

**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

Respondent

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. C43, AS AMENDED

RESPONDING PARTY'S FACTUM
(on behalf of the Creditor, ROL-LAND FARMS and GREENHOUSES INC.)

September 14, 2017

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RESPONDING PARTY'S FACTUM

PART I - INTRODUCTION

1. Rol-Land Farms Greenhouses Inc. was a 2017 grower of Tomato seedlings pursuant to a supply contract entered prior to the interim receivership of Thomas Canning (Maidstone) Limited. Invoices were rendered on May 1, 2017 and June 19, 2017, respectively for \$43,154.97 and \$42,260.01, for a total of \$85,414.98.
2. Rol-Land Farm's position is that it is entitled to payment of its supply invoices out of the proceedings of sale of Thomas Canning in priority to Bridging Finance Inc. and/or the accounts of Richter Advisory Group Inc.
3. Rol-Land takes this position for two reasons:

- (a) Bridging Finance Inc. and Richter Advisory Group Inc. undertook separate and distinct personal obligations to pay the 2017 growers through the Order obtained by Bridging Finance Inc. on April 20, 2017, and by knowingly permitting the 2017 suppliers to continue to produce in compliance with that Order, to the sole benefit of Bridging Finance Inc. and Richter Advisory Group Inc.; and,
- (b) Richter Advisory Group Inc. failed in its duty as an officer of the Court by acting as an agent for, and preferring the interests of Bridging Finance Inc. over the interest of the other creditors, in particular, the 2017 growers.

4. Bridging Finance Inc. specifically sought the interim receivership order on an *ex parte* basis on the representation that the 2017 growers would be paid. The Order, dated April 20, 2017, specifically requested and obtained by Bridging Finance Inc., specifically compelled the 2017 growers to continue to supply to Thomas Canning and that the Receiver would pay them for same.

5. Bridging Finance Inc. and the Receiver were aware that the 2017 growers had already planted and were starting to produce prior to the interim receivership order.

6. In compliance with the Order, Rol-Land Farms continued to produce the tomato seedlings it was under contract, and now Court Order, to produce. At no time did Bridging Finance Inc. or the Interim Receiver or Monitor, contact Rol-Land Farms to instruct it to stop and when the tomato plants were ready for delivery, they refused payment.

PART II - SUMMARY OF FACTS

7. On March 29, 2017, Rol-Land Farms and Greenhouses Inc. (“Rol-Land Farms”) and Thomas Canning (Maidstone) Ltd. (“Thomas Canning”), entered into a “Local Tomato Plant

Contract” wherein Thomas Canning agreed to purchase, and Rol-Land Farms agreed to plant and care for 3,168,000 tomato plants using seeds supplied by Thomas Canning. The seedling plug plants were to be grown by Rol-Land Farms and delivered to Thomas Canning in over the period of May 8, 2017 to June 2, 2017, and invoicing and payment was to be made prior to delivery.

Reference: **Responding Motion Record of Rol-Land Farms and Greenhouses Inc., Affidavit of Lynn Debrouwer, sworn September 8, 2017 [Affidavit of Debrouwer], at paras. 3-4 and Exhibit A.**

8. Rol-Land Farms supplies the raw materials to Thomas Canning for its products, and as such, is a critical supplier of Thomas Canning. Without the delivery of raw agricultural products, the canning business of Thomas Canning cannot survive. The secured creditor, Bridging Finance Inc. (“BFI”), does not seem to disagree and specifically indicated the 2017 suppliers needed to be paid to keep the business going.

Reference: **Affidavit of Debrouwer, at paras. 3-6, 15 and Exhibit D.**
Responding Motion Record of Thomas Canning, Affidavit of William Thomas, sworn June 20, 2017 [Affidavit of Thomas], at paras. 61-62, 78-82.

9. Vegetable growers for the processing industry, such as Rol-Land Farms, incur significant up-front costs in the production of vegetables for supply to processors. The vegetables are grown pursuant to a specific contract with specific stipulations regarding the plants to be supplied, which are not generally marketable to other producers in the event of default. As such, vegetable growers are in a particularly vulnerable position should a processor be unwilling or unable to pay the grower for the tomatoes contracted to be supplied by the grower.

Reference: **Affidavit of Debrouwer, at paras. 5-6.**
Affidavit of James Clark, sworn June 20, 2017, at paras. 8-10.

