

COURT FILE NUMBER 2203 04647
COURT KING'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFF ROYAL BANK OF CANADA
DEFENDANTS 1692260 ALBERTA LTD., BIRKILL HOLDINGS LTD., R.
 BIRKILL PROFESSIONAL CORPORATION, 1015314
 ALBERTA LTD., and RICHARD BIRKILL

BRIEF OF LAW OF THE COURT-APPOINTED RECEIVER, MNP LTD.

MLT Aikins LLP
Suite 2200, 10235 101 Street
Edmonton, AB T5J 3G1
Tel: 780-969-3500
Fax: 780-969-3549
Attention: Dana M. Nowak
Solicitor for MNP Ltd., the Court-Appointed Receiver of
1692260 Alberta Ltd. and Birkill Holdings Ltd.
File: 31617-38

TABLE OF CONTENTS

I. OVERVIEW 1

II. FACTS 1

 Overview..... 1

 Facts Specific to a Sale of the Purchased Assets 3

III. ISSUES 5

IV. LAW AND ANALYSIS 5

 The Court Should Approve the APA 5

 Legal Principles Applicable to Sealing Court Records..... 7

 Legal Principles Applicable to Granting an Interim Distribution..... 8

 Legal Principles Applicable to Approving a Receiver’s Activities 8

V. RELIEF SOUGHT 9

LIST OF AUTHORITIES..... 10

I. OVERVIEW

1. This Brief of Law is submitted on behalf of MNP in its capacity as the Receiver of 169 in support of its Application filed on November 20, 2023 (the “**Application**”) seeking Orders:
 - a. abridging, if necessary, the time for service of the Application and materials in support thereof, and declaring service of same to be good and sufficient;
 - b. approving the proposed sale of, and vesting title to, the Purchased Assets (as defined herein) of 169 to a proposed arm’s length purchaser, 1927949 Alberta Ltd. (the “**Purchaser**”), as recommended by the Receiver;
 - c. authorizing and directing the Receiver to take all steps reasonably required to carry out the proposed sale;
 - d. granting leave to the Receiver to apply to this Court for advice and directions as may be necessary to carry out the terms of any Order granted at the within Application;
 - e. sealing the confidential addendum (the “**Confidential Addendum**”) to the Fourth Report of the Receiver, dated November 17, 2023, including the Confidential Addendum (the “**Fourth Report**”);
 - f. approving an interim distribution of proceeds to the Royal Bank of Canada (“**RBC**”) and Alberta Financial Services Corporation (“**AFSC**”); and
 - g. approving the actions of the Receiver as outlined in the Fourth Report.
2. All capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Application and the Fourth Report.

II. FACTS

Overview

3. By way of the Receivership Order granted on March 24, 2022, the Receiver was appointed as receiver over all of the Property of 169 (except the Excluded Assets), which includes the Purchased Assets.

4. 169 owns a 15-suite multi-family residential apartment complex, operated under the name “Grassland Apartments”, located in the Hamlet of Grassland, Alberta, which is legally described as follows:

PLAN 581HW
BLOCK 1
LOTS 4 TO 6 INCLUSIVE
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

(the “**Property**”).

5. The Receiver implemented a marketing process in respect of the Property. A description of the marketing process, and the Receiver’s evaluation of the outcome of same, are particularized in Fourth Report and the Confidential Addendum.¹
6. The Receiver negotiated an offer (the “**Offer**”) to purchase the Property and associated chattels (collectively, the “**Purchased Assets**”) with the Purchaser, or its nominee, which is significantly less than the appraised value. The Purchaser is a local company that has assisted the Receiver with the ongoing repairs and maintenance of the Property.²
7. The Receiver enlisted a contractor to provide an estimate to determine the amount for the required repair the Property, which estimate totaled \$96,000.00.³
8. Based on the results of the marketing process, the significant ongoing expenses required to continue carrying the Property, the Receiver not receiving any *bona fide* offer to purchase the Property, and after considering that all expressions of interest in the Property were significantly less than the appraised value of the Property, the Receiver concluded that the Offer is reasonable in the circumstances.⁴
9. The Receiver has provided a draft form of Asset Purchase Agreement (the “**APA**”) to the Purchaser and expects the final form of the APA to remain substantially the same without any material changes.⁵

¹ Fourth Report at paras 14 and 15; Confidential Addendum at paras 6-7 and 9-11.

