

COURT FILE NUMBER QBG-SA-00151-2022

**COURT OF QUEEN'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 Mr.
Justice G.A. Meschishnick on Friday, June 10, 2022)**

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I. INTRODUCTION

1. This sale approval application is being made to expedite the closing of the Transaction¹ while the Receiver is preparing for a second application for more extensive relief on a date to be determined.²

2. The prospective purchaser, Fuelled, is not a stranger to the Abbey insolvency proceedings. Indeed, Abbey retained Fuelled to market the Surplus Assets for sale prior to its application pursuant to the *Companies' Creditors Arrangement Act* (Canada) in QBG No. 773 of 2021 (the "CCAA").

3. In the CCAA, Abbey had two sales of Surplus Assets approved by the Court. As part of fulfilling its role as Monitor in the CCAA, the Receiver reviewed an appraisal of the Surplus Assets completed by Fuelled dated June 3, 2020. Fuelled subsequently confirmed that the appraised values had not changed by September 24, 2021, and the Receiver (in its capacity as Monitor) referenced that appraisal in supporting the proposed sales in its Second Report.³

4. After its appointment, the Receiver continued Abbey's listing of the Surplus Assets with Fuelled, which subsequently approached the Receiver with an offer in respect of the Purchased Assets. In evaluating the opportunity, the Receiver, who was cognizant of the previously appraised values from the CCAA, obtained a second opinion as to the current

¹ Capitalized terms not otherwise defined in this Brief of Law have the meaning ascribed to the draft order and First Report.

² McDougall Gauley LLP letter dated June 7, 2022. **TAB A**

³ Excerpt from the Second Report of the Monitor dated October 4, 2021. **TAB B**

fair market value of the Purchased Assets from one of Fuelled’s competitors, Crusader Joint Ventures (the “**Crusader Opinion**”). The Crusader Opinion confirmed that the proposed purchase price⁴ was above the high-end value for the Purchased Assets.

5. In the circumstances, the Receiver is satisfied that the proposed purchase price is commercially reasonable and is making this application to approve the Transaction, as well as seal the commercially sensitive information contained in the Confidential Supplement (the “**Confidential Information**”). As discussed in more detail below, the principles articulated in *Royal Bank of Canada v Soundair Corp.*⁵ and *Sherman Estate v Donovan*⁶ support the granting of the relief sought.

II. FACTS

6. The relevant facts are set out in the First Report and Confidential Supplement.

III. ISSUES

7. This Brief of Law addresses the following issues:

- (a) whether a consideration of the *Soundair* factors favours the approval of the Sale Agreement and Transaction; and
- (b) whether the Confidential Supplement should remain sealed.

IV. DISCUSSION

A. Approval of the Sale Process and Vesting Order

⁴ The proposed purchase price for the Purchased Assets is described at para 7 of the Confidential Supplement.

⁵ 1991 CarswellOnt 205, [1991] OJ No 1137 (ON CA) [*Soundair*].

⁶ 2021 SCC 25, 458 DLR (4th) 361 [*Sherman Estate*].

8. As noted by Justice Layh in *Atrium Mortgage Investment Corp v King Edwards Apartments Inc.*,⁷ the Ontario Court of Appeal's decision in *Soundair* remains the leading authority on the legal principles to be applied by the Court in approving a receiver's proposed sale of a debtor's assets.

9. 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.⁸

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 Has Made a Sufficient Effort and Has Not Acted Improvidently***

11. In considering the sufficiency of the Receiver's efforts and actions, the case law holds that the Court will ordinarily accord the receiver's business judgment a certain level of deference based on the information that was available to the receiver at the time the decision was made.⁹ The rationale for the approach is the Court's desire to provide "participants in a receivership... a measure of confidence that the court will not lightly intervene with a receiver's power to effect a sale."¹⁰

⁷ 2018 SKQB 296 at para 13, 65 CBR (6th) 15 [*Atrium*].

⁸ *Ibid.*

⁹ *Soundair*, *supra* note 5 at para 21.

