

COURT FILE NUMBER **QBG-SA-00880-2021**

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

JUDICIAL CENTRE **SASKATOON**

PLAINTIFF **CONEXUS CREDIT UNION 2006**

DEFENDANTS **VOYAGER RETIREMENT II GENPAR INC., VOYAGER
RETIREMENT II LP, VOYAGER RETIREMENT III GENPAR
INC. AND VOYAGER RETIREMENT III LP**

**IN THE MATTER OF THE RECEIVERSHIP OF VOYAGER RETIREMENT II GENPAR INC.,
VOYAGER RETIREMENT II LP, VOYAGER RETIREMENT III GENPAR INC. AND VOYAGER
RETIREMENT III LP**

**BRIEF OF LAW
OF THE RECEIVER, MNP LTD.**

I. INTRODUCTION

1. MNP Ltd. (the "**Receiver**") was appointed as the Receiver of all of the assets, undertakings and properties of Voyager Retirement II LP and its general partner, Voyager Retirement II Genpar Inc. (collectively, "**Voyager II**"), and of Voyager Retirement III LP and its general partner (collectively, "**Voyager III**") (collectively, Voyager II and Voyager III referred to as the "**Debtors**") pursuant to the Receivership Order of the Honourable Mr. Justice R.W. Elson issued November 10, 2021 (the "**Receivership Order**").

2. The Receivership Order authorizes and empowers the Receiver to market, advertise and solicit offers for the Debtors property and to negotiate terms and conditions in its discretion. In addition, the Receivership Order empowers the Receiver to apply for any vesting order(s) necessary to convey the same to a purchaser free and clear of any liens or encumbrances affecting such property.

Asset Purchase Agreement of Voyager II and Voyager III Retirement Homes

3. This application relates to the sale of all or substantially all of the assets used in the operation of two retirement homes ("**Proposed Sale**"):

- (a) one located at 601 110th Avenue, Tisdale, Saskatchewan and legally described as Surface/Condominium Parcel #166109148, Condo Plan No 102079470 Ext 0 (the "**Voyager II Facility**"); and
 - (b) one located at 680 7th Avenue East, Melville, Saskatchewan and legally described as Surface/Condominium Parcel #166235441, Condo Plan No 102102871 Ext 0 (the "**Voyager III Facility**").
- (collectively, the "**Properties**")

Marketing Efforts

- 4. The Proposed Sale of the Properties is sought following listing with and marketing efforts by CBRE Limited ("**CBRE**").
- 5. As outlined in the First Report of the Receiver dated June 20, 2023 (the "**First Report**") at paragraphs 28 to 46, the Receiver has engaged in extensive marketing for the Properties of the Debtors.
- 6. The marketing and listing efforts by CBRE extended over approximately 14 months and resulted in three Letters of Intention ("**LOI**") for proposed purchases. The Receiver after consulting with the primary secured creditors accepted the LOI from the Proposed Purchaser.
- 7. The Receiver applies for the following relief:

In respect of the Asset Purchase Agreement

- (a) Approving and authorizing MNP Ltd. (the "**Receiver**") in its capacity as Receiver of Voyager Retirement II LP and its general partner, Voyager Retirement II Genpar Inc. (collectively, "**Voyager II**"), and of Voyager Retirement III LP and its general partner (collectively, "**Voyager III**") (the "**Debtors**") pursuant to the Receivership Order of the Honourable Mr. Justice R.W. Elson issued November 10, 2021 (the "**Receivership Order**") to complete the transaction contemplated in the Asset Purchase Agreement dated effective June 14, 2023 (the "**Purchase Agreement**") between the Receiver and 102168803 Saskatchewan Ltd. (the "**Proposed Purchaser**") as outlined in the First Report of the Receiver dated June 20, 2023

(“**First Report**”) and appended to the Confidential Addendum to the First Report (“**Confidential Addendum**”);

- (b) Approving, authorizing and directing the Receiver to enter into a sale of the assets for the purchase price in the Purchase Agreement and subject to the terms and conditions thereof;
- (c) Vesting the Proposed Purchaser with all right, title, and interest in and to, the assets described in the Purchase Agreement, free and clear of all liens, charges, and encumbrances except as provided in the Purchase Agreement;

Miscellaneous Matters

- (d) Sealing the Confidential Addendum until the Asset Purchase Agreement has closed and the Receiver’s Certificate is filed;
- (e) Approving the Receiver’s activities as described within the First Report including but not limited to the fees and disbursements of the Receiver and those of its legal counsel; and
- (f) Such further and other relief as counsel may request and this Honourable Court may allow.

