Court File No. CV-14-10417-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

GLOBAL RESOURCE FUND

Applicant

- and -

TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

Respondents

BOOK OF AUTHORITIES
Motion for Approval and Authorization Order
Returnable January 30, 2019

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1 *Fifth Third Bank v. MPI Packaging Inc.*, 2010 ONSC 73

2 *Bank of Montreal v. Calgary West Hospitality Inc.*, 2011 ABQB 293

3 *Royal Bank v. Soundair Corp.*, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.)

4 *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173

1

2010 ONSC 73
Ontario Superior Court of Justice [Commercial List]

Fifth Third Bank v. MPI Packaging Inc.

2010 CarswellOnt 29, 2010 ONSC 73, [2010] O.J. No. 29, 183 A.C.W.S. (3d) 1006, 62 C.B.R. (5th) 215

In the Matter of an Application under subsection 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3

And In the Matter of Section 101 of the Courts of Justice Act, R.S.O. 1990, c.C.43

Fifth Third Bank (Applicant) and MPI Packaging Inc. (Respondent)

Pepall J.

Judgment: January 5, 2010
Docket: CV-09-8250-00CL

Counsel: Leanne Williams, Sara Wilson for Receiver, Grant Thornton Ltd.
Roger Jaipargas for Fifth Third Bank
Brian N. Radnoff for Zuckerman-Honickman Inc.
Kevin Sherkin for Paul Morton

***Pepall J.*:**

Reasons for Decision

Introduction

1 This case involves a consideration of the validity of a referential bid, that is, "a bid that does not stand on its own, which is not understandable without reference to another bid.": *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.* [1] .

Facts

2 On January 8, 2009, MPI Packaging Inc., an Ontario producer of bottle containers, commenced an action against Zuckerman-Honickman Incorporated ("ZH"), a Pennsylvania bottle distributor, for among other things, $10 million for breach of contract. A few days later, ZH commenced an action against MPI and its President, Ronald O'Brien, for among other things, $10 million for breach of contract.

3 On June 30, 2009, I appointed Grant Thornton Limited as Receiver of MPI at the request of its primary secured creditor, Fifth Third Bank. The Bank was owed in excess of $7.8 million and held a General Security Agreement over all of MPI's assets. Paul Morton, a principal of MPI and the father-in-law of Mr. O'Brien, is a major shareholder of MPI and a secured creditor for in excess of $4.8 million in shareholder loans. Mr. Morton is in a dispute with Fifth Third Bank over a $5 million guarantee of the Bank's loan to MPI. The application for the appointment of a receiver was unopposed.

4 The Receiver proceeded to evaluate the Litigation and concluded that it had many complexities and could involve a long and protracted process at great cost to the MPI Estate with no guarantee of realization for the benefit of creditors. Throughout its discussions with the principals of MPI, the latter continued to reiterate their belief that MPI had a strong case against ZH and were desirous that the Litigation be pursued.

5 The Receiver reported that Fifth Third Bank was not prepared to incur further losses in funding the Receiver to pursue the Litigation given the cost commitment and the assessment of the merits of the case. The Receiver then engaged in discussions for about two months in an attempt to negotiate an assignment of the Litigation to Mr. Morton and the provision for a portion of the proceeds realized to be paid to the Bank. By the time the Receiver filed its November 17, 2009 Third and Final Report in support of its November 24, 2009 motion for a discharge and other ancillary relief, the assignment agreement had still not been finalized.

6 On November 20, 2009, the Receiver received an unsolicited offer from ZH to acquire MPI's interest in the Litigation. As there were two interested offerors, that same day, the Receiver advised both parties that, subject to court approval, they would be given an opportunity to submit their final, irrevocable offer to acquire MPI's interest in the Litigation on or before noon on November 27, 2009. The Receiver states that its counsel spoke to counsel for both Mr. Morton and ZH and it was agreed that both parties would submit their final and best offer by noon, November 27, 2009. The Receiver filed a supplemental Report to this effect and requested that a portion of the relief originally requested in its November 24, 2009 motion be adjourned. On November 24, 2009, I granted the adjournment requested and noted in my endorsement that the Receiver was adopting a process to address the issue of the assignment of the Litigation and would be providing a form of the assignment to interested parties by noon the next day. I ordered that all offers had to be submitted to the Receiver on or before noon on November 27, 2009. It was therefore obvious to all concerned that the sale was not proceeding by way of an auction but by a fixed bid process.

7 The Receiver delivered a form of assignment agreement to counsel for Mr. Morton and for ZH on November 25, 2009. Prior to the bid deadline, both ZH and Mr. Morton made offers to acquire the Litigation. The ZH offer was an all cash offer payable in one sum. The Morton offer was a referential bid. Mr. Morton's bid was contingent on the amount submitted by the highest offeror.

8 On December 2, 2009, the Receiver's solicitors wrote to Mr. Morton's counsel advising that his offer was invalid and that courts have held that a referential bid is inconsistent with and potentially destructive to the integrity of the sealed bid process and must be rejected. Mr. Morton's counsel was referred to the B.C. Court of Appeal decision in *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.*[2]. Mr. Morton's counsel immediately took issue with the Receiver's position stating that no restrictions on the type of offers to be made had been specified.

9 On December 2, 2009, the Receiver advised ZH's counsel that subject to court approval, it proposed to accept ZH's offer. It so advised counsel for Mr. Morton on December 3, 2009.