¹⁰ *Atrium*, *supra* note 7 at para 14.

12. With respect to the sufficiency of the marketing effort, the Receiver is largely relying on Abbey's lengthy exposure of the Surplus Assets to the market prior to the Receivership.¹¹ Marketing efforts aside, the driving force in seeking approval of the Transaction in this case is the amount offered, which the Crusader Opinion confirmed exceeds the fair market value.

13. Based on this information, the Receiver thus formed the opinion that the Sale Agreement represented the best possible recovery for the Purchased Assets in the circumstances based on the information available at the time.¹² Rather than devote resources to testing the market further, the Receiver concluded the Sale Agreement and brought this application requesting the Court confirm the business decision of its officer.

(ii) *The Interests of All Parties*

14. The second *Soundair* factor instructs that, although the primary interests to be considered on a sale approval application are those of the creditors, other stakeholders' interests require consideration.¹³ Such other stakeholders may include the debtor, and in some cases the proposed purchaser (who has likely expended time and resources bargaining with the Receiver).¹⁴

15. This is an unusual receivership in so far as there are no traditional secured creditors to whom the principal of the company has provided a personal guarantee. After the lengthy and contentious *CCAA* proceeding, the Receiver was appointed with a mandate to monetize Abbey's assets, if possible, and bring the matter to close for all involved.

16. The proposed Transaction, which involves the sale of Surplus Assets not being utilized in the ongoing production,¹⁵ is a step toward this result. The Receiver is also

¹¹ First Report at para 9.

¹² First Report at para 14.

¹³ *Soundair*, *supra* note 5 at paras 39 – 40.

¹⁴ *Ibid.*

¹⁵ First Report at para 10.

cognizant of the interests of Fuelled, which has expended time and resources negotiating the Sale Agreement with the Receiver. The Receiver therefore considers the approval of the Transaction to be in the best interests of the stakeholders generally.¹⁶

(iii) **The Efficacy and Integrity of the Process by which the Offers Were Obtained**

17. In *Soundair*, the Court observed that the process by which the sale agreement is obtained should be consistent with the standards of commercial efficacy and integrity.¹⁷

18. The Sale Agreement is the result of an unsolicited offer from Fuelled, as opposed to a formal sales process instituted by the Receiver; consequently, this *Soundair* factor is not engaged on the facts.

19. The price offered is nevertheless above market and, if approved, the Receiver will have secured the net proceeds for the benefit of the Abbey estate without incurring the costs associated with instituting a formal sales process.

(iv) **There Was No Unfairness in the Working Out of the Process**

20. This 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.¹⁸ For example, in *Soundair*, there was an allegation that one of the bidders had been treated unfairly arising from the receiver not having provided the bidder with an offering memorandum.

21. Again, the Sale Agreement was not concluded as the result of a formal sales process. There were no competing bidders in this case, and no such fairness concerns arise on this application. In the event any allegations of unfairness may be forthcoming, the Receiver will respond to the same as necessary at the hearing of this matter.

¹⁶ *Ibid.* at para 14.

¹⁷ *Soundair*, *supra* note 5 at para 43.

¹⁸ *Ibid.* at para 58.

B. The Sealing Order

(i) Sherman Estate in the Insolvency and Restructuring Context

22. The Supreme Court of Canada recently revisited the legal test for sealing orders in *Sherman Estate*:

[38] 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).

While the Court saw fit to reframe the *Sierra Club of Canada v Canada (Minister of Finance)*¹⁹ test, it did not purport to alter its substance. More importantly for the present application, the Court did not take issue with it having previously confirmed that a

¹⁹ 2002 SCC 41, [2002] 2 SCR 52 [*Sierra Club*].

commercial interest constitutes an important interest worth protecting by way of a sealing order.²⁰

23. The above iteration of the legal test from *Sherman Estate* was recently applied by Chief Justice Morawetz of the Ontario Superior Court in *Ontario Securities Commission v Bridging Finance Inc.*²¹ to confirm the sealing of two appendices to a receiver's report containing commercially sensitive information, namely:

- (a) a Confidential Appendix 'A,' which contained confidential and personal information regarding the compensation that certain employees of the distressed company would receive under the proposed KERP (i.e., the proposed key employee retention program);²² and
- (b) a Confidential Appendix 'B,' which detailed the terms of a proposed transaction, including the receiver's own recommendation with respect to that proposed transaction.²³

24. Chief Justice Morawetz applied the *Sherman Estate* test and held that a sealing order was warranted, noting as follows:

[24] Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

...

