

COURT FILE NUMBER KBG-SA-00151-2022

**COURT OF KING'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY**

JUDICIAL CENTRE SASKATOON

**IN THE MATTER OF THE RECEIVERSHIP OF
ABBEY RESOURCES CORP.**

**BRIEF OF LAW ON BEHALF OF THE RECEIVER, MNP LTD.
(Filed in support of an application scheduled to be heard by the Honourable Justice G.A.
Meschishnick on November 2, 2023)**

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I. INTRODUCTION

1. The Receiver¹ and its marketing agent, Sayer, have completed the SSP, which was approved by order of this Honourable Court on October 11, 2022. Since that order was granted, the Receiver has:

- (a) received bids from prospective purchasers;
- (b) engaged in follow up discussions and negotiations with prospective purchasers;
- (c) engaged in extensive discussions with the MER;
- (d) continued to operate the Natural Gas Assets; and
- (e) engaged in discussions with various other stakeholders.

2. The Receiver has accepted an offer made by the Purchaser and the parties have executed the Sale Agreement. The Receiver is requesting that this Honourable Court grant the SAVO in order to complete the Transaction contemplated in the Sale Agreement for the following reasons:

- (a) the Sale Agreement was derived from a Court-approved sales process;
- (b) the consideration for the Purchased Assets is, in the Receiver's view, fair and reasonable in the circumstances taking into account:
 - (i) the cash portion of the purchase price;
 - (ii) the assumed liabilities; and

¹ Unless otherwise defined, capitalized terms will have the meaning ascribed to them in the fourth report of MNP Ltd. ("MNP" or the "Receiver") dated October 30, 2023 (the "Fourth Report") and MNP's Notice of Application.

- (iii) the comparative costs of removing any resulting Dead Legs in the other sale scenarios;
 - (c) the MER, the creditor most affected by the Transaction and these proceedings, is supportive of the Sale Agreement; and
 - (d) the Receiver is unaware of any party who is alleging that the marketing process under the SSP was inadequate, the Receiver acted improvidently, or that the SSP was not conducted in a fair and reasonable manner.
3. The Receiver is also seeking the following ancillary relief:
- (a) an amendment to sections 3(1)(i) and 20 of the Receivership Order to allow the Receiver to sell the Residual Property without having to apply for Court approval of the anticipated sales;
 - (b) a sealing order with respect to the Confidential Supplement;
 - (c) approval of the Fourth Report and the activities described in that report; and
 - (d) approval of the Receiver's fees and charges, as well as the fees and charges of its legal counsel.
4. The Receiver submits that it is entitled to the relief sought because it has satisfied the legal tests articulated in both *Royal Bank of Canada v Soundair Corp.*² and *Sherman Estate v Donovan*.³

II. FACTS

5. The relevant facts are set out in the Fourth Report, the Confidential Supplement, and the previous reports and affidavits filed in these proceedings. For the sake of economy, the facts will not be summarized here, but will instead be referred to, where appropriate, in the discussion below.

² 1991 CarswellOnt 205, [1991] OJ No 1137 (ON CA) [*Soundair*].

³ 2021 SCC 25 [*Sherman Estate*].

III. ISSUES

6. This Brief of Law addresses the following issues:

- (a) Should the Court approve the SAVO?
- (b) Should section 3(1)(i) of the Receivership Order be amended?
- (c) Should the Confidential Supplement be sealed?
- (d) Should the Court approve the Fourth Report and activities of the Receiver?
- (e) Should the Court approve the fees and disbursements of the Receiver and its legal counsel?

IV. DISCUSSION

A. The SAVO should be approved

7. In *Atrium Mortgage Investment Corp v King Edwards Apartments Inc.*, Justice Layh confirmed that *Soundair* remains the leading authority with respect to the legal test governing a court-appointed receiver's sale of assets.⁴

8. The *Soundair* factors require the Court to consider:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers were obtained; and
- (d) whether there has been unfairness in the working out of the process.⁵

⁴ 2018 SKQB 296 at para 13, 65 CBR (6th) 15.

⁵ *Soundair*, *supra* at para 16.