10 The Receiver then brought its motion for an order approving the terms of the ZH offer and authorizing the Receiver to assign its interest in the MPI Litigation to ZH. It also requested certain other relief including approval of its activities as set out in its Reports of November 17, 23 and December 4, 2009. In support of the relief requested, the Receiver filed a Report dated December 4, 2009.

11 Mr. Morton filed an affidavit sworn December 9, 2009 addressing concerns he had with the Receiver's December 4 Report. He stated that the insolvency of MPI was caused by ZH and that until the third week of November, 2009, he believed that he had an agreement with the Receiver to purchase the Litigation. (This argument was not advanced in oral argument and furthermore, Mr. Morton's participation in the bid process suggests otherwise.) He complained that the only stipulation associated with the process was that offers had to be submitted by noon on November 27, 2009. He stated that if the Receiver wanted strict rules, they should have been clearly spelled out by the Receiver. He further stated that the actions of the Receiver had unfairly prejudiced the MPI Estate and the potential of a greater recovery and that the Receiver had failed to indicate whether it had estimated the value of the Litigation.

Issues

12 The issue to consider is whether Mr. Morton has standing to object to approval of the sale, and if so, whether the sale to ZH should be approved.

Discussion

13 Firstly, an unsuccessful prospective purchaser does not have an interest that allows for standing on a sale approval motion: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* [3] As stated by O'Connor A.C.J.A. in that case, the fundamental purpose of the sale approval motion is to consider the best interests of the parties having a direct interest in the proceeds of sale. These are primarily the creditors. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers but that in itself does not create a right or interest in a prospective purchaser. That said, Mr. Morton does have an interest in his capacity as a creditor and is a guarantor of MPI's indebtedness albeit disputed. As such, he is entitled to standing on the approval motion.

14 Secondly, all agree that the applicable test to be applied to this approval motion is that set forth in *Royal Bank v. Soundair Corp.* [4] The Court should consider:

1. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

2. the interests of all parties;

3. the efficacy and integrity of the process by which offers are obtained; and

4. whether there has been unfairness in the process.

As Blair J.A. wrote in *Regal Constellation Hotel Ltd., Re* [5], the receiver "must act with meticulous correctness, but not to a standard of perfection."

15 Given that it was unlikely that any other party would be interested in purchasing the MPI litigation, the Receiver acted reasonably in negotiating only with Mr. Morton and ZH. Throughout, the Receiver made a considerable effort to obtain the best price and certainly did not act improvidently. It is required to obtain the best price, not necessarily the highest price: *Royal Bank of Canada v. Soundair Corp.* [6] It assessed the Litigation, considered both offers and considered that the ZH offer was the best offer in the circumstances. Furthermore, the Receiver did consider the interests of all parties.

16 The key issue is whether there was unfairness in the process and whether the efficacy and integrity of the process by which offers were obtained was lacking. In this regard, counsel for the Receiver submits that such an inquiry is academic as the Bank is suffering a huge shortfall. It has the economic interest in the assignment and consents to the proposed sale to ZH. There are two responses to this argument. Firstly, although disputed by him, Mr. Morton as guarantor of the Bank's debt has at a minimum a contingent interest in the quantum of recovery. Secondly, the Bank sought the court appointment of a receiver. If it had wanted to control the process, presumably it could have relied on the provisions of its GSA and pursued a private appointment of a receiver. It is the court's responsibility to decide whether the process is fair.

17 That said, as stated by Galligan J.A. in *Soundair*, the court must exercise extreme caution before it interferes with the process adopted by the Receiver to sell an unusual asset. [7] If the court is satisfied that the Receiver has acted reasonably, prudently, fairly and not arbitrarily, it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations. [8]

18 To consider whether the process in this case was fair, one must understand the referential bid concept. Its provenance appears to derive from the 1898 U.K. Court of Appeal decision in *South Hetton Coal Co. v. Haswell, Shotlon & Easington Coal & Coke Co.* [9] In that case, one bidder offered £31,000 and the second bidder put in a referential bid of £200 more

than the amount offered by the other bidder. The Court held that the referential bid was invalid. As noted by Lord Templeman in the House of Lords decision of *Harvela Investments Ltd. v. Royal Trust Co. of Canada (CI)* [10], the *South Hetton* case was decided by a powerful court and has stood unchallenged for over 80 years. The New York Court of Appeal followed the *South Hetton* decision in *S.S.I. Investors Ltd. v. Korea Tungsten Mining Co.* [11] and stated that:

> The very essence of sealed competitive bidding is the submission of independent, self-contained bids, the fair compliance with which not only the owner but the other bidders are entitled...to give effect to this or any similar bidding practice in which the dollar amount of one bid was tied to the bid or bids of another or others in the same bidding would be to recognise means whereby effective sealed competitive bidding could be wholly frustrated. In the context of such bidding, therefore, a submission by one bidder of a bid dependent for its definition on the bids of others is invalid and unacceptable as inconsistent with and potentially destructive of the very bidding in which it is submitted. [12]

19 The most extensive description of referential bids is found in the subsequent decision of the House of Lords in *Harvela Investments Ltd. v. Royal Trust Co. (C.I.).* [13] There, Lord Templeman distinguished between an auction and a fixed bid sale. In the former, each bidder may adjust its bid by reference to rival bids whereas with the latter, a bidder may not adjust its bid. The House of Lords rejected referential bids for four reasons. Firstly, there is a risk that all bidders will file referential bids in which case the sale would be aborted. Secondly, there was a possibility that one bidder would never have an opportunity to buy. Thirdly, such a process does not provoke the best price; and lastly, bizarre results may ensue. He also observed that the invitation to bid did not say that referential bids would be acceptable.

