

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

**B E T W E E N:**

**BRIDGING FINANCE INC.,  
as agent for SPROTT BRIDGING INCOME FUND LP**

Applicant

**- and -**

**THOMAS CANNING (MAIDSTONE) LIMITED  
and 692194 ONTARIO LIMITED**

Respondents

**IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND  
243 (1) OF THE *BANKRUPTCY ACT AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS  
AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*,  
R.S.O. 1990, C. c. 43, AS AMENDED**

**FACTUM OF THE MOVING PARTY, WILLIAM THOMAS**

(Motion Returnable November 28, 2017)

November 21, 2017

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Lawyers for the Moving Party, William Thomas

**TO:** Service List

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**INDEX**

<b>SECTION</b>	<b>TITLE</b>	<b>PAGE</b>
<b>Part I</b>	<b>Overview</b>	<b>1</b>
<b>Part II</b>	<b>Facts</b>	<b>4</b>
<b>Part III</b>	<b>Issues &amp; Law</b>	<b>9</b>
	Thomas Canning Should be Granted Leave	10
	Bridging's Obligation to Pay has Never Ceased	12
<b>Part IV</b>	<b>Relief Requested</b>	<b>19</b>
<b>Schedule A</b>	<b>Authorities</b>	<b>20</b>
<b>Schedule B</b>	<b>Statutes</b>	<b>21</b>
<b>Appendix 1</b>	<b>Chronology</b>	<b>22</b>

## **PART I - OVERVIEW**

1. The moving party, William Thomas (“**Mr. Thomas**”), brings a motion for: i) an Order authorizing Richter Advisory Group Inc. (“**Richter**”) in its capacity as receiver of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited (collectively, “**Thomas Canning**” or the “**Company**”) (in such capacity, the “**Receiver**”) to pay the reasonable fees and disbursements of counsel for the Company, Blaney McMurtry LLP (“**Blaney**”), up to and including June 21, 2017, and ii) leave to bring the herein motion.

2. This motion was originally returnable on September 27, 2017. On October 13, 2017, Justice McEwan issued an endorsement requiring the Company to seek leave to bring the motion, and asking the parties to make additional submissions and adduce additional evidence on the issue of whether or not the Accommodation Agreement (as defined below) was terminated. The Company filed its factum, dated September 15, 2017, for the original return date, and continues to rely on the submissions made therein. The Company files this supplemental factum to address the issues raised by Justice McEwan in the October 13<sup>th</sup> endorsement.

3. On September 27, 2017, this Court heard argument that the outstanding fees of Blaney incurred during the forbearance period should be paid from the Reserve (as defined below) held by the Receiver. At the hearing, Bridging Finance Inc., as agent for Sprott Bridging Income Fund LP (“**Bridging**”) argued that its obligation to pay the legal fees incurred by Thomas Canning should not be enforced due to the termination of the Accommodation Agreement (even though Bridging had led no evidence of this fact at the hearing). This Court effectively adjourned the matter to provide Bridging with an opportunity to present this evidence.

4. It is the position of Thomas Canning (to which it has sworn two affidavits) that the Accommodation Agreement remained in effect until June 21, 2017 when the Receiver was appointed. There is no evidence from Bridging to the contrary. Given this fact, there is no question that the fees of Blaney should be paid, for the reasons set forth on September 27<sup>th</sup>.

5. Neither side in this matter disputes that Bridging entered into an agreement under which it agreed to pay Blaney's fees, subject to those fees being reasonable and to them not being incurred in opposition to a motion to approve the sale of Thomas Canning. It is the position of Thomas Canning that the fees of its counsel are reasonable, but they are prepared to have them submitted to the Court for review and approval, and this Court has consented to do so. Bridging is estopped from arguing the fees it agreed to pay should not be paid.

6. It is not disputed that Bridging knew that counsel for Thomas Canning was incurring fees which could only be paid by Bridging when Bridging authorized such payment.

7. It is not disputed that Thomas Canning valued the services provided and would have paid them had the funds been available.

8. It is not disputed that the effect of the sale process (in which Blaney's advice was, according to its client, essential), was that Bridging recovered all of its debt from Thomas Canning. Nothing further is owed by Thomas Canning to Bridging. Bridging may not have recovered cash for the entirety of its debt, but it accepted the assumption of that debt and counsel conceded this point before the court on September 27<sup>th</sup>.

9. Bridging has still not produced any evidence on the matter at hand. Instead, it has had its solicitor swear an affidavit full of argument, but entirely lacking on the key fact that was

required. It is respectfully submitted that the key question which this Court asked of Bridging on September 27<sup>th</sup> is: Did Bridging's obligation to pay for legal fees cease and did it provide notice of same to Thomas Canning? If so, when and how?

10. Respectfully, Bridging cannot answer this question because it did not happen. There is no evidence before this Court that Bridging sent a termination notice to Thomas Canning, even though the Accommodation Agreement provided notice provisions for formal communications. Rather, the evidence is that Bridging's counsel complained about possible defaults, and in each case Thomas Canning's counsel denied them. Following each such crossing of swords, the parties returned to the status quo, which was that the sale process continued, Bridging continued to meet its obligations under the Accommodation Agreement to fund the business, and Thomas Canning continued to operate.

11. The evidence is that during the 51 days of the monitorship, Bridging continued to fund amounts due under the Accommodation Agreement and the Company continued to operate. Bridging continued to ask for tasks to be done by counsel to Thomas Canning and those tasks were performed. It continued to require the Company to abide by its obligations under the Accommodation Agreement.

12. Bridging seeks for this Court to interpret the Accommodation Agreement to read that upon Bridging's counsel declaring the existence of an event of default, an event of default has occurred. That is not a reasonable interpretation of the agreement or any agreement. In any event, Bridging's conduct clearly proves they did not consider the agreement terminated and Thomas Canning has sworn to the fact that it was not.

