-Plas Systems Inc.***, [2008] O.J. No. 4218, 48 C.B.R. (5th) 91 (Ont. Sup. Ct. J. [Commercial List]) at paragraph 15:

> A quick flip transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a quick flip transaction, the 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.

72. The Proposed Receiver as well as the Secured Creditors have concluded that it is not likely that the same value as reflected in the Transaction would be achieved through any other process. As a result, in this case the proposed treatment of the various parties would realistically be much worse if the Transaction is not approved and it is submitted that the Transaction provides the best possible result in the circumstances taking into account the reality of the situation including:

   a. the historical unprofitability of Farming;
   b. the current state of the economy as a result of COVID-19;

c. that there are limited parties who could buy the McCain Sale Assets;
d. no one other party than McCain expressed serious interest in the Farming Assets; and
e. the alternative to the Transaction is a sale of the assets on a piecemeal basis which would reduce the realization to the Secured Creditors and eliminate the benefit of continued employment and economic spin off to the community.

73. It is respectfully submitted that this Honourable Court should authorize the completion of the Transaction in the manner proposed.

Issue D – Should this Court approve the Distribution?

74. The Companies' total indebtedness to the Secured Creditors is approximately $90 Million. The proceeds from the Transaction are significant and the proposed receiver has recommended that up to 98% be distributed.

75. The Proposed Receiver has obtained independent legal opinions in relation to the Secured Creditors' loan and security documents with the Companies. The opinions have verified the priority ranking of the Secured Creditors in and to the real property forming part of the McCain Sale Assets.

76. The Proposed Receiver is not aware of any security interests, liens, charges, encumbrances or other rights of third parties that would have priority over the respective interest of the Secured Creditors in and to the personal property forming part of the McCain Sale Assets.

77. It is respectfully requested that the Distribution be approved in order to maximize efficiency and allow for the reduction of the amount outstanding to the Secured Creditors and the interest that continues to accrue on their advances.

Issue E - Should the Court approve the sales process as requested in the Notice of Application?

78. The Applicants are seeking approval of the Receiver having the power to market and sell all Residual Property through various possible methods as detailed in the Report of the Proposed Receiver and set out in the Notice of Application (the "**Sales Process**").

79. The Proposed Receiver has acted honestly and in good faith in recommending the Sales Process. The Proposed Receiver is of the opinion that completing the Sales Process is commercially reasonable and in the best interests of the estate of the Companies.

80. The Proposed Receiver has considered all available information, weighed the competing interests and has considered the costs and benefits of the various options for realizing on the Residual Property.

81. EYI is satisfied that the recommended Sales Process is commercially reasonable because of the reasons set out in its Report.

82. It is respectfully submitted that EYI's recommendations should be followed because the Proposed Receiver has significant experience as an officer of the Court, is familiar with the Residual Assets, the claims in and to those assets and is acting in accordance with its obligation to obtain the best result for the Companies' stakeholders.

83. Further, EYI's recommendations have been agreed to by the primary secured creditors of the Companies having an economic interest in the assets to be disposed of, as have the Companies themselves.

84. It is respectfully submitted that this Honourable Court should authorize the Proposed Receiver to complete the Sales Process that provides for sales to be completed in accordance with the test in *Soundair.* Approving the Sales Process in advance also allows for the efficient administration of the estates of the Companies and without the need for a multitude of proceedings for the Residual Assets that are not unique in nature.

Issue F - Should the Court authorize and direct the Receiver to make an assignment in bankruptcy in the name of and on behalf of the Company?

<u>The Role of the Receiver</u>

85. In Frank Bennett, ***Bennett on Receiverships***, 2nd ed. (Toronto: Carswell, 1999) ("**Bennett on Receiverships**"), the authors state at page 233:

> At the outset of the receivership, the receiver decides whether to carry on the debtor's business or to close it down and sell the assets. Any authority to sell does not originate from ownership of the collateral but rather any authority to sell originates from the terms of a court order.

86. In Bennett on Receiverships, the authors state at pages 497-498 that bankruptcy often follows a receivership and that that there are several preferential reasons for bankruptcy from the point of view of both secured and unsecured creditors.

87. As such, it is submitted that the role of the receiver is, generally, to preserve and protect the property in question and, in some cases, to sell the debtor's assets. It is not uncommon that the appointment of a receiver triggers an application for a receiving order or an assignment by a debtor into bankruptcy.

88. The bankruptcy of the Companies would be beneficial because it will assist the Proposed Receiver in carrying out its duties including

potentially recovering assets for the benefit of the estates. Further, the Proposed Receiver should be authorized and directed to make an assignment in bankruptcy on behalf of the Companies in this case because, among other reasons:

a. the Companies are insolvent and are co-Applicants in seeking the relief;

b. the *BIA* provides for a clear claim process that will assist in the orderly and fair distribution of any property; and

c. the *BIA* allows for investigations to be made of the affairs of the bankrupt if required.

