

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Applicant

- and -

WHYTE'S FOODS INC., MAISON GOURMET INC., TRIAK CAPITAL INC.
AND MARIO SAROLI SALES INC.

Respondents

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

FACTUM OF THE APPLICANT

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TO: **THE SERVICE LIST**

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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. Wells Fargo Capital Finance Corporation Canada (the "**Applicant**") is bringing this Application seeking an order appointing Ernst & Young Inc. ("**EY**") as receiver (in such capacity, the "**Receiver**"), without security, of those assets that constitute Trade Personal Property (as defined below) of Whyte's Foods Inc. ("**Whyte's**"), Maison Gourmet Inc. ("**Maison Gourmet**" and together with Whyte's, the "**Co-Borrowers**"), Triak Capital Inc. ("**Triak**") and Mario Saroli Sales Inc. ("**Mario Saroli**" and together with Triak, the "**Guarantors**" and collectively with the Co-Borrowers, the "**Debtors**") pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**")¹, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the "**CJA**")².

¹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ["**BIA**"], s. 243(1).

² *Courts of Justice Act*, R.S.O. 1990, c. C-43 ["**CJA**"], s. 101.

2. The Applicant is a senior secured operating lender of the Debtors. The Applicant's priority collateral consists principally of the Trade Personal Property.³
3. The efforts of the Debtors to sell their business (consisting of the Whyte's business) as a going concern in the SISP (defined below) were unsuccessful.
4. In the circumstances, the appointment of a receiver over the Applicant's priority collateral is just and convenient to prevent further erosion of value.
5. Capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the affidavit of Carmela Massari sworn October 3, 2023.

PART II - SUMMARY OF FACTS

The Parties

6. The Applicant is a company incorporated and existing under the laws of the Province of Ontario, with its principal place of business in Toronto, Ontario. The Applicant is a subsidiary of Wells Fargo Bank, N.A., specializing in, among other things, providing asset-based loans to companies in a number of industries in Canada.⁴
7. The Debtors are a group of privately owned companies. Whyte's is a corporation amalgamated under the laws of the Province of Québec, Maison Gourmet and Mario Saroli are

³ "**Trade Personal Property**" means all of the present and future accounts receivables, monetary claims, cash, deposit accounts, inventory, Operational Financing Purchased Equipment and Intellectual Property (both as defined in the A&R FCC Intercreditor Agreement) of the Debtors, together with all claims, documents of title, chattel paper, instruments, books and records, customer lists, credit files, computer files, programs, printouts and other computer materials and records relating to the foregoing, and all accessions to, substitutions for and replacements, and products of the foregoing or relating to the foregoing, including cash and other proceeds thereof, including, without limitation, proceeds of insurance and insurance indemnities and the right to receive proceeds of insurance on account of any of the foregoing; Affidavit of Carmela Massari sworn October 3, 2023 ["**Massari Affidavit**"], para 3, Application Record, Tab 2, p 12.

⁴ Massari Affidavit, para 12, Application Record, Tab 2, p 13.

corporations incorporated under the laws of the Province of Ontario and Triak is a corporation incorporated under the laws of Canada.⁵

8. Whyte's is the only currently operating entity within the group of Debtors and is a producer of pickles and other fermented food in Canada selling under a number of household brands.⁶

9. The Debtors own two plants, one in Wallaceburg, Ontario and one in Saint-Louis, Québec.⁷ Whyte's also has leased office space in Mississauga, Ontario for its sales and administrative functions.⁸

Liabilities

10. The Debtors have two primary secured creditors both holding priority collateral: the Applicant and Farm Credit Canada ("**FCC**").

The Wells Credit Agreement

11. Pursuant to the Credit Agreement, the Applicant provides a senior secured revolving asset-based lending facility to the Debtors.⁹ The Debtors are all either co-borrowers or guarantors of the obligations under the Credit Agreement and have granted security to the Applicant in connection with those obligations.¹⁰

12. The Applicant's first priority security consists principally of the current assets (inventory and receivables) of the Debtors as well as the Debtors' intellectual property but is more specifically defined as Trade Personal Property in the A&R FCC Intercreditor Agreement (defined below).¹¹

⁵ Massari Affidavit, para 13, Application Record, Tab 2, p 13.