13. It is submitted that if there was to be a disputed event of default, the proper remedy was to send a formal notice to Thomas Canning and for Bridging to seek to appoint a receiver or otherwise apply to the court. Bridging did none of these things. It did nothing as it wanted the sale process to continue and to continue to have the benefit of the agreement it had entered into.

14. Bridging now wants the Court to determine, after the fact, that there have been events of default and to discharge Bridging of its obligation to pay for Blaney's fees, after those fees were incurred in good faith. Bridging took the benefit of seeking compliance with the agreement and now, having received that benefit, wants to avoid the accompanying burden. The Court should not allow that.

15. The Accommodation Agreement was never terminated and no one suggested it was until counsel for Blaney required payment of their fees. Given the acrimonious nature of the communication between the parties, it is easy to understand that Bridging does not want to pay the fees of Thomas Canning's counsel, but that does not excuse them from having to do so. Bridging's obligation to pay fees continued during the forbearance period, which continued to and including June 21<sup>st</sup> when Thomas Canning consented to the appointment of the Receiver.

## **PART II - FACTS**

16. A chronology of events and communications on the issue of whether the Accommodation Agreement is in good standing is attached as Appendix 1 and summarized below.

17. Between April 20<sup>th</sup> and April 29<sup>th</sup> the parties negotiated a form of forbearance agreement. On April 29, 2017, the Company, Bridging, and the Company's principals, William Thomas,

Robert Thomas and John Thomas, entered into the Accommodation Agreement (“**Accommodation Agreement**”).<sup>1</sup>

18. Pursuant to the Accommodation Agreement, Bridging agreed to pay the legal costs of Thomas Canning related to the Accommodation Agreement up to and including \$20,000, but has not done so to date. Bridging has also not paid any money to Thomas Canning in respect of Blaney’s outstanding fees.<sup>2</sup>

19. On June 21, 2017, Justice Conway appointed Richter as Receiver on the consent of the parties, including Thomas Canning (“**Receivership Order**”). The Receivership Order also provides for a \$1.2 million reserve from the sale of Thomas Canning’s business and assets (“**Reserve**”) to be established, subject to further order of this Court, to pay certain outstanding claims of the Company, such as the fees owing to Blaney.<sup>3</sup>

20. Between April 29<sup>th</sup> and June 21<sup>st</sup>, Bridging’s counsel alleged that Thomas Canning committed events of default under the Accommodation Agreement in e-mail correspondence with Thomas Canning’s counsel. For each and every one of these allegations, Thomas Canning has denied (through its counsel and through the sworn evidence of Mr. Thomas) that any of these allegations constitute termination events. The alleged events of default are as follows:

- (a) On May 1<sup>st</sup>, Bridging became aware that the Ontario Farm Marketing Commission (“**Commission**”) had made an Order on April 13, 2017 with respect to Thomas Canning’s tomato processing license, requiring Thomas Canning to,

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<sup>1</sup> Affidavit of William Thomas, sworn June 20, 2017 (“**Thomas Affidavit**”), Exhibit F at para. 12, Motion Record of the Moving Party, William Thomas, dated November 1, 2017 (“**Motion Record**”) Tab 2F, pg. 79. Thomas Affidavit, Exhibit D, Motion Record, Tab 2D, pgs. 45-68.

<sup>2</sup> Thomas Affidavit, para. 72 and Exhibit D, Motion Record, Tab 2 and Tab 2D, pgs. 24, 57.

<sup>3</sup> Justice Conway’s Order appointing the Receiver, dated June 21, 2017, Motion Record, Tab 4, pgs. 137-153.

among other things, post a letter of credit to protect growers contracting with Thomas Canning for the 2017 crop (“**Commission Order**”).<sup>4</sup> This Court’s Order appointing Richter as Monitor of Thomas Canning on May 1, 2017 contained a provision staying all regulatory bodies.<sup>5</sup> Apart from requiring this stay of proceedings in the May 1<sup>st</sup> Order, Bridging took no action on this issue between May 1<sup>st</sup> and May 7<sup>th</sup>. On May 8<sup>th</sup>, Ken Rosenstein, counsel for Bridging, advised David Ullmann at Blaney via telephone that failing to inform Bridging of the Commission Order constituted a default under the Accommodation Agreement. Mr. Ullmann denied that this was a breach of the agreement.<sup>6</sup> On the same day, Mr. Rosenstein made requests that Blaney provide all documents and correspondence related to the growers and licensing issues, and Blaney obliged.<sup>7</sup>

- (b) On May 9<sup>th</sup>, Mr. Ullmann informs Mr. Rosenstein about issues with Thomas Canning’s grant from the Ontario Ministry of Agriculture, Food and Rural Affairs. Mr. Rosenstein takes the position that this is an event of default under the Accommodation Agreement, which Mr. Ullmann denies.<sup>8</sup>
- (c) On June 8<sup>th</sup>, counsel for Bridging took the position in e-mails to Mr. Ullmann that newly discovered instances of alleged diversion of funds that pre-date the

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<sup>4</sup> Affidavit of Ken Rosenstein, sworn November 10, 2017 (“**Rosenstein Affidavit**”), para. 36, Responding Motion Record, dated November 10, 2017 (“**Responding Motion Record**”).

<sup>5</sup> Report of the Interim Receiver and Monitor, dated June 15, 2017, Appendix F at para. 15.

<sup>6</sup> Rosenstein Affidavit, para. 37 and Exhibit Q, Responding Motion Record.

<sup>7</sup> Reply Affidavit of William Thomas, sworn November 17, 2017 (“**Reply Affidavit**”), Exhibits A and B, Reply Motion Record.