20 The *Havela Investments* decision was followed by the B.C. Court of Appeal decision in *Bank of Nova Scotia v. Yoshkuni Lumber Ltd.* [14] In that case, a court appointed receiver accepted an offer subject to court approval. At the approval hearing, the judge did not approve the offer but rather ordered that new sealed offers be presented. Three offers were received one of which contained a referential bid. The receiver supported approval of that bid as it represented the best price before the court. The judge selected that offer for approval. The Court of Appeal overturned that decision. The question before the Court of Appeal was whether the referential bid qualified as an offer.

21 The majority held that it did not. Gibbs J.A. writing for the majority concluded that the process was unfair to the other two bidders because the successful party introduced into the sealed bid system elements of a public auction without any risk of being outbid by either of the other parties. "In effect the other two interested parties were denied the opportunity which would have been present in a public auction to succeed in a bidding contest. They were also denied the fairness of treatment implicit in a sealed fixed bid procedure." [15] The majority concluded that it was in the contemplation of the parties that the sale would be by fixed bidding. The referential bid was rejected as invalid and the matter was remitted to the motions judge to exercise her discretion with respect to the two remaining bids.

22 Applying these principles to the case before me, it is clear that no one intended or contemplated an auction which by its nature enables a bid to be adjusted by reference to another bid. Rather, they intended a fixed bid process. The Receiver states that it advised both parties that they would be given an opportunity to submit their final irrevocable offer to the Receiver. The process adopted by the Receiver anticipated that both bidders would be given an equal opportunity to purchase the Litigation. As in *Harvela Investments*, the Receiver never indicated that referential bids would be considered or acceptable. Although the terms 'sealed' or 'fixed' bid were not used by the Receiver, it was obvious that the bids were to be submitted in written form to the Receiver. It was also obvious that the Receiver wanted to ensure that the best bid was forthcoming and that, subject to court approval, a sale would result from the invitation to bid. As noted by Lord Templeman in *Harvela Investments*, a process that included consideration of referential bids would preclude such assurances. Lastly, a deadline was imposed which also is indicative of the preclusion of an auction process. In my view, the Receiver was correct in rejecting the Morton bid as being invalid. I am satisfied that there was no unfairness in "the working out of the process" and with "the efficacy and integrity of the process by which the offers were obtained".

23 Furthermore, even if I were to determine that the Morton bid was valid, the Receiver is of the view that the ZH offer was the best offer in the circumstances. Again to quote from Blair J.A. in *Regal Constellation Hotel Ltd., Re*[16]:

> Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown.

24 Having reviewed the two offers, I am satisfied that the Receiver's conclusion was commercially fair and reasonable in the circumstances and should be accepted.

25 I would also observe that the solicitation of new bids would result in further delay and expense and would run the risk of losing or lessening the ZH offer.

26 The terms of the ZH offer are approved and the Receiver is authorized to assign all of its right, title and interest in and to the MPI Litigation to ZH. The relief requested in the amended notice of motion that was not already granted in my order of November 24, 2009 is also granted.

Order accordingly.

Footnotes

1 (1992), 16 C.B.R. (3d) 10 (B.C. C.A.) at para. 21.

2 Ibid.

3 (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).

4 (1991), 4 O.R. (3d) 1 (Ont. C.A.).

5 (2004), 71 O.R. (3d) 355 (Ont. C.A.), at 362.

6 Ibid, at para. 30.

7 Suprs, note 5 at para. 46.

8 Ibid, at para. 58.

9 [1898] 1 Ch. 465 (Eng. C.A.).

10 [1985] 2 All E.R. 966 (U.K. H.L.), at 976.

11 449 N.Y.S.2d 173 (U.S. N.Y. 1982).

12 Ibid, at p.174-175.

13 Supra, note 8.

14 Supra, note 1.

15 Supra, note 7, at para 25.

16 Supra, note 5 at p.361.

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2011 ABQB 293
Alberta Court of Queen's Bench

Bank of Montreal v. Calgary West Hospitality Inc.

2011 CarswellAlta 698, 2011 ABQB 293, 201 A.C.W.S. (3d) 337, 514 A.R. 329, 78 C.B.R. (5th) 287

Bank of Montreal (Plaintiff) and Calgary West Hospitality Inc., Gamehost Limited Partnership, Gamehost Management Inc., Darcy Will and David Will (Defendants)

J.E. Topolniski J.

Heard: March 24, 2011
Judgment: April 29, 2011
Docket: Edmonton 0903-12151

Counsel: Richard J. Cotter Q.C. for Bank of Montreal
Douglas N. Tkachuk for Gamehost Limited Partnership, Gamehost Management Inc., Darcy Will, David Will
Steven H. Leitl for Deloitte & Touche Inc.

***J.E. Topolniski J.*:**

I. Introduction

1 A consent receivership order granted on August 13, 2009 (the Receivership Order) appointed Deloitte & Touche Inc. the receiver and manager (Receiver) of the assets and undertakings of Calgary West Hospitality Inc. (Calgary West).