II. FACTS

8. The Receiver refers this Honourable Court to the First Report and the Confidential Addendum thereto which outline the facts underlying this application in detail, and further describes the Receiver’s activities to date.

III. ISSUES

9. The following issues are raised on this application:

- (a) Should this Honourable Court approve the sale of the Properties?
- (b) Should this Honourable Court seal the Confidential Addendum?

IV. ARGUMENT

(a) Should this Honourable Court Approve the sale of the Properties?

10. Section 243 of the *Bankruptcy and Insolvency Act* [the **BIA**] permits the court to appoint a Receiver to do any of the following:

- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;
- (b) exercise any control that the court considers advisable over the property and over the insolvent person's business; and
- (c) take any other action that the court considers advisable.

11. Section 247(b) of the *BIA* provides that a Receiver shall "act honestly and in good faith" and "deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner".

12. The decision of *Royal Bank v Soundair Corp.* (1991), 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA) [**Soundair**] enumerates the well-known criteria to be applied when considering the approval of a sale or the sales process of a Receiver. When considering whether a proposed sale should be approved and ratified by the court, the court is to consider and determine:

- (a) Whether the Receiver made 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.

13. *Soundair* has been cited with approval by the Saskatchewan Court of Queen's Bench in the relatively recent published decision of *Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203 [**TD Bank**] at para 24.¹

¹ See also *Atrium Mortgage Investment Corp. v King Edward Apartments Inc.*, 2018 SKQB 296, 65 CBR (6th) 15 at para 13.

14. It should also be noted that a court-appointed Receiver is afforded a high degree of deference in running such an asset sale within a receivership, provided that its course of action and recommendation is appropriate and nothing to the contrary is shown in the evidence. To order otherwise calls into question the Receiver's expertise and authority in the receivership process, thereby compromising both the integrity of the sales process, and undermining commercial certainty.

15. To that end, Galligan J.A. stated at paras 46-47 of *Soundair*:

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, *supra*, at p. 109 [O.R.]:

The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

16. Therefore, applying the test in *Soundair*, the Receiver submits the following.

Factor 1: Whether the Receiver made sufficient effort to get the best price and has not acted improvidently

17. With regard to the first factor, the Receiver submits that its efforts to sell the Properties have been more than sufficient to get the best possible price in the circumstances.

(i) CBRE's Efforts

18. In the Receiver's view, the Proposed Sales and the purchase price thereof represent the best possible outcome in the circumstances. As noted above, all of the real properties of the Debtor were listed with CBRE in December 2021. The Properties received significant market exposure through CBRE's efforts. The Receiver views CBRE as an extremely experienced commercial brokerage with extensive market penetration and a wide network assisting to find potential purchasers. The Receiver submits that CBRE's efforts found at paragraph 30 of the

First Report in traditional and online marketing have been both very typical and commercially reasonable.

(ii) Sufficient Overall Efforts To Obtain The Best Price

19. Overall, the Properties were exposed to the market since December 2021. The Receiver therefore submits that exposing the Properties since December 2021, marketing and attempting to sell the Properties has been a most provident effort and that the Receiver has made more than sufficient effort to get the best price possible. Ultimately, it is the market that sets the value of property and quoting the Alberta Court of Appeal in *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433, 98 Alta LR (6th) 1 [*PWC*] at para 16, "At a certain point, however, it is the market that sets the value of property and appraisals simply become 'relegated to not much more than well-meant but inaccurate predictions': *Romspen Mortgage Corporation v Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (BCSC) at para 20".