[27] I am satisfied that no stakeholders will be materially prejudiced by sealing the Confidential Appendices and that the salutary effects of granting the Sealing Order outweigh any deleterious effects. As such, I am satisfied that the sealing order should be granted, pending further order of the court.

[Emphasis added.]

25. His Lordship's reference to the "*public interest in ensuring the integrity of the Sales Process...*" acknowledges that the commercial information the receiver was seeking to

²⁰ *Ibid.* at para 53.

²¹ 2021 ONSC 4347 [*Bridging*]

²² *Ibid.* at para 25.

²³ *Ibid.* at para 26.

protect was at risk in the sense contemplated by the first step of the *Sherman Estate* test, which has important implications for this application.

(ii) *Is it appropriate for the Court to award the requested sealing order?*

26. In this case, the Confidential Information consists of:

- (a) the Receiver's assessment of the Sale Agreement;
- (b) the Crusader Opinion; and
- (c) the proposed purchase price for the Purchased Assets.

27. The disclosure of the Confidential Information could prejudice future attempts to secure alternative proposals if this Court does not approve the Sale Agreement or if the Transaction does not close; consequently, as was the case in *Bridging*:

- (a) there is a public interest in preserving the integrity of this commercially sensitive information (the first step of the *Sherman Estate* test); and
- (b) the sealing order sought is necessary because there is no alternative method by which this information can be introduced into evidence but also continue to be confidential (the second step of the *Sherman Estate* test).

28. To minimize the scope of the sealing order, only the appraised value of the Purchased Assets, amount of the deposit, and purchase price will be withheld from the public. The balance of the commercial terms of the Sale Agreement are disclosed in the partially redacted copy of the Sale Agreement appended to the First Report, which is public.

29. Finally, in an effort to balance the need to keep the Confidential Information sealed with the public's interest in open and accessible court proceedings, the proposed form of

the order filed allows for an interested party to apply to unseal the Confidential Supplement in the event it feels prejudiced by the sealing order.²⁴

30. With these additional steps taken, any negative effects of the sealing order have been minimized as much as possible and, in the Receiver's respectful submission, are therefore outweighed by its benefits (the third step of the *Sherman Estate* test).

V. CONCLUSION

31. For the foregoing reasons, the Receiver respectfully requests that the requested relief be granted in the form of the draft Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2022.

McDOUGALL GAULEY LLP

Per:


Counsel to the applicant, MNP Ltd.

²⁴ Draft Order, para 18A.

VI. AUTHORITIES

TABLE OF AUTHORITIES (in accordance with Rule 13-38.1 of <i>The Queen's Bench Rules</i>)		
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 21	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, 65 CBR (6 th) 15	Paragraph 13	Affirming the application of the <i>Soundair</i> factors in Saskatchewan proceedings. Summarizing the <i>Soundair</i> factors.
	Paragraph 14	Reiterating legal principle that court-appointed receivers should be afforded deference with respect to proposed sales.
<i>Sherman Estate v Donovan</i> , 2021 SCC 25, 458 DLR (4 th) 361	Paragraph 38	The revised legal test for sealing orders in Canada.
<i>Sierra Club of Canada v Canada (Minister of Finance)</i> , 2002 SCC 41, [2002] 2 SCR 522	Paragraph 53	Authority for the proposition that “important commercial interests” may be candidates for confidentiality orders.
<i>Ontario Securities Commission v Bridging Finance Inc.</i> , 2021 ONSC 4347	Paragraphs 24 to 27	The application of the <i>Sherman Estate</i> test in an insolvency proceeding.

