

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY AND INSOLVENCY)  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,  
R.S.C. 1985, c. B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF  
QUALITY MEAT PACKERS LIMITED**

**FACTUM OF QUALITY MEAT PACKERS LIMITED  
(Motion Returnable April 10, 2014)**

**Part 1 – Overview**

1. Quality Meat Packers Limited (“**Quality**”) and a related company Toronto Abattoirs Limited (“**TAL**”) each filed a Notice of Intention to make a proposal (the “**NOI**”) pursuant to the provisions of the *Bankruptcy and Insolvency Act* (the “**BIA**”) on April 3, 2014. Because of extremely high hog prices, Quality and TAL are experiencing severe cash flow issues. Quality Meat Packers Holdings Limited (“**QMP Holdings**”), a related party to Quality, has loaned over \$19 million to Quality including in excess of \$11.5 million since February of 2013 to see Quality through what was hoped to be a short period of losses while the market improved. Quality has been in breach of certain financial covenants with its lender, the Toronto-Dominion Bank (“**TD**”) and had negotiated a forbearance agreement on April 2, 2014 to provide short term funding. Quality and TAL were left with no other option but to file NOIs in order to attempt to restructure operations and preserve value for all stakeholders (including an aggregated 661 unionized employees and 116 non-unionized employees, customers, suppliers and creditors).

2. On this motion, Synergy Swine Group<sup>1</sup> seeks to terminate the NOI proceedings of Quality and/or appoint a receiver over the inventory of Quality to, among other things, allow Synergy Swine Group to receive the benefit of a special priority pursuant to section 81.2 of the BIA which is granted to farmers only in a bankruptcy or receivership proceeding.

3. If Synergy Swine Group's motion is allowed:

- a. the immediate effect would be to provide a few select creditors with a preference that they do not currently enjoy over other creditors and to abort, at this early stage, any possibility of Quality reorganizing and making a proposal to its creditors;
- b. because of the integration between Quality and TAL, the peripheral effect of granting the relief sought by Synergy Swine Group would be to eliminate any chance of TAL restructuring and making a proposal to its creditors; and
- c. the long-term effect would be to establish a precedent allowing farmers to terminate or otherwise impede or prevent any debtor who relies on supply from a farmer from restructuring under the BIA.

4. Synergy Swine Group has failed to demonstrate that the Court should, under the test required by section 50.4(11) of the BIA, terminate the period for Quality to make a proposal to its creditors. Quality has acted and continues to act in good faith and with

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<sup>1</sup> As defined in paragraph 5 of the factum of the moving party dated April 8, 2014 filed by Synergy Swine Group in these proceedings.

due diligence. No evidence to the contrary has been provided by Synergy Swine Group.

5. Further, even at this early stage in the NOI proceedings (only 6 days in) Quality has had communications with: (i) its union regarding their ongoing participation in the Quality business; (ii) with alternate financiers regarding potential ongoing lending arrangements or equity investments; (iii) with certain customers regarding increased pricing; and (iv) with suppliers regarding decreased hog pricing. These discussions, along with stabilization of operations, are key in Quality moving forward to make a proposal.

6. With respect to stabilization of operations, Quality has managed to a negotiate pre-payment agreement with the Ontario Pork Producers' Marketing Board (the "**Board**") and a short term forbearance with TD, its primary lender which provide a mechanism to ensure hog suppliers are paid on a go forward basis so operations can resume and customer orders can be filled.

## **Part 2 – The Facts**

7. Due to time constraints, the key facts are set out in the affidavit of David Schwartz sworn April 9, 2014 (the "**Schwartz Affidavit**") and have not been repeated here.

## **Part 3 – The Issues**

8. Issue 1: Should this Court terminate the period for making a proposal and therefore bankrupt Quality?

9. Issue 2: Is the appointment of a receiver just and equitable in these circumstances?

#### **Part 4 – Law and Argument**

##### ***Issue 1: Should this Court terminate the period for making a proposal and therefore bankrupt Quality?***

10. The Court may terminate the period for making a proposal only if is satisfied that one or more of the factors set out in section 50.4(11) of the BIA have been met. The onus of proof is on the person applying for the termination order to satisfy the Court that the debtor comes within one of the grounds in section 50.4(11).<sup>2</sup>

11. Section 50.4(11) provides:

##### *Court may terminate period for making proposal*

50.4 (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

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<sup>2</sup> N.T.W. Management Group Ltd., Re, 1993 CarswellOnt 208 ["**NTW Management**"] at para. 14; Quality's Book of Authorities, Tab 5