<sup>8</sup> Rosenstein Affidavit, Exhibit Q, Responding Motion Record.

Accommodation Agreement constitute forbearance termination events, which Mr. Ullmann denied.<sup>9</sup>

21. Despite allegations that Thomas Canning was in default of the terms of the agreement from Bridging's counsel, Bridging continued to act as though the Accommodation Agreement was in good standing and continued to require compliance with its terms. For example:

- (a) Bridging continued to provide funding for the Company up to and including June 21, 2017.<sup>10</sup> For example, on May 12<sup>th</sup>, Bridging advised the Commission that it was prepared to fund Thomas Canning for security which may be negotiated between Thomas Canning and the 2017 growers.<sup>11</sup> On May 15<sup>th</sup>, upon Richter's recommendation, Bridging confirmed that it would fund 150 acres to keep the business operational during the sale process.<sup>12</sup> On May 19<sup>th</sup>, Bridging entered into an escrow agreement with one tomato field grower, pursuant to which it was supposed to place \$472,500 into escrow.<sup>13</sup> On June 1<sup>st</sup>, Bridging denied Thomas Canning's request to fund 100 acres not because the Accommodation Agreement was terminated, but because it was "not a critical payment given that the business is able to continue to operate without it."<sup>14</sup>

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<sup>9</sup> Rosenstein Affidavit, Exhibit S, Responding Motion Record. See also Reply Affidavit, Exhibit M, Reply Motion Record.

<sup>10</sup> Reply Affidavit, para. 8, Reply Motion Record, pg. 4.

<sup>11</sup> Reply Affidavit, Exhibit C, Reply Motion Record. See also the Report of the Interim Receiver and Monitor, dated June 15, 2017 at Appendix J.

<sup>12</sup> Rosenstein Affidavit, Exhibit R, Responding Motion Record. See also the Report of the Interim Receiver and Monitor, dated June 15, 2017 at Appendix L.

<sup>13</sup> Report of the Interim Receiver and Monitor, dated June 15, 2017, at para. 33. See also the First Report of the Receiver, dated September 18, 2017, at para. 36.

<sup>14</sup> Reply Affidavit, Exhibit K, Reply Motion Record.

- (b) Bridging made requests from Thomas Canning and its counsel for assistance with various issues throughout the forbearance period, including the operation of the business and issues relating to the Commission.<sup>15</sup>
- (c) On May 16<sup>th</sup>, Mr. Thomas provided sworn evidence that the Accommodation Agreement was in good standing. Bridging did not contest this point at the hearing before Justice Newbould, but in fact relied on the Accommodation Agreement at the hearing.<sup>16</sup> Bridging's counsel took the position that Thomas Canning's motion before Justice Newbould would effectively "rip up the Accommodation Agreement,"<sup>17</sup> to which it objected.
- (d) On June 8<sup>th</sup> and June 19<sup>th</sup>, Richter required that the Company comply with the Accommodation Agreement. On June 9<sup>th</sup>, Bridging sent a similar request to Thomas Canning.<sup>18</sup>

22. Mr. Thomas provided sworn evidence on May 17<sup>th</sup>, June 20<sup>th</sup> and November 17<sup>th</sup> that, at all relevant times during the forbearance period, Thomas Canning acted in good faith and in accordance with its obligations under the Accommodation Agreement. Mr. Thomas provided sworn evidence on these three dates that the Accommodation Agreement was not terminated and still in good standing.<sup>19</sup>

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<sup>15</sup> See for example, Rosenstein Affidavit, Exhibit Q, Responding Motion Record. See also Reply Affidavit, Exhibits E, F, H, I, and J, Reply Motion Record.

<sup>16</sup> Thomas Affidavit, para. 51, Motion Record, pg. 20.

<sup>17</sup> Reply Affidavit, Exhibit G, Reply Motion Record.

<sup>18</sup> See Rosenstein Affidavit, Exhibit S, Responding Motion Record. See also Thomas Affidavit, paras. 45, 46 and Exhibit L, Motion Record, pgs. 19, 107-108.

<sup>19</sup> See Thomas Affidavit, paras. 48-49 and Exhibit F, Motion Record, pgs. 19, 80. See also Reply Affidavit, para. 7, Reply Motion Record, pg. 4.

23. Bridging has never provided anything more than e-mail correspondence from its counsel to counsel for Thomas Canning alleging that the Accommodation Agreement was in breach. No termination notice was ever provided to Thomas Canning personally or otherwise.<sup>20</sup>

### **PART III - ISSUES & LAW**

24. The issues before this Honourable Court are:

- (a) Should the Court grant leave to Thomas Canning to bring the herein motion? Yes. Even though the Company is in receivership, it continues to exist and Mr. Thomas is a director of the Company. The Receivership Order did not extinguish Thomas Canning's rights with respect to the herein motion. It is just and equitable to grant leave for Thomas Canning to seek payment of Blaney's fees from the Reserve as there is no other practical way of addressing this issue, and no parties would be prejudiced by leave being granted.
- (b) Did Bridging's obligation to pay the reasonable fees and disbursements of Blaney cease because the Accommodation Agreement was terminated? Thomas Canning has always denied the existence of any events of default, and has always maintained that the Accommodation Agreement was in good standing up to and including June 21, 2017, at which time the Receiver was appointed on consent. Bridging's counsel alleged that Thomas Canning was in default of the Accommodation Agreement in e-mail correspondence between counsel. Thomas Canning has consistently denied these allegations. After alleging events of default, Bridging continued to fund the operations of Thomas Canning, and

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<sup>20</sup> Reply Affidavit, para. 4, Reply Motion Record, pg. 4.

continued to request Thomas Canning's assistance with the sale and its compliance with the terms of the Accommodation Agreement. By the parties' conduct, there has been no termination of the Accommodation Agreement, and Bridging is required to pay the fees of Blaney.