9. The Alberta Court of Appeal in *Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd.*⁶ recently confirmed that Courts *might* also consider a subset of factors when evaluating the first prong of the *Soundair* test, namely:

- (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;
- (b) whether the circumstances indicate that insufficient time was allowed for the making of bids;
- (c) whether inadequate notice of sale by bid was given; and
- (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner.⁷

10. As discussed below, on the evidence before the Court, a consideration of the *Soundair* factors weighs in favour of approving the Transaction contemplated by the Sale Agreement.

(i) *The Receiver made sufficient efforts to get the best price and did not act improvidently*

11. In considering the first prong of the *Soundair* test, the Court will ordinarily accord the court-appointed receiver's business judgment a high level of deference.⁸ The Courts have acknowledged that there are serious risks associated with not approving a sale entered into by a court-appointed receiver, such as eroding the participants' confidence in the receivership proceedings and the public's confidence in the Canadian bankruptcy and insolvency regime, generally.⁹

12. In this case, the Receiver submits that it made sufficient efforts to market the Natural Gas Assets and did not act improvidently by executing the Sale Agreement for the following reasons:

- (a) this Transaction was derived from a Court-approved, multi-phased SSP and is therefore distinguishable from the sale approval sought in *393 Alberta*. Put another way, the Receiver did not enter into the Sale Agreement on a mere whim;

⁶ 2019 ABCA 433 [*393 Alberta*].

⁷ *Ibid.* at paras 11 to 13.

⁸ *Soundair, supra* at para 21.

⁹ *Ibid.* at paras 21 and 22.

- (b) following the issuance of the SSP, Sayer and the Receiver undertook an extensive marketing initiative whereby they advised the public and various industry participants as to the sale opportunity and SSP. This robust marketing process included the following:
- (i) mailing and distributing a Marketing Brochure to thousands of Sayer's contacts in the oil and gas sector;
 - (ii) posting the Marketing Brochure to Sayer's website, where it was downloaded 424 times; and
 - (iii) placing an advertisement in the DOE, A&D Watch, Energy Advisors Group and Sayers Canadian Oil Industry Asset Sale Listing.¹⁰

As a result of these efforts, Sayer received executed confidentiality agreements from 22 parties, six of which submitted non-binding letters of intent. Sayer advised that this was a high number of interested parties for a divestiture of this nature;¹¹

- (c) the Receiver spent a considerable amount of time consulting with the MER and requesting additional information from the Qualified Bidders to:
- (i) ensure that the MER had sufficient information to consider the license transfer requirements; and
 - (ii) quantify the removal costs for the Dead Legs that would be created and ultimately borne by the MER in the different sales scenarios;¹²
- (d) the consideration to be received for the Purchased Assets under the Sale Agreement is fair and reasonable in the circumstances, taking into account not just the cash purchase price, but also:
- (i) the liabilities to be assumed by the Purchaser;
 - (ii) the comparative costs associated with removing Dead Legs; and
 - (iii) the unanticipated problems encountered in the SISP, the passage of time, and fact that the continuation of the receivership is no longer economic.¹³

¹⁰ Fourth Report at para 14.

¹¹ *Ibid.* at para 15.

¹² *Ibid.* at paras 23 to 27.

¹³ *Ibid.* at paras 28 to 30 and 35.

(ii) It is in the best interests of the parties to approve the Sale Agreement

13. In assessing whether a prospective sale by a receiver is in the best interests of the parties, the Court should give primary consideration to the debtors' creditors. The Court may also consider the interests of the debtor and the prospective purchaser (who has likely expended time and resources bargaining with the receiver).¹⁴

14. Given the significant abandonment and reclamation obligations associated with the Natural Gas Assets,¹⁵ the MER's interests as regulator and creditor are paramount in this proceedings. The MER supports the approval of the Sale Agreement and the closing of the Transaction with the Purchaser,¹⁶ which will also benefit the relevant surface leaseholders, taxing authority, and other parties who will financially benefit from the continued operation of the Purchased Assets going forward.¹⁷

15. If the approval of the Transaction (and other relief sought on this application) is granted the Unsold Natural Gas Assets will be prepared for abandonment, disclaimed, and surrendered to the Orphan Fund Procurement Program.¹⁸ This, too, stands to benefit the Abbey stakeholders by bringing finality to this lengthy matter.

