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COURT COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL CENTRE CALGARY Justice Johnston
COM
MATTER IN THE MATTER OF THE RECEIVERSHIP
OF ALTER NRG CORP. Oct 22, 2021



IN THE MATTER OF THE RECEIVERSHIP
OF ALTER NRG CORP.

IN THE MATTER OF SECTION 85 OF THE
CIVIL ENFORCEMENT ACT, RSA 2000, c C-
15

-and-

IN THE MATTER OF SECTION 13(2) OF THE
JUDICATURE ACT, RSA 2000, c J-2

APPLICANT MNP LTD., in its capacity as receiver and
manager of ALTER NRG CORP.

DOCUMENT **BRIEF OF THE RECEIVER**

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A. INTRODUCTION

1. This Brief is submitted on behalf of MNP Ltd. in its capacity as receiver (the “**Receiver**”) of the Debtor, Alter NRG Corp. (“**Alter NRG**” or the “**Debtor**”), in support of its application (the “**Application**”) for the following:
 - (a) approval of a proposed sale transaction of Alter NRG’s assets, undertakings, and properties (collectively, the “**Property**”) pursuant to the terms of the Asset Purchase Agreement (the “**Skyfuel APA**”) ¹ between the Receiver and Skyfuel Inc. (“**Skyfuel**”);
 - (b) approval of a proposed claims procedure (the “**Claims Procedure**”) setting out a claims procedure for determining any and all claims of creditors of Alter NRG;
 - (c) approval of the Receiver’s actions, conduct, and activities of the Receiver, as outlined in the First Report of the Receiver dated July 5, 2021 (the “**First Report**”), the Second Report of the Receiver dated October 12, 2021 (the “**Second Report**”), and the Confidential Supplement to the Second Report of the Receiver dated October 12, 2021 (the “**Confidential Second Report**”); and
 - (d) proposed temporary sealing Order respecting the Confidential Second Report.
2. In obtaining the Skyfuel APA, the Receiver has complied with the sale and solicitation process Order (the “**SSP**”), which was approved by this Honourable Court on July 16, 2021 (the “**SSP Order**”). Pursuant to the terms and timelines in the SSP Order, the Receiver marketed the Property, and generated multiple offers for their purchase. The Receiver has satisfied all of the principles for approval of the Skyfuel APA pursuant to *Royal Bank of Canada v Soundair* (“**Soundair**”).²
3. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the First Report and the Second Report.

¹ Second Report of the Receiver, dated October 12, 2021 (“**Second Report**”), at Appendix B, and in full at Confidential Supplement to the Second Report of the Receiver dated October 12, 2021 (the “**Confidential Second Report**”), at Appendix B.

² *Royal Bank of Canada v Soundair* (“**Soundair**”), (1991), 83 DLR (4th) 76 (Ont CA), at para. 16 [TAB 1].

B. BACKGROUND

4. Alter NRG specialized in providing alternative energy solutions and is a corporation registered in the Province of British Columbia and extra-provincially registered in Alberta.³
5. The Company sold its Westinghouse Plasma Gasification Technology through a wholly owned subsidiary called Westinghouse Plasma Corp. The proprietary plasma gasification technology was used to convert biowaste into renewable energy solutions including liquid fuels, electrical power, and syngas. On March 27, 2015, the Company was acquired by Harvest International New Energy Co., Ltd. ("**Harvest**") through its wholly owned subsidiary, 1030629 B.C. Ltd. Harvest is the wholly owned subsidiary of Sunshine Kaidi New Energy Group Co. Ltd. ("**Sunshine**").⁴
6. Prior to the receivership the operations of Alter were being funded by Harvest and its ultimate parent company, Sunshine.⁵
7. The Receiver's understanding is that in 2019 Sunshine was having financial difficulty that resulted in defaults on its bonds. As a result, the Receiver was advised that Sunshine's bondholder imposed restrictions that prevented Sunshine from providing further funding to Harvest and/or to Alter.⁶
8. Alter NRG ceased operations in or around January 2020 and all employees were terminated prior to the commencement of receivership proceedings.⁷
9. Aleksandr Gorodetsky, Bruce Leonard and Kenneth Willis (collectively, the "**Applicants**") commenced legal proceedings to recover amounts due and owing to them and obtained a Judgement and Writ of Enforcement against Alter.⁸
10. On April 29, 2021, on application by the Applicants, the Receiver was appointed as the receiver and manager over all of the current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof of the Debtor as set out in the April 29, 2021 receivership order (the

³ Second Report, at paras. 2 and 3.