**A) Thomas Canning Should Be Granted Leave**

25. When a receiver is appointed, the debtor company continues to exist and the board of directors remains in office. The receiver is given control over the assets of the company in accordance with the receivership order.<sup>21</sup>

26. In this case, Richter was appointed as Receiver of Thomas Canning with the consent of the Company, and on the express understanding that the issue of the payment of Blaney's reasonable fees would be the subject of a future motion and that funds would be set aside to fund those fees.<sup>22</sup>

27. On June 21, 2017, Justice Conway appointed the Receiver, and authorized the Receiver to distribute the net sale proceeds from the sale of the Company's business and assets to Bridging, subject to the Reserve, the entitlements and priority of claims (including the claim for Blaney's fees) to which would be subject to further order of the Court.

28. The Receivership Order expressly provides that this Court can make a further order with respect to proceedings against the property of Thomas Canning. In addition, the Receivership Order was clear that the matter of the payment of Blaney's fees would be addressed on another

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<sup>21</sup> Houlden and Morawetz Bankruptcy and Insolvency Analysis, L§5, L.W. Houlden and Geoffrey B. Morawetz, Moving Party's Brief of Authorities, Tab 1.

<sup>22</sup> See Endorsement of Justice Conway, dated June 21, 2017, Motion Record, Tab 5, pg. 154. See also Justice Conway's Order appointing the Receiver, dated June 21, 2017, para. 24, Motion Record, Tab 4, pg. 148.

day to be scheduled at a chambers appointment on July 5, 2017.<sup>23</sup> The motion with respect to counsel's fees was initially scheduled on July 5<sup>th</sup> and subsequently adjourned. The Company appeared before Justice Hainey on September 13<sup>th</sup> to schedule this motion again.<sup>24</sup>

29. The Receivership Order must be read in the context in which it was made. It is clear that the Court did not intend that the granting of the Receivership Order would preclude or otherwise nullify Thomas Canning's ability to pursue the issue of the outstanding fees due to Blaney.

30. Notwithstanding the Receivership Order, the Company continues to exist and Mr. Thomas remains an officer and director of Thomas Canning. Mr. Thomas previously brought a motion on September 27, 2017 for an Order authorizing him to represent the Company in a criminal proceeding relating to issues before the Canada Food Inspection Agency ("CFIA"), and to settle the outstanding CFIA matter on behalf of Thomas Canning, which would have otherwise fallen to the Receiver to resolve. Bridging and the Receiver did not oppose this relief, and this Court granted the Order sought on September 27, 2017.<sup>25</sup>

31. This Honourable Court has broad equitable discretion to make any orders that are fair in the circumstances.<sup>26</sup> It is just and equitable that the Company be granted leave to seek payment of the outstanding fees owed to its counsel. No party would be prejudiced if leave were granted as there are funds delineated in the Reserve, which is currently being held by the Receiver for this purpose.

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<sup>23</sup> Justice Conway's Order appointing the Receiver, dated June 21, 2017, paras. 8 and 24, Motion Record, Tab 4, pgs. 143, 148. See Endorsement of Justice Conway, dated June 21, 2017, Motion Record, Tab 5, pg. 154

<sup>24</sup> See Endorsement of Justice Hainey, dated September 13, 2017, Motion Record, Tab 7.

<sup>25</sup> See Endorsement of Justice McEwan, dated September 27, 2017.

<sup>26</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ("BIA"), s. 183(1).

32. Additionally, there is no practical way for this matter to be resolved other than through Thomas Canning being granted leave to bring the within motion as Blaney as no privity of contract with Bridging, and Thomas Canning is insolvent and therefore unable to pay the fees of its counsel.

33. The Receiver has also not indicated a willingness to advance this issue on behalf of Thomas Canning, or otherwise exercised its rights under the Receivership Order. Given the Receiver's comments on September 27<sup>th</sup> before this Court that its relationship with Thomas Canning is an acrimonious one, the Receiver is not in a position to now pursue the payment of Blaney's fees from Bridging on behalf of Thomas Canning.

**B) Bridging's Obligation To Pay Has Never Ceased**

**No event of default under the Accommodation Agreement**

34. The evidence before this Court is that Bridging's counsel has made allegations that Thomas Canning is in default of the Accommodation Agreement. These allegations are not proven. Indeed, Thomas Canning has consistently denied each one of these allegations. Additionally, Mr. Thomas, as a representative of Thomas Canning, has provided sworn evidence that the Company has always acted in good faith and that he believes the Accommodation Agreement was in good standing up to the date of the Receivership Order.<sup>27</sup>

35. Mr. Thomas was of the view that Bridging was using threats and strong arm tactics to force compliance with the Accommodation Agreement, and at no time believed that the

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<sup>27</sup> See Thomas Affidavit, paras. 48, 49, 51, and Exhibit F at para. 15, Motion Record, Tab 2 and Tab 2F at pgs. 18-19, 80. See also Reply Affidavit, para. 7, Reply Motion Record, pg. 4.

Accommodation Agreement was at an end. If the agreement was at an end, Bridging's threats would have carried no weight.<sup>28</sup>

36. Mr. Thomas has also provided sworn evidence to contest and explain the recent allegations made in Mr. Rosenstein's affidavit concerning the recently discovered diversion of funds that predate the Accommodation Agreement.<sup>29</sup>

37. While Thomas Canning has provided direct evidence to attest to the fact that there has been no breach of the agreement, Bridging has only provided evidence from its counsel, despite being specifically asked for additional evidence by this Court on September 27<sup>th</sup>.