12. The primary purpose of insolvency legislation in Canada is to first provide a company with the ability to restructure.<sup>3</sup>

13. In considering a motion to terminate a proposal proceeding, the Court must consider what a reasonable person would do in the circumstances. The primary purpose of the BIA and the specifically the proposal sections is one of rehabilitation, and matters considered by the Court under these sections are to be applied on a rehabilitation basis rather than on a liquidation basis. It is also important for the Court in considering a motion to terminate a proposal proceeding to take a broad approach and look at a number of interested and potentially affected parties, including employees, secured and unsecured creditors, as well as the creditor that is present before the Court.<sup>4</sup>

14. As the result of terminating an NOI proceeding is bankruptcy, Courts have held that this is an unusual and serious remedy and therefore the Court must be satisfied on a balance of probabilities that the evidence warrants the remedy.<sup>5</sup>

15. Synergy Swine Group has not demonstrated that any of the factors set out in section 50.4(11) have been met. They rely on subsections 50.4(11) (a), (c) and (d), which will each be addressed in turn.

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<sup>3</sup> Cantrail Coach Lines Ltd., Re, 2005 CarswellBC 581 [**“Cantrail Coach”**] at para. 11; Quality’s Book of Authorities, Tab 2

<sup>4</sup> Cantrail Coach, *ibid*, at para. 11 and 12 (quoting the Court in NTW Management); Quality’s Book of Authorities, Tab 2

<sup>5</sup> *Cougar Metal Industries, Re*, 2004 BCSC 1258 [**Cougar Metal Industries**] at para 12; Quality’s Book of Authorities, Tab 3

**50.4(11)(a) - Quality has acted and is acting in good faith and with due diligence**

16. As a starting point, Courts have generally held that only a debtor's conduct after the filing of an NOI is relevant when considering if a debtor is acting in good faith and with due diligence.<sup>6</sup> Synergy Swine Group does not point to any post-filing conduct of Quality to demonstrate that Quality is not acting in good faith and with due diligence.

17. Even assuming pre-filing conduct is to be considered, the Synergy Swine Group has failed to demonstrate, on a balance of probabilities that Quality acted in bad faith prior to filing its NOI.

18. A more extreme situation was before the British Columbia Supreme Court in *Cougar Metal Industries*.<sup>7</sup> In that case, certain suppliers claimed that the debtor had increased orders prior to filing an NOI. The unpaid suppliers sought relief under section 50.4(11) of the BIA to terminate the NOI proceedings, therefore allowing the unpaid suppliers (under section 81.1 of the BIA) to repossess the product which they had supplied and for which they had not been paid.

19. In that case, evidence of increased orders prior to the NOI filing was before the Court. However, Justice Morrison stated that although he was left with some suspicion of bad faith as a result of the sudden spike in ordering patterns<sup>8</sup>, the application to terminate the NOI proceedings under section 50.4(11) of the BIA is an unusual and serious remedy and that "*Suspicion does not amount to what is required.*"<sup>9</sup>

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<sup>6</sup> *NTW Management, supra*, at para. 16; Quality's Book of Authorities, Tab 5

<sup>7</sup> *Cougar Metal Industries, supra*, at para 12 – 13; Quality's Book of Authorities, Tab 3

<sup>8</sup> *Cougar Metal Industries, ibid*, at para 12; Quality's Book of Authorities, Tab 3

<sup>9</sup> *Cougar Metal Industries, ibid*, at para 13; Quality's Book of Authorities, Tab 3

20. Here, the evidence is that:

- a. Quality purchases hogs from approximately 160 hog suppliers in Ontario;
- b. In the four days leading to the filing of the NOI, Quality received orders in the ordinary course from approximately 68 hog suppliers;
- c. During an ordinary course week, Quality will process anywhere between 23,000 and 24,000 hogs;
- d. In the week leading to the filing, Quality processed approximately 23,400 hogs; and
- e. Quality made all orders in the ordinary course of business and continued to make payments to hog suppliers in the ordinary course of business until the day of the NOI filing.<sup>10</sup>

21. The only facts on which Synergy Swine Group relies for a finding of bad faith are that the creditor listing submitted with the NOI filing was not 100% accurate, and certain hog suppliers were unpaid at the date of filing.

