Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

BOOK OF AUTHORITIES OF THE APPLICANT
(returnable August 15, 2014)

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INDEX

INDEX

TAB	CASES
1.	*Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Comm. List)
2.	*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Comm. List)
3.	*YBM Magnex International Inc. (Re)*, Court of Queen's Bench of Alberta, Judicial District of Calgary (Court File No. 9801-16691), Transcription of Proceedings (In Chambers) on December 8, 1998
4.	*Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 (Comm. List)
5.	*Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.)

TAB 1

Indexed as:

Bank of Nova Scotia v. Freure Village on Clair Creek

Between
Bank of Nova Scotia, applicant, and
Freure Village on Clair Creek, Freure Management and Freure Investments, respondents/defendants, and
Toronto-Dominion Bank and Canada Trust, creditors

[1996] O.J. No. 5088

40 C.B.R. (3d) 274

1996 CarswellOnt 2328

1996 CanLII 8258

Ontario Court of Justice (General Division)
Commercial List

Blair J.

May 31, 1996.

Mortgages -- Mortgage actions -- Action on covenant -- Practice -- Summary judgment -- Receivers -- Appointment -- By court.

This was a motion by the Bank of Nova Scotia for summary judgment regarding covenants in certain mortgages and the appointment of a receiver-manager. Three of the mortgages granted by Freure Village to the Bank had matured and had not been paid. A fourth mortgage was in default due to tax arrears. The Bank was owed in excess of $13,200,000. Freure argued that the Bank had agreed to forebear for six months to a year such that the monies were not due and owing at the time the demand was made. The mortgage covenants permitted the Bank to appoint a private receiver-manager. Freure argued that the Bank could effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver. Freure also argued that a court-appointed receiver was more costly than a privately-appointed one.

HELD: Motion granted. On the evidence, there was no merit to the defence that the Bank had agreed to forebear. The Bank was entitled to summary judgment. It was just and convenient for there to be a court-appointed receiver. An attempt by the Bank to enforce its security privately would probably have led to more litigation. The interests of debtors and creditors and the orderly disposition of the property were better served by the Court appointing a receiver-manager.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 101.

Ontario Rules of Civil Procedure, Rules 20.01, 20.04.

Counsel:

John J. Chapman and John R. Varley, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust.

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1 **BLAIR J.** (endorsement):-- There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

The Motion for Summary Judgment

2 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

3 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225; Irving Ungerman Ltd. v. Galanis (1993) 4 O.R. (3d) 545.

4 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii)

that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

5 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

6 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

7 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the Courts of Justice Act rate.

Receiver/Manager

8 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

9 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

11 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

12 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

13 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

14 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

15 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

16 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

BLAIR J.

TAB 2

Case Name:

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.

APPLICATION UNDER Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended
RE: Elleway Acquisitions Limited, Applicant, and The Cruise Professionals Limited, 4358376 Canada Inc. (Operating as itravel2000.com) and 7500106 Canada Inc., Respondents

[2013] O.J. No. 5399

2013 ONSC 6866

Court File No. CV-13-10320-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: November 4, 2013.
Judgment: November 27, 2013.

(34 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Notice -- Order -- Appointment of receiver -- Powers -- Realization of property -- Managing the business of the debtor -- Sales by receiver -- Equitable receivers -- Grounds -- Just and convenient -- Application by creditor for order appointing GTL as Receiver without security over all property, assets and undertakings of respondents allowed -- Respondents were debtors and guarantors of credit facility in default and acknowledged inability to pay and consented to early enforcement -- Respondents were insolvent and would need to borrow to continue operating, but unlikely to find willing lenders -- With GTL's appointment and approval of asset sales to applicant's affiliates, purchasers would assume some of respondents' liabilities, cancel portion of indebtedness and continue to operate respondents' travel business, thus saving jobs -- Appointing GTL as receiver just and convenient.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243, s. 244(1), s. 244(2)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Counsel:

Jay Swartz and Natalie Renner, for the Applicant.

John N. Birch, for the Respondents.

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

2 Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"), without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

3 The application was not opposed.

4 The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of GBP 17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under section 244(1) of the BIA. Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

5 Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

6 Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately GBP 3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

7 Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

8 Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

9 It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

10 Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

11 itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

12 The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

13 Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

14 The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

15 Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

16 Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the "Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

17 Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

18 Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of itravel Canada.

19 Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "itravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the itravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of itravel Canada (the "Purchase Transactions").

20 If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

21 The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

22 The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

23 This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

24 Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

25 Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

26 In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 at para. 10 (Gen. Div.)

27 Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

28 Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;
(a) the relationship between the debtor and the creditors;
(b) the likelihood of preserving and maximizing the return on the subject property; and
(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

29 Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

30 It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

(a) the potential costs of the receivership will be borne by Elleway;
(a) the relationships between itravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;
(b) appointing GTL as the Receiver is the best way to preserve itravel Canada's business and maximize value for all stakeholders;
(c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and

(d) all other attempts to refinance itravel Canada's debt or sell its assets have failed.

