

COURT FILE NUMBER KBG-SA-01031-2024

COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE SASKATOON

APPLICANT CANADIAN IMPERIAL BANK OF COMMERCE

**RESPONDENTS CUSTOM AGRICULTURE INTELLIGENCE
INCORPORATED, GREEN CHEM CONSULTANTS
INC., BERMMAN MICRONUTRIENTS
INCORPORATED AND BERMMAN HAVEN
INCORPORATED**

**IN THE MATTER OF THE RECEIVERSHIP OF CUSTOM
AGRICULTURE INTELLIGENCE INCORPORATED, GREEN CHEM
CONSULTANTS INC., BERMMAN MICRONUTRIENTS INCORPORATED
AND BERMMAN HAVEN INCORPORATED**

BRIEF OF LAW OF THE RECEIVER, BDO CANADA LIMITED

**Date of hearing: Thursday, March 6, 2025 at 10:00 a.m. before the Honourable
Justice C.D. Clackson**



500 – 616 Main Street
Saskatoon, Saskatchewan S7H 0J6

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I. INTRODUCTION

1. Since this matter was last before the Court, the Receiver's¹ work has focused on preparing and marketing the Industrial Drive Property (and Culver Property) for sale, which has resulted in the Sale Agreement and Transaction for which the Receiver now seeks the Court's approval.

2. As will be discussed in more detail below, the Receiver:

- (a) retained G&R to complete the remedial environmental work recommended by Basin for the Industrial Drive Property and Culver Property;
- (b) retained Brunsdon Lawrek & Associates to complete the Industrial Appraisal to obtain evidence of the Industrial Drive Property's estimated fair market value;
- (c) circulated a request for proposals to six realtors and executed the Colliers Listing Agreement based on the preferred proposal from that entity;

¹ Unless otherwise defined, capitalized terms appearing in this brief of law will have the meanings given to them in the notice of application, Second Report, and draft orders.

- (d) oversaw Colliers' marketing of the Industrial Drive Property; and
- (e) negotiated two different offers with interested parties, the latter of which resulted in the Sale Agreement.

3. This brief of law provides the Receiver's submissions as to why the Sale Agreement and Transaction should be approved based on the *Soundair* factors (as defined below), as well as the additional relief sought on this application, namely, the sealing of the Second Confidential Supplement and the approval of the Second Report and the Receiver's actions and activities described therein.

4. For the reasons that follow, the Receiver respectfully requests that the SAVO and Sealing Order be granted in the forms filed with the Court.

II. FACTS

5. The relevant facts are set out in the Second Report of the Receiver and Second Confidential Supplement. For the sake of economy, those facts will not be summarized here, but instead will be referred to in the course of the discussion below.

III. ISSUES

6. This brief of law addresses the following issues:
- A. the approval of the Sale Agreement and Transaction;
 - B. the sealing of the Second Confidential Supplement; and
 - C. the approval of the Second Report, and the Receiver's actions and activities described therein.

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IV. DISCUSSION

A. The Sale Approval and Vesting Order

(i) Introduction

7. The leading case—consistently applied by this Court² and endorsed by the Saskatchewan Court of Appeal³—setting out the factors to be considered by the Court on a court officer's application to approve the sale of a debtor's assets is the Ontario Court of Appeal's decision in *Royal Bank of Canada v Soundair Corp.*⁴

8. In that decision, Justice Galligan described the Court's duties when considering the approval of a sale and vesting order as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.⁵

(collectively, the "***Soundair* factors**")

9. The following sections of this brief will discuss the Receiver's submissions on each of the *Soundair* factors in turn.

² See e.g. *Canadian Western Bank v Goshen Professional Care Inc.*, 2025 SKKB 5 at para 82 [***Goshen***]; *Affinity Credit Union 2013 v Ritchie Industries Inc.*, 2023 SKKB 152 at para 7 [***Affinity Credit Union***]; *Atrium Mortgage Investment Corporation v King Edward Apartments Inc.*, 2018 SKQB 296 at para 13, 65 CBR (6th) 15 [***Atrium Mortgage***]; *Golden Opportunities Fund Inc v Phenomenome Discoveries Inc*, 2016 SKQB 306 at para 27, 41 CBR (6th) 141; *The Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289 at para 24, 401 Sask R 203.