22. As explained in the Schwartz Affidavit, the creditor listing was prepared over the night of April 2 and into the morning of April 3. The filing was not planned in advance and the urgency with which the material was being prepared unfortunately resulted in inadvertent errors in the creditor listing.<sup>11</sup>

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<sup>10</sup> Schwartz Affidavit at paras 37 -38.

<sup>11</sup> Schwartz Affidavit at paras 31-33.

23. Further, if all that is required for a finding that a debtor is or was not operating in good faith and with due diligence is that suppliers were unpaid in the days leading up to the NOI filing and the creditor listing compiled for filing is incomplete, virtually every debtor who files an NOI would be found to be acting in bath faith.

24. In this case, Quality has demonstrated that it is acting in good faith and with due diligence. Quality has taken steps to stabilize operations by negotiating a forbearance agreement with TD and a pre-payment arrangement with the Board. Quality has commenced its discussions with its union, certain of its customers, suppliers and alternate debt or equity providers in order to lay the foundation for a restructured company with a view to making a viable proposal to its creditors.<sup>12</sup>

***50.4(11)(c) - Quality will likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors***

25. Courts have repeatedly held that it is disingenuous for a creditor to say that they would vote against any proposal, when on the facts there is no evidence of bad faith and there is no determination at such an early stage as to what a proposal will actually be.<sup>13</sup>

26. Here, only one week into the NOI proceedings, it is entirely disingenuous for a creditor to say that they will categorically reject any proposal, without providing the company with an opportunity to put forth the proposal for their consideration. The only

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<sup>12</sup> Schwartz Affidavit at para 40.

<sup>13</sup> *Cantrail Coach*, supra, at para. 17; Quality's Book of Authorities, Tab 2; See also *NWT Management*, supra, at para. 19; Quality's Book of Authorities, Tab 5



reason Synergy Swine Group has categorically stated it would reject any proposal is to provide it with a preference over all other creditors.

27. The reliance by Synergy Swine Group on *1512759 Ontario Inc.*<sup>14</sup> and *Com/Mit Hitech Services*<sup>15</sup> is misplaced. Unlike the creditors in question in those cases, Synergy Swine Group (even with the supporting hog suppliers) is not the only creditor with an economic interest at play. Further, much more time had passed between the filing of the NOI and the motion to terminate the proceedings in *1512759 Ontario Inc.* As a result, these cases are distinguishable.

28. Synergy Swine Group, even with the hog suppliers who appear to be supporting their position, do not represent a clear majority of Quality's creditors such that they can satisfy this Court with certainty that any proposal put forth before the debtor would fail. They are not collectively owed "an amount that will dwarf the other creditors" in these proceedings (as was the case in *1512759 Ontario Inc.*)<sup>16</sup> nor are they "very close to being in essence 'all the creditors'" of Quality (as was the case in *Com/Mit Hitech Services*).<sup>17</sup>

***50.4(11)(d) – Quality's creditors as a whole are not materially prejudiced by the continuation of the NOI proceeding***

29. To terminate the NOI proceedings pursuant to subsection 50.4(11)(d) of the BIA, Synergy Swine Group must show that creditors as a whole would be materially prejudiced.

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<sup>14</sup> *Re 1512759 Ontario Ltd. (cob The Post Group)*, [2002 O.J. No. 4457 (Ont. S.C. J.); Brief of Authorities of the Moving Party, Tab 1 ["**1512759**"]

<sup>15</sup> *Re Com/Mit Hitech Services Inc.*, [1997] O.J. No. 3360 (Ont. Gen. Div. (In Bankruptcy)); Brief of Authorities of the Moving Party, Tab 2 ["**Com/Mit**"]

<sup>16</sup> *1512759*, supra, at para. 2; Brief of Authorities of the Moving Party, Tab 1

<sup>17</sup> *Com/Mit*, supra, at para. 4; Brief of Authorities of the Moving Party, Tab 2

30. It is not sufficient to show that Synergy Swine Group, alone or together with any other unpaid hog suppliers, would be prejudiced (which they are not). Rather the interests of the creditors as a whole must be considered.<sup>18</sup> Synergy Swine Group has not provided any evidence that creditors as a whole would be prejudiced. To the contrary, providing time for Quality to develop a proposal is in the interests of Quality's employees, customers, other creditors and stakeholders generally.

31. Further, claims by Synergy Swine Group that it is being materially prejudiced are ill founded. Synergy Swine Group, and other unpaid hog suppliers, are unsecured creditors of Quality.