2 There are two interconnected applications now before the court:

> 1. The Defendants' application for leave to commence litigation (Cause of Action) against the Calgary Exhibition and Stampede Limited (CES), which they say they are entitled to pursue at their own cost and for their own benefit under an agreement made with the Plaintiff Bank of Montreal (BMO). The Receiver and BMO oppose the application on the basis that there is potential value in the Cause of Action, which should be monetized for the benefit of the creditors of Calgary West.
>
> 2. The Receiver's application for directions concerning marketing the Cause of Action. The Receiver suggests a closed auction involving BMO, the Defendants and CES. The Defendants oppose the application, urging that any bidding process for the Cause of Action should exclude BMO and CES.

II. Background

3 The Defendant Calgary West is a private company that was involved in the operation of a casino on the Calgary Stampede grounds. The casino and grounds are owned by CES. BMO provided a commercial debt facility to Calgary West, secured by assignments of rents and leases and a charge against all of its present and after acquired property, including "choses in action of every kind or nature." The Defendants Gamehost Limited Partnership, Darcy Will and David Will all gave limited guarantees of Calgary West's obligations to BMO. The Defendant Gamehost Management Inc. is the general partner of Gamehost Limited Partnership. After February or March 2009, Calgary West's account was under the management of BMO's special accounts handling unit.

4 On July 27, 2009, Calgary West informed BMO that it could no longer fund casino operations and intended to cease operations by August 7, 2009 - two days before the opening of the Calgary Stampede.

5 BMO commenced action against the Defendants on August 6, 2009. It claims that Calgary West owed it $41,245,554.80 at the time.

6 Counsel for BMO and the Defendants started negotiating a form of receivership order while their clients engaged in simultaneous settlement discussions that included Calgary West proposing to "hand over the casino keys" to BMO and to waive the notice requirement under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and the guarantors proposing a payment on the guarantees in satisfaction of their obligations.

7 The following is a summary of the pertinent events (taken in part from certain "without prejudice" correspondence relating to the settlement discussions entered into evidence on this application by BMO, without objection by the Defendants):

> (a) On July 31, 2009, the Defendants offered to resolve matters with BMO in part by making a deferred $20,500,000 cash payment in satisfaction of the guarantors' obligations, entering into a management agreement with the receiver, co-operating with the receiver, and sharing with BMO in any surplus at the end of the receivership.
>
> (b) On August 6, 2009, BMO responded with a counter-proposal that referred to a receiver and potential for a management agreement with the receiver, but pointing out that any surplus would be paid to other creditors in priority to the Defendants.
>
> (c) On August 10, 2009, BMO's counsel presented a draft receivership order to Defendants' counsel that provided in clause 3(j) of the order for the usual power of a receiver to prosecute, defend and settle litigation. That provision also required the receiver to investigate the Cause of Action and to report to the court on its investigation on notice to BMO and the Defendants if it chose not to seek court approval to sue CES.
>
> (d) Defendants' counsel responded on August 10, 2009 by e-mail (the letter is incorrectly dated July 30, 2009) seeking a change to clause 3(j) (the Requested Change) to "...reflect that the Defendants are at liberty, at their cost, to pursue the claim against Calgary Exhibition & Stampede Limited in the event that the Receiver elects not to do so..."
>
> (e) The Defendants made another settlement offer on August 11, 2009 for $20,500,000 to be paid by the guarantors by installments, the last of which would occur by September 20, 2009. This offer also spoke of a management agreement with the receiver.
>
> (f) BMO's counsel responded on August 11, 2009, accepting the money payment offered by the guarantors and offering this comment about the proposed management agreement: "...BMO cannot fetter the discretion of the Court and the entering into any Management Agreement by Deloitte & Touche would be subject to Court approval. That said, if BMO, as the largest creditor of Calgary West and Deloitte, as the Receiver support entering into a Management Contract with your client's management company, we are hopeful that the Court would be persuaded that entering into a Management Contract was in the best interests of all parties." Aspects of BMO's letter of August 6th referencing the receivership also were incorporated by reference.
>
> (g) On August 12, 2009, a revised draft receivership order incorporating the Requested Change was circulated by counsel for BMO to counsel for the Alberta Gaming and Liquor Commission, Deloitte & Touche, the Defendants and CES (the August 12th Draft). Clause 3(j) of the August 12th Draft read, in part:

> ...In respect to potential for commencement for proceedings as against (CES), the Receiver shall investigate the commencement of such proceedings and shall report to this Court in respect thereto upon notice to BMO and the Defendants and in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants shall be authorized to commence such proceedings. The Receiver shall not settle or compromise any claim against CES without first obtaining the approval of the Defendants and failing such approval, the Order of this Court."
>
> [Emphasis added.]

(h) Deloitte & Touche's counsel indicated that leave of the court would be required before the Defendants could pursue the Cause of Action. On being advised of that, Defendants' counsel sent a letter to BMO's counsel on August 12th (the "August 12th Letter") saying:

> You have advised that the solicitor for the Receiver has requested a further change to paragraph 3(j) of the Receivership Order. I do not see the need for the change. However, I also do not see the need for incurring additional costs for the Receiver's solicitor to attend in Court to argue the matter. It does not make economical sense. Having said this, please provide me with a revised form of Receivership Order that includes the change requested for the solicitor for the Receiver.

(i) The August 12th Draft was amended to reflect the Receiver's request, signed by the Defendants' counsel, and returned to BMO's counsel later in the day on August 12, 2009.

