



COURT FILE NUMBER 2301-03023

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF (APPLICANT) OTERA CAPITAL INC.

DEFENDANT (RESPONDENT) PLAZA 1000 LTD.

DOCUMENT **BENCH BRIEF OF THE RECEIVER**

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**Hearing via Webex before the Honourable Justice C.J. Feasby  
on the Commercial List, on October 23, 2023, commencing at 3:00 P.M.**

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## A. INTRODUCTION

1. This Brief is submitted on behalf of MNP Ltd. ("**MNP**") in its capacity as the court-receiver (the "**Receiver**") of Plaza 1000 Ltd. (the "**Debtor**"), in support of its application (the "**Application**") for, among other things:
  - (a) approval of a proposed sale transaction of the Debtor's interest in a downtown Calgary office tower known as Plaza 1000 (the "**Property**") pursuant to the terms of an Offer to Purchase (the "**Sale Agreement**") between the Receiver and Astra Real Estate Corp. or its nominee (the "**Purchaser**");
  - (b) approval of the Receiver's actions, conduct, and activities, as outlined in the First Report of the Receiver dated October 16, 2023 (the "**First Report**"); and
  - (c) a temporary sealing order with respect to the Confidential Supplement to the First Report (the "**Confidential Supplement**").
2. In obtaining the Sale Agreement, the Receiver marketed the Property and generated offers for its purchase. The Receiver has satisfied the principles for approval of the Sale Agreement pursuant to the principles set forth in *Soundair*.<sup>1</sup>
3. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the First Report.

## B. BACKGROUND

4. The Property, located at 1000, 7 Avenue SW, Calgary, Alberta, is 10-storey Class A office building developed in 2003 comprised of over 160,000 square feet.
5. On March 17, 2023 (the "**Receivership Date**"), an Order was granted by the Court of King's Bench of Alberta (the "**Receivership Order**") pursuant to, among others, section 243 (1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), appointing MNP as Receiver over the Property.

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<sup>1</sup> *Royal Bank of Canada v Soundair* ("**Soundair**"), (1991), 83 DLR (4<sup>th</sup>) 76 (Ont CA), at para. 16 [**Tab 1**].

**C. SALE PROCESS**

6. Shortly after its appointment, the Receiver engaged Avison Young Real Estate Services LP Inc. ("**Avison Young**") as its advisor to assist with the marketing of the Property.
7. The Receiver and Avison Young carried out various marketing and advertising activities in relation to the proposed sale of the Property, specifically targeting the commercial tenant and conversion markets. Ultimately, 18 prospective purchasers signed confidentiality agreements with respect to the Property, with eight touring the Property.<sup>2</sup>
8. In consultation with the Debtor's secured creditors, the Receiver determined that the offer submitted by the Purchaser was the most desirable for the Property.<sup>3</sup>
9. The Receiver ultimately agreed to accept the Sale Agreement in light of, among others, the following factors:
  - (a) It was the highest unconditional offer received;
  - (b) the Purchaser paid a significant deposit to the Receiver;
  - (c) the Sale Agreement has a proposed closing date of March 31, 2024, (subject to an extension that, if exercised, will generate additional funds for the Debtor's estate) assuming this Court's approval of the Sale Agreement (the "**Closing Date**"); and
  - (d) the Sale Agreement was only conditional on approval of the Court.<sup>4</sup>

**D. ISSUES**

10. The issues to be determined by this Honourable Court are:
  - (a) whether the Sale Agreement should be approved; and
  - (b) whether the Confidential Supplement should be subject to a temporary sealing Order.

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<sup>2</sup> First Report, at para 12.

<sup>3</sup> First Report, at para 18.

<sup>4</sup> First Report, at paras 14-17.

