



Clerk's Stamp

COURT FILE NUMBER

1903 12504

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

PLAINTIFF

MAYNBRIDGE CAPITAL INC.

DEFENDANTS

VOICE CONSTRUCTION OPCO ULC, VOICE
MANAGEMENT LTD., VOICE
CONSTRUCTION LTD., EARTH & ENERGY
CONSTRUCTION LTD., VOICE HOLDINGS
LTD., and 2012442 ALBERTA LTD.

DOCUMENT

**BRIEF OF LAW FOR ORDER APPROVING
AND VESTING SALE AND OTHER RELIEF**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

MILLER THOMSON LLP
Barristers and Solicitors
2700, Commerce Place
10155-102 Street
Edmonton, AB, Canada T5J 4G8
Phone: 780.429.1751 Fax: 780.424.5866
Lawyer's Rick T.G. Reeson, QC
Name: Stephanie A. Wanke
Lawyer's rreeson@millerthomson.com /
Email swanke@millerthomson.com
File No.: 182818.4

INDEX

I.	INTRODUCTION	3
II.	BACKGROUND	4
	A. The Debtor	4
	B. Indebtedness and Security	4
	C. Offer to Purchase by BSC.....	5
III.	ISSUES.....	5
IV.	SUBMISSIONS	5
	A. Approval of Sale and Vesting of Assets	5
	B. Soundair Criteria.....	6
	i. Sufficient Effort	6
	ii. Interest of All Parties	7
	iii. The Efficacy and Integrity of the Process	8
	iv. Unfairness in the Process	8
	C. Interim Distribution.....	9
	D. Sealing Order	9
V.	RELIEF CLAIMED.....	11

I. INTRODUCTION

1. This brief of law is submitted on behalf of Alvarez & Marsal Canada Inc. (the “**Receiver**”) in its capacity of the court-appointed Receiver and Manager of the Voice Construction OPCO ULC, Voice Management Ltd., Voice Construction Ltd., Earth & Energy Construction Ltd., Voice Holdings Ltd., Voice Holdings Ltd., and 2012442 Alberta Ltd. (collectively, the “**Debtor**”) in support of its application (the “**Application**”) for, among other things, an Order approving the agreement between the Receiver in its capacity as receiver of the Debtor (and not in its personal or corporate capacity) and Brent Scarbrough & Co. Inc. (“**BSC**”) for the purchase and sale of certain equipment of the Debtor (the “**Equipment**”) on certain terms offered to and accepted by the Receiver (the “**BSC Offer**”) on behalf of the Debtor and vesting the Equipment with BSC.
2. The Application has been brought in accordance with paras 3(h), (k), (l), and (m) of the Order of the Honourable Associate Chief Justice K.G. Nielsen of the Court of Queen’s Bench of Alberta (the “**Court**”) granted June 25, 2019 (the “**Receivership Order**”), which authorized the Receiver to, among other things, execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (as defined in the Receivership Order) for any purpose pursuant to the Receivership Order and market any or all of the Property, sell the Property or any parts thereof, and apply for any vesting order necessary to convey the Property or any parts thereof, free and clear of any liens of encumbrances.¹
3. The Receiver has reviewed and determined that the BSC Offer is fair and reasonable and in the best interest of the Debtor, the creditors, and shareholders. As set out below, the Receiver has met the test for this Honourable Court to grant the Order approving and ratifying the BSC Offer.
4. In addition to the Sale and Vesting Order with respect to the BSC Offer, the Receiver seeks, among other things:
 - (a) an Order sealing the Confidential Appendices 1 and 2 (collectively, the “**Confidential Appendices**”) to the Second Report of the Receiver dated September 9, 2019 (the “**Receiver’s Second Report**”); and

¹ *Consent Receivership Order*, granted by the Honourable Associate Chief Justice K.G. Nielsen on June 25, 2019 QB Action No. 1903 12504 [*Consent Receivership Order*] [TAB 1] para 3.