<u>Purposes of the *BIA*</u>

89. The mechanisms of the *BIA* are designed to protect all unsecured creditors notwithstanding that there may not be any assets for the Trustee in Bankruptcy to administer. For example, bankruptcy affords unsecured creditors, through the trustee, the right to demand an accounting from a security holder as well as an opportunity of determining whether there are any flaws with a security instrument.

90. Whatever the kind of receivership, the bankruptcy gives all creditors a measure of protection through the mechanics of the *BIA* (see Bennett on Receiverships at page 499).

91. In ***Churchill Forest Industries (Man.) Ltd.*** 1972] 2 W.W.R. 178, 16 C.B.R. (N.S.) 158, Justice Nitikman ordered that a receiving order be made, where a receiver-manager had been appointed by the court. The judge held at paragraph 33 that:

> [T]he appointment of the receiver did not freeze the obligations of the debtor nor did it create a new entity for the purpose of receiving or dealing with claims against the debtor... Therefore, that the position of the debtor insofar as its liability for debts is concerned, ... was not altered merely by reason of the appointment of the receiver made by court order.

<u>Co-Existence of Receiver and Trustee</u>

92. A court appointed Receiver can co-exist with a Trustee in bankruptcy so long as there is not a conflict of interest or conflict of jurisdiction, neither of which exist in this case (see ***Canadian Imperial Bank of Commerce v King Truck Engineering Canada*** (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.)).

93. Given the insolvent state of the Companies, the benefit of the *BIA* to all creditors through the Trustee and the expected simplification of the determination of claims in accordance with the *BIA*, it is appropriate that the requested relief be granted.

Issue G - Should this Court grant an order sealing certain confidential information?

94. The Supplemental Confidential Report of the Proposed Receiver contains commercially sensitive information including the Sale Agreement, the forced liquidation analysis and various related agreements. It is respectfully submitted that this information be treated on a sealed and confidential basis until the completion of the duties of the Proposed Receiver or on terms of a confidentiality agreement acceptable to the Proposed Receiver.

95. In ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41, [2002] 2 S.C.R. 522 ("***Sierra Club***"), the Supreme Court of Canada ("**SCC**") articulated a two-part test that should be applied when considering whether to grant a confidentiality order. The SCC stated at paragraph 53 that a confidentiality order should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

96. The reasoning in *Sierra Club* has been applied in New Brunswick in ***Évêque Catholique Romain de Bathurst v New Brunswick (A.G)***, 2010 NBQB 400.

97. In the present case, a sealing of the information is appropriate for the following reasons:

    a. it would be prejudicial to the interests of the stakeholders of the Companies if the information were available to future prospective purchasers of the Companies' assets; and

    b. there is no other reasonable alternative to preventing this information from becoming available upon review of this Honourable Court.

98. The salutary effects of maintaining the confidential nature of the information until the completion of the Receivership greatly outweighs the deleterious effects. It is respectfully submitted that this Honourable Court grant the sealing order.

PART IV – Relief Sought

99. The Applicants therefore apply to this Honourable Court for the relief requested in the Notice of Application as documented in the draft orders presented to the Court.

All of which is respectfully submitted this 24th day of June, 2020.

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SCHEDULE "A" – List of Authorities

Legislation:

1. *Judicature Act*, R.S.N.B. 1973, c. J-2.
2. *Rules of Court*, NB Reg 82-73.
3. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Secondary Sources:

4. Lloyd W Houlden, Geoffry B Morawetz & Dr Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009).
5. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, Markham: 2008).
6. Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999).

Case Law.

7. *Newman v Tibbetts*, 2005 NBCA 37, 283 N.B.R. (2d) 63. http://canlii.ca/t/1k25v
8. *Textron Financial Canada Ltd v Chetwynd Motels Ltd*, 2010 BCSC 477. http://canlii.ca/t/2972j
9. *Maple Trade Finance Inc. v CY Oriental Holdings Ltd*, 2009 BCSC 1527. http://canlii.ca/t/26h6z
10. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 (Ont SCJ [Commercial List]). http://canlii.ca/t/g25th
11. *Bank of Nova Scotia v. Freure Village on Clair Creek,* (1996), 40 C.B.R. (3d) 274 (Ont. Ct. J. (Gen. Div.) [Commercial List]). http://canlii.ca/t/1wbtz
12. *Business Development Bank of Canada v 2197333 Ontario Inc.*, 2012 ONSC 965. http://canlii.ca/t/fq4qf
13. *GE Canada Equipment Financing GP v Barber Group Rentals Inc.*, 2011 ONSC 3459. http://canlii.ca/t/fm47c
14. *Elleway Acquisitions Ltd. v 4358376 Canada Inc.*, 2013 ONSC 7009. http://canlii.ca/t/g25ss