32. As Justice Lax held in *MGP Packers Inc. v. Livestock Financial Protection Board*<sup>19</sup>, section 81.2 of the BIA does not provide any priority to farmers where a debtor liquidates inventory. Priority is only provided where there is a receiver appointed within the meaning of section 243(2) of the BIA or a bankruptcy.

33. As the unpaid hog suppliers do not have any priority lien rights, they cannot be materially prejudiced by not being able to enforce rights which do not exist.

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<sup>18</sup> *NTW Management, supra*, at para 20; Quality's Book of Authorities, Tab 5

<sup>19</sup> *MGP Packers Inc. v. Livestock Financial Protection Board*, 2001 CarswellOnt 2540; Quality's Book of Authorities, Tab 4

***Issue 2: Is the appointment of a receiver just and equitable in these circumstances?***

34. In deciding whether or not to appoint a receiver pursuant to section 101 of the *Courts of Justice Act* (the “**CJA**”), this Court has held<sup>20</sup>:

The Court has the power to appoint a receiver or receiver and manager where it is “just or convenient” to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently.

35. Synergy Swine Group has no contractual right to appoint a receiver over the assets of Quality. As a result, it has a higher standard to meet when asserting that it is just or convenient in these circumstances, when considering the rights and interests of all parties that a receiver should be appointed pursuant to section 101 of the CJA.

36. If additional oversight is warranted following an NOI filing, the BIA provides for the appointment of an interim receiver under section 47.1 of the BIA. However, the appointment of an interim receiver in accordance with the provisions of the BIA does not enhance Synergy Swine Group’s position as against Quality’s other creditors as it does not trigger the application of a priority lien under section 81.2 of the BIA. Therefore Synergy Swine Group is resorting to relief outside of the legislative scheme that parliament enacted under the BIA to attempt to obtain a priority over other creditors. This cannot be just or convenient.

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<sup>20</sup> *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC) at para 10; Quality’s Book of Authorities, Tab 1


37. The appointment of a receiver under section 101 of the CJA is solely sought by Synergy Swine Group to artificially create a special priority for Synergy Swine Group and other hog suppliers which they would not otherwise be entitled to in an NOI proceeding. In order for a receiver appointed under section 101 of the CJA to qualify as a receiver under section 243(2) of the BIA, the receiver would need to take possession or control of all or substantially all of the inventory, accounts receivable or other property of Quality. This would include live hogs when Quality resumes operations. The effect of doing so would be to deprive Quality from using its working capital to continue in operations. This cannot be just or convenient.

38. It is just and equitable and in the best interests of all stakeholders generally, including, the employees, customers, and creditors, that the NOI proceeding continue and Quality be given an opportunity to develop, negotiate and present a proposal to its creditors.

#### **Part 5 – Order Requested**

39. On the above basis, Quality respectfully requests that the relief as set out in Synergy Swine Group's notice of motion be denied and the motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9TH DAY OF APRIL, 2014.



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**Cassels Brock & Blackwell LLP**  
Lawyers for the Applicant

### **Schedule “A” – List of Authorities**

1. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC) (accessed April 9, 2014)
2. *Cantrail Coach Lines Ltd., Re* 2005 BCSC 351, 2005 CarswellBC 581 (accessed April 8, 2014)
3. *Cougar Metal Industries Inc., Re* 2004 BCSC 1258, 2004 CarswellBC 2339 (accessed April 8, 2014)
4. *MGI Packers Inc. v. Livestock Financial Protection Board*, 2001 CarswellOnt 2540 (accessed April 8, 2014)
5. *N.T.W. Management Group Ltd., Re* 1993 CarswellOnt 208 (accessed April 8, 2014)

## **Schedule “B” – Legislation Cited**

### ***Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), at Section 47.1***

#### **Appointment of interim receiver**

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

- (a) the trustee under the notice of intention or proposal;
- (b) another trustee; or
- (c) the trustee under the notice of intention or proposal and another trustee jointly.

#### **Duration of appointment**

(1.1) The appointment expires on the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) court approval of the proposal.

#### **Directions to interim receiver**

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;
- (b) take possession of all or part of the debtor's property mentioned in the order of the court;
- (c) exercise such control over that property, and over the debtor's business, as the court considers advisable;
- (d) take conservatory measures; and
- (e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

#### **When appointment may be made**

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of one or more creditors, or of the creditors generally.

#### Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

1992, c. 27, s. 16; 2005, c. 47, s. 31; 2007, c. 36, s. 15.