38. Graham Marr, a Portfolio Manager at Bridging, provided evidence with respect to Bridging's *ex parte* motion to appoint an interim receiver, but this affidavit was sworn April 20, 2017 and predates the Accommodation Agreement. A representative of Bridging has not provided any further evidence with respect to Bridging's interpretation of the Accommodation Agreement, or sworn to the fact that the Accommodation Agreement is in default.

39. Bridging made the decision not to provide this Court with direct evidence or open itself up for cross-examination, and it should live with the consequences of that decision. Respectfully, Mr. Rosenstein's evidence about Bridging's perspective as to whether or not an event of default has occurred should be given little weight.

40. Solicitors should not be the affiants on affidavits dealing with substantive matters not only because it offends the best evidence rule, but also because it would compromise the ability

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<sup>28</sup> Reply Affidavit, para. 7, Reply Motion Record, pg. 4.

<sup>29</sup> Reply Affidavit, paras. 12-21, Reply Motion Record, pgs. 5-7.

of the other party to cross-examine the solicitor who could merely assert privilege, and potentially require the solicitor to withdraw from the proceedings.<sup>30</sup>

41. At best, there is contradictory evidence as to whether or not a forbearance termination event has occurred. Mr. Ullmann's e-mail to Mr. Rosenstein on May 16<sup>th</sup> exemplifies Thomas Canning's viewpoint on the multitude of aspersions cast by Bridging's counsel: "I feel compelled to respond to say that just because you write an email with your version of the facts does not make it so. Can we just leave it for now that we continue to disagree?"<sup>31</sup>

42. Bridging has never brought an application or motion before this Honourable Court to seek a declaration that there has been a forbearance termination event under the Accommodation Agreement. It has never commenced an action against Thomas Canning for damages as a result of the breach of the Accommodation Agreement.

### **Accommodation Agreement has never been terminated**

43. When a party fails to perform a contractual obligation, the other party is faced with a right of election respecting any remaining contractual obligations, which determines the consequences of the repudiation. The non-breaching party has the option of either putting an end to its obligations under the contract by accepting the repudiation and suing for damages, or to treat the contract as still being in force and to maintain the binding quality of the contract.<sup>32</sup>

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<sup>30</sup> *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)*, 1993 CarswellNS 58, para. 21, Moving Party's Brief of Authorities, Tab 2.

<sup>31</sup> Reply Affidavit, Exhibit D, Reply Motion Record, pgs. 39-45.

<sup>32</sup> *Guarantee Co. of North America v Gordon Capital Corp.*, 1999 CarswellOnt 3171 (SCC) at paras. 40-41, Moving Party's Brief of Authorities, Tab 3. See also *Vanvic Enterprises Ltd. v Mack*, 1985 CarswellBC 270 (BC CA), at paras. 16-18, Moving Party's Brief of Authorities, Tab 4.

44. In this case, Bridging did the latter. After each alleged default, Bridging continued to provide funding to the Company in accordance with its obligations under the Accommodation Agreement, and it continued to require that Thomas Canning comply with its obligations thereunder, including by requesting that Thomas Canning and its counsel assist Bridging with various issues related to the business and its sale.

45. Ultimately, Thomas Canning's consent was required for the appointment of the Receiver on June 21<sup>st</sup>.<sup>33</sup> This point alone is indicative of the parties' view that the Accommodation Agreement had not come to an end, as Bridging now alleges. Had the Accommodation Agreement been terminated on June 21<sup>st</sup>, Bridging would have been able to appoint a receiver without the consent of Thomas Canning.

#### **No notice of termination provided by Bridging**

46. Section 7.8 of the Accommodation Agreement provides as follows:

Any notice, demand or other communication required or permitted to be given to any party hereunder shall be given in writing and addressed as follows:

...

In the case of the Obligors:

c/o Thomas Canning (Maidstone) Limited  
326 South Talbot Road  
Maidstone, Ontario N0R 1K0

Attention: William Thomas  
Email: [williamt@thomascanning.net](mailto:williamt@thomascanning.net)

...

Any such notice shall be deemed to be sufficiently given if personally delivered or sent by facsimile transmission, and in each case shall be deemed to have been received by the other party on the same day on which it was delivered or sent by

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<sup>33</sup> See Endorsement of Justice Conway, dated June 21, 2017, Motion Record, Tab 5, pg. 154.

facsimile transmission, if such day is a Business Day, and, if not, on the next following Business Day.<sup>34</sup>

47. Aside from alleging on various occasions that events of default had taken place, Bridging has never advised Thomas Canning personally that the Accommodation Agreement was terminated by providing Mr. Thomas with a notice in writing delivered personally or by fax, in accordance with s. 7.8 of the Accommodation Agreement.<sup>35</sup>

48. Courts have held that it is important for formal notice requirements to be satisfied, particularly in circumstances where the parties are in constant communication through their solicitors.

49. In *High Tower Homes Corp. v. Stevens*, the Court of Appeal for Ontario held that it was not sufficient for the purchaser's solicitor to give notice to the vendor's solicitor by fax that the purchaser had waived certain conditions when the notice provision in the agreement required notice to be provided to the vendor personally. The Court of Appeal also found that the vendor had not waived compliance with the express notice provision by permitting the respective solicitors to negotiate the agreement with offers and counter-offers by fax.<sup>36</sup>

50. An express notice term is required in order to ensure that the parties are aware of the status of their relationship, and the respective rights and obligations under an agreement.<sup>37</sup>

51. In this instance, counsel for Bridging and Thomas Canning were involved in almost daily e-mail correspondence. Bridging's counsel made allegations that Thomas Canning had

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<sup>34</sup> Thomas Affidavit, Exhibit D, Motion Record, Tab 2D, pg. 62.

<sup>35</sup> Reply Affidavit, para. 4, Reply Motion Record, pg. 4.