³ *Koh v Atrium Mortgage Corporation*, 2023 SKCA 45 at para 33.

⁴ *Royal Bank of Canada v Soundair Corp.*, 1991 CarswellOnt 205, [1991] OJ No 1137 (ON CA) [***Soundair***].

⁵ *Ibid* at para 16.

(ii) *The Receiver's efforts were sufficient and it has not acted improvidently*

10. When deciding whether a receiver has made sufficient efforts to get the best price and has acted providently, the court will examine the receiver's conduct in light of the information known at the time the receiver agreed to accept the offer to purchase the debtor's asset.⁶ The case law instructs that the court should be hesitant to analyze the receiver's decision-making with the benefit of hindsight.⁷ Moreover, the court will rely upon the receiver's commercial expertise, while recognizing that a forced sale of the debtor's assets may "*put downward pressure on the price offered by the property*" such that the best price in all possible circumstances may be practically unattainable.⁸ In short, a court will interfere with the receiver's recommendations "*only in an exceptional case.*"⁹

11. As the Receiver describes in its Second Report, the Receiver's efforts to obtain the best price for the Industrial Drive Property included:

- (a) arranging for an environmental assessment to be performed, and ensuring that necessary remediation work was completed, so as to maximize the value and marketability of the property;¹⁰
- (b) engaging the services of Brundson Lawrek & Associates to appraise the property to determine its estimated fair market value;¹¹
- (c) soliciting listing proposals from six realtors, reviewing those proposals, and determining which realtor would, in the Receiver's view, maximize realization for the Debtor's estate and ultimately selecting Colliers;¹²
- (d) overseeing Colliers' extensive marketing of the property, which included:
 - (i) sharing the property's listing with over 140 commercial realtors in Saskatchewan;

⁶ *Ibid* at para 21.

⁷ *Ibid*.

⁸ See *Goshen*, *supra* note 2 at paras 84-85; *Soundair*, *supra* note 4 at paras 21-22.

⁹ *Crown Trust Co. v Rosenberg* (1986), 39 DLR (4th) 526 at 550 (Ont CA), quoted in *Affinity Credit Union*, *supra* note 6 at para 20.

¹⁰ Second Report at paras 16-19.

¹¹ *Ibid* at para 22.

¹² *Ibid* at paras 23-24.

- (ii) hosting an ‘open house’ attended by a large number of realtors;
 - (iii) responding to numerous inquiries regarding the property; and
 - (iv) holding multiple showings of the property to prospective purchasers;¹³
- (e) receiving and examining offers from potential purchasers;¹⁴ and
- (f) engaging in negotiations with the potential purchaser, EAI, to maximize recovery for the Debtors and their creditors.¹⁵

12. The Receiver and its chosen agent’s efforts in this process generated a significant number of inquiries from interested parties and resulted in a competitive offer which achieves, in the Receiver’s opinion, the best possible price in these circumstances. While all of the various factors that were weighed and considered by the Receiver before accepting EAI’s offer cannot be discussed publicly at this time—but which are described for this Court in the Second Confidential Supplement—the Receiver is certainly prepared to stand behind its process and decisions as having been reasonable and prudent in the circumstances and submits that the first *Soundair* factor is satisfied based on the evidence before the Court.

(iii) The Receiver has considered the interests of all parties

13. It is well established in the jurisprudence that the primary interest that the receiver must consider when selling the debtor’s assets is that of the creditors.¹⁶ Nevertheless, the interests of other stakeholders must be taken into account. Such stakeholders include the debtor itself and the proposed purchaser, who has likely “*bargained at some length and doubtless at considerable expense with the receiver.*”¹⁷ Prospective purchasers are entitled

¹³ *Ibid* at paras 26-27.