² Fourth Report at paras 16 and 17; Confidential Addendum at paras 11 and 12 and Schedule 1.

³ Fourth Report at para 18 and Schedule 3.

⁴ Fourth Report at paras 17-19; Confidential Addendum at paras 10, 14 and 15.

⁵ Fourth Report at para 21; Confidential Addendum at para 12 and Schedule 2.

10. The APA is conditional upon this Court granting a Sale Approval and Vesting Order in respect of the Purchased Assets.⁶
11. Paragraph 3(1)(ii) of the Receivership Order empowers and requires the Receiver to obtain Court approval of the sale of the Purchased Assets.
12. The senior secured creditor of the Purchased Assets does not appear to oppose the relief sought in the Application.⁷
13. The Receiver recommends an interim distribution to RBC and AFSC totaling \$1,222,801.78 (“**Interim Distribution**”).
14. Since the Receiver’s appointment, the Receiver has acted so as to maximize the value of the Purchased Assets, as further described in the Fourth Report and as outlined in detail below.

Facts Specific to a Sale of the Purchased Assets

15. In respect of a valuation of the Property, the Receiver retained the appraisal services of Harrison Bowker Appraisal (the “**Appraiser**”). The Appraiser provided an Executive Summary to the Receiver dated May 10, 2022 (the “**Executive Summary**”), a copy of which is appended to the Confidential Addendum to the Fourth Report. The Executive Summary generally suggests that the purchase price as stated in the Offer is below the fair market value but is reasonable given the amount of time the Property have been on the market, the lack of any *bona fide* offers by a third party purchaser, the significant expense required to maintain and perform the necessary repairs to the Property, and given the condition of the Property.⁸
16. In respect of implementing a commercially reasonable marketing process, the Receiver undertook, *inter alia*, the following activities:
 - a. The Receiver circulated an information summary to: (i) third parties who expressed an interest in the Property; (ii) commercial realtors in Northern Alberta; and (iii) the Receiver’s network.⁹

⁶ Confidential Addendum at para 17 and Schedule 2.

⁷ Fourth Report at para 20; Confidential Addendum at para 16.

⁸ Confidential Addendum at Schedule 1.

⁹ Second Report of the Receiver dated September 26, 2022 (“**Second Report**”) at para 11.

- b. The Receiver posted information and details regarding the Sales Process (as defined in the Second Report) on a paid LinkedIn posting, which recorded 55,700 impressions and 130 click throughs.¹⁰
 - c. The Receiver entered into confidentiality agreements with eleven parties to provide further information relating to, *inter alia*, the sales process and all of the properties of 169 AB Ltd.¹¹
 - d. The Receiver contacted parties who had previously expressed an interest in the Property.¹²
 - e. The Receiver enlisted a contractor to provide an estimate for the cost of the repairs identified as required and has been undertaking some repairs and maintenance of the Property.¹³
17. The marketing process did not yield any other offers except the Offer. No better offers currently exist than Offer. In the Receiver's opinion, the Offer provides the best opportunity to maximize the value of the Property while not incurring any further expenses to repair and maintain the Property, which are substantial and ongoing.¹⁴
18. Based on the marketing process, feedback from the primary secured creditor of the Property, the Appraiser, the Offer received, the Receiver has concluded that the Offer is reasonable in the circumstances and recommends that it be approved by this Court.¹⁵

Facts Regarding the Sealing of the Confidential Addendum

19. The Confidential Addendum contains confidential information regarding the value of the Purchased Assets, the disclosure of which is likely to materially jeopardize the value which the Receiver might subsequently obtain in respect of the Purchased Assets if the APA does not close and were the Receiver required to further market the Purchased Assets.¹⁶

¹⁰ Second Report at para 12.

¹¹ Second Report at para 13.

¹² Fourth Report at para 14; Confidential Addendum at para 11.

¹³ Fourth Report at paras 16 and 18.

¹⁴ Fourth Report at paras 17 and 19; Confidential Addendum at paras 13-15.

¹⁵ Fourth Report at paras 19 and 20; Confidential Addendum at paras 15-16.

¹⁶ Confidential Addendum at para 4.

III. ISSUES

20. The Application raises the following issues for determination by this Court:
- a. Should this Court approve the Offer and vest the Purchased Assets in the Purchaser?
 - b. Should this Court grant the Restricted Court Access Order?
 - c. Should this Court approve the Interim Distribution?
 - d. Should this Court approve the actions of the Receiver outlined in the Fourth Report?

