

## **THOMAS CANNING (MAIDSTONE) LIMITED AND 692194 ONTARIO LIMITED**

**September 18, 2017**

Court File No. CV-17-11773-00CL

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

BETWEEN:

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

Applicant

- and -

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

Respondents

**APPLICATION UNDER subsections 47(1) and 243(1) of the *Bankruptcy and Insolvency Act*,  
R.S.C. 1985, c. B-3, as amended, and under section 101 of the  
*Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended**

**FIRST REPORT OF RICHTER ADVISORY GROUP INC.  
IN ITS CAPACITY AS RECEIVER OF  
THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED**

September 18, 2017

## I. BACKGROUND

1. Pursuant to the Order of The Honourable Mr. Justice Newbould of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated April 20, 2017 (the "**Interim Receivership Order**"), Richter Advisory Group Inc. ("**Richter**") was appointed as interim receiver (the "**Interim Receiver**") of all of the assets, properties and undertakings (collectively, the "**Property**") of Thomas Canning (Maidstone) Limited ("**TCL**") and 692194 Ontario Limited (together with TCL, the "**Company**") under section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").
2. The appointment of an interim receiver was sought, on an *ex parte* basis, by the Company's senior secured lender, Bridging Finance Inc. as agent for Sprott Bridging Income Fund LP ("**Bridging**" or the "**Lender**").
3. The Court set a comeback date of April 28, 2017 for the hearing of Bridging's application for the appointment of Richter as receiver of the Property under section 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended (the "**CJA**").
4. The comeback hearing was subsequently adjourned to May 1, 2017 to afford the parties with additional time to negotiate an acceptable resolution.
5. Bridging and the Company entered into an accommodation agreement dated April 29, 2017 (the "**Accommodation Agreement**"), which, among other things, established a refinancing, investment and/or sale solicitation process (the "**RISP**"), and required the appointment of Richter as a Court-appointed monitor to supervise and assist the Company (but not to have control over the business or to have control over or take possession of the Property).
6. Pursuant to the Order of Justice Newbould dated May 1, 2017 (the "**Monitor Order**"), the Court, among other things:
  - (a) appointed Richter as monitor of the Company and the Property pursuant to section 101 of the CJA (the "**Monitor**");
  - (b) outlined the powers of the Monitor, which included but was not limited to, monitoring, making recommendations and approving all matters concerning the management and operation of the Company's business, and marketing the Company's business and/or Property under the RISP as set out in the Accommodation Agreement;

- (c) approved the Interim Receiver's report dated April 28, 2017 and the activities of the Interim Receiver described therein; and
  - (d) discharged the Interim Receiver from its duties, except for the performance of certain incidental duties, as required, as set out in the Interim Receivership Order.
7. As detailed in the Report of the Interim Receiver and the Monitor dated June 15, 2017 (the "**June 15 Report**"), the RISP had been completed and an offer from Mr. Santosh Mahal, on behalf of a company to be incorporated ("**Mahal**"), to purchase substantially all of the Company's Property, was selected as the winning bidder by the Monitor and Bridging.
8. To facilitate the completion of the sale transaction with 2581150 Ontario Inc., a company owned by Mahal (the "**Purchaser**"), as contemplated under the Mahal offer (the "**Sale Transaction**"), Bridging revived its receivership application returnable June 21, 2017 and requested that the Court grant orders:
- (a) appointing Richter as receiver of the Company and the Property pursuant to section 243(1) of the BIA and section 101 of the CJA (the "**Receiver**");
  - (b) authorizing and directing the Receiver to execute an asset purchase agreement dated June 15, 2017 (the "**APA**");
  - (c) approving the APA and authorizing and directing the Receiver to take all necessary steps to complete the Sale Transaction;
  - (d) vesting in the Purchaser the right, title and interest of the Company in and to the Purchased Assets (as defined in the APA), free and clear of all claims and encumbrances (other than permitted encumbrances under the APA); and
  - (e) authorizing and directing the Receiver, upon the closing of the Sale Transaction, to:
    - (i) repay the Interim Receiver's borrowings and associated interest charges;
    - (ii) pay the fees and disbursements of the Monitor and its counsel, Chaitons LLP ("**Chaitons**"), as approved by the Court; and
    - (iii) distribute the net sale proceeds (net of reasonable reserves as determined by the Receiver) to Bridging.