(iii) The SSP was efficacious and had integrity

16. The third prong of the *Soundair* test examines the process employed by a receiver to achieve a sale. In particular, the Court must be satisfied that the sales process is consistent with the standards of commercial efficacy and integrity.¹⁹

17. The Receiver submits that it has satisfied this *Soundair* factor. As previously discussed:

¹⁴ *Soundair, supra* at paras 39 to 40.

¹⁵ Fourth Report at para 39.

¹⁶ *Ibid.* at paras 31 and 35.

¹⁷ *Ibid.* at para 33.

¹⁸ *Ibid.* at para 38.

¹⁹ *Soundair, supra* at para 43.

- (a) the SSP was commercially efficacious: the Receiver and Sayer carried out the court-approved SSP, which included:
 - (i) a robust marketing process;
 - (ii) generated a higher than average level of interest for a divestiture of this nature; and
 - (iii) culminated in four Qualified Phase 2 Bids;²⁰
- (b) the SSP was conducted with integrity: all participants were given the benefit of the extension of the Phase 1 and 2 Bid Deadlines, and the Qualified Bidders all had the same opportunity to submit the additional information required to allow the MER and Receiver to consider the unanticipated issues arising from the manner in which the Phase 2 Qualified Bids were framed.²¹

(iv) There was no unfairness in the working out of the SSP

18. The final *Soundair* factor requires an assessment as to whether the Receiver “acted reasonably, prudently, fairly and not arbitrarily” in conducting the sales process and making its recommendation to the Court.²²

19. The SSP was drafted to ensure that all participants were treated fairly, while still affording a degree of flexibility to ensure regulatory compliance with the *Indian Oil and Gas Act*,²³ the *Indian Oil and Gas Regulations*,²⁴ *The Oil and Gas Conservation Act*,²⁵ and *The Pipelines Act, 1998*.²⁶

20. As previously discussed, the Receiver extended certain deadlines to ensure that the participants had an opportunity to submit competitive and compliant bids. These extensions were necessary to ensure that prospective bidders could satisfy the obligations they would subsequently

²⁰ Fourth Report at paras 14, 15, 19, and 22.

²¹ *Ibid.* at paras 18, 21, and 27.

²² *Soundair, supra* at para 58.

²³ RSC 1985, c I-7.

²⁴ SOR/2019-196.

²⁵ RSS 1978, c O-2.

²⁶ SS 1998, c P-12.1.

owe to the MER, in particular. In each case, the Receiver took care to ensure that all of the prospective bidders were treated the same.²⁷

21. The Receiver is unaware of any party that is alleging that the Receiver or its agents acted improperly with respect to the SSP, and will respond to any such allegations that are forthcoming at the hearing of this matter.

22. For the foregoing reasons and based on the evidence before the Court, the Receiver submits that it has satisfied the test set out in *Soundair* and that the SAVO should be granted.

B. The Court should approve the proposed amendments to the Receivership Order

23. The proposed amendments to subsection 3(1) and section 20 of the Receivership Order (collectively, the “**Amendments**”) are sought to allow the Receiver to be nimble and address the changing circumstances arising from the pending shut-down of the Unsold Natural Gas Assets.

24. Paragraph 3(1)(i) of the Receivership Order provides that the Receiver may sell, convey, transfer, lease, or assign Abbey’s property out of the ordinary course of business without approval of the Court, provided that: (i) no single transaction exceed \$50,000; and (ii) the aggregate consideration for all such transactions does not exceed \$100,000. Paragraph 20 of the Receiverships Order sets the Receiver’s borrowing limit (and the corresponding Receiver's Charge) at \$500,000.

25. Not all of the Debtor’s assets will be sold to the Purchaser; various Unsold Natural Gas Assets and Residual Property will remain. The Receiver has determined that it will not be economical to continue to operate the Unsold Natural Gas Assets.²⁸ The Receiver anticipates that MER will issue an abandonment order with respect to the Unsold Natural Gas Assets in the near future.²⁹

²⁷ Fourth Report at paras 25 to 27.

²⁸ *Ibid.* at para 36.