## E. SALE APPROVAL OF THE SALE AGREEMENT

11. In *Three M Mortgages*,<sup>5</sup> the Alberta Court of Appeal confirmed the applicability of the *Soundair* test, which requires the satisfaction of the following factors:
  - (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
  - (b) whether the interest of all parties have been considered, and not just the interests of the creditors;
  - (c) the efficacy and integrity of the process by which offers are obtained; and
  - (d) whether there has been unfairness in the working out of the process.<sup>6</sup>
12. The Court in *Three M Mortgages* also noted that, when approving a sale recommended by a receiver, the Court "is not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances."<sup>7</sup>
13. The Receiver submits that it has satisfied the foregoing *Soundair* considerations and the Sale Agreement should be approved.
  - (a) ***The Receiver has made sufficient effort to obtain the best price***
14. As noted in *Soundair*, in determining whether the Receiver has acted providently, a Court should examine the business judgment of the Receiver in light of the information the Receiver had when it agreed to accept an offer and should be hesitant to conclude the Receiver's conduct was improvident based on information that came to light after the Receiver's decision.<sup>8</sup>
15. In *River Rentals*, the Alberta Court of Appeal considered a number of additional factors to determine if a receiver made sufficient efforts to obtain the best price:

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<sup>5</sup> 1705221 *Alberta Ltd. v Three M Mortgages Inc.*, 2021 ABCA 144 ("***Three M Mortgages***") [Tab 2].

<sup>6</sup> *Three M Mortgages*, at para 19 [Tab 2]; see also *Soundair*, at paragraph 16 [Tab 1].

<sup>7</sup> *Three M Mortgages*, at para 22 [Tab 2].

<sup>8</sup> *Soundair*, at paragraph 21 [Tab 1].

- (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 interest of either the creditors or the owner.<sup>9</sup>

16. In *190 Alberta*, the Alberta Court of Appeal cited *River Rentals* factors in response to an argument that the receiver's abbreviated sales process resulted in an offer that was unreasonably low in the circumstances.<sup>10</sup> However, the Court concluded that the receiver's decision to accept an offer out of its sales process was appropriate in the circumstances:

The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based.<sup>11</sup>

17. In *190 Alberta*, the receiver engaged in a sales process, which the Court of Appeal noted was extensive:

Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.<sup>12</sup>

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<sup>9</sup> *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa.*, 2010 ABCA 16, at para 13 ("*River Rentals*") [Tab 3].

<sup>10</sup> *PricewaterhouseCoopers Inc. v 1905393 Alberta Ltd.*, 2019 ABCA 433, at para 8 ("*190 Alberta*") [Tab 4].

<sup>11</sup> *190 Alberta*, at para 14 [Tab 4].

<sup>12</sup> *190 Alberta*, at para 17 [Tab 4].

18. In applying the *River Rentals* factors to the proposed sale of the Property, the Receiver notes, among other things:
- (a) the accepted offer is a reasonable price in the circumstances;
  - (b) there is no evidence that there was insufficient time to submit bids;
  - (c) adequate notice of the bidding process was provided by Avison Young's outreach;  
and
  - (d) the Sale Agreement is in the best interests of the Debtor's creditors, including the Plaintiff in these proceedings and 255 Alberta, who is anticipated to be the fulcrum creditor.
19. The Receiver submits that the evidence before this Court demonstrates that the first consideration under *Soundair* has been satisfied and the Receiver has obtained the best price possible in the circumstances and as evidenced by the Sale Agreement.

**(b) *The interests of all parties***

20. As set forth in *Soundair*, while the primary interests in a court-approved asset sale are those of the debtor's creditors, they are not the only or overriding consideration.<sup>13</sup> Other persons whose interests require consideration include purchasers who have bargained at length and at their own expense.<sup>14</sup> This was confirmed in *170 Alberta*, where the Court noted that the successful bidder had negotiated an offer to purchase in good faith over a year before the appeal was heard, and who continued to live with uncertainty.<sup>15</sup>
21. The Court in *170 Alberta* reiterated the importance of a successful bidder's interests to avoid undermining the integrity of receivership proceedings more broadly:

I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the

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<sup>13</sup> *Soundair*, at para 39 [Tab 1].

<sup>14</sup> *Soundair*, at para 40 [Tab 1].