9. The Interim Receiver and the Monitor also brought a motion returnable June 21, 2017 seeking an order granting the following relief:
- (a) approving the Interim Receiver's statement of receipts and disbursements for the period from April 20, 2017 to and including May 31, 2017 (the "**IR R&D**");
  - (b) approving the fees and disbursements of the Interim Receiver and its counsel, Chaitons;
  - (c) authorizing and directing the Interim Receiver to distribute the net proceeds outlined in the IR R&D, including any future net proceeds, if any are received, to the Lender;
  - (d) terminating the interim receivership proceedings, including termination of the Interim Receiver's Charge and the Interim Receiver's Borrowing Charge (as defined in the Interim Receivership Order), upon the repayment of the Interim Receiver's borrowings (including interest) by the Receiver following the closing of the Sale Transaction or any other sale, and the Interim Receiver filing a discharge certificate with the Court (the "**IR Discharge Certificate**");
  - (e) approving the fees and disbursements of the Monitor and its counsel, Chaitons, to completion of the proceeding; and
  - (f) in the event that the Receiver was appointed, discharging Richter as Monitor, which was to include the termination of the Monitor's Charge (as defined in the Monitor Order) following payment of the Monitor's fees and disbursements and upon the Monitor filing a discharge certificate with the Court (the "**Monitor Discharge Certificate**"). On the filing of the Monitor Discharge Certificate, Richter was to be released from any and all liability that Richter had or may have by reason of, or in any way arising out of, the acts or omissions of Richter while acting in its capacity as Monitor, save and except for any gross negligence or willful misconduct on the Monitor's part.
10. In response to the return of Bridging's receivership application and the motion brought by the Monitor, the Company served a responding motion record containing an affidavit of William Thomas sworn June 20, 2017 (the "**Thomas Affidavit**"). In the Thomas Affidavit, the Company requested that the Monitor's motion be adjourned until after the completion of the Sale Transaction.
11. The Company also requested that the fees and disbursements of its counsel, Blaney, McMurtry LLP, and amounts owed to suppliers that the Company alleged supplied goods and/or services to the Company during the Monitor's appointment, be paid out of the net proceeds from the Sale Transaction in priority to Bridging's interest in the sale proceeds.

12. The Sale Transaction was approved by the Court pursuant to the Approval and Vesting Order of The Honourable Madam Justice Conway dated June 21, 2017 (the "**Approval and Vesting Order**"), a copy of which is attached hereto as **Appendix "A"**. The Company did not oppose the approval of the Sale Transaction by the Court. Additionally, the Court granted the relief sought by the Interim Receiver in the Order dated June 21, 2017. The Interim Receiver completed the remaining incidental duties and was discharged upon filing the IR Discharge Certificate with the Court of July 31, 2017.
13. The Court appointed Richter as Receiver pursuant to the Order (Appointment of Receiver) of Justice Conway dated June 21, 2017 (the "**Receivership Order**"), a copy of which is attached hereto as **Appendix "B"**. As noted above, Bridging's application requested that the net proceeds from the Sale Transaction be distributed to Bridging. As a result of the issues raised by the Company and the Ontario Farm Marketing Commission (the "**Commission**"), the parties agreed to paragraph 24 of the Receivership Order, which provides that:

**"THIS COURT ORDERS** that the Receiver is hereby authorized, upon the closing of the sale transaction approved by the Court pursuant to the Approval and Vesting Order dated June 21, 2017, to: ...

(b) distribute the net sale proceeds to the Applicant, subject to a \$1,200,000 reserve, the entitlements and priority of claims to which reserve (including those claims set out in the Affidavit of William Thomas sworn June 20, 2017 and/or the Affidavit of James Clark sworn June 20, 2017) shall be subject to further Order of this Court."
14. With respect to the relief sought by the Monitor, as noted in Justice Conway's endorsement dated June 21, 2017, a copy of which is attached hereto as **Appendix "C"**, the Monitor's motion was adjourned to be scheduled at a 9:30 am chambers appointment on July 5, 2017.
15. On July 5, 2017, the parties appeared before Justice Conway in chambers, at which time the Court ordered that the Monitor's motion, and matters related to the entitlement of the \$1.2 million being held in reserve by the Receiver as agreed to by the parties (the "**Reserve**"), be scheduled for September 11, 2017. As a result of an administrative request received from the Court, the motions were subsequently scheduled to be heard on September 27, 2017.
16. On September 13, 2017, parties appeared in chambers before The Honourable Mr. Justice Hainey to discuss matters related to the motions scheduled to be heard on September 27, 2017. As a result of the attendance, and information requests made of the Receiver by the former principals of the Company, the Court issued an endorsement setting out litigation timetables for the hearing of the motions related to the Reserve, which was to proceed on September 27, 2017, and the Monitor's motion, which was re-scheduled

to be heard on October 17, 2017. The litigation timetable requires the Receiver to serve a report by September 18, 2017. A copy of the endorsement is attached hereto as **Appendix "D"**.

