

COURT FILE NUMBER:	2201-13687
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	MGT MANAGEMENT INC. and MGT AGGREGATE PRODUCTS INC.
APPLICANT	BDO CANADA LIMITED, in its capacity as the Court- appointed Receiver of MGT MANAGEMENT INC. AND MGT AGGREGATE PRODUCTS INC.
DOCUMENT:	BRIEF OF THE RECEIVER
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100, 222 - 3 rd Ave SW Calgary, AB T2P 0B4 Telephone: 403.693.4310/4347 Fax: 403.508.4349 Attention: Jonathan Bouchier/Catrina Webster File: 0064652.00095

I. INTRODUCTION

1. This brief is submitted on behalf of the Receiver, BDO Canada Limited (“**BDO**” or the “**Receiver**”), in its capacity as the court-appointed Receiver of MGT Management Inc. and MGT Aggregate Products Inc. (collectively, the “**Debtors**”) in support of its application (the “**Application**”) for, among other things, the following:
 - (i) a Sale Approval and Vesting Order approving the auction agreement between the Receiver and McDougall Auctioneers Ltd. (“**McDougall**” or the “**Auctioneer**”) dated June 5, 2023 (the “**Auction Agreement**”) for the auction sale of certain equipment, serial-numbered goods and miscellaneous assets of the Debtors (collectively, the “**Assets**”);
 - (ii) an Order increasing the Receiver’s Charge (as defined in the Receivership Order) from \$200,000 to \$500,000; and
 - (iii) an Order sealing the Confidential Supplement (the “**Confidential Supplement**”) to the First Report of the Receiver dated June 5, 2023 (the “**Receiver’s First Report**”).
2. All capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Receiver’s First Report.
3. The Receiver submits that the relief sought is reasonable and appropriate in the circumstances and at this stage of the proceedings.

II. BACKGROUND

4. The facts relevant to this Action are contained in the Receiver’s First Report and briefly summarized below.
5. The Debtors operated a limestone quarry pursuant to a sublease agreement with the registered lessor in Clearwater, Alberta.¹
6. The Debtors granted their primary operating lender, the Royal Bank of Canada (“**RBC**”),

¹ First Report of BDO Canada Limited, in its capacity as Court-appointed receiver of MGT Management Inc. and MGT Aggregate Products Inc., dated June 5, 2023 (“**Receiver’s First Report**”), at paras 9-10.

a security interest in the Debtors' present and after-acquired property to secure payment of all present and future obligations of the Debtors to RBC.²

7. On December 7, 2022, Justice M.H. Hollins granted the Receivership Order appointing BDO as the Receiver.
8. In early December 2022, the Receiver engaged McDougall as a liquidator to recover certain of the Debtors' equipment from the quarry. McDougall has familiarity with the Debtors' equipment from a prior appraisal on behalf of RBC.³
9. Concurrent with McDougall's recovery of the Debtors' equipment, the Receiver explored a potential "turn-key" sale of the Debtors' assets to another existing operator; however, the operator in question was not receptive and the Receiver's efforts ultimately proved unsuccessful.⁴
10. McDougall provided the Receiver with a liquidation proposal in the form of the Auction Agreement and an updated appraisal, both of which are contained in the Confidential Supplement.
11. The Confidential Supplement provides more details of the Auction Agreement at paragraphs 6 and 7, but one of the key features of the Auction Agreement is a net-minimum guarantee sale price ("**NMG**").
12. Based on the values ascribed to the Debtors' assets in McDougall's initial appraisal and updated appraisal, the Receiver is of the view that the Auction Agreement, including the NMG, is commercially reasonable in the circumstances.

III. ISSUES

13. The Application raises the following issues:
 - (a) whether a Sale Approval and Vesting Order should be granted over the Debtors' Assets pursuant to the Auction Agreement;

² Receiver's First Report, at para 11.

³ Receiver's First Report, at para 11 and 14.

⁴ Receiver's First Report, at para 18.