⁶ Massari Affidavit, para 14, Application Record, Tab 2, p 13.

⁷ Massari Affidavit, paras 4 and 14, Application Record, Tab 2, p 13.

⁸ Massari Affidavit, para 14, Application Record, Tab 2, p 13.

⁹ Massari Affidavit, para 19, Application Record, Tab 2, p 14.

¹⁰ Massari Affidavit, paras 16-17 and 21, Application Record, Tab 2, p 14-15.

¹¹ Massari Affidavit, para 3, Application Record, Tab 2, p 12.

13. As of October 2, 2023, the Debtors remained indebted to the Applicant in the principal amount of \$8,109,221.60.¹²

The FCC Credit Agreement

14. FCC advanced two real property loans and subsequently made available additional credit facilities to Whyte's pursuant to the credit agreement dated as of May 20, 2020, which was amended and restated on April 11, 2023 (as so amended and restated and as further amended, supplemented or otherwise modified from time to time, the "**FCC Credit Agreement**").¹³

15. As of July 31, 2023, Whyte's was indebted to FCC in the amount of approximately \$34.3 million.¹⁴

The FCC/Wells Intercreditor Agreement

16. The Applicant, FCC and the Debtors entered into an intercreditor agreement dated as of October 14, 2022 (as amended, the "**A&R FCC Intercreditor Agreement**") at the time that the Applicant entered into the Original Credit Agreement.¹⁵

17. The A&R FCC Intercreditor Agreement sets out the respective priorities along with certain other rights as between the Applicant and FCC, including rights of access by the Applicant in an enforcement scenario.¹⁶

¹² Massari Affidavit, para 20, Application Record, Tab 2, p 14.

¹³ Massari Affidavit, paras 24-25, Application Record, Tab 2, p 16.

¹⁴ Massari Affidavit, para 25, Application Record, Tab 2, p 16.

¹⁵ Massari Affidavit, para 27, Application Record, Tab 2, p 18.

¹⁶ Massari Affidavit, paras 28-29, Application Record, Tab 2, pp 18-19.

Defaults and Events Leading Up to this Application

18. The Debtors' financial distress was apparent almost immediately after the Original Credit Agreement was entered into.¹⁷ Due to depressed sales, the Debtors failed to meet the minimum EBITDA financial covenants for the months ending October 31, November 30 and December 31, 2022 and January 31 and February 28, 2023, thereby resulting in events of default under the Credit Agreement.¹⁸

19. The Applicant sent notices of default and reservation of rights letters to the Debtors on December 13, 2022 and January 30, March 28 and April 3, 2023.¹⁹

20. On April 19, 2023, the Applicant and the Debtors entered into the Forbearance and Second Amendment pursuant to which the Debtors covenanted and agreed, among other things, to undertake a sale process whereby the Debtors were to provide the Applicant with evidence that the sale process had closed by July 31, 2023 (the "**Pre-NOI Sale Process**").²⁰

21. Following multiple failed attempts by the Debtors to find an investor or buyer, on June 15, 2023, the Applicant delivered a demand letter to the Debtors along with notices of intention to enforce its security pursuant to Section 244 of the BIA ("**244 Notices**").²¹

22. By mid-August 2023, it was apparent that no acceptable offer was forthcoming, and the Applicant advised that it was no longer willing to support Whyte's outside of an insolvency filing and that such filing was required to complete the Pre-NOI Sale Process.²²

¹⁷ Massari Affidavit, para 36, Application Record, Tab 2, p 21.

¹⁸ Massari Affidavit, para 37, Application Record, Tab 2, p 21.

¹⁹ Massari Affidavit, para 38, Application Record, Tab 2, p 21.