<sup>36</sup> *High Tower Homes Corp. v. Stevens*, 2014 ONCA 911, paras. 27, 28, 40-42, 45-47, Moving Party's Brief of Authorities, Tab 5.

<sup>37</sup> *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, paras. 29, 34-5, 38-9, 47, Moving Party's Brief of Authorities, Tab 6.

committed events of default under the Accommodation Agreement solely by e-mail, Thomas Canning's counsel denied each and every one of those allegations, and the parties returned to the status quo. Compliance with the formal notice requirement under the Accommodation Agreement is particularly important in these circumstances in order to differentiate a termination notice from everyday communications that were subsequently contradicted by Bridging's conduct.

52. Without a notice being sent to Thomas Canning personally (and not through Blaney) either delivered personally or by fax, Thomas Canning did not have a clear understanding of the status of the Accommodation Agreement or its relationship with Bridging, especially in light of the fact that Bridging continued to require compliance with the Accommodation Agreement and provide funding to the Company up to and including June 21, 2017.

**Termination does not extinguish Bridging's obligation to pay**

53. In the alternative, Thomas Canning takes the position that, if there was a repudiation of the Accommodation Agreement (which is denied), this does not extinguish Bridging's obligation to pay the reasonable fees of Blaney which accrued prior to termination.

54. When one party breaches a contract, the "innocent" party may choose to treat the contract as terminated. When a contract is terminated, discharged for breach or repudiated, the effect is that both parties are discharged from their future obligations under the agreement.<sup>38</sup>

55. However, the contract is not rescinded or void *ab initio*, and rights or obligations that have already accrued or matured under the contract are not extinguished. The parties are only

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<sup>38</sup> *Guarantee Co. of North America v Gordon Capital Corp.*, 1999 CarswellOnt 3171 (SCC) at paras. 40-41, Moving Party's Brief of Authorities, Tab 3. See also *1394918 Ontario Ltd. v. 1310210 Ontario Inc.*, 2002 CarswellOnt 8, para. 22, Moving Party's Brief of Authorities, Tab 7.

discharged of their prospective obligations under the contract as from the date of termination. Rescission only applies to voidable contracts, not to the termination of initially valid, but subsequently broken contracts.<sup>39</sup>

56. Bridging is not taking the position that the Accommodation Agreement is void *ab initio*. Indeed, it is relying on the releases under s. 7.1 of the Accommodation Agreement.<sup>40</sup>

57. Even if the Accommodation Agreement was at an end at any time prior to June 21<sup>st</sup> (which is expressly denied), the repudiation of the contract by Bridging does not extinguish Bridging's obligation to pay Blaney's fees, which accrued prior to termination.

58. Bridging knew at all relevant times that Blaney was providing advice and services to Thomas Canning throughout the forbearance period. Blaney was in almost daily contact with counsel for Bridging and counsel for the Richter, and Bridging's counsel requested that Blaney perform certain tasks throughout May and June 2017.<sup>41</sup> Legal services and the obligation to pay for same accrue as they are being performed and rendered; this is not a scenario where services result in a final work product.

59. Bridging's obligation to pay for the services rendered by Blaney accrued when those services were rendered, and not when the invoices were submitted.

60. In any event, it was agreed among the parties that Blaney would receive payment of its fees after funds were available from the sale of Thomas Canning's business and assets.<sup>42</sup>

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<sup>39</sup> *Guarantee Co. of North America v Gordon Capital Corp.*, 1999 CarswellOnt 3171 (SCC) at paras. 40-41, Moving Party's Brief of Authorities, Tab 3.

<sup>40</sup> See Rosenstein Affidavit, para. 31, Responding Motion Record.

<sup>41</sup> See for example, Rosenstein Affidavit, Exhibit Q, Responding Motion Record. See also Reply Affidavit, Exhibits E, F, H, I, and J, Reply Motion Record.

<sup>42</sup> Thomas Affidavit, paras. 69-70, Motion Record, pg. 23.

Bridging cannot take the position that its obligation to pay has been extinguished as a result of the consensual appointment of the Receiver before the invoices were rendered by Blaney when those obligations survive termination of the Accommodation Agreement and the appointment of the Receiver.

**PART IV - RELIEF REQUESTED**

30. The Moving Party, Mr. Thomas, respectfully requests that this Honourable Court grant leave for the Company to bring the herein motion.

31. The Moving Party seeks an Order authorizing the receiver to disburse from the Reserve the reasonable outstanding fees and expenses of Blaney incurred in these proceedings up to and including June 21, 2017, plus its costs in seeking this relief.

32. In the alternative, the Moving Party respectfully requests a charge in the amount of \$90,324.63 equal in priority to the Receiver's Charge.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON NOVEMBER 21, 2017.**



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David Ullmann  
Counsel for the Moving Party

**SCHEDULE “A” - AUTHORITIES**

1. Houlden and Morawetz Bankruptcy and Insolvency Analysis, L§5: Effect of Appointment of a Receiver, L.W. Houlden and Geoffrey B. Morawetz
2. *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)*, 1993 CarswellNS 58
3. *Guarantee Co. of North America v Gordon Capital Corp.*, 1999 CarswellOnt 3171
4. *Vanvic Enterprises Ltd. v Mack*, 1985 CarswellBC 270
5. *High Tower Homes Corp. v. Stevens*, 2014 ONCA 911
6. *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597
7. *1394918 Ontario Ltd. v. 1310210 Ontario Inc.*, 2002 CarswellOnt 8

## SCHEDULE “B” - STATUTE

### *Bankruptcy and Insolvency Act, RSC 1985, c B-3*

#### Courts vested with jurisdiction

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

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen’s Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen’s Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