- (b) whether this Honourable Court should increase the Receiver's Charge to \$500,000.00; and
- (c) whether a sealing order should be granted with respect to the Confidential Supplement.

IV. LAW AND ARGUMENT

A. Approval of the Auction Agreement

- 14. The Receiver submits that the Auction Agreement is commercially reasonable in the circumstances and recommends that it be approved by this Honourable Court.
- 15. Pursuant to section 3 of the Receivership Order, the Receiver has been authorized to, among other things:
 - (a) engage appraisers, among other parties, to assist the Receiver with the exercise of its duties;
 - (b) market any or all of the Property (as defined in the Receivership Order), including by advertising and soliciting offers in respect of the Property and negotiating such terms and conditions of sale as the Receiver deems appropriate;
 - (c) sell, convey, transfer, lease or assign the Property with approval of this Court if the aggregate consideration for the transactions exceeds \$100,000; and
 - (d) apply for any vesting order necessary to convey the Property free and clear of any liens or encumbrances.
- 16. In carrying out its duties and exercising its powers, a receiver has an obligation to deal with an insolvent company's property in a commercially reasonable manner.⁵
- 17. According to the Ontario Court of Appeal in *Royal Bank v Soundair Corp.* ("**Soundair**"),⁶ when considering whether to approve an asset sale recommended by a receiver, the Court

⁵ BIA, section 247, at TAB 1 of the Book of Authorities (the "**Authorities**").

⁶ *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205, 7 CBR (3d) 1 ("**Soundair**"), at para 16, at TAB 2 of the Authorities.

should consider and determine the following factors:

- (a) whether the receiver made sufficient efforts 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.⁷
18. Alberta Courts have adopted these criteria and applied them in receivership proceedings on numerous occasions.⁸ In *1705221 Alberta Ltd v Three M Mortgages Inc.*, the Alberta Court of Appeal adopted the above-noted factors and clarified that when a receiver recommends a sale, 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.”⁹
19. When considering the factors in *Soundair*, Courts have further acknowledged that they must place a great deal of confidence in the actions taken and in the opinions formed by a receiver, and should assume that a receiver is acting properly unless the contrary is clearly shown.¹⁰ The Alberta Court of Appeal noted that receivers are officers of the court, and as such “their advice should therefore be given significant weight”.¹¹
20. The Receiver respectfully submits that the considerations set out in *Soundair* are satisfied, and the Court should approve the Auction Agreement. The Receiver will address each of these considerations individually.

Receiver has Made Sufficient Efforts to Obtain the Best Price

21. Pursuant to *Soundair*, when determining if a receiver made sufficient efforts to obtain the

⁷ *Soundair*, at para 16, at TAB 2 of the Authorities.

⁸ *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726, at para 3, at TAB 3 of the Authorities; *705221 Alberta Ltd v Three M Mortgages Inc.*, 2021 ABCA 144 (“**170 Alberta**”), at para 19, at TAB 4 of the Authorities.

⁹ *170 Alberta*, at para 22, at TAB 4 of the Authorities; *Soundair*, at paras 21 and 58, at TAB 2 of the Authorities.

¹⁰ *Soundair*, at para 14, at TAB 2 of the Authorities.

¹¹ *170 Alberta*, at para 22, at TAB 4 of the Authorities.

best price, the Court should examine the business judgment of the Receiver in light of the information the Receiver had when it agreed to an offer, and a Court should be very cautious to decide the Receiver's conduct was improvident based on information that came to light after the Receiver's decision.¹²

22. The Auction Agreement allows for the highest price to be obtained for the Assets through a public auction process while still guaranteeing a minimum purchase price for the Receiver through the NMG. This reduces the Receiver's exposure to potential losses on the Assets while also allowing interested purchasers to purchase the Assets at the highest bid. Further, the amount of the NMG is fair in light of the appraised value of the Assets.
23. In addition, the Receiver has already incurred significant costs for McDougall to recover and relocate the Assets. Selling the Assets pursuant to the Auction Agreement reduces any additional costs to the estate to relocate the respective Assets.¹³
24. As provided in the First Report of the Receiver, the Receiver did consider a "turn-key" sale of the Assets to another operator, but this ultimately did not go forward as the intended operator was not receptive.¹⁴
25. In light of the appraised value of the Assets, the amount of the NMG, the exposure of the Assets to a bidding process and the avoidance of relocation costs, the Receiver submits it has made sufficient efforts to obtain the best possible recovery in the circumstances for the Assets.