(b) an Order approving the Interim Distribution herein defined.

5. The Receiver submits that the relief sought is reasonable and appropriate in the circumstances and at this stage of these proceedings.

II. BACKGROUND

6. A detailed background of the Debtor and the Receiver's activities leading up to the Application is more fully described in the Receiver's First and Second Reports. A brief overview of these proceedings is set out below.

A. The Debtor

7. The Debtor is a body of affiliated corporations carrying on business of providing civil construction services, including, heavy construction, earthworks, contracting services, and environmental management, primarily to the energy and resource sector in Western Canada for over 75 years. The company is headquartered in Edmonton, Alberta.

B. Indebtedness and Security

8. On June 25, 2019, Maynbridge Capital Inc. ("**Maynbridge**") applied to appoint a receiver over the current and future assets, undertakings and properties of the Debtor.
9. Maynbridge, is the assignee and successor in interest of a syndicate of lenders, including their agent, ATB Financial (formerly Alberta Treasury Branches) ("**ATB**"), under the subject syndicate loan agreement. At the time of the appointment of the Receiver, Maynbridge held various security over the Property of the Debtor, including security interests in all present and after-acquired property of the Debtor ("**AIIPAAP**").
10. Caterpillar Financial Services Limited ("**Caterpillar**") has registered a security interest against certain pieces of the Equipment as more thoroughly described in the Receiver's Second Report and referred to below.²

² The First Report of the Receiver, dated August 6, 2019.

C. Offer to Purchase by BSC

11. The receivership of the Debtor has attracted significant attention from the construction community and the Receiver has received a number of unsolicited offers for the Property of the Debtor.
12. The Receiver received an unsolicited offer from BSC for the purchase of the Equipment. After negotiating with BSC, the Receiver advised BSC that it accepted the BSC Offer subject to approval of the Court and entered into an asset purchase agreement, subject to approval of the Court (the "**BSC APA**").
13. The BSC APA is attached as Confidential Appendix 2 to the Second Report.

III. ISSUES

14. The issues to be determined by this Honourable Court are whether it is appropriate and reasonable in the circumstances to:
 - (a) approve the BSC APA;
 - (b) approve of Interim Distribution (as defined below); and
 - (c) grant a sealing order with respect to the Confidential Supplemental.

IV. SUBMISSIONS

A. Approval of Sale and Vesting of Assets

15. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 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 corporation's business; and
 - (c) take any other action that the Court considers advisable.³

³ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**"), s. 243(1) [TAB 2]

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.⁴

B. Soundair Criteria

17. The criteria to be applied when considering the approval of a sale or, in this case, acceptance of a proposal recommended by a receiver were first set out by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.*⁵ When considering whether an offer accepted by a receiver 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.
18. The Alberta Courts have adopted these criteria and have applied them in receivership proceedings on numerous occasion.⁶
19. It has been further acknowledge that the Court 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.⁷

i. Sufficient Effort

20. Although a public tender process has not been engaged for the Equipment, further efforts to attempt to market the Equipment to other parties would increase costs and would not necessarily garner a better price.

⁴ BIA, s. 247 [TAB 3]

⁵ *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76 [Soundair] [TAB 4].

⁶ *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726 at para 3 [TAB 5].

⁷ *Soundair supra*, [TAB 4] at para 14.

21. After reviewing the appraised value of the Equipment, as more thoroughly discussed in the Confidential Appendices, and considering the additional costs of removing, storing, insuring, and marketing the Equipment to conduct a sales process for the Equipment, the Receiver is of the opinion that a sales process would not necessarily result in a higher net realization of the Equipment. Further, it is a term of the BSC APA that BSC will pick up and remove the Equipment, saving the Receivership the expense of potentially having to transport the Equipment to facilitate a sales process.
22. The Receiver submits that it has made reasonable and sufficient efforts to obtain the best price for Equipment by entering into the BSC APA and such a transaction is commercially reasonable.