²⁹ *Ibid.* at para 37.

26. The Receiver anticipates the preparatory work to safely abandon the Unsold Natural Gas Assets may cost approximately \$2,220,000.³⁰ In addition to preparing the Unsold Natural Gas Assets for abandonment, the Receiver must still pay certain 2023 property tax obligations and the Marketing Agent's commission.³¹ These are significant expenses and, with the shut-down of the Unsold Natural Gas Assets, there will no longer be any income generated from the estate after October 31, 2023. In short, the Receiver requests that the borrowing charge be increased from \$500,000 to \$3,000,000 to allow the Receiver to ensure it has sufficient borrowing authority to pay these post-receivership expenses.³²

27. The Residual Property, on the other hand, will no longer be needed for operations and therefore may be sold to create value and reduce the amounts the Receiver anticipates that it will be required to borrow.³³ Furthermore, if the Residual Property is left unattended, it may be vandalized or stolen.³⁴ The Receiver believes that the costs associated with applying for (and conducting) a further sales process and subsequent vesting order outweigh the potential benefits of selling these assets privately.³⁵

28. For the forgoing reasons the Receiver respectfully requests that this Honourable Court approve the amendments to the Receivership Order.

C. The Confidential Supplement should be sealed

29. The legal test that the Court must apply in determining whether to grant a sealing order was revised by the Supreme Court of Canada in *Sherman Estate* where it held that, in order to rebut the general open-Court presumption, an applicant must establish that:

- (a) court openness poses a serious risk to an important public interest;

³⁰ *Ibid.* at para 39.

³¹ *Ibid.* at para 48.

³² *Ibid.* at para 49.

³³ *Ibid.* at para 43.

³⁴ *Ibid.* at para 42.

³⁵ *Ibid.* at para 44.

- (b) the order sought by an applicant is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.³⁶

30. Chief Justice Morawetz of the Ontario Superior Court applied the *Sherman Estate* test in *Ontario Securities Commission v Bridging Finance Inc.*³⁷ and held that a sealing order was warranted where a receiver made an application to seal commercially sensitive information regarding a prospective sale of assets.³⁸

31. In this case, the Receiver is requesting a sealing order with respect to the following information:

- (a) Sayer's Summary of Marketing Process and Offers Received – Phases 1 and 2 (the “**Sayer Summaries**”);
 - (b) copies of the Phase 2 Qualified Bids received under the SSP (the “**Offers**”) and the Receiver's assessment of the same; and
 - (c) a copy of the unredacted Sale Agreement.³⁹
- (collectively, the “**Confidential Information**”).

32. The Receiver submits that it has satisfied the test laid out in *Sherman Estate* and that is appropriate to grant the sealing order for the following reasons:

- (a) the Receiver has taken steps to minimize the intrusion on the open-court principle by appending a redacted copy of the Sale Agreement to Fourth Report (which is publicly available);
- (b) publicly disclosing the Offers, the Sayer Summaries, and the unredacted Sale Agreement could prejudice the commercial interests of the Debtor and its

³⁶ *Sherman Estate*, *supra* at para 38.

³⁷ 2023 ONSC 4203 at para 27.

³⁸ *Ibid.* at paras 25 and 40.

³⁹ Confidential Supplement at para 3.

stakeholders if, for example, the Sale Agreement is not approved or the Purchaser fails to close the Transaction;⁴⁰

- (c) it is necessary to seal the Confidential Supplement because there is no alternative method by which the Confidential Information can be introduced into evidence before the Court without exposing the Confidential Information to the deleterious effects associated with public exposure; and
- (d) any interested party may apply to Court to unseal the Confidential Supplement in the event it feels prejudiced by the sealing order.

D. The Court should approve the Fourth Report and the Receiver's activities

33. The Receiver requests this Court's approval of its Fourth Report and the activities described in that report. In *Re Target Canada Co.*,⁴¹ Justice Morawetz (as he then was) commented that where a court-appointed monitor in proceedings under the *Companies' Creditors Arrangement Act* seeks approval of its activities, such relief is routinely granted where there is no opposition.⁴²

34. In *Triple-I Capital Partners Limited v 12411300 Canada Inc.*,⁴³ Justice Osborne explained that Justice Morawetz's (as he then was) comments in *Target* were equally applicable in the context of a receivership:

65. While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.

66. The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.

67. The Third Report and the activities described in it are approved.

35. The Fourth Report details the Receiver's activities since this Honourable Court granted the Auction Approval, Vesting and Sealing order on August 31, 2022. These activities are described

⁴⁰ *Ibid.* at para 33.