20. Even considering the additional possible factors for this first part of the *Soundair* test as set out in *River Rentals Group Ltd. v Hutterian Brethren Church of Codesa*, 2010 ABCA 16, 18 Alta LR (5th) 201 [*River Rentals*] at para 13:

13 The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

- (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; or
- (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

the Receiver submits that this first branch has been easily satisfied, given the long marketing periods, and the interest of all parties as detailed in the next section of this Brief.

Factor 2: The interests of all parties

21. With regard to the second factor, the Receiver submits that approving the Proposed Sale is in the interests of the parties with an economic stake in the outcome.

22. First, the Properties have now been on the market for approximately fourteen months. The Receiver submits that trying to market the Properties for longer would be prejudicial to all

parties. The sales now recommended by the Receiver help to avoid additional carrying costs chargeable to the Debtor's estate from the Receiver and property managers (as well as legal counsel involved).

23. Second, there is no evidence available to the Receiver indicating that spending additional time and money attempting to re-market the Properties after so long on the market will yield any additional money for the estate, particularly when given the additional costs which would certainly be incurred.

24. The Receiver therefore submits that approval of the Proposed Sales serves the interests of all parties involved with an economic interest.

Factor 3: The efficacy and integrity of the process by which offers were obtained

25. With respect to the third factor, the Receiver submits that the sales efforts to date were fair, efficient, targeted a wide audience, and commercially reasonable. The process clearly provided an efficient and open mechanism for any interested party to make an offer for the purchase of the Debtors assets.

26. The Receiver and CBRE were at all times responsive to the inquiries of all interested parties and worked diligently to market and show the Properties to prospective purchasers since December 2021.

Factor 4: Whether there has been unfairness in the working out of the process

27. In respect of this final factor, is important to note that, as of the date of the Brief, no party with an economic interest in the Debtors assets or any other party has challenged or provided evidence of any unfairness or irregularity in the sales efforts to date for the Debtors assets.

28. As such, the Receiver therefore submits that this Honourable Court should, in 'balancing' of the above *Soundair* factors², approve the Proposed Sales and the Receiver's activities to date.

² PWC at para 12.

(b) Should this Honourable Court seal the Confidential Addendum?

29. The Receiver submits that sensitive information, including the particulars of the appraised values for the assets of Ritchie are contained in the Confidential Addendum. The Receiver is concerned that publicly disclosing this highly sensitive information would be prejudicial to the sales efforts in future sales process(es) should the Proposed Sale fail to close.

30. The Supreme Court of Canada, in the recent decision of *Sherman Estate v. Donovan*, 2021 SCC 25 [***Sherman Estate***], laid out the applicable test for when a party seeks a sealing order or other similar relief. In *Sherman Estate*, the Supreme Court affirmed the importance of the 'open court principle', but also affirmed the exceptions to such principle based largely on the existing jurisprudence. The test for doing so is summarized at para 38 of *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.

31. Overall, despite *Sherman Estate* being a new decision, the Receiver submits that it need not turn established insolvency practice (sealing commercially sensitive information) on its head (in the correct circumstances). In particular, it is important to note that the main commentary in *Sherman Estate* deals with personal privacy (see paras 31-32), rather than commercial considerations in established and specialized insolvency practice. In that context, *Sherman Estate* has, to date, been utilized in two recent decisions dealing with insolvency proceedings.

32. First, in *Re Laurentian University of Sudbury*, 2021 ONSC 4769, Chief Justice Morawetz of the Ontario Superior Court expressed concerns that a particular confidential appendix did not appear to contain commercially sensitive and proprietary information. Upon consultation with

counsel, it was agreed to narrow the scope of the sealing order sought. As such, Chief Justice Morawetz did grant a sealing order on the basis of the *Sherman Estate* test.

33. Secondly, in *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347, the applicant receiver requested a sealing order where confidential appendices set out details of the KERP (Key Employee Retention Program) compensation payments as well as information relating to a sale process. Chief Justice Morawetz granted the order after considering the three-part test in *Sherman Estate* and stating at para 27 that “the salutary effects of granting the order outweighed deleterious effects.”

34. In the case at bar and in relation to the first two prongs of the *Sherman Estate* test, the Receiver submits that disclosing sensitive information relating to the market, for and appraised value of, the Debtors assets in advance of the transaction contemplated by the application would pose a harm to public interest and that no other reasonable measures could be used. Public harm would result from a future court-supervised sales process being undermined. In addition, such action would harm the stakeholders at the table. The Receiver submits that the bulk of established insolvency practice in Saskatchewan supports this proposition. Nothing new is proposed in this regard.