(j) The Receivership Order was granted on August 13, 2009. The relevant portion of clause 3(j) of the Receivership Order reads as follows:

> ...In respect to potential for commencement for proceedings as against (CES), the Receiver shall investigate the commencement of such proceedings and shall report to this Court in respect thereto upon notice to BMO and the Defendants and in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants may seek leave of the Court to commence such proceedings. The Receiver shall not settle or compromise any claim against CES without first obtaining the approval of the Defendants and falling such approval, the Order of this Court."
>
> [Emphasis added.]

(k) The guarantors' settlement with BMO was concluded in October 2009. Monies were paid and releases given.

(l) Since its appointment, the Receiver has carried out its mandate, including operating the casino while it was being marketed, and investigating the proposed litigation. A broad marketing effort resulted in sale of the casino for nine million dollars to corporate and trust vehicles controlled by CES. [The Receiver's Third Report to the Court indicates that it had been proposed that concurrent with the sale, CES would acquire all or a portion of the debt and security held by BMO over Calgary West's present and after acquired property. It is unknown whether that occurred.] The sale was approved by the court in May 2010.

(m) Even with the monies paid on the guarantees and the net proceeds from the casino sale, BMO has sustained a shortfall of more than thirty million dollars. The Receiver reported in May 2010 that it anticipated there would be no funds available for distribution to the unsecured creditors.

8 The Receiver has not sought the approval of the court to pursue the Cause of Action against CES itself. As a result, the present cross-applications have been brought. The Cause of Action is a chose in action which, subject to any agreement between BMO and the Defendants and the effect of clause 3(j) of the Receivership Order, is captured by the security made in BMO's favour.

III. The Issues

9 The interconnected issues in relation to the cross-applications are:

A. Should the Defendants be granted leave to pursue the Cause of Action at their own cost and for their own benefit?

B. If not, how should the Receiver realize on the value of the Cause of Action?

IV. The Parties' Positions

10 The Defendants assert that it would be unfair and constitute a miscarriage of justice to deny them leave to pursue the Cause of Action at their own cost and for their own benefit, since BMO agreed that they could do so.

11 Alternatively, they argue that if leave is denied and the Cause of Action is put to auction, BMO and CES should be excluded from the bidding process; BMO because of the alleged agreement and CES because it is not a known creditor of Calgary West.

12 BMO contends that the wording of clause 3(j) of the Receivership Order is sufficient evidence of it having reserved the right to argue against the Defendants being allowed to pursue the Cause of Action if the Receiver elected not to do so itself. BMO takes the position that there was no agreement between it and the Defendants. It says that it did not require a consent receivership order as a condition of the settlement with the guarantors and was merely deferring decision-making. It says that it only consented to the final Receivership Order and that the August 12th Draft was just that, a draft. It asserts that it has not released its security in the Cause of Action and wants to bid on it.

13 The Receiver submits that the Defendants' leave application supports a finding that the Cause of Action is an asset of some value that should not be given away for free. It contends that even if the alleged agreement between BMO and the Defendants exists, it cannot override the Receiver's fiduciary duty to maximize recovery for the creditors or derogate from the court's jurisdiction. The Receiver wants to put the Cause of Action to a bidding process involving the Defendants, CES and BMO as the "most interested" parties.

V. Analysis

A. Should the Defendants be Granted Leave to Pursue the Cause of Action at Their Own Cost and for their Own Benefit?

14 The Defendants' leave application hinges on whether they can establish in this summary hearing that they should be allowed to pursue the Cause of Action at their own cost and for their own benefit because:

1. all interested parties agreed that they could do so; or

2. the Cause of Action has no value for the estate; or

3. there is some reason why the estate should not benefit from realizing on the value of the Cause of Action.

1. Is there an agreement by all interested parties?

15 The Defendants contend that BMO agreed that they could pursue the Cause of Action at their own cost and for their own benefit if the Receiver elected not to do so, as evidenced by the August 12th Draft.

16 However, while the Cause of Action remains the property of Calgary West and while BMO has security in the Cause of Action, neither has control over that property. It is the Receiver which has possession and control over the

Cause of Action. There is no dispute that the Receiver refused to agree to the August 12th Draft and insisted that the Defendants would have to seek court approval to commence the litigation.

17 The Defendants do not allege any agreement on the part of the Receiver to consent to their leave application. Indeed, Victor Kroeger, who swore an affidavit on behalf of the Receiver, deposed that at no time was the Receiver a party to any agreement with the Defendants or any other party to the effect that the Defendants could proceed, for their own benefit, with a claim against CES should the Receiver elect not to pursue such a claim.

18 Even if BMO did enter into the agreement alleged by the Defendants, that agreement would bind only those two parties. At most, BMO could have agreed to compromise only its own position, not that of Calgary West's other creditors. If the implication of the alleged agreement is that BMO would relinquish its security in the Cause of Action or not take any benefit from it, the Cause of Action would remain the property of the Defendants. That property would still fall under the receivership and should be available to benefit the other creditors. The Defendants do not allege that Calgary West's other creditors agreed that the Defendants could pursue the Cause of Action if the Receiver decided not to do so.

19 The Receivership Order speaks for itself. The language of clause 3(j) is clear. Leave is required before the Defendants can pursue the Cause of Action. For their own reasons and based on their own perceptions of the consequences, the Defendants agreed to that language. It is a valid, subsisting and binding order. It is also a sensible order as it properly recognizes and preserves the functions of the Receiver and the court.

20 A court-appointed receiver is an officer of the court with fiduciary obligations to the estate (*Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53). A court appointed receiver is not subject to control by the party appointing it or by anyone other than the court.