<sup>15</sup> *Three M Mortgages*, at para 42 [Tab 2].

assets involved, should expect that their bargain will be confirmed by the court.<sup>16</sup>

22. The Receiver submits that the Sale Agreement benefits the interests of the Debtor's creditors, as well as the good faith interests of the Purchaser. Further, approving the Sale Agreement maintains the integrity of the receivership process.

**(c) The efficacy and integrity of the sales process by which the offer was obtained**

23. If a receiver's primary concern is protecting the interests of creditors, its secondary concern is the commercial efficacy and integrity of the process by which the sale is effected.<sup>17</sup>
24. The Court in *Soundair* also confirmed that it is "neither logical nor practical" to compare current results to what might have been recovered in some other set of circumstances.<sup>18</sup>
25. *Soundair* does not dictate that a formal sales process be conducted in every instance. As plainly stated by Justice Romaine in *Calpine*: "*Soundair* did not suggest that a formal auction process was necessary or advisable in every case."<sup>19</sup> In the particular circumstances of that case, Justice Romaine further remarked that the uniqueness of an asset may bear on the appropriate sales process.
26. The Court in *170 Alberta* ultimately rejected the argument that the marketing process was rushed, noting the receiver fielded inquiries from 15 interested parties, toured the lands with three interested parties, posted signs visible from the highway, and ensured the listing was posted on the listing agent's website. In light of these efforts, the Court noted:

Marketing an asset is an unpredictable exercise. It is pure speculation that a longer marketing period would have generated additional, let alone better, offers.

We are not persuaded that the integrity of the sale process was compromised.<sup>20</sup>

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<sup>16</sup> *Three M Mortgages*, at para 42 [Tab 2], citing to *Soundair*, at para 69 [Tab 1].

<sup>17</sup> *Soundair*, at para 42 [Tab 1].

<sup>18</sup> *Soundair*, paragraph 45 [Tab 1].

<sup>19</sup> *Re Calpine Canada Energy Ltd*, 2007 ABQB 49 ("*Calpine*"), at para 29 [Tab 5].

<sup>20</sup> *Three M Mortgages*, at paras 44-45 [Tab 2].



**(d) There was no unfairness in the process**

27. In determining whether the process by which the Receiver obtained an offer was fair, courts typically avoid delving "into the minutia of the process or of the selling strategy adopted by the receiver",<sup>21</sup> but are still responsible for making the final determination of whether the process was fair.
28. In *Soundair*, the Court examined the Receiver's negotiations to determine if there was evidence of any prejudice to the interested parties, and ultimately concluded the negotiations were fair.<sup>22</sup>
29. The Receiver submits that it has acted reasonably, prudently, fairly and not arbitrarily in entering into the Sale Agreement. In support of its recommendation that the Court approve the Sale Agreement, the Receiver notes the following factors:
  - (a) the Property was marketed widely with the assistance of the Advisor;
  - (b) the Sale Agreement is unconditional, except for obtaining Court approval;
  - (c) the Sale Agreement is the highest offer received and the Receiver is of the view that this offer will result in the highest return to the stakeholders; and
30. Accordingly, and based upon the foregoing, the Receiver submits that all aspects of the *Soundair* principles have been satisfied in the present circumstances. The Receiver has undertaken extensive and lengthy efforts to market and sell the Property.

**F. TEMPORARY SEALING ORDER**

31. On an Application to temporarily seal a court document, this Honourable Court has broad discretion and may make a direction on any matter that the circumstances require, notwithstanding the provisions of Division 4 of Part 6 of the Rules of Court.
32. The Receiver requests that the Confidential Supplement be temporarily sealed pending closing of the Sale Agreement or until the Receiver obtains its discharge.

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<sup>21</sup> *Soundair*, at para 49 [Tab 1].

<sup>22</sup> *Soundair*, at para 55 [Tab 1].