31 It is noted that Elleway has also served a notice of intention to enforce security under section 244(1) of the BIA. itravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

32 Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of itravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both itravel Canada and Elleway.

33 Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of itravel Canada will continue as a going concern and the jobs of substantially all of itravel Canada's employees will be saved.

34 Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of itravel Canada under both section 243 of the BIA and section 101 of the CJA. The Application is granted and the order has been signed in the form presented.

G.B. MORAWETZ J.

cp/e/qlacx/qlpmg

TAB 3

No. 9801-16691

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

IN RE S. 234 OF THE BUSINESS CORPORATIONS ACT, R.S.A. (1980) c. B-15 AS AMENDED

IN RE S. 13(2) OF THE JUDICATURE ACT, R.S.A. (1980) c. J-1

IN RE THE MATTER OF YBM MAGNEX INTERNATIONAL, INC.

P R O C E E D I N G S
(IN CHAMBERS)

Calgary, Alberta
8th December, 1998

Transcript Management Services - Calgary

Proceedings taken in Chambers, in the Court of Queen's Bench of Alberta, Court House, Calgary, Alberta

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8th December, 1998

The Honourable Madam Justice Paperny — Court of Queen's Bench of Alberta

P. Howard, Esq.)
B. E. Emes, Esq.) — For the Applicant

S. O'Brien — Court Clerk

MR. HOWARD: Good afternoon, My Lady.
THE COURT: Good afternoon.
MR. HOWARD: My name is Peter Howard, and along with Barry Emes, we appear for the applicant. With your leave, John Stransman will sit at the counsel table, if that's permissible.
THE COURT: That's fine.
MR. HOWARD: And we want to do an inventory as to what you have in terms of material that has been provided, if you have an originating notice and a draft order and a rather lengthy affidavit of G. Wesley Vorheis?
THE COURT: I have the filed affidavit, both volumes. I have the court file with the originating notice in it, and I do believe I have a faxed copy of

a proposed order. Am I supposed to have anything else?

MR. HOWARD: You're not supposed to have anything else. If I could, I would pass up, we have -- or file -- or, My Lady, the consent of the proposed receiver that we would file, if that were permissible; and also, a binder with the relevant sections of the Acts and any particular cases that may be applicable to -- if issues arise that were ...

THE COURT: Thank you.

MR. HOWARD: And as you say, a fax copy, and it probably isn't the best copy. I have a further copy of the order that may be less repugnant than the fax copy to deal with.

THE COURT: Thank you.

MR. HOWARD: And this is an application by YBM Magnex International Inc. under section 234 and section 231 of the Alberta Business Corporations Act, and specifically, today, 234(3)(b) for the appointment of a receiver manager. And the sections under the Act dealing with receiver manager are found at sections 93 through 96 as well, and those are in the binder that is passed up to you.

Alternatively, this is an application under section 13(2) of the Judicature Act; that it would be just and convenient to appoint a receiver manager in these specific and particular circumstances.

The facts that exist in this case are not commonplace. The jurisdiction to appoint a receiver manager we hope to convince My Lady exist, and that the need for a receiver manager is well established on the material before you.

Subject to your direction and/or questions, I would propose to deal with the application in three parts; first to address some of the background facts, including the interested persons and the discussions that have been held with parties potentially interested in this application, and the specific circumstances that make a receiver manager the appropriate or optimal remedy in this instance, and that would be -- the latter part will deal more closely with the facts.

The second part would be the authority, if you have any questions, to appoint a receiver manager under the specific Acts; and the third area would be to look with you at the elements of this particular order that are specific to these circumstances and depart from the standard, and to discuss and advise as to the thinking and planning that went into them and the authority for this court to make those specific orders.

So dealing --

THE COURT: Go ahead.

MR. HOWARD: Dealing with the first part, the applicant, YBMI, is an Alberta corporation. Its registered office is in Calgary. It was incorporated in March of 1994 as Pratex (phonetic) Technology, and in July of '94, it issued 4 million shares as a junior capital corporation under the regulations of the Alberta Securities Commission, qualifying as a junior capital corporation, and became a reporting issuer under the Alberta Securities Act in 1994.

In October of 1995, by a share exchange reverse takeover with a company called YBM Magnex Inc., which is a Pennsylvania company, the owners of that entity became majority shareholders of Pratex, and there was the name change to YBM Magnex International.

As at March or May of 1998 - it's the same - there were approximately 44.3 million shares outstanding. The company was initially listed on the Alberta Stock Exchange, and in March of 1996, it was listed on the Toronto Stock Exchange.

Early in 1998, in March of 1998, the stock price crested to something in excess of $20, for a market capitalization of approximately $900 million.

The company raised capital on the capital markets in Canada and raised, in 1997, some $106 million in two tranches: the first in August of 1997, it raised 50 -- sorry, $48 million as senior subordinated secured convertible notes; and then when it received its prospect -- our prospectus in November of 1997, it raised a further $58 million, and that prospectus, the receipt for that prospectus, was issued in November of 1997 by the applicable Securities Commissions in Canada, and at that time the subordinated notes were converted to 4 million shares.