21 The Receiver here has not sought the approval of the court to pursue the Cause of Action at the expense of the estate, but rather is proposing a limited sales process which it believes could result in the estate obtaining maximum value and realization on the Cause of Action.

2. Does the Cause of Action have some value for the estate?

22 I agree with the Receiver that the Defendants' leave application and BMO's support for the Receiver's proposal to allow the Defendants, BMO and CES to bid on the Cause of Action are evidence that the Cause of Action has some value. As a result, the potential exists for the creditors to benefit from a sale of this property.

23 Having investigated the Cause of Action, the Receiver has elected not to pursue it. Presumably, if the Receiver was of the view that the Cause of Action might have a value of over 30 million dollars, it would have decided otherwise.

24 As BMO is Calgary West's principal secured creditor (unless its security has been assigned to CES) and as it is still owed over 30 million dollars, the reality is that it is the only creditor which could benefit from the proceeds received from a sale of the Cause of Action, unless the Defendants can prove that BMO agreed to relinquish its security in that asset and/or agreed not to take any benefit from the Cause of Action, in which case the other creditors of Calgary West might receive a benefit.

3. Is there some reason why the estate should not benefit from realizing on the value of the Cause of Action?

25 No contractual, equitable or other reason has been cited by the Defendants why its creditors, other than BMO, should not benefit from a sale of the Cause of Action.

26 The Defendants may have a cause of action against BMO if they can prove that the bank impliedly agreed not to contest their leave application. However, that need not be decided now. The Defendants can file a statement of claim against BMO if they choose to do so.

27 The Defendants contend that the court should not allow a process that could result in BMO reneging on its agreement to allow them to pursue the Cause of Action at their own cost and for their own benefit.

28 I agree that it would be inequitable to allow BMO (and presumably any assignee of its security in the property of Canada West) to participate in the bidding and/or to benefit from a sale of the Cause of Action if the Defendants can prove that BMO expressly or impliedly agreed not to do so. That issue can be addressed in relation to the Receiver's application. However, as I have stated previously, even if the Defendants can prove the alleged agreement with BMO, that agreement cannot prejudice the rights of other creditors.

29 The Defendants' application for leave to pursue the Cause of Action at their own cost and for their own benefit is denied.

B. How Should the Receiver Realize on the Value of the Cause of Action?

1. Bidding process

30 Section 247 of the *BIA* specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner.

31 The Receiver here is of the view that more can be realized for the estate by putting the Cause of Action up for bidding by the Defendants and CES (the most interested parties to the proposed litigation) and by BMO (the "most interested" creditor), than by pursuing the Cause of Action itself at the expense of the estate.

32 There is case law which supports the Receiver's proposal to put the Cause of Action up for bids. In *Katz, Re* (1991), 6 C.B.R. (3d) 211 (Ont. Bktcy.)), Farley J. considered an application to set aside the sale of a lawsuit by a trustee in bankruptcy who had sold a piece of litigation after seeking sealed bids from the only two likely bidders, the "parties friendly to the two sides of the action." The highest and successful bidder was a company owned by the defendants to the litigation, which beat out the bankrupt. Mr. Justice Farley observed that the result of the sale was a settlement of the lawsuit for the price of the assignment, concluding that the process and result were legitimate.

33 Farley J. compared (at para. 5) the trustee's duty to that of a receiver. Citing *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.)), he considered the following to be factors relevant to assessing the propriety of a receiver's action in selling assets:

> (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) the interests of all parties;
>
> (iii) the efficacy and integrity of the process; and
>
> (iv) whether there has been unfairness in the working out of the process.

34 In my view, these considerations also apply to a receiver's intended sale process.

35 There are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern (as on an application to approve a sale completed by a receiver) should be whether the process is reliable, transparent, efficient, fair and one which guards the parties' interests.

36 The Defendants do not suggest that the proposed bidding process would constitute champerty and maintenance. Given the commercial interests at stake, I agree (*1239745 Ontario Ltd. v. Bank of America Canada* ([1999] O.J. No. 3178 (Ont. S.C.J.) at para. 67). They simply take the position that neither BMO nor CES should participate in the bidding. They offer no alternatives, presumably as they wish to be the only bidder.

37 Like Farley J. in *Katz, Re*, I consider the process of calling for tenders one that invites fairness (at para.12). A bid process or auction involving the only directly interested parties, the Defendants, CES and BMO would provide an efficient and commercially reasonable approach to monetizing the asset. The question is whether it would be fair and one which guards the parties' interests.

2. Who should be invited to participate?

38 The Defendants argue that it would make no sense to include CES in the bidding process. However, as the intended defendant in the Cause of Action, CES may well have an interest in bidding as a sale to it would constitute a settlement of the lawsuit.

39 BMO, assuming it has not assigned its security to some other entity, is the principal secured creditor of Canada West and has an interest in recovering as much as possible on the debt owed to it.

40 As previously stated, the Defendants urge that it would be unfair to allow BMO (and presumably any assignee of its security in the property of Canada West) to participate in the bidding and/or to benefit from a sale of the Cause of Action since it agreed that the Defendants could pursue the Cause of Action for their own benefit if the Receiver elected not to do so. The Defendants, in bringing their own application and in opposing BMO's right to bid on the Cause of Action, in essence are seeking a form of summary judgment.