⁴ Second Report, at para. 3.

⁵ Second Report, at para. 4.

⁶ Second Report, at para. 5.

⁷ Second Report, at para. 6.

⁸ Second Report, at para. 7.

“**Receivership Order**”) of the Honourable Justice K.M. Eidsvik pursuant to the *Civil Enforcement Act*, RSA 2000, c C-15 and the *Judicature Act*, RSA 2000, c J-2.⁹

C. SALE AND SOLICITATION PROCESS

11. On July 16, 2021, an Order was granted approving the SSP Order in order to facilitate a process to solicit bids for the Property.¹⁰

12. The SSP was conducted in accordance with the SSP Order using the following estimated deadlines:¹¹

Milestones	Estimated deadlines
Issuance of a teaser and non-disclosure agreement	July 19, 2021
Issuance of a CIM upon receipt of a non-disclosure agreement	Beginning July 19, 2021
Due diligence period for potential bidders	July 19, 2021 - August 30, 2021
Deadline for receipt of offers	August 30, 2021
Selection of successful offeror(s)	September 3, 2021
Closing of transaction (dependant on timing of any required Court approval)	September 30, 2021

13. The Receiver conducted the SSP and prepared a related Confidential Information Memorandum (“**CIM**”). Potential purchasers were provided access to the CIM following the signing of a confidentiality agreement.¹²

14. The Receiver carried out various marketing and advertising activities in relation to the proposed sale of the Property. The Receiver took the following steps:

(a) placed and online posting of the teaser on MNP’s national website;

(b) advertised in *Insolvency Insider*, a national weekly insolvency newsletter, beginning on July 20, 2021;

(c) advertised in the *Daily Oil Bulletin* on July 22, 2021;

⁹ Second Report, at para. 1.

¹⁰ Second Report, at para. 16 and Appendix A containing a copy of the July 16, 2021 Order granted by Justice K.M. Horner.

¹¹ Second Report, at Appendix A.

¹² Second Report, at para. 16.

- (d) posted the information to www.patentauction.com, an online patent auction site beginning on July 20, 2021;
 - (e) sent an email notification MNP LLP's cross Canada partners and managers advising of the SSP;
 - (f) sent the SSP to MNP LLP's international affiliation;
 - (g) sent the CIM to twenty-one parties who had signed non-disclosure agreements; and
 - (h) maintained and provided access to the virtual data room.¹³
15. The SSP was conducted in accordance with the timelines above and following the August 30, 2021 deadline for receipt of offers, the Receiver received 4 offers to purchase the Property.¹⁴
16. The highest and best offer was submitted by Harvest International New Energy Co., Ltd. (the "**Harvest Offer**").¹⁵ The Harvest Offer included a provision stating that the purchaser could be substituted with a Harvest affiliate. On September 17, 2021, Harvest International New Energy Co., Ltd. notified the Receiver that it had elected to substitute the purchasing entity to Skyfuel Inc.¹⁶
17. The Receiver ultimately agreed to accept the Skyfuel APA in light of the following factors:
- (a) Harvest's offer was the highest offer received, which included cash and credit components;
 - (b) Harvest paid a significant deposit to the Receiver;
 - (c) the Skyfuel APA has a proposed closing date of 10 days following the issuance of the Court's approval of the Skyfuel APA (the "**Closing Date**"); and
 - (d) the Skyfuel APA was only conditional on approval of the Court.¹⁷

¹³ Second Report, at para. 17.

¹⁴ Second Report, at para. 18.

¹⁵ Second Report, at para. 19.

¹⁶ Second Report, at para. 19.