## APPENDIX 1 - CHRONOLOGY

Date	Event	Reference
October 2016	Bridging discovers Thomas Canning opened bank accounts at RBC. Bridging discovers that Thomas Canning allegedly deposited money into the RBC accounts in May/June 2016, and not into the blocked account.	Marr Affidavit, paras. 29, 32. See also Exhibit L and Exhibit M to the Marr Affidavit.
March 2017	Bridging is aware that Thomas Canning was charged for mislabelling tomato products by the CFIA	Exhibit N to the Marr Affidavit
April 5, 2017	Bridging issues demands and notice to enforce security to Thomas Canning and 692194 Ontario	Exhibit O to the Marr Affidavit
April 13 <sup>th</sup>	Commission makes Order requiring Thomas Canning to post a letter of credit or license would be revoked (“ <b>Commission Order</b> ”)	See para. 29 of the Report of the Interim Receiver and Monitor, dated June 15, 2017
April 16 <sup>th</sup>	David Ullmann advises Ken Rosenstein that it is Thomas Canning’s position that it is a farmer and that the loan agreement between Thomas Canning and Bridging expired on January 3, 2017, which therefore obviates the obligation of Thomas Canning to deposit funds into the blocked account. David Ullmann further advises that Thomas Canning will be making deposits into a new account, but that MNP would audit all receipts and withdrawals from the account.	Exhibit A to the Thomas Affidavit
April 18 <sup>th</sup>	Bridging is aware that Thomas Canning deposited \$10,434.05 in its BMO disbursement account, and not in the blocked account	Exhibit Q to the Marr Affidavit
April 20 <sup>th</sup>	Bridging obtains <i>ex parte</i> order from Justice Newbould appointing Richter as interim receiver	Appendix B to the Report of the Interim Receiver and Monitor, dated June 15, 2017
April 20 <sup>th</sup> to April 29 <sup>th</sup>	Parties are engaged in negotiating the Accommodation Agreement	See Exhibit F to the Thomas Affidavit, at para. 12
April 29 <sup>th</sup>	Accommodation Agreement is entered into between Bridging, Thomas Canning, 692194 Ontario, and William, Robert and John Thomas	Exhibit D to the Thomas Affidavit
May 1 <sup>st</sup>	Richter is appointed as Monitor pursuant to the Order of Justice Newbould, made on consent of the parties and in accordance with the Accommodation Agreement	Appendix F to the Report of the Interim Receiver and Monitor, dated June 15, 2017
May 1 <sup>st</sup>	Bridging became aware of the Commission Order	Rosenstein Affidavit, para. 36

May 8 <sup>th</sup>	Ken Rosenstein informs David Ullmann on the phone that Commission Order is a default under the Accommodation Agreement, which David Ullmann denies in an e-mail on May 9 <sup>th</sup> . After the call, Ken Rosenstein requires that counsel for Thomas Canning provide to him all documents and correspondence relating to the growers, licensing issues and the Commission, and that Bridging be included on all calls and correspondence any regulators going forward. David Ullmann responds to this request.	Rosenstein Affidavit, para. 37 and Exhibit Q Reply Affidavit of William Thomas, sworn on November 17, 2017 (“ <b>Reply Affidavit</b> ”), Exhibit A and B
May 9 <sup>th</sup>	David Ullmann informs Ken Rosenstein about issues with the OMAFRA grant. Ken Rosenstein takes the position this is a breach of the Accommodation Agreement, which David Ullmann does not accept.	See para. 30 of the Report of the Interim Receiver and Monitor, dated June 15, 2017. See also Exhibit Q to the Rosenstein Affidavit
May 11 <sup>th</sup>	Hearing held via teleconference before the Commission to address issues relating to the Commission Order, which was attended by counsel for the company, Bridging and the Monitor, among others. Thomas Canning requested Commission to hold a hearing at the end of June, and Bridging agreed with this submission.	See para. 30 and Exhibit J of the Report of the Interim Receiver and Monitor, dated June 15, 2017
May 12 <sup>th</sup>	Thomas Canning and Bridging provided written submissions to the Commission. Bridging stated it was prepared to fund Thomas Canning for security which may be negotiated between Thomas Canning and the 2017 growers, subject to certain conditions	Exhibit J of the Report of the Interim Receiver and Monitor, dated June 15, 2017 Reply Affidavit, Exhibit C
May 15 <sup>th</sup>	The Monitor recommends Bridging fund 150 acres of tomato plants when Thomas Canning insists that 400 acres should be planted in order to maximize the value of the business. Bridging confirms that it will fund 150 acres to keep the business operating during the sale process.	See Exhibit R to the Rosenstein Affidavit. See also Appendix L to the Report of the Interim Receiver and Monitor, dated June 15, 2017
May 16 <sup>th</sup>	David Ullmann writes to Ken Rosenstein: “I feel compelled to respond to say that just because you write an email with your version of the facts does not make it so. Can we just leave it for now that we continue to disagree?”	Reply Affidavit, Exhibit D
May 17 <sup>th</sup>	William Thomas provides sworn evidence that the Accommodation Agreement remains in place and is in good standing. Bridging and the Monitor did not contest this point at the	See Exhibit F to the Thomas Affidavit, at para. 15. See also para. 51 of the Thomas Affidavit