IV. LAW AND ANALYSIS

The Court Should Approve the APA

General Principles Regarding Sales Processes

21. Section 247(b) of the *Bankruptcy and Insolvency Act*, provides that a receiver shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.¹⁷
22. The leading statement of the law with respect to whether a receiver has acted properly is set out in the Ontario Court of Appeal's decision in *Royal Bank of Canada v Soundair Corp*, in which the Court held as follows:

[...] I adopt as correct the statement made by Anderson J. in *Crown Trust v Rosenberg* [...] of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. [...] I summarize those as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.¹⁸

¹⁷ *BIA*, s. 247(b).

¹⁸ [Royal Bank of Canada v Soundair Corp, 1991 CarswellOnt 205 \(ONCA\)](#) ("*Soundair*") at para 16 [TAB 1], aff'g 1991 CarswellOnt 7706 (ONSC); adopted and reaffirmed by the Alberta Court of Appeal in [PricewaterhouseCoopers Inc v 1905393 Alberta Ltd., 2019 ABCA 433](#) ("*1905393*") [TAB 2].

23. If the Court is satisfied that the a receiver has acted providently in its efforts to sell the debtor's assets, then case law instructs that the Court should approve the sale. To order otherwise improperly calls into question the receiver's expertise and authority in the receivership process, thereby compromising both the integrity of the sales process and commercial certainty.¹⁹

24. The importance of respecting a fair process was emphasized by the Court in *Soundair*, as follows:

It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the [*Soundair* test]...²⁰

25. In the present case, the Receiver submits that it has engaged in a fair, provident and impartial sales process, which takes into account a number of factors, including that maximizing on the value of the Purchased Assets is contingent upon a purchaser making an offer above the forced sale value and near, or above, the fair market value of the Property. The Receiver has obtained the maximum value which the Receiver can reasonably expect to obtain for the Purchased Assets given that it received no other offers despite efforts and the significant expenses necessary to repair and maintain the Property.

26. The marketing process regarding the Purchased Assets was efficient, transparent and commercially reasonable.

27. There is no evidence of unfairness in the Receiver's marketing process and, as at the date of the Report, no stakeholders have expressed concerns to the Receiver with the marketing process.

28. Based on the foregoing, the Receiver respectfully submits that the marketing process and the Offer are reasonable in the circumstances and this Court should approve same and vest the Purchased Assets in the Purchaser.

¹⁹ [Soundair](#) supra note 17 at para 43; [1905393](#) supra note 17 at paras 11-14; [9-Ball Interests Inc v Traditional Life Sciences Inc., 2012 ONSC 2788 \(Commercial List\)](#) at para 28 [TAB 3]; [Skyepharma PLC v Hyal Pharmaceutical Corp., 1999 CarswellOnt 3641 \(ONSC Commercial List\)](#) at para 3 [TAB 4].

²⁰ [Soundair](#) supra note 17 at para 70.

Legal Principles Applicable to Sealing Court Records

29. Pursuant to Part 6, Division 4 of the Alberta *Rules of Court*, AR 124/2010, the Court is empowered to partially seal a court file on application.²¹
30. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada held that a sealing order where the applicant demonstrates that:
- a. the order sought is necessary to prevent the identified risk because reasonably alternative measures will not prevent the risk; and
 - b. the benefits of the order outweigh its negative effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.²²
31. In *Sherman Estate v Donovan*, the Supreme Court of Canada recently confirmed the *Sierra Club* test and clarified the core considerations in an application for a sealing order:
- a. Court openness poses a serious risk to an important public interest;
 - b. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - c. The benefits of the order restricting openness of the courts outweigh its negative effects.²³
32. Canadian courts have routinely recognized the importance of protecting the highly sensitive commercial information that is shared in the context of a proposed sale of distressed assets and the harmful effects on future transactions that could arise if the information were to become publicly available.²⁴

²¹ *Rules of Court*, AR 124/2010, Part 6, Division 4.

²² [Sierra Club of Canada v Canada \(Minister of Finance\), 2002 SCC 41](#) at para 53 [TAB 5].

²³ [Sherman Estate v Donovan, 2021 SCC 25](#) at para 38 [TAB 6].