10. On April 30, 2017, the Chairman of the Ontario Seedlings Board provided to Rol-Land Farms a copy of the Order of the Honourable Justice Newbould, dated April 20, 2017, in which Richter Advisory Group Inc. (“Richter”) was appointed Interim Receiver of all of the assets, undertakings and properties of Thomas Canning.

Reference: Affidavit of Debrouwer, at para. 8 and Exhibit B.

11. By the time Rol-Land Farms had notice of the appointment of the Interim Receiver, the tomato plants had already been seeded in the greenhouse pursuant to the Local Tomato Plant Contract.

Reference: Affidavit of Debrouwer, at para. 9.

12. The Order of Justice Newbould, which was requested by the secured creditor, BFI, included the following provision:

THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other dates services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Interim Receiver, and that the Interim Receiver shall be entitled to the continued use of the Debtors’ current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Interim Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Interim Receiver, or as may be ordered by this Court.

(emphasis added)

13. Richter was specifically aware that Thomas Canning had already procured its seeds for the 2017 season and that they were in the process of being planted by third party greenhouses.

Reference: Report of Richter Advisory Group Inc., dated April 28, 2017, at para. 20(b).

14. At no time did anybody from BFI or Richter advise Rol-Land Farms to stop producing the tomato plants that were being grown pursuant to the Local Tomato Plant Contract, or that Rol-Land Farms would not be paid for same.

Reference: Affidavit of Debrouwer, at para. 16.

15. At no time did anybody from BFI, Richter or Thomas Canning, provide notice of the motion or the Order of Justice Newbould, dated May 1, 2017. At no time did Rol-Land Farms ever receive notice of this Order.

Reference: Affidavit of Debrouwer, at para. 14.

16. In compliance with its contractual obligations, and in compliance with the Order of Justice Newbould, dated April 20, 2017, Rol-Land Farms produced the tomato seedlings ordered by Rol-Land Farms prior to the receivership.

Reference: Affidavit of Debrouwer, at para. 13 and Exhibit C.

17. The Monitor originally agreed to and approved a plan for Thomas Canning to plant 400 acres. Furthermore, BFI, the entity that put the Interim Receiver and Monitor in place, acknowledged in sworn evidence that “commitments have to be made to the growers for this year’s supply and the purchase of seeds has to be funded. Bridging is willing to fund these critical expenses and the ongoing operations...with the oversight and control of the receiver.”

Reference: Affidavit of Thomas, at paras. 78-79 and Exhibit F (para. 25).

18. Invoices were provided on May 1, 2017, in the amount of \$43,154.97, and on June 19, 2017, in the amount of \$42,260.01.

Reference: Affidavit of Debrouwer, at paras. 13, 22 and Exhibits C, E.

19. The Monitor does not dispute that the invoices rendered by Rol-Land Farms were for post-filing goods and services.

Reference: Affidavit of Thomas, at paras. 61-62 and Exhibit H.

20. It was not until June 13, 2017, Mr. Thomas advised Rol-Land Farms that Thomas Canning would not be able to pay for the tomato seedlings it had contracted with Rol-Land Farms to produce. The reason given was that the Receiver/Monitor would not permit payment.

Reference: Affidavit of Debrouwer, at para. 18.

21. By that time, it was too late to source an alternative purchaser for the tomato seedlings, as all other producers already had their plants. The tomato plants had to be destroyed.

Reference: Affidavit of Debrouwer, at para. 19.

22. Had Rol-Land Farms had notice in April or early May that the delivery of the seedlings would not be required, Rol-Land Farms could have found an alternative purchaser.

Reference: Affidavit of Debrouwer, at para. 20.

23. It is not in dispute that Rol-Land Farms was a critical supplier, and the tomato seedlings that it produced were post filing goods that were critical to the continuing operation of the business.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

24. The issue to determine is whether the invoices of Rol-Land Farms, totalling \$85,414.98, ought to be paid out of the proceeds of sale of the business of Thomas Canning as a going concern.

25. It is submitted that the secured creditor, BFI, and/or the Receiver/Monitor, Richter, undertook through their conduct, a separate and distinct obligation to pay the 2017 suppliers, apart from those of Thomas Canning, which compels them to pay.

Reference: *Re St. Marys Paper Inc.* (1994), 19 O.R. (3d) 163 (C.A.).

26. The 2017 suppliers were required by BFI and Richter to sell the business of Thomas Canning as a going concern. Without the 2017 supplier contracts, the business would have been significantly less marketable and BFI and Richter specifically benefitted from maintaining those contracts.