#### ***Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), at Section 50.4***

#### Notice of intention

**50.4** (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books, and attaching thereto a copy of the consent referred to in paragraph (b).

#### Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

#### Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

#### Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

#### Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

#### Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

#### Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

#### Where assignment deemed to have been made



(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

#### Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

#### Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

#### Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17.

***Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), at Section 81.1***

**Right of unpaid supplier to repossess goods**

**81.1** (1) Subject to this section, if a person (in this section referred to as the “supplier”) has sold to another person (in this section referred to as the “purchaser”) goods for use in relation to the purchaser’s business and delivered the goods to the purchaser or to the purchaser’s agent or mandatary, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier’s own expense, and the purchaser, trustee or receiver, or the purchaser’s agent or mandatary, as the case may be, shall release the goods, if

(a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in the prescribed form and containing the details of the transaction, within a period of 15 days after the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(b) the goods were delivered within 30 days before the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(c) at the time when the demand referred to in paragraph (a) is presented, the goods

(i) are in the possession of the purchaser, trustee or receiver,

(ii) are identifiable as the goods delivered by the supplier and not fully paid for,

(iii) are in the same state as they were on delivery,

(iv) have not been resold at arms’ length, and

(v) are not subject to any agreement for sale at arms’ length; and

(d) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.

Where goods have been partly paid for

(2) Where, at the time when the demand referred to in paragraph (1)(a) is presented, the goods have been partly paid for, the supplier's right to repossess under subsection (1) shall be read as a right

(a) to repossess a portion of the goods proportional to the unpaid amount; or

(b) to repossess all of the goods on paying to the purchaser, trustee or receiver an amount equal to the partial payment previously made to the supplier.

(3) [Repealed, 1999, c. 31, s. 23]

If notice of intention or proposal was filed

(4) If a notice of intention under section 50.4 or a proposal was filed in respect of the purchaser after the delivery of the goods to the purchaser and before the purchaser became bankrupt or became a person who is subject to a receivership, the 30-day period referred to in paragraph (1)(b) is the 30-day period before the filing of the notice of intention or, if there was no notice of intention, the filing of the proposal.

Expiry of supplier's right

(5) A supplier's right to repossess goods under this section expires if not exercised within the 15-day period referred to in paragraph (1)(a), unless the period is extended before its expiry by the trustee or receiver, or by the court.

Ranks above other claims

(6) Notwithstanding any other federal or provincial Act or law, a supplier's right to repossess goods pursuant to this section ranks above every other claim or right against the purchaser in respect of those goods, other than the right of a *bona fide* subsequent purchaser of the goods for value without notice that the supplier had demanded repossession of the goods.

Application to court for directions

(7) The purchaser, trustee or receiver may apply to the court for directions in relation to any matter relating to this section, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

Supplier may appeal to court

(8) Where a supplier is aggrieved by any act, omission or decision of the purchaser, trustee or receiver, the supplier may apply to the court and the court may make such order as it considers proper in the circumstances.

#### Other rights saved

(9) Nothing in subsection (7) or (8) precludes a person from exercising any right that the person may have under subsection 34(1) or section 37.

#### No payment

(10) A supplier who repossesses goods pursuant to this section is not entitled to be paid for those goods.

#### Provincial rights saved

(11) Nothing in this section precludes a supplier from exercising any right that the supplier may have under the law of a province.

#### Definitions

(12) The following definitions apply in this section.

“person who is subject to a receivership”

« *mise sous séquestre* »

“person who is subject to a receivership” means a person in respect of whom any property is under the possession or control of a receiver.

“receiver”

« *séquestre* »

“receiver” means a receiver within the meaning of subsection 243(2).

### ***Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), at Section 81.2***

#### Special right for farmers, fishermen and aquaculturists

##### **81.2 (1) Where**

(a) a farmer has sold and delivered products of agriculture, a fisherman has sold and delivered products of the sea, lakes and rivers, or an aquaculturist has sold and delivered products of aquaculture, to another person (in this section referred to as the “purchaser”) for use in relation to the purchaser’s business,

(b) the products were delivered to the purchaser within the fifteen day period preceding

(i) the day on which the purchaser became bankrupt, or

(ii) the first day on which there was a receiver, within the meaning of subsection 243(2), in relation to the purchaser,

(c) as of the day referred to in subparagraph (b)(i) or (ii), the farmer, fisherman or aquaculturist has not been fully paid for the products, and

