



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00707205-00CL

DATE: Monday, November 6, 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: FARM CREDIT CANADA v WHYTE'S FOODS INC./LES AILMENTS et
al

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
KLUGE, NICHOLAS	Farm Credit Canada	Nicholas.kluge@gowlingwlg.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
MIGHTON, JESSE	The receiver	mightonj@bennettjones.com
ROSENBERG, JEFFREY	The receiver	Jeffrey.rosenberg@fticonsulting.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
JOHNSON, HOWARD	Kroll Corporate Finance	howard.johnson@kroll.com
NEWMAN, JAKE	Kroll Corporate Finance	jake.newman@kroll.com
STOYAN, JOHN	Kroll Corporate Finance	john.stoyan@kroll.com

ENDORSEMENT OF JUSTICE STEELE:

- [1] The Receiver brings a motion for:
- a. An order approving the sale transaction contemplated by an asset purchase agreement between the Receiver and THS Foods Canada Ltd. and sealing the purchase price until the transaction has been completed; and
 - b. An order authorizing the Receiver to make one or more distributions to Farm Credit Canada (“FCC”), amending the style of cause of the proceeding to correct the French-language spelling, approving the Receiver’s report, and approving the fees of the Receiver and legal counsel.

[2] No one opposes the relief sought by the Receiver.

[3] Terms not defined herein are as defined in the Receiver’s First Report.

The Proposed Sale

- [4] The Receiver asks the Court to approve the asset purchase agreement and the proposed sale transaction. Under the agreement, the Receiver will sell to THS Food Canada certain listed assets, which comprise substantially all Non-Trade Personal Property of the debtors located at the Facilities.
- [5] Under section 100 of the *Courts of Justice Act* (Ontario) the Court has the power to vest in any person an interest in real or personal property that the Court has the authority to order be disposed of, encumbered or conveyed. Further s. 243(1) of the BIA gives the Court jurisdiction to “grant a vesting order vesting property in a purchaser.”
- [6] The Court of Appeal in *Royal Bank of Canada v. Soundair Corporation*, 1991 CanLII 2727 (Ont. C.A.) set out the criteria to be applied when considering the approval of a sale by a receiver.
- a. Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - b. Whether the interests of all parties have been considered;
 - c. The efficacy and integrity of the process by which offers are obtained; and
 - d. Whether there has been unfairness in the workout of the process.

[7] The Receiver submits that the proposed transaction satisfies the *Soundair* principles for the following reasons:

- a. The assets that are being purchased in the transaction were subject to multiple broad marketing efforts by the Debtors and Kroll.
- b. The Purchaser is the only party with whom negotiations reached a stage where it was possible for a reasonable agreement to be reached.
- c. The Receiver is of the view that the approval of the asset purchase agreement and the transaction represents the best recovery in respect of the Non-Trade Personal Property in the circumstances.
- d. FCC, the only party with an economic interest in the assets to be sold and the sale proceeds, supports the completion of the transaction.

[8] I accept the Receiver's recommendation. I am satisfied that the proposed sale satisfies the requirements of the principles set out in *Soundair* and should be approved. I note that no party on the service list has indicated any opposition to the relief sought.

Request for Sealing Order

[9] The Receiver seeks an order sealing the purchase price of the transaction until the transaction closes or further order of the Court.

[10] Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[11] The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, articulated the test applicable when determining whether a sealing order ought to be granted:

The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

1. Court openness poses a serious risk to an important public interest;
2. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
3. As a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

- [12] There is public interest in preserving commercially sensitive confidential information. In addition, Courts have acknowledged that there is public interest in maximizing recoveries in an insolvency that goes beyond the individual case: *Danier Leather Inc., Re*, 2016 ONSC 1044, at para. 84.
- [13] The proposed sealing order is temporary and is limited to the purchase price of the transaction. I find the proposed sealing order to be proportionate.
- [14] The benefits of the sealing order outweigh the negative effects. The Receiver states that it is necessary to seal the purchase price pending closing of the transaction to preserve value for FCC if the THS APA transaction fails to close. The sealing order will preserve the integrity of the sale process. This outweighs any potential negative effect that may result from temporarily restricting public access to one piece of information.
- [15] 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 in *Sherman Estate*.
- [16] The Receiver is directed to provide the sealed confidential exhibit 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 exhibit can be physically sealed.

Distribution Order

- [17] The Receiver is seeking authorization to make a distribution of the proceeds of sale from the proposed transaction and the St. Louis Proceeds to FCC, while withholding an amount for the Receiver's ongoing activities and an amount to satisfy the Administration Charge and Directors' Charge remaining from the proposal proceedings.
- [18] FCC is the first ranking secured creditor in respect of the Non-Trade Personal Property. FCC is owed approximately \$35 million.
- [19] The Court will grant orders authorizing distributions with a reserve in insolvency proceedings where appropriate to do so: See, for example, *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772 (ONSC), at paras. 8 & 13, and *AbitibiBowater Inc. (Re)*, 2009 QCCS 6461, at paras. 70-75.
- [20] FCC holds security over the assets that are being purchased in the transaction and the Property. The indebtedness owed to FCC is such that they will likely not be paid-out in full. The Receiver's counsel has reviewed FCC's security and determined that it is valid and enforceable, subject to standard assumptions and qualifications.
- [21] I am satisfied that the distribution and holdback orders sought are appropriate in this case.

Approval of Fees and Activities

- [22] The Receiver seeks approval of its fees and disbursements and those of its counsel detailed in the First Report.

- [23] The Court is focused on whether the fees and disbursements incurred in carrying out the receivership were fair and reasonable. The Court of Appeal in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (Ont. C.A.), at paras. 33 and 45, set out guidelines the Court may consider.
- [24] The Receiver submits that its actions, conduct, and activities in these proceedings have been carried out in good faith and in accordance with the receivership order. The Receiver further submits that its fees and those of its counsel are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the receivership order.
- [25] Having reviewed the fee affidavits, I am satisfied that the fees and disbursements are fair and reasonable in the circumstances.
- [26] Orders to go in the forms signed by me today.

A handwritten signature in blue ink, appearing to be "J. Diemer", is located in the lower right quadrant of the page. The signature is fluid and cursive, with a horizontal line extending from the end.