33. In *Sierra Club*, the Supreme Court held that a sealing or restricted court access order may be granted when:
- (a) an Order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
  - (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes public interest in open and accessible court proceedings.<sup>23</sup>
34. The Supreme Court of Canada further confirmed in *Sherman Estate* that the "core prerequisites" to establish to obtain a sealing order include:
- (a) court openness poses a serious risk to an important public interest;
  - (b) the sealing order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
  - (c) as a matter of proportionality, the benefits of the sealing order outweigh its negative effects.<sup>24</sup>
35. In the insolvency context, it is common when assets are being sold pursuant to a court process to seal various bids and other commercially sensitive material, such as valuations, in case a further bidding process is required should the transaction being approved falls through.<sup>25</sup>
36. The Ontario Courts have noted that sealing orders in this context are normally granted to maintain fair play so that competitors and potential purchasers do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources.<sup>26</sup>
37. In *Elaborate Homes*, Nielsen J. (as he then was) accepted the reasons and rationale of the Ontario Courts and acknowledged that it is common practice in the insolvency context that

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<sup>23</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [Tab 6].

<sup>24</sup> *Sherman Estate v Donovan*, 2021 SCC 25, at para. 38 [Tab 7].

<sup>25</sup> *Look Communications Inc v Look Mobile Corp.* 2009 CarswellOnt 7952 {Ont SCJ [Commercial List] at para 17 [Tab 8].

<sup>26</sup> *887574 Ontario Inc v Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112 at para 6 [Tab 9].

information relating to the sale of the assets of an insolvent corporation be kept confidential until after the sale is completed pursuant to a court order.<sup>27</sup>

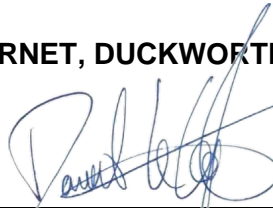
38. The Receiver submits that in these circumstances it is necessary to seal the Confidential Supplement to prevent a real and substantial risk of harm to commercial interest.
39. Sealing the Confidential Supplement is necessary to preserve the integrity of any subsequent attempts to market and sell the Property in the event that the proposed sale does not close. The granting of a temporary sealing Order avoids any prejudice that might be caused by publicly disclosing the confidential and commercially sensitive information contained in the Sale Agreement and the Confidential Supplement. There is no other reasonable alternative to prevent this information from becoming publicly available.

**G. RELIEF REQUESTED**

40. The Receiver respectfully requests that this Honourable Court approve the Sale Agreement and grant the form of Sale Approval and Vesting Order submitted by the Receiver as well as the Sealing Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of October, 2023.

**BURNET, DUCKWORTH & PALMER LLP**



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David LeGeyt / Ryan Algar  
Counsel for MNP Ltd. in its capacity as the court-  
appointed Receiver of Plaza 1000 Ltd.

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<sup>27</sup> *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 at para. 54 [Tab 10]; *Look Communications Inc. v Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J.) at para. 17 [Tab 8].

**LIST OF AUTHORITIES**

<b>TAB</b>	<b>DOCUMENT</b>
1.	<a href="#"><u>Royal Bank of Canada v Soundair Corp. (1991), 83 DLR (4<sup>th</sup>) 76 (Ont CA)</u></a>
2.	<a href="#"><u>1705221 Alberta Ltd v Three M Mortgages Inc., 2021 ABCA 144</u></a>
3.	<a href="#"><u>River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, 2010 ABCA 16</u></a>
4.	<a href="#"><u>Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd., 2019 ABCA 433</u></a>
5.	<a href="#"><u>Re Calpine Canada Energy Ltd, 2007 ABQB 49</u></a>
6.	<a href="#"><u>Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41</u></a>
7.	<a href="#"><u>Sherman Estate v Donovan, 2021 SCC 25</u></a>
8.	Look Communications Inc. v Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J.) [No Hyperlink Available]
9.	<a href="#"><u>887574 Ontario Inc v Pizza Ltd, 1994 CarswellOnt 1214, [1994] OJ No 3112</u></a>
10.	<a href="#"><u>Alberta Treasury Branches v Elaborate Homes Ltd., 2014 ABQB 350</u></a>