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July 7, 2022
Justice Romaine

COURT FILE NUMBER 2201-03735
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF THE BANK OF MONTREAL
DEFENDANTS THE INSTITUTE OF WELLNESS AND ADVANCED
AESTHETICS LTD., WANDA LEE, THE ESTATE OF
JONATHAN PATRICK LEE, 1608309 ALBERTA LTD., and
MOUNT ROYAL SURGICAL CENTRE INC.
DOCUMENT **BRIEF OF LAW AND ARGUMENT OF THE APPLICANT**

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BRIEF OF LAW AND ARGUMENT OF THE APPLICANT

**TO BE HEARD BY
THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE**

July 7, 2022 AT 2:00 P.M.

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I. INTRODUCTION

1. This Brief of Law and Argument is submitted in support of the application of Alvarez & Marsal Canada Inc. (the “**Receiver**”), in its capacity as the court-appointed receiver and manager of the assets, properties, and undertakings (collectively, the “**Property**”) of The Institute of Wellness and Advanced Aesthetics Ltd., 1608309 Alberta Ltd., and Mount Royal Surgical Centre Inc. (collectively, the “**Debtors**”) for, *inter alia*:

(a) an Order (the “**Fee and Conduct Approval and Sealing Order**”):

- (i) approving the interim accounts of the Receiver and its legal counsel to date in respect of the Debtors;
- (ii) approving the actions and conduct of the Receiver, as set out in the Second Receiver’s Report of the Receiver, dated June 27, 2022 (the “**Second Receiver’s Report**”) and the Confidential Appendices to the Second Receiver’s Report (the “**Confidential Appendices**”);
- (iii) sealing the Confidential Appendices, on the Court file, until the filing of the Receiver’s Certificates (as defined below).

(b) an Order (the “**Distribution Order**”):

- (i) authorizing the Receiver to make distributions of the Property or any proceeds received from the disposition of the Property to the Bank of Montreal (“**BMO**”) and to any other persons who hold valid and enforceable security interests in respect of the Property in priority to BMO.

(c) an Order (the “**Sale Approval and Vesting Order**”):

- (i) approving the Asset Purchase Agreement, dated June 24, 2022 (the “**APA**”), between the Debtors by and through the Receiver in its capacity as court appointed receiver and manager of the assets, properties and undertaking and not in its personal or corporate capacity, as vendor, and 2440656 Alberta Corporation (the “**Purchaser**”), as purchaser, and the sale, transfer, and assignment of the right, title, estate and interest in the assets, properties and undertakings, as identified therein (collectively,

the “**Assets**”), and the transfer and vesting of the Assets to the Purchaser (the “**Transactions**”);

- (ii) assigning all of the rights and obligations of the Debtors under and to the Lease (as such term is defined in the APA) to the Purchaser.

2. The Receiver respectfully submits that the relief sought should be granted because:

- (a) the Transactions are commercially reasonable and appropriate and are the result of a robust sales process;
- (b) the Transactions represent the best outcome for the Debtors’ creditors and their stakeholders in the circumstances;
- (c) the Transactions satisfy the principles set out in *Soundair* Principles (as defined below);
- (d) The Receiver’s actions, conduct and activities are reasonable, appropriate and in line with the Court’s direction and common law expectation of a court appointed Receiver;
- (e) the professional fees of the Receiver and its legal counsel are fair and reasonable; and,
- (f) the Confidential Appendices contain commercially sensitive information, the public disclosure and dissemination of the information in the Confidential Appendices would cause serious and irreparable harm to the estate of the Debtors and their stakeholders, if the Property is required to undergo an additional remarketing and sales process. The limited sealing provision sought by the Receiver, in respect of the Confidential Appendices, is therefore a fair and reasonable method of addressing the serious and irreparable harm that would result, if the Confidential Appendices were publicly disseminated.

II. **FACTS**

- 3. The relevant facts supporting the relief sought by the Receiver are more particularly set out in the Second Receiver’s Report and the First Supplement to the Second Receiver’s Report, dated July 7, 2022 (the “**Supplemental Second Receiver’s Report**”). Capitalized

terms not otherwise defined herein have the meanings ascribed to them in the Second Receiver's Report and the Supplemental Second Receiver's Report.

III. ISSUES

4. This Bench Brief addresses the issue of whether it is appropriate in the circumstances for this Honourable Court to approve the Transactions.

IV. LAW AND ARGUMENT

A. The Transactions satisfy the *Soundair* Principles and should be approved

5. Where a Court is asked to approve a transaction in the receivership context, the Court must be satisfied that the factors set out in the well-established test adopted by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.*¹ are satisfied in the circumstances. The *Soundair* test requires the Court to consider four factors:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor;
- (c) the efficacy and integrity of the process by which offers are obtained; and,
- (d) whether there has been unfairness in the working out of the process.

(collectively, the "***Soundair* Principles**").²

6. The Alberta Court of Appeal in *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, identified four additional factors that the Court may consider under the first prong of the *Soundair* test: (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;

¹ [1991 CanLII 2727 \(ON CA\)](#) [*Soundair*].