¹⁴ *Ibid* at paras 28-31.

¹⁵ *Ibid* at paras 31-32.

¹⁶ *Soundair*, *supra* note 4 at para 39.

¹⁷ *Ibid* at para 40; see also *Goshen*, *supra* note 2 at para 93.

to trust that, if they bargain in good faith with the receiver and enter into an agreement to acquire the debtor's assets, the court will not lightly interfere with that agreement.¹⁸

14. In this case, the Receiver has considered the interests of:

- (a) CRA, Service Canada, and CIBC, who stand to benefit from the generation of proceeds to be distributed in accordance with the pre-existing priorities;
- (b) the Debtor, whose obligations to those priority creditors will be reduced accordingly; and
- (c) the prospective purchaser, EAI, who has expended time and money negotiating and concluding the Sale Agreement with the Receiver.

15. Accordingly, the Receiver submits that the second *Soundair* factor is also satisfied based on the evidence before the Court.

(iv) **The efficacy and integrity of the process**

16. The Court will also consider whether the process by which the sale agreement was obtained is consistent with the commercial standards of efficacy and integrity, bearing in mind that the purpose of appointing a receiver is to have it do the work that the court otherwise would have had to do.¹⁹ The Court's duty is to assure that maximum recovery is achieved within the limitations inherent in the process—not by comparing the results with what might have been achieved in a perfect world, but by having regard to the nature of the assets, the circumstances of the sale, and the commercial judgment of the receiver.²⁰

17. Here, the Receiver utilized a standard listing process to secure the Sale Agreement. The Court can take judicial notice that a listing agreement is not only the most common, but also an effective way to market and sell real property. The effectiveness of the process chosen by the Receiver is evidenced by the number of interested potential purchasers who

¹⁸ *Atrium Mortgage*, *supra* note 6 at para 14.

¹⁹ *Soundair*, *supra* note 4 at para 43.

²⁰ *Ibid* at para 45; *Goshen*, *supra* note 2 at para 99.

viewed the Industrial Property's listing and visited property itself. This process resulted in two competitive offers in a relatively short period of time and, ultimately, in EAI's offer being selected by the Receiver. There is no indication that further listing of the Industrial Drive Property or, perhaps more importantly, an alternative sales process would result in a better price, and further marketing efforts may simply result in additional delays and costs to the estate, which would not be in the interests of the stakeholders.

18. Regarding the integrity of the sales process chosen, the listing process was transparent and competitive, allowing the Receiver to review and negotiate with prospective purchasers as offers were received. EAI's offer was the superior offer for the Industrial Drive Property.

19. The Receiver submits that the third *Soundair* factor is satisfied based on the evidence before the Court.

(v) **There was no unfairness in the working out of the sales process**

20. Finally, when assessing the fairness of the sales process in general, the court will not “go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair.”²¹ The court is not looking for whether the sales process aligned with a template procedure. Indeed, “[t]here are many ways that a receiver can go about selling an asset.”²² Instead, the analysis under this factor is simply to determine “whether the process [was] reliable, transparent, efficient, fair and one which guard[ed] the parties’ interests.”²³

21. The Receiver's submissions on the fairness of the sales process are captured in paragraphs 11, 17, and 18, above. In addition, the Receiver emphasizes that numerous potential purchasers participated at some point in the sales process, and that the Receiver

²¹ *Soundair*, *supra* note 4 at para 49.

²² *Bank of Montreal v Calgary West Hospitality Inc.*, 2011 ABQB 293 at para 35, 78 CBR (5th) 287.

²³ *Ibid.*

is not aware of any objections to either the process in general or to the proposed sale to EAI in particular. The Receiver submits that the fourth and final *Soundair* factor is satisfied based on the evidence before the Court.