15. *Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1 (Ont. Sup. Ct. J.). http://canlii.ca/t/1q88h

16. *Funds 321 Ltd. Partnership v. Samsys Technologies Inc.* (2006), 21 C.B.R. (5th) 1 (Ont. Sup. Ct. J. [Commercial List]). http://canlii.ca/t/1n47p

17. *Farm Credit Canada v. Ocean Legacy Inc.*, 2011 NBQB 194. http://canlii.ca/t/fmkh8

18. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). http://canlii.ca/t/1p78p

19. *Re Tool-Plas Systems Inc.*, [2008] O.J. No. 4218, 48 C.B.R. (5th) 91. http://canlii.ca/t/21b15

20. *Churchill Forest Industries (Man.) Ltd.* (1971), 23 D.L.R. (3d) 301 at para. 33 (Man. Q.B.). http://canlii.ca/t/gcxsl

21. *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.).

22. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. http://canlii.ca/t/51s4

23. *Évêque Catholique Romain de Bathurst v. New Brunswick (A.G)*, 2010 NBQB 400. http://canlii.ca/t/2g1fn

Schedule "B"

A. ***Business Development Bank of Canada v 2197333 Ontario Inc.*****,** 2012 ONSC 965 ("***Business Development Bank***").

1. In ***Business Development Bank of Canada***, Justice Morawetz allowed an application for the appointment of a receiver pursuant to Section 243(1) of the *BIA* and Section 101 of the *Courts of Justice Act*, RSO 1990 c C 43 (the "***CJA***").

2. The respondent, a real estate holding company with no employees and no active business, was indebted to the applicant in the amount of approximately $2.5 million. The respondent was in default of its obligation to the applicant and the applicant's security became enforceable. The respondent was served a demand with a Notice of Intention to Enforce Security pursuant to Section 244(1) of the *BIA*. The mortgage agreement provided that following an event of default, the applicant was entitled to apply to the court to seek the appointment of a receiver.

3. The applicant argued that a receiver should be appointed for the following reasons:

   a) the credit agreement was in default;

   b) the indebtedness was not in dispute;

   c) there had been a loss of confidence in management and the debtor showed a flagrant disregard for the secured position of the applicant in view of the continued accrual of interest; and

   d) the respondent was a holding company and had no other assets, lines of business or any reasonable prospects for future solvency.

4. The applicant argued that the court should not interfere with the rights derived by private contract and, in that case, the mortgage gave the

applicant the right to seek the appointment of a court-appointed receiver. The applicant also argued that it would be unjust to deny it the remedy of a court administration as the respondent's default had not been cured.

5. The court held that the above submissions of applicant were persuasive and concluded that the appointment of a receiver was justified for the following reasons at para 21:

a) there had been a default;

b) there was a contractual remedy provided for in the mortgage that contemplated the appointment of a receiver, thus, the relief could not be seen to be extraordinary in nature;

c) the respondent had been in default for a considerable period of time; and

d) due to the lack of operating business, there was no prejudice to the debtor that was directly related to the appointment.

B. GE Canada Equipment Financing GP v Barber Group Rentals Inc., 2011 ONSC 3459 ("*GE Canada*").

6. In ***GE Canada***, Justice Morawetz granted an application for the appointment of a receiver pursuant to Section 243 of the *BIA* and Section 101 of the *CJA*.

7. The respondents admitted default and conceded that the applicants were entitled to a remedy as a result of such default. The possible remedies for the applicant included power of sale, judicial sale, private receivership and court appointed receivership.

8. The applicants outlined the following reasons why a receiver should be appointed by the court at para 4:

a) judicial process will ensure that an independent court officer will control the sale process;

b) court-appointed receiver can address issues arising from competing offers;

c) it will avoid precipitous actions by creditors;

d) provides for the potential granting of a vesting order;

e) cost concerns are not material in the context of an approximately $12 million indebtedness;

f) court-appointed receiver can address competing timeframes;

g) court-appointed receiver can address issues relating to interest, taxes and borrowings; and

h) in exercising its business judgment, a court-appointed receiver can balance competing interests.

9. In addition to these reasons, the applicants had the contractual right to apply to court for the appointment of a receiver. Morawetz J. noted that such right was not dispositive of the matter, but was a factor to be taken into account.

10. Based on the foregoing, Morawetz J. concluded that the just or convenient test for the appointment of a receiver under both Section 243 of the *BIA* and Section 101 of the *CJA* had been met.