## **II. PURPOSE OF REPORT**

17. The purpose of this report (the "**Report**") is to detail matters related to the appointment of the Receiver and the completion of the Sale Transaction.

## **III. QUALIFICATIONS**

18. In preparing this Report, the Receiver has relied upon unaudited financial information, the Company's books and records, financial information prepared by the Company and discussions with management (collectively, the "**Information**"). The Receiver has reviewed the Information for reasonableness, internal consistency, and use in the context in which it was provided, and in consideration of the nature of the evidence provided to this Court, in relation to the relief sought therein. The Receiver has not, however, audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Auditing Standards ("**GAAS**") pursuant to the Canadian Institute of Chartered Accountants Handbook and, as such, the Receiver expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information. An examination of the Company's financial forecasts in accordance with the *Canadian Institute of Chartered Accountants Handbook* has not been performed. Future-oriented financial information reported on or relied upon in this Report is based on management's assumptions regarding future events; actual results achieved may vary from forecast and such variations may be material.
19. Unless otherwise noted, all monetary amounts contained in this Report are expressed in Canadian dollars.

## **IV. RECEIVER'S ACTIVITIES SINCE ITS APPOINTMENT**

20. This section details certain of the activities of the Receiver since its appointment on June 21, 2017. This section is not an exhaustive report on the Receiver's activities since its appointment, which the Receiver will provide in its next and expected final report to the Court.
21. Immediately upon issuance of the Receivership Order, the Receiver attended at the Company's premises in Maidstone, Ontario to take possession and secure the Company's assets, and books and records located therein.

22. At the time of the Receiver's appointment, the Company was in the midst of its seasonal slow period and as a result it had minimal employees, and was only dealing with equipment repair and maintenance activity and limited shipping operations.
23. Following its appointment, the Receiver's initial activities included:
- (a) informing the Company's employees, including workers employed by the Company through the Temporary Foreign Worker Program or the International Mobility Program, that their employment had been terminated pursuant to paragraph 13 of the Receivership Order;
  - (b) holding numerous discussions with the Company's foreign migrant workers and coordinating with the Jamaican Liaison Office and the Mexican migrant workers regarding their departure from the Company's premises and/or the country as required. As a result of the Receiver's efforts, all of the Mexican migrant workers were returned to Mexico and the Jamaican migrant workers were placed under the care of the Jamaican Liaison Office;
  - (c) informing the Canadian full time and part time employees that the Receiver and/or the Purchaser may communicate with them shortly to inquire about their interest in assisting the Receiver and/or the Purchaser should assistance be required;
  - (d) entering into consulting arrangements with certain former employees on a term and task basis to assist the Receiver in its administration, including human resource activities (final pay, records of employment and T4 documents), HST filings, and taking steps to arrange for the release of the Company's inventory that was located at a third-party warehouse;
  - (e) changing the locks and securing the premises;
  - (f) responding to demands from a party that was attempting to take possession of certain mobile units located at the Company's premises;
  - (g) corresponding with the Commission with respect to a hearing that was scheduled to take place with respect to the Company's marketing license;
  - (h) determining the amounts owed under the *Wage Earners Protection Program Act* and liaising with Service Canada on these amounts;

- (i) taking possession of the Company's books and records and, among other things, taking steps to complete administrative filings/mailings and HST returns that had been outstanding since June 2016, and to file corporate income tax returns;
- (j) repaying the Interim Receiver's borrowings and accumulated interest to Bridging;
- (k) corresponding with tote lessors; and
- (l) arranging for the continuation of all applicable utilities, insurance and security at the premises.

