

COURT FILE NUMBER Q.B.G. 399 of 2020

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

JUDICIAL CENTRE SASKATOON

PLAINTIFF CANADIAN MORTGAGE SERVICING CORPORATION

DEFENDANT 101118672 SASKATCHEWAN LTD. (formerly Korf Properties Ltd.)

**IN THE MATTER OF THE RECEIVERSHIP OF 101118672 SASKATCHEWAN LTD.
(formerly Korf Properties Ltd.)**

**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 101118672 Saskatchewan Ltd. (formerly Korf Properties Ltd.) (the "**Debtor**"); by an Order of the Honourable Mr. Justice B.J. Scherman granted March 17, 2020 (the "**Receivership Order**").

2. The Receivership Order authorizes and empowers the Receiver to market, advertise and solicit offers for the Debtor's 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.

3. This application by the Receiver concerns the approval of proposed sale of an industrial property located at NW Quarter 9, Township 50, Range 1, West of the Fourth Meridian in the County of Vermilion River in the Province of Alberta (west of the City of Lloydminster) (the "**Vermilion Property**") to Westmount Projects Inc. (or its nominee) (the "**Proposed Purchaser**" and the "**Proposed Sale**").

4. As fully detailed in the First Report of the Receiver dated December 7, 2020 (the "**First Report**"), the Receiver has engaged in extensive marketing for the properties of the Debtor including the subject Vermilion Property.
5. On June 18, 2020, the Receiver listed the Properties with Colliers International ("**Colliers**") on an "Invitation for Offers" (no price specified) basis. Colliers' listing efforts included extensive internet and traditional marketing.
6. All told, the properties of the Debtor were listed by Colliers for a period of nine (9) months commencing on June 18, 2020.
7. Unfortunately, no party other than the tenant, Calroc Industries Inc. (the "**Tenant**") expressed an interest in purchasing the Vermilion Property. The Tenant, with the assistance of Colliers, arranged for the Proposed Purchaser to make an offer on the Vermilion Property.
8. Following negotiations between the Receiver and the Proposed Purchaser in March to June 2021, the final form of the Asset Purchase Agreement for the Vermilion Property was finalized and executed by the Receiver and the Proposed Purchaser effective June 17, 2021 (the "**Agreement**")¹ and the purchase price for the Vermilion Property is \$1.3 million.
9. The Receiver therefore applies for the following relief:
 - (a) Approving the Agreement and authorizing the Receiver to complete the transaction with the Proposed Purchaser contemplated therein, as outlined in Appendix II attached to the Third Report of the Receiver dated June 18, 2021, (the "**Third Report**");
 - (b) Approving, authorizing and directing the Receiver to enter into a sale of the assets for the purchase price in the Agreement and subject to the terms and conditions thereof;

¹ Found at Appendix II of the Third Report of the Receiver dated June 18, 2021.

- (c) Vesting the Proposed Purchaser with all right, title, and interest in and to, the assets described in the Agreement, free and clear of all liens, charges, and encumbrances except as provided in the Agreement;
- (d) Authorizing the Receiver to distribute the sale proceeds as outlined in the proposed Sale Approval, Vesting and Distribution Order filed in these proceedings;
- (e) Approving the Receiver's activities as described within the Third Report including but not limited to the fees and disbursements of the Receiver and its legal counsel; and
- (f) Such further and other relief as counsel may request and this Honourable Court may allow.

II. FACTS

10. The Receiver refers this Honourable Court to the First Report and the Third Report and the Appendices thereto which outline the facts underlying this application in detail, and further describes the Receiver's activities to date.

III. ISSUES

11. The following issues are raised on this application:
- (a) Does this Honourable Court have jurisdiction to vest title to property located in the Province of Alberta?
 - (b) If so, should this Honourable Court approve the Proposed Sale?

IV. ARGUMENT

(a) Does this Honourable Court have jurisdiction to vest title to property located in the Province of Alberta?

12. The Receiver submits that this Court has the jurisdiction to vest title to property in Alberta based on the authority found in the *Bankruptcy and Insolvency Act* [the **BIA**].