ii. Interest of All Parties

23. Courts have acknowledged that a receiver's primary concern should be to protect the interest of the debtor's creditors.⁸
24. 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 majority rules. Rather, a receiver must consider the interest of all creditors and then act for the benefit of the general body.⁹
25. The Debtor's primary secured creditor, Maynbridge, supports the Receiver's acceptance of the BSC Offer. The Receiver expects that Maynbridge will suffer a shortfall in respect of its indebtedness following the final distribution in this receivership.
26. The other creditors who have priority claims to the Equipment are Caterpillar and the parties who can prove that they hold valid garage keeper's liens. As set out below, the Receiver is seeking to pay Caterpillar in full from the proceeds of the sale of the Equipment and to hold sufficient funds to pay the valid garage keeper's liens at a later date.

⁸ See *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766 [TAB 6]

⁹ *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 [Elaborate Homes] at para 61 [TAB 7] citing *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 NSR (2d) 34.

27. The Receiver is of the opinion that the BSC Offer provides for the highest estimated net realization of the Equipment and the highest potential recovery for the creditors of the Debtor.
28. In these circumstances, it is commercially reasonable and in the best interest of the Debtor's stakeholders that the BSC Offer receive court approval.

iii. The Efficacy and Integrity of the Process

29. When dealing with property of an insolvent corporation, the Court should assume that a receiver has acted properly unless the contrary is clearly demonstrated.¹⁰
30. The Receiver submits that there is nothing improper about the acceptance of the BSC Offer.
31. While the BSC Offer was an unsolicited offer and the Receiver did not make invitation to other parties to tender an offer for the Equipment, it is not necessary for a Receiver to invite all potential purchaser to tender an offer for a debtors' assets or conduct a judicial auction of the assets. The Receiver is encouraged be pragmatic in dealing with the Property of the Debtor to obtain the best price.¹¹
32. Except for the purposes of consultation with Maynbridge, the BSC Offer submitted to the Receiver has been held in confidence.
33. The Receiver has conducted itself with integrity and in good faith in considering and negotiating with BSC and ultimately accepting the BSC Offer.

iv. Unfairness in the Process

34. The Receiver submits that it acted reasonably, prudently, fairly, and not arbitrarily in accepting the BSC Offer.
35. No party was materially prejudiced or disadvantage by the Receiver negotiating and accepting the BSC Offer.

¹⁰ See *Crown Trust Co. et al Rosenberg et al* (1986), 60 OR (2d) 87 (Ont HC), especially paras 65 and 77 [TAB 8]

¹¹ *Salima Investments Ltd. v Bank of Montreal*, 1985 ABCA 191, 1985 CarswellAlta 332 at para 11-12 [TAB 9]

36. Based on the forgoing, 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 accepting the BSC Offer.
37. The Court should therefore grant an Order approving the Receiver's acceptance of the BSC Offer and vesting the Equipment with BSC on closing of the transaction.

C. Interim Distribution

38. The Receiver seeks an order for an interim distribution of the proceeds realized on the sale of the Equipment in order to pay Caterpillar the amount it is owed and is secured against the Equipment.
39. Caterpillar has not yet provided a final payout statement. As a result, unless a final payout statement is provided and approved by the Receiver prior to the application, the Receiver is seeking an authorization to pay Caterpillar on Caterpillar providing a payout statement approved by the Receiver (the "**Interim Distribution**").

D. Sealing Order

40. In addition to an Order approving the BSC Offer and vesting title of the Equipment with BSC, the Receiver seeks a sealing order with respect to the Confidential Appendices of the Receiver's First Report.
41. The Court's authority to grant sealing orders is contemplated under Rule 6.28 and Division 4 of Part 6 of the *Alberta Rules of Court*.¹²
42. The seminal case of *Sierra Club of Canada v Canada (Minister of Finance)* provides the guiding principles in granting sealing orders and publications bans. Justice Iacobucci for the Court accepted that a confidentiality or sealing order could be granted when:
 - (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

¹² *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28 [TAB 9].