²⁰ Massari Affidavit, para 40, Application Record, Tab 2, pp 21-22.

²¹ Massari Affidavit, para 41, Application Record, Tab 2, p 22.

²² Massari Affidavit, para 44, Application Record, Tab 2, p 23.

NOI Proceedings

23. On August 23, 2023, with the support of the Applicant and FCC, Whyte's filed a notice of intention ("**NOI**") bearing Estate file number 31-2978830 to make a proposal under the BIA.²³

24. The purpose of the NOI Proceedings was to allow Whyte's to complete the Pre-NOI Sale Process within the NOI (the "**SISP**").²⁴

25. In connection with the NOI Proceedings, the Applicant agreed to provide post-filing advances pursuant to the DIP Facility Agreement, on the conditions of certain terms (the "**DIP Facility**").²⁵

26. The Applicant was clear that it was providing this accommodation on the basis that if no acceptable sale agreement was signed by September 25, 2023, pursuant to the SISP, it would terminate the DIP Facility Agreement and move to enforce its security.²⁶

27. The obligations of Whyte's under the DIP Facility are secured by the Applicant's existing security as well as a DIP Lender's Charge pursuant to an Order of Justice Cavanagh granted in the NOI Proceedings on August 31, 2023.²⁷

The Sale Process and Bid Deadline

28. The bid deadline under the SISP was September 21, 2023.²⁸

29. The SISP did not result in a successful offer for the Applicant's priority collateral.²⁹

²³ Massari Affidavit, paras 15 and 45, Application Record, Tab 2, pp 14 and 23.

²⁴ Massari Affidavit, para 45, Application Record, Tab 2, p 23.

²⁵ Massari Affidavit, para 46, Application Record, Tab 2, p 23.

²⁶ Massari Affidavit, para 7, Application Record, Tab 2, p 12.

²⁷ Order of Justice Cavanagh dated August 31, 2023, paras 17-20, Exhibit B to the Massari Affidavit, Application Record, Tab 2B, pp 63-64.

²⁸ Massari Affidavit, para 53, Application Record, Tab 2, p 26.

²⁹ Massari Affidavit, paras 10 and 54-55 Application Record, Tab 2, pp 13 and 26.

Need for a Receiver

30. In light of the failed SISP, the Applicant is of the view that it has no choice but to seek the appointment of a receiver for the purpose of liquidating the Trade Personal Property.³⁰

31. EY has consented to act as receiver and is a trustee within the meaning of Section 2 of the BIA.³¹

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

32. The main issue for determination on this Application is whether the appointment of a receiver over the Trade Personal Property is appropriate.

33. Pursuant to both Section 243(1) of the BIA³² and Section 101 of the CJA³³, a court may appoint a receiver when it is just and/or convenient to do so.

The Statutory Requirements for Appointment of a Receiver have been Met

34. The Applicant has complied with the technical requirements of Section 243(1) of the BIA:

- (a) It is clear that the Applicant is a secured creditor entitled to make an application under Section 243(1) of the BIA;
- (b) The Debtors are “insolvent persons” under the BIA³⁴ because they are unable to meet their obligations as they generally become due; and

³⁰ Massari Affidavit, paras 11 and 56, Application Record, Tab 2, pp 13 and 26.

³¹ Massari Affidavit, para 57, Application Record, Tab 2, p 26; BIA, s. 2.

³² BIA, s. 243(1).

³³ CJA, s. 101.

³⁴ BIA, s. 2.

- (c) The proposed powers of the Receiver are within the scope of those listed in Section 243(1) of the BIA and are consistent with the powers generally granted by the Court.

35. Section 69(2) of the BIA provides that the stay of proceedings under Section 69(1) of the BIA does not apply to any creditor who has given notice of intention to enforce its security under Section 244(1) more than 10 days prior to the filing of an NOI.³⁵ As set out above, the Applicant sent the 244 Notices on June 15, 2023, well in advance of the NOI filing on August 23, 2023.³⁶

The Appointment of the Receiver over the Trade Personal Property is Just and Convenient

36. The determination of whether the appointment of a receiver is just and/or convenient is to be determined having regard to all the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation thereto, including the rights of a secured creditor under its security.³⁷

37. The Courts have taken into consideration several factors when determining whether or not a receiver should be appointed:

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

³⁵ BIA, s. 69(2).