13. Section 243 of 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.

14. Because the Receiver was appointed pursuant to the BIA (*inter alia*), it is a "national receiver" (*Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 45). The Ontario Court of Appeal in the recent decision of *Third Eye Capital Corporation v Resources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 [**Third Eye**] outlined the history of section 243 of the BIA in the context of sale approval and vesting orders in "national receiverships". Madam Justice S.E. Pepall explained for the Court at para 44:

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. **"Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.**
Emphasis added

See also *Third Eye* at paras 72-74.

15. Thus, in the interests of efficiency, it has become relatively common to have a court in one province provide vesting orders in respect of assets located in another following the enactment of section 243 of the BIA. The Ontario Court of Appeal in *Third Eye* explicitly stated that:

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

Emphasis added

16. Therefore, the Receiver submits that this Honourable Court not only has the jurisdiction to issue the Sale Approval Vesting and Distribution Order as proposed, but for the reasons to follow, should issue such order.

(b) Should this Honourable Court Approve the Proposed Sale?

17. In addition to the authority in section 243 of the BIA, subsection 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".

18. The decision of *Royal Bank v Soundair Corp.* (1991) 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA)² [**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.

19. Furthermore, as noted in *Soundair* at paras 46-47, 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.

20. With respect to the Proposed Sale, the Receiver submits that it has engaged in fair, impartial and provident efforts which resulted in the Proposed Sale and that the listing efforts it engaged in were taken with a view towards obtaining the best price having regard to the economic interests of stakeholders.

21. 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

22. With regard to the first factor, the Receiver submits that the listing efforts to date made by both itself and Colliers were of sufficient length and breadth to expose the Vermilion Property to a wide audience of potential purchasers with a view towards obtaining the best price and most commercially reasonable process possible.

² *Soundair* has been cited with approval by the Saskatchewan Court of Queen's Bench in the published decisions of *Toronto Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203 [**TD Bank**] at para 24 and *Atrium Mortgage Investment Corp. v King Edward Apartments Inc.*, 2018 SKQB 296, 65 CBR (6th) 15 at para 13.

23. In the Receiver's view, Colliers is an extremely experience commercial brokerage with extensive market penetration and a wide network assisting to find potential purchasers. The Receiver submits its view that Colliers' efforts in traditional and online marketing have been both very typical and commercially reasonable:

24. The Vermilion Property was listed on the market for nine (9) months by Colliers, the total period contemplated in the original listing agreement and Colliers used all marketing tools at its disposal.

25. However, as stated in the Third Report, the proposed purchase price in respect of the subject property is below the appraised value³, but not very far below appraised value. The Receiver is of the opinion that prices for similar properties have dropped particularly in the area. Nevertheless, the Receiver submits that the proposed purchase price is still a good result as the Vermilion Property was exposed to the market for a significant period of time and yielded no interest other than from the Tenant and through them, the Purchaser.

26. In addition, the Receiver further submits that through negotiations the amount of the purchase price was increased as well as the non-refundable deposit, thereby helping maximize the value of the receivership estate.

27. As stated in paragraphs 14-17 of the Third Report, the remaining real properties of the Debtor will likely be sold in early-July 2021. Upon that occurring, all or substantially all of the Debtor's property will have been sold meaning that this receivership will be in its twilight. Given the impending conclusion of this matter, the Receiver submits that further exposing the Vermilion Property to the market on top of the nine months in which it was marketed, is not commercially reasonable.

28. All told, the Receiver therefore submits that a thorough and diligent effort was made to market assets and the Receiver is still of the view that the Proposed Sale represents a good outcome for all stakeholders.

³ Found in the Confidential Appendix II to the First Report.

Factor 2: The interests of all parties

29. With regard to the second factor, the Receiver submits that all parties are well served by approving the Proposed Sale. If approved, it provides an efficient disposition of the subject property without the need to incur additional costs, while providing for a certain level of recovery for the primary secured creditor, Canadian Mortgage Servicing Corporation (“CMSC”).