Interests of All Parties

26. Courts have acknowledged that a Receiver's primary concern should be to protect the interest of the debtor's creditors.¹⁵
27. In considering the "interest of all parties", Courts have recognized that a receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the

¹² *Soundair*, at para 21, at TAB 2 of the Authorities.

¹³ Receiver's First Report, at para 25.

¹⁴ Receiver's First Report, at paras 18-19.

¹⁵ *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766, at paras 22 and 26, at TAB 5 of the Authorities.

majority rules. Rather, the receiver must consider the interest of all creditors, and then act for the benefit of the general body.¹⁶

28. The Debtors' largest creditor, RBC, supports the Receiver's acceptance of the Auction Agreement, even though it will experience a shortfall on the outstanding indebtedness.¹⁷
29. The Receiver is of the opinion that the Auction Agreement provides for the highest estimated net realization on the Assets and the highest potential recovery for all creditors of the Debtors while limiting their exposure to losses on the Assets.
30. In these circumstances, it is commercially reasonable and in the best interest of the Debtors' stakeholders that the Auction Agreement receive Court-approval.

The Efficacy and Integrity of the Process

31. Secondary to the Receiver's primary concern of protecting the interests of creditors, is its concern for protecting the commercial efficacy and integrity of the sales process.¹⁸ As set out in *Soundair*, it is "neither logical nor practical" to compare current results to what might have been recovered in some other set of circumstances.¹⁹
32. When deciding to enter into the Auction Agreement, the Receiver considered the difference in the outstanding indebtedness to RBC and the appraised value of the Assets and determined it was unlikely that soliciting offers from other auction companies would result in a substantially better recovery for RBC, let alone any other creditors. Further, McDougall was already familiar with the Assets, having conducted an earlier appraisal on the Assets and having removed the Assets to its facilities.
33. As the Court of Appeal has stated, marketing an asset is an "unpredictable exercise. It is pure speculation that a longer marketing period would have generated additional, let alone

¹⁶ *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 ("**Elaborate Homes**"), at para 61, at TAB 6 of the Authorities, citing *Scanwood Canada Ltd., Re*, 2011 NSSC 189.

¹⁷ Receiver's First Report, at para 31.

¹⁸ *Soundair*, at para 42, at TAB 2 of the Authorities.

¹⁹ *Soundair*, at para 45, at TAB 2 of the Authorities.

better, offers.”²⁰ The Receiver is unaware of any allegations that an alternative auction agreement would have generated a better offer with lower costs to the estate.

34. The Auction Agreement itself is a hybrid agreement that also provides for a sale process – an unreserved public auction of the Assets – while still guaranteeing minimum payment to the Receiver under the NMG. In the Receiver’s assessment, the Auction Agreement provides for a fair and competitive sales process that sufficiently exposes the Assets to the public market and reduces the Receiver’s exposure to loss.
35. As a result of the foregoing, the Receiver submits there is both integrity and efficacy in the sales process, both in soliciting the Auction Agreement and within the Auction Agreement itself.

Fairness in the Process

36. As stated in *Soundair*, a general rule guiding the Court’s determination of whether a receiver acted fairly in obtaining an offer should not go “into the minutia of the process or of the selling strategy adopted by the receiver”.²¹ With this in mind, the Court is still ultimately responsible for making a final determination of whether the Receiver’s process was conducted fairly.
37. The Receiver submits that it acted reasonably, prudently, fairly and not arbitrarily in proposing the Auction Agreement to maximize value to the Debtor’s creditors while minimizing their exposure to loss.
38. Negotiating to include the NMG in the Auction Agreement, ensuring the exposure of the Assets to a public bidding process, and working to avoid relocation costs demonstrates that the Receiver was acting in a manner that considered the interests of all parties.
39. The Receiver maintains that there was no unfairness to the parties in the process it followed and that this Honourable Court should approve the Auction Agreement.