	hearing before Justice Newbould, but relied on the Accommodation Agreement at the hearing	
May 17 <sup>th</sup>	Bridging's counsel refers to the attendance before Justice Newbould and states that Thomas Canning is asking the court to "rip up the Accommodation Agreement"	Reply Affidavit, Exhibit G
May 17 <sup>th</sup>	Counsel for Bridging requests assistance from counsel for Thomas Canning with respect to the issue of sourcing farmers to grower the acres for 2017 and the Commission	Reply Affidavit, Exhibit E
May 17 <sup>th</sup>	Counsel for Thomas Canning takes steps to follow up with the Commission following the pre-hearing teleconference, as requested by Bridging	Reply Affidavit, Exhibits F and H
mid- May	Monitor recommended and Bridging financed 50 acres of organic tomato feedstock	para. 54 of Second Report of the Receiver, dated September 25, 2017
May 19 <sup>th</sup>	Counsel for Bridging requests that counsel for Thomas Canning following up with the Commission	Reply Affidavit, Exhibit I
May 19 <sup>th</sup>	Thomas Canning, Bridging and one tomato field grower entered into an escrow agreement pursuant to which Bridging places \$472,500 into escrow	See para. 33 of the Report of the Interim Receiver and Monitor, dated June 15, 2017. See also para. 36 of the First Report of the Receiver, dated September 18, 2017
May 29 <sup>th</sup>	Counsel for Bridging asks counsel for Thomas Canning to provide details with respect to discussions with the growers for conventional acreage	Reply Affidavit, Exhibit J
May 31 <sup>st</sup>	Monitor informs Thomas Canning and Bridging that it discovered alleged diversion of funds by Thomas Canning, which all predate the Accommodation Agreement.	See para. 71(d) and Exhibit K of the Report of the Interim Receiver and Monitor, dated June 15, 2017
June 1 <sup>st</sup>	David Ullmann requests funding for 100 acres, and Ken Rosenstein denies the funding on behalf of Bridging on the basis that it is "not a critical payment given that the business is able to continue to operate without it"	Reply Affidavit, Exhibit K
June 5 <sup>th</sup>	Thomas Canning takes the position that it has, at all relevant times, cooperated with the Monitor and answered its questions, and that it was further investigating the diversion of funds issue	See Exhibit K of the Report of the Interim Receiver and Monitor, dated June 15, 2017
June 5 <sup>th</sup>	Bridging's counsel confirms that the Monitor has complied with the Accommodation	Reply Affidavit, Exhibit L

	Agreement	
June 7 <sup>th</sup>	Monitor informs Thomas Canning and Bridging that it discovered alleged diversion of funds by Thomas Canning, being cheques from Garden Fresh for \$50,646.96USD dated February 17, 2017	See para. 71(d) and Exhibit K of the Report of the Interim Receiver and Monitor, dated June 15, 2017
June 8 <sup>th</sup>	Monitor requests that Thomas Canning continues to carry out its obligations under the Accommodation Agreement to assist with closing of the sale transaction. David Ullmann confirms that parties are still subject to the Accommodation Agreement. Bridging takes the position that failure to notify of the Commission Order and the recently discovered diversion of receipts from the block accounts amounts to forbearance termination event. David Ullmann takes the position that these do not constitute termination events and that the Accommodation Agreement is not terminated. Bridging advises it wishes to convert Richter to a receiver for practical reasons.	Rosenstein Affidavit, Exhibit S Reply Affidavit, Exhibit M
June 9 <sup>th</sup>	Bridging requires that Thomas Canning comply with the Accommodation Agreement via email	Thomas Affidavit, para. 46
June 12 <sup>th</sup>	Monitor informs Thomas Canning and Bridging that it discovered alleged diversion of funds by Thomas Canning, which allegedly occurred on February 9, 2017	See para. 71(d) and Exhibit K of the Report of the Interim Receiver and Monitor, dated June 15, 2017
June 12 <sup>th</sup>	Thomas Canning requests payment of Blaney's invoice for \$18,500 plus HST for negotiation of the Accommodation Agreement	Thomas Affidavit, para. 72, Exhibit I
June 14 <sup>th</sup>	Bridging rejects Thomas Canning's request to pay Blaney's \$18,500 invoice because it takes the position that there have been several forbearance termination events	Rosenstein Affidavit, Exhibit T
June 15 <sup>th</sup>	Thomas Canning takes the position that no funds have been diverted from the company at any time since the engagement of Blaney, and that there is no violation of the Interim Receivership Order or the Monitor Order. The company confirms that it has, specifically since the execution of the Accommodation Agreement, acted in good faith and in cooperation with the process being followed	Exhibit K of the Report of the Interim Receiver and Monitor, dated June 15, 2017
June 19 <sup>th</sup>	Thomas Canning received an email from the	Thomas Affidavit, para. 45

	Monitor relying on the Accommodation Agreement, and requiring that Thomas Canning comply with the terms therein	and Exhibit L
June 20 <sup>th</sup>	William Thomas provides sworn evidence that Accommodation Agreement is still in good standing and that Thomas Canning has abided by the Accommodation Agreement, and acted in good faith	Thomas Affidavit, paras. 49, 52
June 21 <sup>st</sup>	Order of Justice Conway approving the sale transaction between Richter and 2581150 Ontario Inc. of substantially all of the property, assets and undertaking of Thomas Canning and 692194 Ontario, made on consent Order of Justice Conway appointing Richter as receiver, made on consent	See Appendix A and B of the First Report of the Receiver, dated September 18, 2017
November 2017	As a result of the Court's Order on October 19 <sup>th</sup> , the Receiver obtained additional information from Western Union, which allegedly demonstrated diversion of funds, and which alleged diversion all predate the Accommodation Agreement	Rosenstein Affidavit, para. 43. See also para. 71(d) of the Report of the Interim Receiver and Monitor, dated June 15, 2017

**IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**Commercial List Court File No. CV-17-11773-00CL**

**BRIDGING FINANCE INC., AS AGENT  
FOR SPROTT BRIDGING INCOME FUND L.P.**

Applicant

**THOMAS CANNING (MAIDSTONE) LIMITED  
and 692194 ONTARIO LIMITED**

Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF MOVING PARTY,  
WILLIAM THOMAS**  
(Motion Returnable November 28, 2017)

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