30. Even with the distribution to CMSC of \$2,212,635.09 following the sale of three large apartments in Estevan, Saskatchewan and \$3,311,876 following the sale of the Industrial Drive property, the debt owing by the Debtor to CMSC, as detailed at para 12 of the First Report, is still extremely significant. As such, at this stage CMSC are really the only party with a financial interest in the Proposed Sale. CMSC is satisfied the Proposed Sale is reasonable.

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

31. 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 inquire and perform due diligence on the assets for sale or to make an offer for the purchase of the Debtor’s assets.

32. The Receiver and its agent were at all times responsive to the inquiries of all interested parties, and encouraged the submission of offers on an ongoing basis following its appointment. The process was of sufficient length, nine months in total, to sufficiently expose the subject property to the market and gain valuable feedback on the amount of interest in the Vermilion Property from prospective purchasers.

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

33. 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 Debtor’s assets or any other party has challenged or provided evidence of any unfairness or irregularity in the sales efforts to date for the Debtor’s assets. Furthermore, CMSC supports the Proposed Sale.

34. As such, the Receiver therefore submits that this Honourable Court should approve the Receiver's activities to date (including its listing efforts) and approve the Proposed Sale.

V. DISTRIBUTION & OTHER MATTERS

35. Following receipt of an opinion from its counsel that the security of CMSC is valid, the Receiver has already effected two major distributions to CMSC in the total amount of \$5,524,511.09 following the closing of the sales of the large apartments in Estevan and the Industrial Drive property.

36. The Receiver has received an opinion from Alberta legal counsel stating that CMSC's mortgage security registered against title to the Property is valid and enforceable.

37. Therefore, the Receiver proposes to distribute the net sales proceeds from the sale of the Property to the secured creditor, CMSC, within a reasonable time following the closing of the Proposed Sale.

38. Finally, the Receiver seeks approval of its activities as described within the Third Report including but not limited to the sales process to date, and the fees and disbursements of the Receiver and its legal counsel.

VI. CONCLUSION


39. The Receiver submits that the results culminating in the Proposed Sale represent an excellent result for the value of the receivership estate. Although slightly below appraised value, the purchase price is still a healthy one and given the lack of interest from perspective purchasers represents a fair outcome for all parties involved and should be approved on the basis of the *Soundair* factors.

40. Therefore, 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 18th day of June, 2021.

KANUKA THURINGER LLP

Per: 
Solicitors for the Receiver,
MNP Ltd.

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AUTHORITIES

Cases

| Name & Citation | Paragraph | Principle |
|---|------------------------------|--|
| <i>Saskatchewan (Attorney General) v Lemare Lake Logging Ltd</i> , 2015 SCC 53, 391 DLR (4th) 383 | 45 | Proposition that a Receiver appointed pursuant to s.243 of the BIA is considered to be a “national receiver” with powers across Canada. |
| <i>Third Eye Capital Corporation v Resources Dianor Inc/Dianor Resources Inc</i> , 2019 ONCA 508, 435 DLR (4th) 416 | 44 72-74 83-84 | National receivers appointed pursuant to s.243 of the BIA are appointed for efficiency and expediency and to avoid the multiplicity of proceedings. One of the purposes of a receivership is to enhance and facilitate realization of assets in the estate. Asset sales are inherent to court-appointed receiverships. Section 243 of the BIA grants a court in one province authority to vest title to assets in another, based on the purpose of such section of the BIA in the interest of efficiency and to avoid a patchwork of proceedings and vesting orders. |
| <i>Royal Bank v Soundair Corp.</i> (1991) 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA) | 16 46-47 | Off-cited test for asset sales in receiverships. Receivers afforded a high degree of discretion in recommending a sale. Courts should not lightly interfere with recommendation of receivers. |
| <i>Toronto Dominion Bank v 101142701 Saskatchewan Ltd.</i> , 2012 SKQB 289, 401 Sask R 203 | 24 | Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test. |
| <i>Atrium Mortgage Investment Corp. v King Edward Apartments Inc.</i> , 2018 SKQB 296, 65 CBR (6th) 15 | 13 | Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test |

Statutes

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