27. The Order of Justice Newbould, dated April 20, 2017, was expressly requested by BFI and was the Order under which Richter was to operate. The Order expressly provided that those with existing contracts for any goods or services had to continue to supply and that they would be paid for same. This provision was necessarily included to ensure that Thomas Canning could continue operations such that it could be sold as a going concern to the sole benefit of BFI.

28. BFI and Richter were aware that the 2017 growers had already seeded the tomato plants for Thomas Canning prior to the interim receivership order. As part of its affidavit in support of the interim receivership order, BFI expressly represented that payment of the 2017 suppliers would be funded by BFI, as it was critical to the continuing operations of Thomas Canning. BFI specifically sought and obtained an Order compelling these suppliers to continue to produce on the

representation that they would be paid. Rol-Land Farms complied with its contract, and complied this Order.

29. At no time did BFI or Richter advise any of the growers, at least Rol-Land Farms, that their seedlings were no longer needed. Now that a sale of the business has been achieved, they cannot now resile from the undertakings made, and the provisions of the very Order that BFI put into place. Delivery of the tomato seedlings is irrelevant, as it was an obligation undertaken directly by BFI and/or Richter, which they have breached.

30. BFI and/or Richter could have cancelled the Rol-Land Farms contract, but chose not to and permitted Rol-Land Farms to continue to produce. When a secured creditor has sought and obtained an *ex parte* Order compelling suppliers to continue to supply, surely it is not too much to ask the secured creditor, or the Receiver/Monitor it puts in place, to contact any suppliers of goods and services that are no longer required instead of leaving them blissfully unaware that their compliance with the Order will not be compensated.

31. While it is submitted that both invoices of Rol-Land Farms ought to be paid, at the very least, Rol-Land Farms first invoice, dated May 1, 2017, ought to be paid as supply made after the Order dated April 20 and prior to the Order dated May 1.

32. Richter is a court appointed receiver and monitor. As such, Richter is an officer of the Court and owes a fiduciary duty and a duty to impartially represent the interests of all creditors. Richter was under an obligation to act even-handedly with respect to all creditors and must not prefer one creditor over another.

Reference: *1231640 Ontario Inc., Re*, 2007 ONCA 810, at paras. 43-47, 50.

Bank of Nova Scotia v. Diemer, 2014 ONCA 851, at para. 31.

33. It is submitted that Richter failed in its duty as an officer of the court, to fairly and with an even hand represent the interests of all creditors and the debtor. Instead, Richter acted as an advocate for BFI and wrongfully preferred its interests over those of the debtor and the 2017 suppliers.

34. Richter and BFI were aware of the fact that the 2017 growers had already been contracted for the 2017 before or shortly after the initial Interim Receivership Order of Justice Newbould was made on April 20, 2017. Richter and BFI were aware of the importance of the 2017 growers for the purpose of selling the business of Thomas Canning as a going concern. It is submitted that Richter and BFI knowingly allowed the 2017 growers to continue to produce pursuant to their contracts and the April 20, 2017 Order of Justice Newbould in order to benefit from the presence of those contracts in maximize the purchase price of the business as a going concerns, but now does not want to recognize that value or those efforts, and instead prefer the interest of BFI over that of the unpaid growers.

35. As no time was Rol-Land Farms contacted by BFI or Richter and advised that delivery of the tomato seedlings would not be accepted, or that payment would not be made in accordance with the Order of Justice Newbould. It is submitted that this was deliberate to ensure that the 2017 growers continued to produce under the indirect representation that they would be paid.

36. It is submitted that in allowing the 2017 suppliers of tomato seedlings to continue to produce their supply for Thomas Canning in compliance with the Order of Justice Newbould, dated April 20, 2017, when BFI and/or Richter had no intention of paying them, BFI and/or

Richter acted in bad faith to prefer the interests of BFI over those of the unpaid agricultural suppliers.

PART IV - ORDER REQUESTED

37. For the above reasons, it is requested that the invoices of Rol-Land Farms be paid out of the remaining proceeds of sale of Thomas Canning.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2017.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Re St. Marys Paper Inc.* (1994), 19 O.R. (3d) 163
2. *1231640 Ontario Inc., Re*, 2007 ONCA 810
3. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. N/A

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BRIDGING INCOME FUND LP
Applicant

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