41 It is helpful in framing the analysis to consider the following principles governing summary judgment:

> 1. The party who applies for summary judgment bears the evidentiary burden of proving all facts necessary to establish its claim on a balance of probabilities (*Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, 339 A.R. 165 (Alta. C.A.)); *Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (Alta. C.A.)). The evidentiary burden then shifts to the other party to prove that there is a genuine issue for trial, although the ultimate burden remains with the moving party.
>
> 2. It must be beyond doubt that no genuine issue for trial exists *(Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126 (Alta. C.A.) at para. 14, citing *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at paras. 9-10, (2006), 401 A.R. 88 (Alta. C.A.)).
>
> 3. If the outcome of the case depends on the interpretation of a statute or document or some other issue of law arising from undisputed facts, the test is whether the issue of law can fairly be decided on the record before the court. It may be necessary to have a full trial if the legal issue is unsettled, complex or fact dependent, in order to provide a proper foundation for the decision (*Tottrup* at para. 11).

42 As to consideration for the agreement alleged by the Defendants, David Will, one of the Defendant guarantors and a director of Calgary West, deposed that:

> At the same time as the proposed Consent Receivership Order the Defendants proposed a settlement on the Guarantees which was accepted by the Plaintiff. The settlement included a Consent Receivership Order as well as the payment of $20,500,00.00 on the Guarantees. However, included in this settlement was the agreement of the Bank of Montreal that the Defendants could proceed with a claim for their own benefit, against the Calgary Exhibition and Stampede Limited in the event that the Receiver elected not to do so.

43 While it is not entirely clear, this statement seems to suggest that it was a condition of the Defendants' agreement to consent to a receivership order and to reach a settlement on the guarantees that BMO would allow the Defendants to pursue the Cause of Action for their own benefit if the Receiver elected not to do so.

44 The "without prejudice" correspondence entered into evidence does not disclose an express requirement by BMO for a consent receivership order as a condition of its settlement with the guarantors, nor an express requirement by the

guarantors that the Defendants be allowed to pursue the Cause of Action as a condition of their settlement with the bank. However, there were repeated references to receivership that began with the Defendants' opening offer of July 31, 2009 and continued until the parties' attentions turned to drafting the receivership order.

45 BMO contends that a consent receivership order was not a condition of BMO's settlement with the Defendants, but rather arose from Calgary West's notification of its intention to "hand over the keys" to BMO and its advice that BMO could "continue operations under its security."

46 David Ross, the lead special accounts manager at BMO assigned to this loan, swore an affidavit in opposition to the Defendants' application. In questioning on that affidavit, he confirmed that settlement discussions with the guarantors and discussions concerning a consent receivership order were being held within the same time frame. However, he denied that the two were a package deal. He reluctantly acknowledged that he had had "no objection" to the Defendants' Requested Change, but later added that the August 12th Draft was a draft order which had to be agreed to by other counsel.

47 As to the terms of the alleged agreement, the Defendants maintain that BMO's August 12th Draft included their Requested Change and accurately reflects the intentions of BMO and the Defendants and what actually was agreed to by them. It stresses that it was the Receiver and not BMO which sought amendment of clause 3(j).

48 On August 10, 2009, counsel for the Defendants requested an amendment to the initial draft of the receivership order to "...reflect that the Defendants are at liberty, at their cost, to pursue the claim against Calgary Exhibition & Stampede Limited in the event that the Receiver elects not to do so..." No mention was made of who was to receive the benefit if the Cause of Action was successfully litigated.

49 The August 12th Draft stated: "... in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants shall be authorized to commence such proceedings..." Again, no mention was made of who was to receive the benefit of pursuing the Cause of Action. Nor was mention made as to who would bear the cost of the litigation.

50 In its submissions, BMO states that: "[o]n August 12, 2009, the Receivership Order was revised to reflect the changes requested by RMRF to paragraph 3(j) and was circulated ... for comment and agreement thereto." At most then, BMO appears to be acknowledging that the August 12th Draft was intended to reflect the Requested Change that the Defendants be at liberty, at their cost, to pursue the Cause of Action.

51 Murray Sutherland, a special accounts manager with BMO, deposed that:

> 1. Before the Receivership Order, BMO deferred making a decision about who would benefit from the proposed litigation as it was unnecessary to do so earlier;
>
> 2. Clause 3(j) of the Receivership Order allowed the parties to defer their decisions and advance all available arguments on a leave application;
>
> 3. There was no discussion about selling the proposed litigation before the Receivership Order or about BMO releasing its security in it.
>
> 4. BMO never entered into the agreement alleged by the Defendants.

52 BMO is a sophisticated lender. It involved its special accounts branch and veteran insolvency counsel to deal with the Defendants and this receivership. Given the experience of those involved, I would have expected BMO to respond to the Defendants' Requested Change with a clear statement that it wished to defer any decision on who should benefit from the Cause of Action, if that in fact was its intention. Instead, BMO's counsel prepared and circulated the August

12th Draft, which incorporated the Requested Change. In doing so, BMO ran the risk that the Receiver would agree to the August 12th Draft. If BMO's counsel had no objection to the Defendants' Requested Change but questioned whether the Receiver might, why was that not communicated clearly? If BMO was concerned about fettering the court's discretion and the need for court approval, why did it not provide for that in the April 12th Draft?