(d) the farmer, fisherman or aquaculturist files a proof of claim in the prescribed form in respect of the unpaid amount with the trustee or receiver, as the case may be, within thirty days after the day referred to in subparagraph (b)(i) or (ii),

the claim of the farmer, fisherman or aquaculturist for the unpaid amount in respect of the products is secured by security on all the inventory of or held by the purchaser as of the day referred to in subparagraph (b)(i) or (ii), and the security ranks above every other claim, right, charge or security against that inventory, regardless of when that other claim, right, charge or security arose, except a supplier's right, under section 81.1, to repossess goods, despite any other federal or provincial Act or law; and if the trustee or receiver, as the case may be, takes possession or in any way disposes of inventory covered by the security, the trustee or receiver is liable for the claim of the farmer, fisherman or aquaculturist to the extent of the net amount realized on the disposition of that inventory, after deducting the cost of realization, and is subrogated in and to all rights of the farmer, fisherman or aquaculturist to the extent of the amounts paid to them by the trustee or receiver.

#### Definitions

(2) In this section,

“aquaculture”

« *aquiculture* »

“aquaculture” means the cultivation of aquatic plants and animals;

“aquaculture operation”

« *exploitation aquicole* »

“aquaculture operation” means any premises or site where aquaculture is carried out;

“aquaculturist”

« *aquiculteur* »

“aquaculturist” includes the owner, occupier, lessor and lessee of an aquaculture operation;

“aquatic plants and animals”

« *organismes animaux et végétaux aquatiques* »

“aquatic plants and animals” means plants and animals that, at most stages of their development or life cycles, live in an aquatic environment;

“farm”

« *ferme* »

“farm” means land in Canada used for the purpose of farming, which term includes livestock raising, dairying, bee-keeping, fruit growing, the growing of trees and all tillage of the soil;

“farmer”  
« *agriculteur* »

“farmer” includes the owner, occupier, lessor and lessee of a farm;

“fish”  
« *poisson* »

“fish” includes shellfish, crustaceans and marine animals;

“fisherman”  
« *pêcheur* »

“fisherman” means a person whose business consists in whole or in part of fishing;

“fishing”  
« *pêche* »

“fishing” means fishing for or catching fish by any method;

“products of agriculture”  
« *produits agricoles* »

“products of agriculture” includes

(a) grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil, and

(b) honey, livestock (whether alive or dead), dairy products, eggs and all other indirect products of the soil;

“products of aquaculture”  
« *produits aquicoles* »

“products of aquaculture” includes all cultivated aquatic plants and animals;

“products of the sea, lakes and rivers”  
« *produits aquatiques* »

“products of the sea, lakes and rivers” includes fish of all kinds, marine and freshwater organic and inorganic life and any substances extracted or derived from any water, but does not include products of aquaculture.

Interpretation — products and by-products

(3) For the purposes of this section, each thing included in the following terms as defined in subsection (2), namely,

- (a) "products of agriculture",
- (b) "products of aquaculture", and
- (c) "products of the sea, lakes and rivers",

comprises that thing in any form or state and any part thereof and any product or by-product thereof or derived therefrom.

Section 81.1 applies

(4) For greater certainty, "goods" in section 81.1 includes products of agriculture, products of the sea, lakes and rivers, and products of aquaculture.

Other rights saved

(5) Nothing in this section precludes a farmer, fisherman or aquaculturist from exercising

- (a) the right that that person may have under section 81.1 to repossess products of agriculture, products of the sea, lakes and rivers, or products of aquaculture; or
- (b) any right that that person may have under the law of a province.

1992, c. 27, s. 38; 1997, c. 12, s. 72(F); 2004, c. 25, s. 49.

### ***Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), at Section 243***

Court may appoint receiver

**243.** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless



(a) the insolvent person consents to an earlier enforcement under subsection 244(2);  
or

(b) the court considers it appropriate to appoint a receiver before then.

#### Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

#### Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

#### Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

#### Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

#### Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

#### Meaning of "disbursements"



(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

## **Courts of Justice Act, R.S.O. 1990, Chapter C. 43, Section 101**

### **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.

R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

### **Terms**

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

R.S.O. 1990, c. C.43, s. 101 (2).

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED  
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF QUALITY MEAT PACKERS LIMITED

Court File No. 31-1855569

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**  
**(COMMERCIAL LIST)**

**FACTUM OF QUALITY MEAT PACKERS LIMITED**  
**(Motion Returnable April 10, 2014)**

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