

THE KING'S BENCH

WINNIPEG CENTRE

IN THE MATTER OF:

THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. C. C280

BETWEEN:

FIRST NATIONAL FINANCIAL GP CORPORATION,

Applicant,

- and -

**5684961 MANITOBA LTD. 6315402 MANITOBA LTD.
and K & P PROPERTIES INC.,**

Respondents.

**MOTION BRIEF OF THE RECEIVER
HEARING DATE: WEDNESDAY, JUNE 14, 2023 at 9:00 a.m.
BEFORE THE HONOURABLE MR. JUSTICE MARTIN**

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PART I

LIST OF DOCUMENTS TO BE RELIED UPON

1. Notice of Motion, to be filed;
2. The Receiver's First Report, dated April 24, 2023;
3. Confidential Supplement to the Receiver's First Report, dated April 24, 2023;
4. Motion Brief of the Receiver dated April 27, 2023;
5. SSP Approval Order pronounced April 28, 2023;
6. The Receiver's Second Report, dated June 9, 2023; and
7. Confidential Supplement to the Receiver's Second Report, dated June 9, 2023.

PART II

AUTHORITIES TO BE RELIED UPON

1. The Authorities to be relied upon are set out in Tabs 1 to 10 of the Motion Brief of the Receiver, dated April 27, 2023 (the "**SSP Motion Brief**").

PART III

STATEMENT OF FACTS

1. This is a motion brought by MNP Ltd., the Court-appointed receiver of the Respondent, 5684961 Manitoba Ltd. (the "**Receiver**"). The relevant information to be considered and the Receiver's position can be found in the First Report of the Receiver, dated April 24, 2023 (the "**First Report**"), the Confidential Supplement to the First Report (the "**Confidential Supplement**"), the Second Report of the Receiver (the "**Second Report**") and the Confidential Supplement to the Second Report (the "**Confidential Supplement**")

PART IV

ISSUE

1. Should this Honourable Court approve the proposal for sale of the Property to list the Property for sale on an "as is" basis with Avison Young Commercial Real Estate (Manitoba) Inc. as recommended by the Receiver in its Second Report?

2. Should the Confidential Supplement be sealed?

PART V
ARGUMENT

This Court should approve the proposal for sale recommended by the Receiver.

1. The factors to be considered by the court when determining whether it should approve a particular sales process proposed by a receiver are the same as those the court considers when determining whether to approve a proposed sale by a receiver.

***CCM Master Qualified Fund Ltd. v Blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para 6 ("CCM") [TAB 1; SSP Motion Brief]**

2. The four factors to be considered by the court on an application to approve a proposed sale by a receiver were set out by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.*:

- (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (ii) the efficacy and integrity of the process by which offers are obtained;
- (iii) whether there has been unfairness in the working out of the process; and
- (iv) the interests of all parties.

***Royal Bank of Canada v Soundair Corporation*, 1991 CarswellOnt 205 (Ontario Court of Appeal) ("*Soundair*") at para 16 [TAB 2 SSP Motion Brief]**

***Royal Bank of Canada v Keller & Sons Farming Ltd.*, 2016 MBCA 46 at para 14 [TAB 3; SSP Motion Brief]**

3. Accordingly, when reviewing a sales process proposed by a receiver, the court should assess (i) the fairness, transparency and integrity of the proposed process; (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

***CCM, supra*, at para 6 [TAB 1; SSP Motion Brief]**

4. In *Soundair*, the Ontario Court of Appeal also stated that when it appoints a receiver, the court intends to rely upon the receiver's expertise and not upon its own. Specifically, the Ontario Court of Appeal stated:

The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. (emphasis added)

***Soundair, supra*, at para 14 [TAB 2; SSP Motion Brief]**

5. Pursuant to the SSP Approval Order of Justice Martin pronounced April 28, 2023, the SSP was approved subject to approval by the Court of the proposal for sale.

6. The Receiver submits that the proposal for sale was the result of a fair, transparent process and will maximize the chances of obtaining the best possible price for the Property, and further that the process satisfies the *Soundair* criteria as outlined above.

7. The proposal to list the Property for sale on an "as is" basis with Avison Young Commercial Real Estate (Manitoba) Inc. is recommended by the Receiver due to its pricing, suggested listing period, reputation within the market and familiarity with similar properties.

8. Pursuant to subparagraphs 3(d), (k), (l) and (m) of the Order of Justice Martin, dated March 18, 2023 (the "**Receivership Order**") the Receiver has, among other powers, broad discretion to market, advertise, solicit offers in respect of, and to sell the Property.

9. After reviewing all proposals received from the RFP process, the Receiver recommends that the Property be listed for sale on an "as is" basis with Avison Young Commercial Real Estate (Manitoba) Inc.

The Confidential Supplement should be sealed.

10. The Receiver requests a sealing order with respect to the Confidential Supplement, until such time as a sale is closed or upon further order of the Court.

11. Section 77(1) of the *Court of King's Bench Act* provides as follows:

The Court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not part of the public records of the proceedings.

**Section 77 of the *Court of King's Bench Act*, C.C.S.M. c. C280
[TAB 4; SSP Motion Brief]**

12. The test to obtain a sealing order was set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)* and revised by the Supreme Court in *Sherman Estate v Donovan*:

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.

***Sherman Estate v Donovan*, 2021 SCC 25 at para 38
[TAB 5; SSP Motion Brief]**

***Sierra Club of Canada v Canada (Minister of Finance)*,
2002 SCC 41 at para 53 [TAB 6; SSP Motion Brief]**

13. In *Bank of Montreal v Trent Rubber Corp*, a sealing order was granted with respect to a Confidential Exhibit of the Receiver's Report, which contained information regarding the value of some of the debtor's assets. The Court found that it would be potentially prejudicial to disclose the values attributed to those assets before they were disposed of in an open market.

***Bank of Montreal v Trent Rubber Corp*, 2005 CarswellOnt 3126
(Ontario Superior Court of Justice) at para 16 [TAB 7; SSP Motion Brief]**

14. Sealing orders are also appropriate in the context of a proposed sale of assets by a Receiver, where the sealing order is limited in either scope or time. As the Ontario Superior Court stated in *Rose-Isli Corp v Frame-Tech Structures Ltd.*:

The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.

The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

***Rose-Isli Corp v Frame-Tech Structures Ltd.*, 2023 ONSC 832
at paras 138-140 [TAB 8; SSP Motion Brief]**

15. In this case, the Confidential Supplement contains sensitive financial information and analysis as to the value of the Property. This is a serious risk that disclosure of the information contained in the Confidential Supplement to prospective purchasers would compromise the SSP and the sales process, and may impact upon the ability of the Receiver to maximize the recovery and obtain the best price for the Property. The Receiver submits that the sealing order is

appropriate, pending the closing of a sale, that alternative measures will not prevent the risk of disclosure, and the benefits to the stakeholders in granting the sealing order outweigh the potential harmful effects.

16. The Receiver therefore submits that the salutary effects of a sealing order outweigh any negative effects.

Receiver's Borrowing Charge:

17. As outlined in the Second Report, based on the receipts and disbursements in the Receivership since the date of the First Report, an increase in the Receiver's Borrowing Charge is not required at this time, and the Receiver requests that its motion to amend paragraph 20 of the Receivership Order to increase the Borrowing Charge be adjourned *sine die*.

CONCLUSION

18. In light of the above, the Receiver respectfully submits that the proposal for sale ought to be approved by this Court and the Confidential Supplement should be sealed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2023.

PITBLADO LLP

Per:

Catherine E. Howden
Counsel for the Receiver