B. Sealing of the Second Confidential Supplement

22. The Receiver is requesting that the Second Confidential Supplement be sealed in this matter. The Second Confidential Supplement contains unredacted versions of the appraisal of the Industrial Drive Property provided by Brunsdon Lawrek & Associates, the Amended EAI offer to purchase the Industrial Drive Property, and the Receiver's analysis as to why the EAI offer was acceptable (the "**Confidential Information**"). The Confidential Information is, in the Receiver's respectful view, commercially sensitive and its disclosure at this time would risk prejudicing future attempts to sell the Industrial Drive Property, should that become necessary.²⁴

23. The legal test applied by the Court to determine whether to grant a sealing order was revised by the Supreme Court of Canada in *Sherman Estate v Donovan*,²⁵ where the Court held that, in order to rebut the presumption that court proceedings ought to be open to the public, an applicant must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought by an applicant is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.²⁶

24. Chief Justice Morawetz of the Ontario Superior Court applied the *Sherman Estate* test in *Ontario Securities Commission v Bridging Finance Inc.*²⁷ and held that a sealing

²⁴ Second Report at para 34.

²⁵ 2021 SCC 25, 458 DLR (4th) 361 [*Sherman Estate*].

²⁶ *Ibid*, at para 38.

²⁷ 2021 ONSC 5338 [*Bridging*].

order was warranted to keep confidential commercially sensitive information regarding, among other things, a receiver's proposed asset sale.²⁸ A similar sealing order was granted by Justice Gerecke of this Court on an earlier application within these proceedings, in paragraph 18A of the Auction Approval, Vesting, and Other Relief Order granted on November 7, 2024.

25. The Receiver submits that it has satisfied the test articulated in *Sherman Estate* with respect to the Confidential Information, such that it is appropriate to grant the sealing order sought for the Second Confidential Supplement, for the following reasons:

- (a) the courts have accepted that there is a public interest in preserving commercially sensitive information, such as the Confidential Information, as it relates to a proposed asset sale;²⁹
- (b) it is necessary to seal the Confidential Supplement because there is no alternative method by which the Confidential Information can be introduced into evidence without also exposing the Confidential Information to the risks associated with public exposure (i.e., the prejudicing of future sale efforts);
- (c) the Receiver has taken steps to minimize the intrusion this order would cause upon the open-court principle by appending redacted copies of the Industrial Appraisal and the Amended EAI Industrial Offer to the Second Report, which is available to the public; and
- (d) any interested party may apply to the Court to unseal the Second Confidential Supplement in the event it feels prejudiced by the same.

26. For these reasons, the Receiver requests that the Second Confidential Supplement be sealed as per paragraph 1 of the draft Sealing Order.

[*This space intentionally left blank.*]

²⁸ *Ibid* at paras 25-26.

²⁹ See, for example, *Bridging*. See also Justice Gerecke's November 7, 2024 order in this same proceeding.

C. Approval of the Receiver's Actions and Activities

27. Finally, the Receiver is requesting that the Court approve the Second Report, and the Receiver's actions and activities detailed therein. This is a routine request in insolvency proceedings and, in the absence of any opposition, this relief is routinely granted.³⁰

28. In *Target Canada Co (Re)*,³¹ Justice Morawetz (as he then was) explained that the Court's approval of the court officer's³² report and activities:

- (a) allows the court officer to move forward with the next steps in the proceeding;
- (b) brings the court officer's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enables the Court to satisfy itself that the court officer's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the court officer not otherwise provided in the governing statute; and
- (f) protects the creditors from the delay in distribution that would be caused by:
 - (i) re-litigation of steps taken to date; and
 - (ii) potential indemnity claims by the court officer.³³

29. Justice Morawetz's factors in *Target* were cited with approval by Justice Gerecke of this Court, within an earlier stage of these proceedings.³⁴ In his decision, Justice Gerecke noted:

³⁰ *Target Canada Co (Re)*, 2015 ONSC 7574, at paras 1-2, 31 CBR (6th) 311 [*Target*].