## **V. SALE TRANSACTION**

- 24. As noted above, the APA was approved by the Court pursuant to the Approval and Vesting Order. A copy of the APA, as executed by the Receiver in accordance with the Approval and Vesting Order, is attached hereto as **Appendix "E"**.
- 25. Pursuant to the terms of the APA, the closing date for the Sale Transaction was to be June 21, 2017 or such later date as the parties may agree to in writing. As noted in the June 15 Report, it was the intent of the parties to close the Sale Transaction on June 21, 2017 or shortly thereafter.
- 26. As previously reported by the Monitor, a \$2.0 million deposit was received by the Monitor from Mahal in connection with the Sale Transaction.
- 27. Following its appointment, the Receiver worked closely with the Purchaser in an attempt to close the Sale Transaction as soon as possible. The Purchaser required additional time to complete its financing arrangements with its lender, which were particularly complex given that the Purchaser, as part of the APA, would be assuming the Company's indebtedness to Bridging, and such amount would not be conclusively determined until the completion of the receivership proceeding. The Receiver was supportive of this extension due to the level of communication with the Purchaser and its lender, the significant Deposit already received by the Receiver, the fact that the only other offer received during the RISP had been retracted by the offeror (a principal of the Company), and the minimal level of Company operations during this period.
- 28. As a result, the parties agreed to an extension of the closing date under the APA to July 7, 2017. The Sale Transaction was completed on that day. In connection with the closing, the Receiver received \$20.0 million from the Purchaser (\$18.0 million on closing and the \$2.0 million deposit), and the Purchaser entered into an assumption agreement with Bridging with respect to the Company's indebtedness that had been assumed by the Purchaser.

29. In accordance with the terms of the Receivership Order, the Receiver has distributed \$18.8 million of the net sale proceeds to Bridging and is maintaining funds for the Reserve in accordance with the Receivership Order.

## VI. ADDITIONAL MATTERS

30. As noted above, the former principals of the Company have requested additional information from the Receiver, which they believe is relevant to the Monitor's motion scheduled for October 17, 2017. This section responds to the information requests.

### Totes and Customers

31. Notwithstanding that the Sale Transaction was completed on July 7, 2017, the Receiver arranged with the Purchaser to have certain tomato produce storage units (known as "Totes") remain at the premises while the Receiver corresponded with Totes lessors regarding the return of empty totes that were situated at the premises and dealing with totes that were filled with tomato paste inventory that had been purchased by the Purchaser.
32. The Receiver understands that the majority of the empty Totes have been removed from the Purchaser's premises.
33. The Receiver issued letters to the Company's customers on or around July 12, 2017, notifying them of the Receiver's appointment, the Sale Transaction, and contact information for the Receiver. Since its appointment, the Receiver has collected cash receipts from the outstanding accounts receivables that were deposited to the Company's bank accounts or mailed to the Company. The Receiver has remitted these proceeds to the Purchaser in accordance with the APA.

### Status of the Business

34. The Receiver has been informed by the Purchaser that it has been unable to recommence the Company's operations since the completion of the Sale Transaction for a number of reasons, including the state of the premises as at closing, the administrative and regulatory steps required of the Canadian Food Inspection Agency (the "CFIA") and the Commission, which have been more difficult than expected given the state of the business as at the time of closing and the outstanding charges laid by the CFIA against the Company and Mr. William Thomas under the *Food and Drugs Act*, the *Canada Agricultural Products Act*, the *Consumer Packaging and Liability Act*, and the fact that a dispute arose with the remaining supplier of tomato crops, 959699 Ontario Inc. o/a DeNijs Organic Farms ("DeNijs").

35. Given the knowledge that Richter had acquired in its capacities as the Interim Receiver, Monitor and Receiver, at the request of the Purchaser, Richter has assisted the Purchaser in setting up the process and procedures for full inventory count as required by the CFIA.

**Escrow Arrangement**

36. As previously reported to the Court in the June 15 Report, the Company entered into an agreement with DeNijs in May 2017 for DeNijs to grow tomato seedlings to be processed by the Company. In connection with the agreement and the requirements imposed by the Commission, the parties entered into an escrow agreement with the Lender dated May 19, 2017, wherein \$472,500 was deposited with Aird & Berlis LLP as escrow agent (the "**Escrow Agent**").
37. Based on the correspondence exchanged by the parties, the Receiver understands that the parties are in dispute as to the state of the tomato crops and whether DeNijs was able to deliver the crops in accordance with the agreement. The Escrow Agent has indicated that, due to the conflict between the parties, it will not release the funds until the parties resolve the conflict.
38. The Receiver was recently informed, through its counsel, that DeNijs intends to commence an action for the release of the escrow funds.

All of which is respectfully submitted on the 18<sup>th</sup> day of September, 2017.

**Richter Advisory Group Inc.**  
**as Receiver of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited**  
**and not in its personal capacity**



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**Clark Lonergan, CPA, CA, CIRP, LIT**  
Senior Vice-President