¹⁷ Second Report, at paras. 19 and Appendix B; Confidential Second Report, at Appendix B.

D. ISSUES

18. The issues to be determined by this Honourable Court are:
- (a) whether the Skyfuel APA should be approved;
 - (b) whether the Claims Procedure should be approved; and
 - (c) whether the Confidential Second Report should be subject to a temporary sealing Order.

E. SALE APPROVAL OF THE SKYFUEL APA

19. The Alberta Court of Appeal has recently confirmed the test in *Soundair* for whether a Court should approve an asset sale by a court-appointed receiver.¹⁸
20. According to the Court in *1705221 Alberta Ltd. v Three M Mortgages Inc.* ("**170 Alberta**"), citing to *Soundair*, the test requires satisfaction of the following factors:
- (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - (b) whether the interest of all parties have been considered, and not just the interests of the creditors;
 - (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.¹⁹
21. In *170 Alberta*, the Court further noted that when approving a sale recommended by a receiver, 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."²⁰
22. The Receiver submits that the Receiver has satisfied the foregoing *Soundair* considerations and the Skyfuel APA should be approved. The Receiver will address each of these considerations individually.

¹⁸ *1705221 Alberta Ltd. v Three M Mortgages Inc.*, 2021 ABCA 144 ("**170 Alberta**") [TAB 2].

¹⁹ *170 Alberta*, at para 19 [TAB 2]; see also *Soundair*, at paragraph 16 [TAB 1].

²⁰ *170 Alberta*, at para 22 [TAB 2].

(a) Receiver has made sufficient effort to obtain the best price

23. As noted in *Soundair*, when deciding whether the Receiver acted providently, the Court should examine the business judgment of the Receiver in light of the information the Receiver had when it agreed to accept an offer, and should be very cautious to decide the Receiver's conduct was improvident based on information that came to light after the Receiver's decision.²¹
24. Further, in *Bank of Montreal v River Rentals Group Ltd. ("River Rentals")*, the Alberta Court of Appeal considered a number of additional factors to help determine if the receiver made sufficient efforts to obtain the best price:
- (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; and
 - (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.²²
25. In *PricewaterhouseCoopers Inc. v 1905393 Alberta Ltd.*, the Alberta Court of Appeal noted the same factors as *River Rentals* in response to an argument that the receiver's abbreviated sales process resulted in an offer that was unreasonably low in the circumstances.²³ However, the Court found that the receiver's decision to accept an offer out of its sales process was appropriate in the circumstances, noting:

The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based.²⁴

²¹ *Soundair*, at paragraph 21 [TAB 1].

²² *Bank of Montreal v River Rentals Group Ltd.*, 2010 ABCA 16, at para 13 ("*River Rentals*") [TAB 3].

²³ *PricewaterhouseCoopers Inc. v 1905393 Alberta Ltd.*, 2019 ABCA 433, at para 8 ("*190 Alberta*") [TAB 4].

²⁴ *190 Alberta*, at para 14 [TAB 4].

26. In *190 Alberta*, the receiver engaged in a similar sales process as the SSP, which the Court of Appeal noted was extensive:

Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.²⁵

27. Similarly, the SSP Order was not appealed, and the Receiver has not been advised of any concerns with its implementation of the SSP.
28. To engage with the factors in *River Rentals*: the accepted offers are a reasonable price in the circumstances; the number and quality of bids do not indicate there was insufficient time to submit bids; adequate notice of the bidding process was provided by the Receiver's public ad in *The Globe and Mail*, and as a result of the Receiver contacting 165 potential purchasers; and the Skyfuel APA is in the best interests of the creditors of Alter NRG.
29. The Receiver submits that the evidence before this Court demonstrates that the first consideration under *Soundair* has been satisfied and the Receiver has obtained the best price possible in the circumstances and as evidenced by the Skyfuel APA.