³¹ *Ibid.*

³² In *Target*, Justice Morawetz was talking about a court-appointed monitor, specifically; however, subsequent cases have held that Justice Morawetz's comments are equally applicable to receivers. See, e.g., *Triple-I Capital Partners Limited v 12411300 Canada Inc*, 2023 ONSC 3400 at paras 65-66.

³³ *Target*, *supra* note 30 at para 23.

³⁴ *Canadian Imperial Bank of Commerce v Custom Agricultural Intelligence Incorporated*, 2024 SKKB 220.

[18] Insolvency is a unique and specialized area of practice. Courts are traditionally inclined to protect their court officers to promote efficiency and cost-effectiveness in such proceedings. If ongoing approval of activities were not available to monitors and receivers, the cost of insolvency proceedings might escalate, with insolvency professionals passing on the cost of what they perceive as increased risk of liability. That would not benefit creditors or debtors.³⁵

30. Justice Gerecke specifically addressed the issue of whether the court officer should be seeking court approval of its actions on an application for substantive relief served on short-notice. He concluded that it was not necessary to impose a rule that requests for such approvals cannot be made at the same time that substantive relief was sought on short-notice, but rather that the length of the notice may be a factor in the Court's assessment of a future application by a party taking issue with the previously-approved actions.³⁶

31. On this application, the Receiver is seeking approval of its Second Report and its activities and actions described therein both generally and in relation to the approval of the proposed sale of the Industrial Drive property. The Receiver's submissions with respect to the approval of the latter appear in section IV(A) of this brief of law and will not be repeated here.

32. With respect to the Receiver's request for general approval, the activities and actions of the Receiver described in the Second Report include:

- (a) continuing to work with the Debtors' bookkeeper to update the books and records of the Debtors' companies;
- (b) corresponding with former employees of the Debtors to complete their Wage Earner Protection Program filings;
- (c) corresponding with Custom Agriculture Intelligence's legal counsel, Miller Thompson LLP, to determine the most appropriate course of action regarding the appeal of CRA's denial of certain scientific research and experimental development claims;
- (d) monitoring CAII's ongoing litigation matter with NCC Nykolaishen Farms Inc.;

³⁵ *Ibid* at para 18.

³⁶ *Ibid* at paras 23-24.

- (e) engaging Basin Environmental & Engineering to conduct environmental assessments at both the Industrial Drive Property and the Culver Property and addressing the recommendations arising therefrom;
- (f) monitoring the release of certain assets following the McDougall Auctioneers Ltd. auction sale, and collecting the proceeds therefrom in accordance with the auction services agreement;
- (g) renewing insurance coverage for the property of the Debtors;
- (h) completing and filing the 2024 tax returns for the Debtors; and
- (i) preparing, reviewing and finalizing the Second Report and the Second Confidential Supplement.

The Receiver is unaware of any allegations or concerns with respect to either the Second Report or its activities and actions described therein, and will respond to any that may be forthcoming at the hearing of this application; otherwise, the Receiver requests that the Second Report and its activities and actions described therein be approved as per paragraph 2 of the draft Sealing Order.

V. CONCLUSION

33. For the foregoing reasons, the Receiver respectfully requests that the Sale Approval and Vesting Order be granted in the form filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 3rd day of March, 2025.

McDOUGALL GAULEY LLP

Per:



