



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00698447-00CL DATE: 25 July 2023

NO. ON LIST: 4

TITLE OF PROCEEDING: **CANADIAN WESTERN BANK v. INDEX HOLDING GROUP
INC. ET AL et al**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Bornstein	Counsel for the Applicant-CWB	jbornstein@cassels.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Tahir Majeed	Counsel for 2851604 Ontario Inc., the purchaser	tahir@tmlaw.ca

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Lisa Corne David Seifer	Counsel to the proposed receiver, MNP	LCorne@dickinson-wright.com dseifer@dickinson-wright.com

ENDORSEMENT OF JUSTICE KIMMEL:

1. At a motion made returnable on a 15-minute scheduling appointment on May 29, 2023, the court appointed receiver, MNP Ltd. (the "Receiver") sought to include the approval of a proposed targeted sales process to sell various Popeye's and Denny's franchises owned and operated by the Debtors, as described in the Receiver's First Report dated May 23, 2023 (the "Sales Process"). The request for the approval of the Sales Process had been added on to other more urgent requested relief for an approval and vesting order ("AVO") in connection with the sale of a property (the "Transaction") owned by one of the Debtors that was subject to a pre-receivership agreement of purchase and sale.
2. The AVO was approved on May 29, 2023. There was not sufficient time for the court to consider and approve the proposed Sales Process. According to the Receiver's counsel, the next available time that the court could offer was not until July 24, 2023 to hear the motion to approve the Sales Process. The Receiver was concerned about waiting approximately two months to embark upon its proposed Sales Process.
3. With the approval of CWB, and the authority that it already had under the May 8, 2023 Appointment Order, the Receiver has undertaken the Sales Process on its own and now comes to the court seeking an order approving the sale transaction (the "Popeye's Transaction") contemplated by the Offer to Purchase dated July 19, 2023 between the purchaser, Varun Kakkar (the "Purchaser"), and the Receiver (the "Popeyes APA") as outlined in the Receiver's Second Report dated July 19, 2023 (the "Second Report"), for various relief ancillary to the Popeye's Transaction, and for the approval of that Second Report and the activities and recommendations of the Receiver described therein.
4. The Popeye's Transaction is the highest and best offer that the Sales Process has produced.
5. As was noted in the court's last endorsement when the AVO was granted, the Debtors' secured debt to the applicant Canadian Western Bank ("CWB") is currently in excess of approximately \$7.5 million. Based on the Receiver's initial review of the potential realizations from the Debtors' assets and operations, CWB is expected to suffer a significant shortfall on its security. It was for that reason that CWB supported the completion of the Transaction and now supports the court's approval of the Popeye's Transaction.
6. No one appearing on this motion objected to the relief sought or opposed the motion. No one else on the service list indicated any objections or concerns about the relief sought. It proceeded on an unopposed basis.

Approval of Popeye's Transaction

7. The targeted Sales Process was designed taking into account that any prospective purchaser of the Popeye's and Denny's franchise restaurants operated by the Debtors must be approved by the applicable franchisor. The franchisors informed the Receiver that unless a prospective purchaser is an existing approved franchisee or experienced franchise restaurant operator, the approval process would take approximately six to eight weeks, without any guaranteed results.
8. The targeted Sales Process was designed to balance the need to minimize the ongoing costs of continued operations, while exposing the property to the most likely acceptable purchasers, in order to maximize the recoveries for stakeholders.
9. With CWB's support, the Receiver implemented the Sale Process outlined in its First Report, including distributing a teaser, entering into non-disclosure agreements, establishing a data room, circulating a confidential information memorandum, publishing notice of the sale process in a nationally circulated food service trade journal and on the Receiver's website, and providing tours of the Debtors' operations. The Receiver canvassed a targeted pool of prospective purchasers who were expected to be approved by the applicable franchisors over an approximately four-week period.