35. With respect to the third and final prong of the *Sherman Estate* test, the Receiver proposes utilizing a rather creative solution to give life to the principle of proportionality articulated by the Supreme Court.

36. To strike a balance between the harm caused by releasing this sensitive information and the Open Court Principle, the Receiver proposes that the Confidential Addendum remain sealed until the transaction is confirmed closed by the Receiver.

37. To accomplish this, the Receiver proposes that an additional line be added to the Receiver’s Certificate for the Sale Approval and Vesting Order to be served on stakeholders and filed with the Court, thereby notifying the stakeholders and the Court that the Confidential Addendum may then be unsealed. In the Receiver’s view this approach is very much in line with the proportionality requirement in *Sherman Estate* test meaning that the Ritchie Confidential Addendum will not stay sealed indefinitely and that the sealing requested is directly tied to its purpose.

38. Overall, the Receiver further submits that salutary effects of temporary sealing of the Confidential Addendum outweigh any potential deleterious effects, and is necessary towards assisting the Receiver in keeping with the *Soundair* principles. Not only is the granting of this relief reasonable in the circumstances, it is, in the Receiver's submission, appropriate and necessary.

39. Finally, the Receiver seeks approval of its activities as described within the First Report.


V. CONCLUSION

40. The Receiver respectfully requests that this Honourable Court grant the relief sought in this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 21st day of June, 2023.

KANUKA THURINGER LLP

Per: 
Solicitors for the Receiver,
MNP Ltd.

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Cases

Name & Citation	Paragraph of decision	Paragraph of Brief	Principle
<i>Atrium Mortgage Investment Corp. v King Edward Apartments Inc.</i> , 2018 SKQB 296, 65 CBR (6th) 15	13	13	Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test.
<i>Ontario Securities Commission v. Bridging Finance Inc.</i> , 2021 ONSC 4347, 90 C.B.R. (6th) 102	27	33	In the circumstances the salutary effects of granting the Sealing Order outweigh any deleterious effects in that particular insolvency context.
<i>Pricewaterhousecoopers Inc v 1905393 Alberta Ltd</i> , 2019 ABCA 433, 98 Alta LR (6th) 1	12	28	River Rentals additional factors may be used for the first branch of the <i>Soundair</i> test in a balancing act and did not fundamentally modify such test.
<i>Re Laurentian University of Sudbury</i> , 2021 ONSC 4769	14	32	Insolvency courts can grant sealing orders in light of <i>Sherman Estate</i> .
<i>River Rentals Group Ltd. v Hutterian Brethren Church of Codesa</i> , 2010 ABCA 16, 18 Alta LR (5th) 201	13	20	Additional factors to potentially consider in the first branch of the <i>Soundair</i> test.
<i>Romspen Mortgage Corporation v Lantzville Foothills Estates Inc.</i> , 2013 BCSC 2222	20	19	Appraisals are of limited value after time given to the market to set the real value for property.
<i>Royal Bank v Soundair Corp.</i> (1991), 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA)	16	12	Of-cited test for asset sales in receiverships.
	46-47	15	Receivers afforded a high degree of discretion in recommending a sale. Courts should not lightly interfere with recommendation of receivers.
<i>Sherman Estate v. Donovan</i> , 2021 SCC 25	38	30	The three part test in respect of exemptions to the Open Court Principle
	31-32	31	The main focus of the decision

Name & Citation	Paragraph of decision	Paragraph of Brief	Principle
			was privacy considerations, not a commentary on insolvency practice.
<i>Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.</i> , 2012 SKQB 289, 401 Sask R 203	24	13	Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test.

Statutes

Name	Section	Paragraph of Brief	Principle
<i>The Bankruptcy and Insolvency Act</i>	243	10	Authority of Receiver to take possession of a Debtor's assets and to deal with them as approved by the Court.
	247(b)	11	Duty of Receiver to act honestly, in good faith and in a commercially reasonable manner.