(b) The interests of all parties

30. Pursuant to *Soundair*, the primary interest in a court-approved asset sale is that of the creditors of the debtor, but it is not the only or overriding consideration.²⁶ Other persons whose interests require consideration include purchasers who have bargained at length and at their own expense.²⁷ This was confirmed in *170 Alberta*, where the Court considered that the successful bidder had negotiated an offer to purchase in good faith over a year before the appeal was heard, and who continued to live with uncertainty.²⁸

²⁵ *190 Alberta*, at para 17 [TAB 4].

²⁶ *Soundair*, at para 39 [TAB 1].

²⁷ *Soundair*, at para 40 [TAB 1].

²⁸ *170 Alberta*, at para 42 [TAB 2].

31. According to *170 Alberta*, with reference to *Soundair*, it was important to consider the successful bidder's interests to avoid undermining the integrity of receivership proceedings:

I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.²⁹

32. The Receiver submits that the Skyfuel APA benefits the interests of Alter NRG's creditors, as well as the good faith interests of the purchaser, Harvest. Further, approving the Skyfuel APA maintains the integrity of the receivership process.

(c) The efficacy and integrity of the sales process by which the offer was obtained

33. If the Receiver's primary concern is protecting the interests of creditors, its secondary concern is the commercial efficacy and integrity of the process by which the sale is effected.³⁰
34. The Court in *Soundair* also confirmed it is "neither logical nor practical" to compare current results to what might have been recovered in some other set of circumstances.³¹
35. In *170 Alberta*, the Court considered this factor in light of the fact the receiver had already obtained an order approving a sales process. The Court noted that in that application, the receiver satisfied its efforts to engage an appraiser to value the lands, determine the best sales process, and why it recommended its selected listing agent.³²
36. The Court in *170 Alberta* went on to reject the argument that the marketing process was rushed, noting the receiver fielded inquiries from 15 interest parties, toured the lands with three interested parties, posted signs visible from the highway, and ensured

²⁹ *170 Alberta*, at para 42 [TAB 2], citing to *Soundair*, at para 69 [TAB 1].

³⁰ *Soundair*, at para 42 [TAB 1].

³¹ *Soundair*, paragraph 45 [TAB 1].

³² *170 Alberta*, at para 43 [TAB 2].

the listing was posted on the listing agent's website. In light of these efforts, the Court in *170 Alberta* held,

Marketing an asset is an unpredictable exercise. It is pure speculation that a longer marketing period would have generated additional, let alone better, offers.

We are not persuaded that the integrity of the sale process was compromised.³³

37. Similarly, the Receiver has followed the terms of the SSP Order, and undertaken significant efforts to market the Property of Alter NRG.³⁴
38. In the present circumstances, the SSP Order was approved by this Honourable Court, and at the time of its approval, no party objected in any way to how it was directed to be carried out.
39. As noted by the Court in *Grant Forest Products Inc., Re*, it is well established in insolvency law in Canada that once a process has been put in place by court order for the sale of assets of a failing business, that process should be honoured, except in extraordinary circumstances.³⁵
40. The Receiver submits that the Court should protect the integrity of the SSP approved in this case and approve the Skyfuel APA that was generated through the SSP.

(d) There was no unfairness in the process

41. In deciding whether the process by which the Receiver obtained an offer was fair, courts typically avoid delving "into the minutia of the process or of the selling strategy adopted by the receiver",³⁶ but are still responsible for making the final determination of whether the process was fair.
42. In *Soundair*, the Court examined the Receiver's negotiations to determine if there was evidence of any prejudice to the interested parties, and ultimately concluded the negotiations were fair.³⁷

³³ *170 Alberta*, at paras 44-45 [TAB 2].

³⁴ Second Report, at para 12.

³⁵ *Grant Forest Products Inc., Re*, 2010 ONSC 1846, at paragraph 29 [TAB 5].

³⁶ *Soundair*, at para 49 [TAB 1].

³⁷ *Soundair*, at para 55 [TAB 1].