²⁰ *170 Alberta*, at para 44, at TAB 4 of the Authorities.

²¹ *Soundair*, at para 49, at TAB 2 of the Authorities.

40. Based on the foregoing, the Receiver submits that the *Soundair* criteria have been satisfied by the Receiver and that the Receiver has acted in a commercially reasonable manner in pursuing the Auction Agreement.
41. Therefore, the Receiver respectfully requests that the Court grant an Order approving and ratifying the Receiver's acceptance of the Auction Agreement.

B. Increase to the Receiver's Charge

42. Pursuant to paragraph 18 of the Receivership Order, the Receiver and its counsel were granted an initial charge on the Debtors' property with respect to the Receiver's fees up to the amount of \$200,000.
43. As provided in the Receiver's First Report, approximately \$416,074.03 has been incurred in the within proceedings.²² The increase of the Receiver's Charge is required and appropriate in order for the Receiver to maximize the value of the estate for the Debtor's creditors.
44. The various professional advisors' assistance and involvement is critical to a successful receivership process and to maximize the potential returns to the Debtor's creditors.²³ The increased quantum is also appropriate given the complexity of the proceedings and the Auction Agreement, which will require the supervision of the Receiver and its counsel.²⁴
45. As required pursuant to section 64.2 of the *BIA*, the Receiver provided notice of the increase in the Receiver's Charge to the secured creditors.²⁵
46. The Receiver submits that the increase in the Receiver's Charge is reasonable and appropriate to successfully realize on the Assets under the Auction Agreement.

²² Receiver's First Report, at para 29 of the Authorities.

²³ *Mustang GP Ltd, Re*, 2015 ONSC 6562, at para 33, at TAB 7 of the Authorities; *Colossus Minerals Inc, Re*, 2014 ONSC 514 ("*Colossus*"), at paras 13-14, at TAB 8 of the Authorities.

²⁴ *Colossus*, at para 14, at TAB 8 of the Authorities.

²⁵ *BIA*, s 64.2, at TAB 1 of the Authorities.

C. Whether the Confidential Supplement to the First Report Should be Sealed

47. The Court's ability to seal materials on the court record is contemplated under Rule 6.28 and Division 4 of Part 6 of the *Alberta Rules of Court*.²⁶
48. In *Sherman Estate v Donovan* ("**Sherman Estate**"),²⁷ the Supreme Court of Canada modified the test for a sealing order articulated in *Sierra Club of Canada v Canada* ("**Sierra Club**"), reframing the previously two-step inquiry into three steps. In order for the Court to grant a sealing order, it must be established that:
- (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) as a matter of proportionality, the benefits of the order outweigh its negative effects.²⁸
49. In a recent decision from the Yukon Supreme Court in *Yukon (Government of) v Yukon Zinc Corporation* ("**Yukon Zinc**"), the Court noted that in the insolvency context, it is standard practice to keep all aspects of the bidding confidential and that courts have found that doing so appropriately satisfies the *Sierra Club* test, as modified in *Sherman Estate*.²⁹
50. In these circumstances, a sealing order is necessary to protect the integrity and fairness of the sale process by ensuring that competitors or potential bidders do not obtain an unfair advantage through obtaining commercial information about the Assets up for sale while others must rely on their own resources to place a value on the Assets in preparing their bids.³⁰
51. Justice K.G. Nielson of this Honourable Court acknowledged this rationale, noting it is common practice in the insolvency context that information related to the sale of the assets

²⁶ *Alberta Rules of Court*, AR 124/2010, r. 6.28, at TAB 9 of the Authorities.