53 I note that in communications dated August 11, 2009, the Defendants sought a management contract with the receiver as part of the settlement. BMO's counsel responded, advising that BMO could not agree as it would fetter the court's jurisdiction and that court approval was needed. He went on to say "...we are hopeful that the Court would be persuaded that entering into a Management Contract was in the best interests of all parties." This is an unequivocal statement of position. If BMO had decided that it could not accede to the Defendants' Requested Change without the receiver's approval and, ultimately, court approval, it is surprising that it did not make a similarly clear statement of position. Rather, BMO's counsel simply circulated the August 12th Draft.

54 BMO's explanation for the August 12th Draft, the position which it now takes, and the conflict in the evidence with respect to consideration for the alleged agreement raise questions of credibility, which cannot be determined summarily. In my view, there is a genuine issue for trial as to whether there was an agreement (aside from any reflected in the Receivership Order) between the Defendants and BMO concerning the Defendants' pursuit of the Cause of Action and, if there was such an agreement, what the express and implied terms of that agreement were.

55 I am directing a trial of those issues. Counsel are to appear before me within the next 30 days in order to discuss the manner of proceeding.

56 Should BMO be precluded from bidding on the Cause of Action in the interim? The tripartite test for an injunction is whether the applicant can demonstrate: (1) there is a serious question to be tried; (2) the applicant would suffer irreparable harm if the stay were refused; and (3) the balance of convenience favours the stay: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.); *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764 (S.C.C.).

57 I have already concluded that there is a serious issue to be tried. The parties did not make submissions on the other parts of the tripartite test. Given that there may be a limitation period approaching in terms of the Cause of Action, I conclude that it would be more appropriate as an interim measure to direct the Receiver to file a claim in respect to the Cause of Action in order to preserve the rights of the Defendants and BMO. The Cause of Action can be put up for bidding after the trial of the issues between the Defendants and BMO, if appropriate. If no bids are received, the Receiver may discontinue the litigation. The Receiver may apply to the court for directions as to whether the estate or some other party should be responsible for any costs incurred by the Receiver in commencing the action.

58 The Receiver and BMO are to have their costs of the Defendants' leave application. If the parties cannot agree on costs of the Receiver's application, they may speak to me on issue within the next 30 days.

Defendants' application dismissed; receiver's application granted in part.

3

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

(b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties 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.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable.

After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer

represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the

process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to 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. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely

and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. 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.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it

is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

Goodman J.A. **(dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from

October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written

notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes

approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

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2014 ONSC 1173
Ontario Superior Court of Justice [Commercial List]

GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.

2014 CarswellOnt 2113, 2014 ONSC 1173, [2014] O.J. No. 835, 238 A.C.W.S. (3d) 101

GE Canada Real Estate Financing Business Property Company, Applicant and 1262354 Ontario Inc., Respondent

D.M. Brown J.

Heard: February 18, 2014
Judgment: February 24, 2014
Docket: CV-12-9856-00CL

Counsel: L. Pillon, Y. Katirai, for Receiver
L. Rogers, for Applicant, GECanada Real Estate Financing Business Property Company
C. Reed, for Respondent and Keith Munt, principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer
A. Grossi, for Proposed purchaser, 5230 Harvester Holdings Corp.

***D.M. Brown J.*:**

I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property

1 PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

2 The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

3 After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

4 The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for $10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of $9.95 million. In January, 2013, the listing price was reduced to $8.2 million.

5 In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

6 Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

7 Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to $6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

8 One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to $6.8 million.

9 On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

10 As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

11 The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at $6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

12 In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

13 By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately $593,000 of the $600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

14 The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

15 In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

16 The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

17 The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, "clean" - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations — and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

18 The only personswho opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver's materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

19 At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver's request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

20 The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the "Receiver's Confidentiality Agreement"). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

21 By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

> As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

22 On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

23 On January 23 Debtor's counsel wrote to the Receiver:

> My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

24 The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

25 The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

26 Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

27 On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

28 At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver - i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/ letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

29 The Receiver's Confidentiality Agreement contained a recital which read:

> The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.

2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person toeffect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.

3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.

4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

30 Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

31 By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

32 In *Sierra Club of Canada v. Canada (Minister of Finance)* [1] the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects. [2] As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer - receiver, monitor or trustee - filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

33 The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids. [3]

34 To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain

sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

35 From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

36 Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

> (i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank v. Soundair Corp.*,[4] specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;
>
> (ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership — a proper request. The Debtor was prepared to agree to that term;
>
> (iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

37 In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

V. Receiver's request for approval of the sale: The Soundair analysis

38 The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

39 The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it

was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

40 Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

(i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;

(ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;

(iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

41 Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

42 As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

43 As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,[5] motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

44 First, one had to take into account the economic reality of this receivership - i.e. thatgiven the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

45 Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to $356,301.40, and its counsel had incurred fees approximating $188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

46 Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

47 Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

48 Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigationgiven the nature and complexity of the litigation. [6] In this receivership the Receiver had served this motion over a week in advance of the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

49 Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

50 Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of areceivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

51 For those reasons, I refused the Debtor's second adjournment request.

52 Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

53 Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

54 For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

Motion granted.

Footnotes

1 2002 SCC 41 (S.C.C.)

2 *Ibid.*, para. 53.

3 *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]).

4 (1991), 4 O.R. (3d) 1 (Ont. C.A.)

5 2011 ONSC 346 (Ont. S.C.J. [Commercial List]), para. 7.

6 *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), para. 31.

GLOBAL RESOURCE FUND	and	TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.	Court File No. CV-14-10417-00CL
Applicant		Respondents	

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SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
Motion Returnable January 30, 2019

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