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TAB A



June 7, 2022

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Via Email

To: The Service List

Re In the Matter of the Receivership of Abbey Resources Corp., QBG-SA-00151-2022

We are legal counsel to MNP Ltd. (the “**Receiver**”), the court-appointed receiver of Abbey Resources Corp. (“**Abbey**”) pursuant to the Order of the Court dated February 28, 2022 (the “**Receivership Order**”).

Since the Receivership Order was granted, the Receiver has continued to operate Abbey’s shallow gas business through its agent, Sproule Asset Management Limited. The Receiver is also working with the Ministry of Energy and Resources to determine the future of the Abbey infrastructure. More information about those efforts and the conclusions reached will be included in a more fulsome report to the Court and stakeholders on an application that has yet to be scheduled.

In the meantime, the Receiver has negotiated a sale of three pieces of Abbey’s surplus equipment and is applying for an order to approve that transaction. The hearing is scheduled for 10:00 a.m. on Friday, June 10, 2022, and the application materials are enclosed for service.

Yours truly,

McDougall Gauley LLP

Per:

CRAIG FRITH
CPF~aai
enclosures

cc Local Registrar
Saskatchewan Court of Queen’s Bench for Saskatchewan
Judicial Centre of Saskatoon

TAB B



COURT FILE NO. QB No. 733 of 2021 Clerk's Stamp

COURT COURT OF QUEEN'S BENCH FOR
SASKATCHEWAN IN BANKRUPTCY
AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

RESPONDENTS ABBEY RESOURCES CORP.

DOCUMENT SECOND REPORT OF THE MONITOR, MNP LTD.

FILED OCTOBER 4, 2021

ADDRESS FOR Counsel to the Monitor

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OTHER MATTERS

SALE OF TWO SURPLUS ASSETS

- 37 Management had, prior to the Initial Order, received offers to purchase 2 pieces of surplus equipment (the "**Surplus Equipment**"), namely, a:
- a) Jenbacher J312 Natural Gas Engine located in Miry Bay for \$65,000 (exclusive of sales taxes) to Steel Reef Infrastructure Corporation; and
 - b) 24"x10' Filter Vessel 720 PSI located in Lancer for \$17,000 (exclusive of sales taxes) to XTO Energy Inc.
- 38 The sale of these pieces of equipment are discussed in paragraphs 29 to 38 of the Sixth Gettis Affidavit.
- 39 The Monitor has reviewed the updated appraisal provided by Fuelled Appraisals ("**Fuelled**") dated September 9, 2021, and attached to the Sixth Gettis Affidavit, and confirmed with Fuelled that the appraised values for the assets have not varied from the date of the initial appraisal on June 3, 2020 to September 24, 2021. The Monitor is therefore in a position to advise this Honourable Court that the transactions for the Surplus Equipment negotiated by Abbey and the purchasers appear to be fair and reasonable.
- 40 Abbey is proposing that the net proceeds (i.e., the purchase prices less Fuelled's 15% commissions) of the sales be held in trust by the Monitor until further order of the Court.

PIPELINE INTEGRITY

- 41 The Ministry of Energy and Resources ("**MER**") issued a letter to Abbey on September 3, 2021 concerning Abbey's pipeline infrastructure and ongoing leak events. The specific directive in the MER's letter references CSA Z662 of the Saskatchewan Pipelines Code that requires operators to carry out additional pressure tests and to conduct special electronic surveys of the pipeline or portion of the pipeline. The MER's deadline for Abbey to comply with its concerns is December 6, 2021.
- 42 Abbey has proposed a solution that includes running interior plastic tubing through the faulty steel pipeline segments. Management has advised that this is a practical, industry standard solution to remedy this issue and the associated costs are incorporated into the Field Operations Costs in the projection for the Second Extension Forecast Period. Abbey is running 2 pilot projects to do this as a demonstration to the MER to obtain the MER's approval for this process. Abbey has further advised that it will be filing its integrity report to the MER by the December 6 deadline. The integrity report will include the particulars of the program and associated costs to complete the relining required over the next three years.