²⁴ [Elleway Acquisitions Ltd v 4358376 Canada Inc., 2013 ONSC 7009](#) at para 48 [TAB 7]; see also [Montrose Mortgage Corp v Kingsway Arms Ottawa Inc., 2013 ONSC 6905](#) at para 13 [TAB 8]; [Tool-Plas Systems, Re, 2008 CarswellOnt 6258](#) at para 22 [TAB 9]; [Yukon \(Government of\) v Yukon Zinc Corporation, 2022 YKSC 2](#) at para 39 [TAB 10]; and [American Iron v 1340923 Ontario, 2018 ONSC 2810](#) at para 47 [TAB 11].

33. Given that the Confidential Addendum contains highly sensitive confidential information regarding the value of the Purchased Assets in the context of a distressed sale, the Receiver is of the opinion that the Confidential Addendum should be temporarily sealed until such time as the APA closes.

Legal Principles Applicable to Granting an Interim Distribution

34. Approval of interim distributions to creditors is justifiable after the Court has scrutinized the advantages, disadvantages, and potential prejudice to all stakeholders of a debtor, keeping in mind that such distribution may create a preference. It is appropriate for a court to approve an interim distribution where it is satisfied that the interim distribution strikes a balance between the need to distribute proceeds to creditors quickly and efficiently while also protecting the interests of all stakeholders.²⁵

Legal Principles Applicable to Approving a Receiver's Activities

35. Approval of a court officer's activities serves a number of purposes, including allowing an opportunity for stakeholders' concerns to be addressed and to rectify any problems that may have arisen in a formal insolvency proceeding. It is appropriate for a court to approve a court officer's activities if the court officer has carried out its duties with reasonable care, supervision and control of the debtor's in accordance with the requirements of governing statutes and court orders.²⁶

²⁵ [Re SemCanada Crude Company \(Companies' Creditors Arrangement Act\)](#), 2009 ABQB 90 at para 27 [TAB 12]; [Ontario Securities Commission v. Bridging Income Fund L.P.](#), 2022 ONSC 4472 at para 10 [TAB 13].

²⁶ [Jaycap Financial Ltd v Snowdon Block Inc.](#), 2019 ABCA 47 at para 28 [TAB 14]; [Bank of Montreal v Ladacor AMS Ltd.](#), 2019 ABQB 985 at paras 130-135 [TAB 15].

V. RELIEF SOUGHT

36. For the reasons described above, the Receiver requests and recommends that this Court grant the Sale Approval and Vesting Order, the Sealing Order, and the Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED NOVEMBER 20, 2023.

MLT AIKINS LLP

Per:

Dana M. Nowak

Solicitor for MNP Ltd., the Court-Appointed
Receiver of 1692260 Alberta Ltd. and Birkill
Holdings Ltd.

LIST OF AUTHORITIES

- TAB 1 [*Royal Bank of Canada v Soundair Corp*, 1991 CarswellOnt 205 \(ONCA\)](#)
- TAB 2 [*PricewaterhouseCoopers Inc v 1905393 Alberta Ltd.*, 2019 ABCA 433](#)
- TAB 3 [*9-Ball Interests Inc v Traditional Life Sciences Inc.*, 2012 ONSC 2788](#)
- TAB 4 [*Skyepharma PLC v Hyal Pharmaceutical Corp*, 1999 CarswellOnt 3641](#)
- TAB 5 [*Sierra Club of Canada v Canada \(Minister of Finance\)*, 2002 SCC 41](#)
- TAB 6 [*Sherman Estate v Donovan*, 2021 SCC 25](#)
- TAB 7 [*Elleway Acquisitions Ltd v 4358376 Canada Inc.*, 2013 ONSC 7009](#)
- TAB 8 [*Montrose Mortgage Corp v Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905](#)
- TAB 9 [*Tool-Plas Systems, Re*, 2008 CarswellOnt 6258](#)
- TAB 10 [*Yukon \(Government of\) v Yukon Zinc Corporation*, 2022 YKSC 2](#)
- TAB 11 [*American Iron v 1340923 Ontario*, 2018 ONSC 2810](#)
- TAB 12 [*Re SemCanada Crude Company \(Companies' Creditors Arrangement Act\)*, 2009 ABQB 90](#)
- TAB 13 [*Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472](#)
- TAB 14 [*Jaycap Financial Ltd v Snowdon Block Inc.*, 2019 ABCA 47](#)
- TAB 15 [*Bank of Montreal v Ladacor AMS Ltd.*, 2019 ABQB 985](#)