- (b) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.¹³
43. In the insolvency context, it is common when assets are being sold pursuant to a court process to seal various bids and other commercially sensitive material, such as valuations, in case a further bidding process is required should the transaction being approved falls through.¹⁴
44. The Ontario courts have further noted that sealing orders in this context are normally granted to maintain fair play so that competitors and potential purchasers do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources.¹⁵
45. In *Alberta Treasury Branches v Elaborate Homes Ltd.*, Justice K.G. Neilsen (as he was then) accepted the reasons and rationale of the Ontario Courts and acknowledged that it is common practice in the insolvency context that information relating to the sale of the assets of an insolvent corporation be kept confidential until after the sale is completed pursuant to a court order.¹⁶
46. The Receiver submits that in these circumstances it is necessary to seal Confidential Appendices to prevent a real and substantial risk of harm to commercial interest. The Confidential Appendices contain appraisals with respect to the Equipment and other Property of the Debtor. If such information was to be made public, any subsequent sales process conducted by the Receiver, could be compromised to the detriment of the Debtor, the Debtor's creditors, and BSC.
47. Release of the information prior to the conclusion of the Receiver's sales and marketing efforts of the Property may cause irreparable harm to the fairness of any sales process the Receiver may conduct. This would negatively impact the stakeholders of the Debtor, who have an interest in ensuring the highest value possible is received for the Property.

¹³ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [TAB 10].

¹⁴ *Look Communications Inc v Look Mobile Corp*, 2009 CarswellOnt 7952 (Ont SCJ [Commercial List] at para 17 [TAB 11].

¹⁵ *887574 Ontario Inc v Pizza Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112 [TAB 12] at para 24.

¹⁶ *Elaborate Homes supra.* at para 54 [TAB 7].

48. The Receiver further submits that salutary effects of a sealing of the Confidential Supplemental outweigh any deleterious effects that may be caused by the sealing.
49. The sealing of the Confidential Appendices is essential to the Receiver satisfying the *Soundair* principles as required by this Court, and therefore it is both reasonable and appropriate for the Court to seal the Confidential Appendices on the Court Record.

V. RELIEF CLAIMED

50. Based upon the materials filed and the foregoing submission, the Receiver respectfully requests, among other things:
 - (a) An Order approving the BSC Offer and BSC APA and vesting title of the Equipment with BSC on closing of the transaction;
 - (b) An Order approving the Interim Distribution;
 - (c) An Order sealing the Confidential Appendices of the Receiver's Second Report on the Court record until the Receiver has completed its sales process of the Property of the Debtor;
 - (d) An Order approving the activities of the Receiver as set out in the Second Report;

Such further or other relief as may be requested of the Court by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF AUGUST, 2019

MILLER THOMSON LLP

Per:

Rick Reeson, QC
Stephanie Wanke
Counsel for the Applicant,
ALVAREZ & MARSAL CANADA INC. in its
capacity as Receiver of Voice Construction
OPCO ULC, Voice Management Ltd.,
Voice Construction Ltd., Earth & Energy
Construction Ltd., Voice Holdings Ltd.,
Voice Holdings Ltd., and 2012442 Alberta
Ltd.

TABLE OF AUTHORITIES

TAB

1. *Consent Receivership Order* granted by Associate Chief Justice K.G. Nielsen dated June 25, 2019.
2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(1).
3. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 247.
4. *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76.
5. *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726, 2011 CarswellAlta 2304.
6. *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766, 2000 CarswellAlta 1211.
7. *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350, 2014 CarswellAlta 921..
8. *Crown Trust Co. et al Rosenberg et al* (1986), 60 OR (2d) 87 (Ont HC).
9. *Salima Investments Ltd. v Bank of Montreal*, 1985 ABCA 191, 1985 CarswellAlta 332.
10. *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28.
11. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, 2002 CarswellNat 822.
12. *Look Communications Inc v Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont SCJ [Commercial List]).
13. *887574 Ontario Inc v Pizza Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112.