43. The Receiver submits that it has acted reasonably, prudently, fairly and not arbitrarily in entering into the Skyfuel APA. In support of its recommendation that the Court approve the Skyfuel APA, the Receiver notes the following factors:
- (a) the Alter NRG assets were widely marketed pursuant to the Court-approved SSP;
 - (b) the Skyfuel APA is unconditional, except for obtaining Court approval;
 - (c) the Skyfuel APA is the highest offer received and the Receiver is of the view that this offer will result in the highest return to the stakeholders; and
 - (d) Harvest provided a significant deposit.
44. The Receiver maintains there was no unfairness to any parties in the Court-approved process it followed, and the Skyfuel APA ought to be approved.
45. Accordingly, and based upon the foregoing, the Receiver submits that all aspects of the *Soundair* principles have been satisfied in the present circumstances. The Receiver has undertaken extensive and lengthy efforts to market and sell the Property.

F. CLAIMS PROCEDURE

46. The Claims Process will allow the Receiver to determine exactly the quantum of the claims with an interest in the proceeds of the proposed transaction and will allow the Receiver to distribute the proceeds accordingly.
47. The main components of the proposed claims process are as follows:
- (a) the determination date for the claims will be April 29, 2021, being the date of the Receivership Order;
 - (b) the deadline to submit a claim is December 15, 2021 (the "**Claims Bar Date**"); and
 - (c) each creditor wanting to submit a claim is required to submit a proof of claim form to the Receiver including supporting documentation prior to the Claims Bar Date.³⁸

³⁸ Second Report, at para. 26.

48. The Claims Process is contemplated to take place over a 6 week period which the Receiver submits should be sufficient to complete the process given the limited known pool of creditors.
49. We respectfully submit that the Claims Procedure is fair, reasonable, and appropriately balances the interests of the Alter NRG stakeholders.

G. TEMPORARY SEALING ORDER

50. On an Application to temporarily seal a court document, this Honourable Court has broad discretion and may make a direction on any matter that the circumstances require, and it may grant the Order notwithstanding the provisions of Division 4 of Part 6 of the Rules of Court.
51. In the context of an insolvency proceeding and the sale of assets, it is common for the Court to seal the Receiver's confidential documents in case a further bidding process may be required if the transaction being approved falls through.³⁹
52. The Receiver requests that the Confidential Second Report be temporarily sealed pending closing of the Skyfuel APA or until further Order of this Honourable Court.
53. The Supreme Court in *Sierra Club of Canada v Canada (Minister of Finance)*, held that a sealing order may be granted when:
 - (a) an Order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
 - (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes public interest in open and accessible court proceedings.⁴⁰
54. The Supreme Court of Canada further confirmed in *Sherman Estate v Donovan*, 2021 SCC 25, that the "core prerequisites" to establish to obtain a sealing order include:
 - (a) court openness poses a serious risk to an important public interest;

³⁹ *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 at para. 54 [TAB 6]; *Look Communications Inc. v Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J.) at para. 17 [TAB 7].

⁴⁰ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [TAB 8].

(b) the sealing order sought is necessary to prevent the 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 sealing order outweigh its negative effects.⁴¹

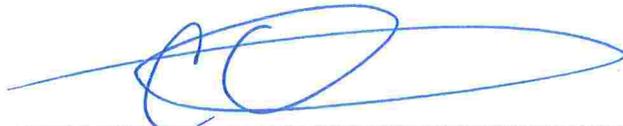
55. Sealing the Confidential Second Report is necessary to preserve the integrity of any subsequent attempts to market and sell the assets of Alter NRG in the event that the proposed sale does not close. The granting of a temporary sealing Order avoids any prejudice that might be caused by publicly disclosing the confidential and commercially sensitive information contained in the Skyfuel APA and the Confidential Second Report. There is no other reasonable alternative to prevent this information from becoming publicly available.

H. RELIEF REQUESTED

56. The Receiver respectfully requests that this Honourable Court approve the Skyfuel APA and grant the form of Sale Approval and Vesting Order submitted by the Receiver as well as the proposed Claims Procedure Order and Sealing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of October 2021.

MLT AIKINS LLP



Ryan Zahara/Catrina Webster
Counsel for MNP Ltd., in its capacity as Receiver of
Alter NRG Corp.

⁴¹ *Sherman Estate v Donovan*, 2021 SCC 25, at para. 38 [TAB 9].