² *Soundair*, at para 16.

and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner.³

7. However, there is no requirement for the Court to consider the additional factors set out in *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, nor are these factors the only factors that the Court can consider. With regards to the additional factors, the Alberta Court of Appeal in *Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd.* held:

River Rentals, it must be recalled, simply identified a subset of factors that a Court **might** also consider when considering the first prong of the *Soundair* test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale... highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the *Soundair* test, establish a hierarchy of factors, nor limit the types of things that a Court might consider.⁴

8. In *Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd.* the Alberta Court of Appeal upheld the decision of the chambers judge approving a sale, which was opposed by creditors on the basis that “the abbreviated sales process resulted in an offer which is unreasonably low having regard to the appraisals”.⁵ In responding to the appellants allegations that the receiver acted improvidently by failing to obtain a price at or close to the appraised value of the assets, the Court held:

A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties.⁶ [citations omitted]

9. In determining that the Receiver has acted in a commercially reasonable manner, two facts are particularly noteworthy. First, the Receiver does not have committed funding to pay ongoing operating costs and expenses of the Receivership for the month of August 2022. Therefore, if the APA is not approved a forced value liquidation is likely. Secondly,

³ [River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa](#), 2010 ABCA 16, at para 13.

⁴ [Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd.](#), 2019 ABCA 433, at para 12 [*Pwc v. 1905393 Alberta Ltd.*].

⁵ [Pwc v. 1905393 Alberta Ltd.](#), at para 8.

⁶ [Pwc v. 1905393 Alberta Ltd.](#), at para 13.

Ms. Lee has suggested that the non-binding VOC Offer made prior to the Receivership Date may have been superior to the APA. The VOC Offer had actually expired prior to it being delivered to the Receiver and the Receiver had several concerns in respect of it. VOC was a participant in the Sales Process initiated by the Receiver and had the opportunity to make a bid; it elected not to do so and the APA is the highest bid made in the Sales Process.

10. In the circumstances, the Receiver has satisfied each of the *Soundair* Principles, which are addressed in greater detail below.

Sufficient effort was made to obtain the best price

11. The APA was negotiated between the Receiver and the Purchaser in accordance with the terms of the Sales Process, in order to obtain the best price for the Property. Specifically, with respect to the Sales Process, the Receiver:
 - (a) delivered the Teaser Letter and supporting Sales Process documentation to 66 financial and strategic buyers that the Receiver understood were potentially interested in participating in the Sales Process;⁷
 - (b) placed advertisements of the Sales Process in local and national publications in Canada;⁸ and
 - (c) provided access to the Data Room to 20 prospective purchasers.⁹
12. The Receiver received and evaluated the non-binding offers received through the Sales Process in significant detail, as outlined in the Confidential Appendix 1 to the Second Receiver's Report.¹⁰
13. The non-binding offer submitted by the Dr. Jason Ronald Sneath Medical Corporation was determined by the Receiver, with the support of BMO, to be the highest and best offer.

⁷ Second Receiver's Report at para 39(g) and (i).

⁸ Second Receiver's Report at para 39(h).

⁹ Second Receiver's Report at para 41.

¹⁰ Second Receiver's Report at para 43.

The Receiver therefore accepted such offer and subsequently negotiated and entered into the APA with the Purchaser.¹¹

The interests of all parties have been served

14. The Transactions contemplated by the APA provide for the best possible outcome in the circumstances for all parties with an economic interest in the proceedings. In particular, the APA provides for a higher and better purchase price than the other offers received in the Sales Process, as set out in the Confidential Appendix 1 to the Second Receiver's Report.
15. Ms. Lee raised no objections to the Sales Process when it was initiated by the Receiver. In addition, the Debtors' senior secured creditor approved the Transactions.¹²

The sales process was run with integrity and there was no unfairness

16. The Sales Process was robust and was conducted with integrity by the Receiver. Any interested party was permitted to participate in the Sales Process, subject to the conditions set out therein (applicable to all parties), which are standard and reasonable in the circumstances. All available information with respect to the Assets was made available to any potential bidder who signed a confidentiality agreement. Thus, all bidders had the opportunity to view the same information.
17. In particular, Ms. Lee and VOC had the opportunity to and were treated as potential bidders during the Sales Process. As such VOC was privy to all information with respect to the Assets and had the opportunity to submit an offer as part of the Sale Process.
18. Ms. Lee, as a guarantor and therefore a potentially affected party in these Receivership Proceedings requested disclosure of the confidential purchase price contained in the APA. On July 7, 2022, Ms. Lee entered into a confidentiality agreement with the Receiver, whereby the Receiver provided Ms. Lee with the confidential purchase price under the APA and Ms. Lee agreed to keep such information confidential and further agreed that she is not, nor will become a potential bidder in the Sale Process.¹³ Upon disclosure of the

¹¹ Second Receiver's Report at para 43.

¹² Second Receiver's Report at para 43.

¹³ Supplemental Second Receiver's Report at para 16.

purchase price, the Receiver considers Ms. Lee a creditor for the purpose of these Receivership Proceedings and not a potential bidder.¹⁴ Such consideration by the Receiver is fair in the circumstances given that Ms. Lee is now privy to the confidential purchase price and specifically agreed not to be a potential bidder.

19. The Receiver was directly involved in negotiating the terms and conditions of the APA and believes it is commercially reasonable and provides the highest net realization to the Property.

V. RELIEF SOUGHT

20. The Receiver respectfully request that this Court grant the relief sought by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of July, 2022.

“McCarthy Tétrault LLP”

Walker M. MacLeod
Counsel for the Applicant, the Receiver

¹⁴ Supplemental Second Receiver’s Report at para 15.

VI. INDEX OF AUTHORITIES AND MATERIALS

1. [*Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd.*, 2019 ABCA 433;](#)
2. [*River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, 2010 ABCA 16;](#) and,
3. [*Royal Bank of Canada v. Soundair Corporation*, 1991 CanLII 2727 \(ON CA\).](#)