⁴¹ 2015 ONSC 7574 [*Target*].

⁴² *Ibid.* at paras 1 to 2.

⁴³ 2023 ONSC 3400.

in detail at paragraph 9 of the Fourth Report and include: (a) taking possession of and securing the Natural Gas Assets; (b) continuing to operate the Natural Gas Assets; (c) engaging in regular discussions and negotiations with Abbey's stakeholders, including the MER; (d) conducting the SSP; and (e) negotiating and entering into the Sale Agreement.

36. As of the date of this Brief, no one has objected to the relief sought by the Receiver. Similarly, the Receiver is unaware of any allegations of wrongdoing or impropriety with respect to its activities. Accordingly, the Receiver requests that it be granted the relief sought.

E. The Court should approve the professional fees and expenses

37. Receiver seeks an order approving its fees and expenses, as well as those of its legal counsel, pursuant to section 18 of the Receivership Order.⁴⁴ The Receiver has reviewed the invoices submitted to date and is of the view that the fees billed and expenses charged have been necessary to facilitate this receivership, the efforts of which have culminated in the Sale Agreement and Transaction.

V. CONCLUSION

38. For the reasons stated in this Brief of Law, the Receiver respectfully requests that the requested relief be granted as set out in the draft orders filed in support of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2023.

McDOUGALL GAULEY LLP

Per: 

fr Craig Frith, legal counsel to the applicant, MNP Ltd.

⁴⁴ Fourth Report at paras 54 to 55.

VI. AUTHORITIES

<p style="text-align: center;">TABLE OF AUTHORITIES (in accordance with Rule 13-38.1 of <i>The King's Bench Rules</i>)</p>		
LEGISLATION/JURISPRUDENCE	SECTIONS/PARAGRAPHS RELIED ON	LEGAL PRINCIPLES
<i>Royal Bank of Canada v Soundair Corp.</i> , 1991 CarswellOnt 205, [1991] OJ No 1137 (ON CA)	Paragraph 16	Establishing the legal test to determine if a Receiver acted properly in entering into a transaction.
	Paragraphs 21 and 22	Stating legal principle that court-appointed receivers should be afforded deference with respect to proposed sales.
	Paragraphs 39 to 40	The second <i>Soundair</i> factor
	Paragraph 43	The third <i>Soundair</i> factor
	Paragraph 58	The fourth <i>Soundair</i> factor
<i>Atrium Mortgage Investment Corp v King Edwards Apartments Inc.</i> , 2018 SKQB 296	Paragraph 13	Confirming that the test delineated in <i>Soundair</i> is the applicable test in Saskatchewan for determining if a receiver's sale of assets should be approved.
<i>Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd.</i> , 2019 ABCA 433	Paragraphs 11 to 13	Additional factors that a Court <i>might</i> consider when evaluating the first prong of the <i>Soundair</i> test.
<i>Sherman Estate v Donovan</i> , 2021 SCC 25	Paragraph 38	The revised legal test for sealing orders in Canada.
<i>Ontario Securities Commission v Bridging Finance Inc.</i> , 2023 ONSC 4203	Paragraphs 25, 27 and 40	The application of the <i>Sherman Estate</i> test in an insolvency proceeding and, specifically, a sale approval by a receiver.
<i>Re Target Canada Co.</i> , 2015 ONSC 7574	Paragraphs 1, 2 and 23	Approving a court-appointed officer's

		activities is a routine exercise unless there is an objection made by an interested party.
<i>Triple-I Capital Partners Limited v 12411300 Canada Inc., 2023 ONSC 3400</i>	Paragraphs 65 to 67	Confirming that Justice Morawetz's (as he then was) comments regarding the approval of a court-appointed officer's activities applies in the context of a receivership.

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