²⁷ *Sherman Estate v Donovan*, 2021 SCC 25 ("**Sherman Estate**"), at TAB 10 of the Authorities.

²⁸ *Sherman Estate*, at para 38, at TAB 10 of the Authorities.

²⁹ *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2 ("**Yukon Zinc**"), at para 39, at TAB 11 of the Authorities.

³⁰ *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173, at para 33, at TAB 12 of the Authorities.

of an insolvent corporation be kept confidential until after the sale is completed pursuant to a court order.³¹

52. In *Yukon Zinc*, the Court determined that the public interest in ensuring the integrity of the sale process is the commercial interests of the Receiver, the bidders, creditors and stakeholders.³² In that case, the receiver represented to bidders that the process would be confidential until completion and the bidders all signed non-disclosure agreements before receiving access to the data. The Court found these interests outweighed the negative effects of the sealing order.³³
53. The Receiver submits that all three requirements of the *Sherman Estate* test have been met.
54. First, the important public interest is the commercial interests of the Receiver, bidders, creditors and stakeholders in maintaining the integrity of the sale process. In these circumstances, it is necessary to seal the Confidential Supplement to prevent a real and substantial risk of harm to the commercial interests of the affected parties.
55. Second, public disclosure of the financial terms of the Auction Agreement may be detrimental to this important public interest. In the event that Auction Agreement is not completed in accordance with its terms, the Assets could be subject to further marketing. In such a situation, the Receiver's ability to obtain the highest and best price could be severely compromised by the financial terms of the Confidential Supplement entering the public domain.
56. Third, as a matter of proportionality, the benefit of sealing the Confidential Supplement to protect the integrity of the sales and marketing process outweighs any deleterious effect that may be caused from the Court granting the sealing order. The Receiver has been careful to only seal those materials that contains confidential information to ensure as much information as possible remains accessible to the public.

³¹ *Elaborate Homes*, at para 54, at TAB 6 of the Authorities

³² *Yukon Zinc*, at para 44, at TAB 11 of the Authorities.

³³ *Yukon Zinc*, at para 44, at TAB 11 of the Authorities.

57. Accordingly, the Receiver requests that the Confidential Supplement be sealed and provided only to this Honourable Court.

V. RELIEF REQUESTED

58. The Receiver respectfully requests that this Honourable Court grants:

- (a) a sale approval and vesting Order approving the Auction Agreement;
- (b) an Order increasing the Receiver's Charge to \$500,000; and
- (c) an Order sealing the Confidential Supplement of the Receiver's First Report on the Court record until the Auction Agreement has closed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June 2023.

MLT AIKINS LLP

Jonathan J. Bouchier

Jonathan J. Bouchier/Catrina J. Webster
Counsel for the Applicant, BDO Canada
Limited

For

LIST OF AUTHORITIES

<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3,	TAB 1
<i>Royal Bank v Soundair Corp</i> , 1991 CarswellOnt 205, 7 CBR (3d) 1.....	TAB 2
<i>Computershare Trust Company of Canada v Vent! Investment Corporation</i> , 2011 ABQB 726.....	TAB 3
1705221 <i>Alberta Ltd v Three M Mortgages Inc</i> , 2021 ABCA 144.....	TAB 4
<i>Cobrico Developments Inc. v Tucker Industries Inc</i> , 2000 ABQB 766	TAB 5
<i>Alberta Treasury Branches v Elaborate Homes Ltd.</i> , 2014 ABQB 350	TAB 6
<i>Mustang GP Ltd, Re</i> , 2015 ONSC 6562	TAB 7
<i>Colossus Minerals Inc, Re</i> , 2014 ONSC 514.....	TAB 8
<i>Alberta Rules of Court</i> , AR 124/2010.....	TAB 9
<i>Sherman Estate v Donovan</i> , 2021 SCC 25	TAB 10
<i>Yukon (Government of) v Yukon Zinc Corporation</i> , 2022 YKSC 2	TAB 11
<i>GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc</i> , 2014 ONSC 1173	TAB 12