Craig Frith, counsel to the receiver,
BDO Canada Limited

VI. AUTHORITIES

TABLE OF AUTHORITIES (in accordance with Rule 13-38.1 of <i>The King's Bench Rules</i>)		
LEGISLATION/JURISPRUDENCE	SECTIONS/PARAGRAPHS RELIED ON	LEGAL PRINCIPLES
<i>Affinity Credit Union 2013 v Ritchie Industries Inc.</i> , 2023 SKKB 152	Paragraph 7 Paragraph 20	Applying the <i>Soundair</i> factors for approving a sale approval and vesting order A court will interfere with a receiver's recommendations only in an exceptional case
<i>Atrium Mortgage Investment Corporation v King Edward Apartments Inc.</i> , 2018 SKQB 296, 65 CBR (6th) 15	Paragraph 13 Paragraph 14	Applying the <i>Soundair</i> factors for approving a sale approval and vesting order. Prospective purchasers are entitled to trust that agreements bargained in good faith with the receiver will be honoured.
<i>Bank of Montreal v Calgary West Hospitality Inc.</i> , 2011 ABQB 293, 78 CBR (5th) 287	Paragraph 35	The court will determine if the sales process is reliable, efficient and fair, though there are many ways to achieve this.
<i>Canadian Imperial Bank of Commerce v Custom Agricultural Intelligence Incorporated</i> , 2024 SKKB 220	Paragraph 18 Paragraphs 23-24	Approval of a receiver's activities promotes the efficiency of the proceedings. A receiver can apply for approval of its actions alongside an application for substantive relief, though short-notice may reduce the threshold of a later application to sue for those actions.
<i>Canadian Western Bank v Goshen Professional Care Inc.</i> , 2025 SKKB 5	Paragraph 82 Paragraphs 84-85	Adopting the <i>Soundair</i> factors for approving a sale approval and vesting order The court should bear in mind the downward pressure of a forced sale.

	Paragraph 93 Paragraph 99	The creditors are the primary interest the receiver must consider, followed by other stakeholders, including the prospective buyer. The court must ensure the sales process was consistent with commercial efficacy and integrity, within the limits of the receivership context.
<i>Crown Trust Co. v Rosenberg</i> (1986), 39 DLR (4th) 526 (Ont CA)	Page 550	A court will interfere with a receiver's recommendations only in an exceptional case
<i>Golden Opportunities Fund Inc v Phenomenome Discoveries Inc</i> , 2016 SKQB 306, 41 CBR (6th) 141	Paragraph 27	Adopting the <i>Soundair</i> factors for approving a sale approval and vesting order
<i>Koh v Atrium Mortgage Corporation</i> , 2023 SKCA 45	Paragraph 33	Mentioning favourably the <i>Soundair</i> factors for approving a sale approval and vesting order
<i>Ontario Securities Commission v Bridging</i> 2021 ONSC 5338	Paragraphs 25-26	The <i>Sherman Estate</i> test applies to applications to seal commercially sensitive information in a receiver's proposed sale process
<i>Re Target Canada Co.</i> , 2015 ONSC 7575	Paragraphs 1-2 Paragraphs 22-23	Absent objections, the court officer's request for approval of activities is routinely granted. Policy reasons for approving the court officer's report and activities.
<i>Royal Bank of Canada v Soundair Corp.</i> , 1991 CarswellOnt 205, [1991] OJ No 1137 (ON CA)	Paragraph 16 Paragraph 21 Paragraphs 39-40	Establishing the legal test to determine if a Receiver acted properly in entering into a transaction. Court-appointed receivers should be afforded deference with respect to proposed sales. The creditors are the primary interest the receiver must consider,

	<p>Paragraphs 43-45</p> <p>Paragraph 49</p>	<p>followed by other stakeholders, including the prospective buyer.</p> <p>The court must ensure the sales process was consistent with commercial efficacy and integrity, within the limits of the receivership context.</p> <p>A court will ensure the sales process was fair without going into the minutia.</p>
<i>Sherman Estate v Donovan</i> , 2021 SCC 25, 458 DLR (4th) 361	Paragraph 38	The revised legal test for sealing orders in Canada.
<i>The Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.</i> , 2012 SKQB 289, 401 Sask R 203	Paragraph 24	Adopting the <i>Soundair</i> factors for approving a sale approval and vesting order
<i>Triple-I Capital Partners Limited v 12411300 Canada Inc</i> , 2023 ONSC 3400	Paragraphs 65-66	Justice Morawetz's (as he then was) comments as to the policy reasons for approving a monitor's report and activities in <i>Target</i> are equally applicable to all court officers.