10. The Popeye's Transaction represents the highest and best offer available for the Purchased Assets (comprised of three operating Popeye's franchise restaurants and all assets of the Debtors relating to or used in connection with the operation of those restaurants). This is apparent from the confidential exhibits filed in support of this motion, in respect of which a sealing order is being sought (below).
11. Completion of the Popeye's Transaction would provide continued employment for the operating Popeye's current employees. If it is not completed, it is anticipated that the Receiver will have to embark on a further process that will involve additional professional fees and further erode the available proceeds for distribution with no certainty that a superior transaction could be completed. In the meantime, the Receiver will also incur additional costs in the continued operation of these three Popeye's restaurants.
12. The Receiver advises that it is presently paying another franchisee (who also unsuccessfully made a bid to purchase them) to operate these restaurants under an operating agreement. Under the agreement of purchase and sale for the Popeye's Transaction, the purchaser will take on this responsibility during the interim period until closing and it will be responsible for the operating costs in this interim period if the transaction is completed. The operating agreement with the purchaser is in the process of being negotiated and will replace the existing operating agreement.
13. The request for the court's approval of the Popeye's Transaction is supported by CWB.
14. In determining whether to approve a proposed sale of assets by a court appointed receiver, Ontario courts have consistently and uniformly applied the following principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*, (1991), 4 O.R. (3d) 1 (CA), all of which the record establishes have been satisfied in this case:
 - a. The receiver has made a sufficient effort to get the best price and has not acted improvidently. A review of the other (confidential and sealed) offers received reinforces this.
 - b. The interests of all parties have been considered (including, for example, not just the interests of CWB, the first ranking secured creditor who is expected to suffer a shortfall, but also the interests of employees at these restaurants who will continue to be employed and the interest of other stakeholders more generally whose prospects of any recoveries are diminished through continued expenditures of professional fees if these assets have to be marketed further);
 - c. The Sales Process was carefully considered and developed by the Receiver taking into account various interests and considerations, including the need for efficiency but also the need for a reasonable marketing period to encourage competitive bids. The bids received through that process were competitive and varied.
 - d. No unfairness in the working out of the Sale Process has been identified.
15. The record filed in support of this motion establishes that these principles have been satisfied and establishes the fairness, efficacy and integrity of the Sales Process.
16. The Receiver's recommendation of the Popeye's Transaction arising out of the Sales Process is not something that the court should or would lightly interfere with and there has been no reason indicated for the court to interfere in this case.
17. The AVO for the Popeye's Transaction is approved and the execution of the Sale Agreement for the Popeye's Transaction by the Receiver is also authorized and approved, with such minor amendments as the Receiver may deem necessary

Sealing Order

18. The Receiver seeks a limited sealing order of the results of the offers made under the Sale Process and the Popeye's APA. The Confidential Appendices contain a summary of the offers and the Popeye's APA.
19. The requested partial sealing order is limited in its scope (only specifically identified confidential appendices) and in time (until the contemplated transaction has closed). It is necessary to protect commercially sensitive information that could negatively impact the debtor and stakeholders if this transaction is not completed and further efforts to sell the property have to be undertaken.

20. The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved sale transaction. These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings.
21. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with the approval and vesting orders. Preservation of the confidentiality of offer information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 85 when limited to only Confidential Appendices (or parts thereof) that contain the confidential and sensitive information and only for as long as may be necessary.
22. The purchase agreement for the Popeye's Transaction ("Popeye's APA") was only recently signed on July 19, 2023. It remains subject to third party approvals among other conditions. The anticipated closing date is in 60 days. The purchaser has paid a 10% deposit and will pay a further deposit upon the court's approval of the requested AVO.
23. Failing to seal the offers and the Popeye's APA contained in the Confidential Appendices could negatively impact realizations in the event the Popeye's Transaction does not close. It is in the public interest that the ability of the Receiver to maximize value be preserved until the Popeye's Transaction has closed. See *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para 39.
24. The receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. The Receiver is further directed to apply, at the appropriate time, for an unsealing order, if necessary.

Approval of the Second Report

25. There are good policy and practical reasons for the court to approve the activities of a Receiver on an ongoing and periodic basis. See *Triple-Capital Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400 at paras citing Regional Senior Justice G.B. Morawetz (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 12 and 23.
26. The Receiver's activities as described in the Second Report are consistent with its duties arising under the Appointment Order.
27. No one has raised any opposition to the approval sought. The qualifying language restricting reliance upon this approval to the Monitor has been included in the final form of order.

Order

28. The order may issue in the form signed by me today with immediate effect.



KIMMEL J.