³⁶ Massari Affidavit, paras 41 and 45, Application Record, Tab 2, pp 22-23.

³⁷ *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, [2023 ONSC 4772 \(CanLII\)](#) ["*Macquarie*"] at para 5; *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186 \(CanLII\)](#) ["*CEF*"] at para 23.

- (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 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 a right to appointment under the loan documentation;
- (h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- (i) the principle that the appointment of a receiver should be granted cautiously;
- (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- (k) 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; and

(p) the goal of facilitating the duties of the receiver.³⁸

38. The Courts have explained that these factors are not a checklist, but a collection of considerations to be “viewed holistically in an assessment as to whether, in all circumstances, the appointment of a receiver is just or convenient.”³⁹

39. In light of the preceding considerations, the appointment of the Receiver is just and convenient for the following reasons:

- (a) The Applicant has the right under its security to appoint a receiver;⁴⁰
- (b) The proposed receivership is limited in scope as it is only in respect of the Applicant’s priority collateral, namely the Trade Personal Property, thus its effect on other parties is expected to be minimal;
- (c) The urgent appointment of a receiver is required to allow preservation of the Applicant’s inventory collateral, which consists principally of perishable food product;⁴¹
- (d) The Applicant has, to the detriment of its secured position, afforded the Debtors every opportunity over an extended period to find a going concern solution for their business, to no avail;⁴² and
- (e) There are no viable alternatives to the appointment of a receiver for the purpose of preserving the value of the Trade Personal Property.

³⁸ [Macquarie](#), *supra* at para 8; [CEF](#), *supra* at para 25.

³⁹ [Macquarie](#), *supra* at para 9.

⁴⁰ Massari Affidavit, para 21, Application Record, Tab 2, pp 15-16.

⁴¹ Notice of Application issued October 3, 2023, para ff, Application Record, Tab 1, p 8.

⁴² Massari Affidavit, para 55, Application Record, Tab 2, p 26.

40. The Applicant continues to work cooperatively with FCC and the Debtors and, in fact, has agreed to continue funding certain NOI costs through the proposed receivership, permit the Administration Charge and Directors' Charge to continue in the proposed receivership and intends to negotiate occupation agreements with FCC and Aliments Putters Inc. (purchaser of the Saint-Louis Plant) as necessary in order to remove and sell the Trade Personal Property as efficiently as possible.⁴³

41. The Debtors and FCC do not oppose the appointment of the Receiver. As of the date hereof, the Applicant is not aware of any contestation by any other parties concerned.

PART IV - ORDER REQUESTED

42. Based on the foregoing, the Applicant respectfully requests a receivership order substantially in the form attached to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2023.



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⁴³ Massari Affidavit, para 59, Application Record, Tab 2, pp 26-27; Report of the Proposed Receiver, Ernst & Young Inc., dated October 5, 2023, para 47.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, [2023 ONSC 4772 \(CanLII\)](#)
2. *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186 \(CanLII\)](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as amended

Definitions

2 insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

trustee or licensed trustee means a person who is licensed or appointed under this Act. (*syndic ou syndic autorisé*)

Limitation

69 (2) The stays provided by subsection (1) do not apply

- (a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under [section 50.4](#) was filed from dealing with those assets;
- (b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under [section 50.4](#) was filed, from enforcing that security, unless the secured creditor consents to the stay;
- (c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under [subsection 244\(2\)](#), consented to the enforcement action; or
- (d) [Repealed, [2012, c. 31, s. 416](#)]

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 and 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 sued 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.

Courts of Justice Act, R.S.O. 1990, C. C-43, as amended

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

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

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