With that brief background, if I could perhaps go -- take you to the chart which is tab 7. It shows the corporate structure, and the applicant, which is the public company, is at the top of the chart, and two underneath it you'll see Krumax (phonetic) Magnetics Inc.

THE COURT: Mm-hm.

MR. HOWARD: That entity was purchased in August of 1997 for some 28.7 million U.S. cash, and 6.4 million assumption of liabilities. And that's a magnets business in -- that's based primarily out of Elizabethtown, Kentucky. And the reason I focus on it and other of the businesses is those businesses were laterally acquired, and there is no reason to think that the troubles that may relate to the other entities have infected these particular entities.

And the last acquisition that I'd refer to is the U.K. company under Krumax U.K. in the box, and it was acquired in March of 1998 from Philip Electronics for approximately U.S. $7 million, and it was incorporated with the U.K. business that existed for Krumax Magnetics Inc., and those two entities are addressed separately in the order, and that's the reason I spend some time identifying them separately now and their latter acquisition.

The business of the company is described in the prospectus which is at tab 8, was -- at page 4, and as a general description, the company as an enterprise sold neodymium magnets, which are used in computers, audio video, electronics, automobiles and general machinery.

You'll see also here described the Sheppel (phonetic) subsidiary, which is a bike manufacturer in Hungary, and certain other businesses are described, and there's the sale of oil in combination with neodymium powder, which is a refined -- said to be a refining process, and then there's made reference to United Trade Limited, which is a Cayman's company.

And if you just flip back to the org -- organization chart, you'll see that the Cayman's company is UTL under YBM Magnex Inc., which is the Pennsylvania head office company, and then the Hungarian magnet manufacturer is under the Cayman company. And the Hungarian -- those companies were the ones that were vended in as part of the reverse takeover.

And the board of the company, as at May of 1998, was comprised of eight persons. In terms of management on the board, there was the president and

CEO, Jacob Bogatin, and the Chief Operating Officer, Igor Fisherman. And there were six other directors, and they were Harry Antes, Michael Schmidt, Kenneth Davies, David Peterson, the former premier of Ontario, and Frank Greenwald. And then there was a director named Owen Mitchell, who remained a -- remained a director throughout until today. And Owen Mitchell was a director and officer of First Marathon, which was one of the underwriters of the company.

In 1997, YBM reported sales of approximately 138 million U.S., and net income of approximately $26 million U.S. In excess of 57 percent of those sales and all of that profit was said to come from the operations of UTL, in combination with the Hungarian Magnex RT.

And all these -- I'm not giving you the page references or paragraph references, all these -- there's evidence for this in all of Mr. -- in Mr. Vorheis's affidavit.

Up until June of 1998, when they resigned, the auditors of the company, the public company, were Deloitte & Touche. And for these purposes, to pick up the fact-specific chronology, in April of 1998, at tab 10, when Deloitte & Touche wrote to the company, and I would specifically draw your attention to the third paragraph, where Deloitte & Touche says:

Our preliminary search has also indicated that

> certain individuals associated with these entities ...,

that's entities with which the company was doing business,

> ... and certain other related entities are reputed to have ties with organized crime. The information obtained heightens our serious concerns that these transactions may be bogus and are being used to cover the flow of money between these companies for other purposes.

And as you can see from the balance of the letter and the chart that's enclosed, Deloitte & Touche was raising concerns about transactions totalling some $168 million U.S.

And the breakdown of what they were concerned about, as set out in Mr. Vorheis's affidavit, is some $48 million of transactions which would see money flowing from the company to certain entities -- either would or had seen money flowing from the company to certain entities for plant acquisition in various places in Russia and Romania, for technology contracts, and for equipment upgrades from various companies. That's 48 million.

Then there was $39 million of sales of samarium and neodymium magnets that they had some -- raised some questions about. That's resale of SM Co. (phonetic) and neomagnet sales, and then some $24 million of purchase of those various types of magnets, neodymium and samarium. Neodymium is a magnet the company makes. Samarium is a type of magnet the company does not make in any of its plants.

And then there were transactions for the purchase of diesel oil that Deloitte was also raising some concerns about, totalling some -- again, some $48 million. And this is in -- these are transactions of some $160 million U.S. in the context of a company that had total yearly sales for '97 reported of 137 million.

And the circumstances and the company's reaction to this Deloitte's letter and Deloitte's obvious concern are set out in Mr. Vorheis's affidavit, but the next salient event is that on May 13, 1998, the FBI and the Organized Crime Strike Force raided the company's premises in Pennsylvania - that's the head office premises in Pennsylvania - pursuant to search warrants and -- which are set out in the documents.

And obviously, on the same day, both the Alberta Securities Commission and the Ontario Securities Commission cease traded the stock on the TSE. That would be the OSC, and then the ASC also had a cease trade order.

And then the next period after those rather public and important events were -- was basically from May to September, when the company, with the existing board and management, attempted to address the Ontario Securities Commission cease trade order and the proposed hearing and the criminal matters in the United States.

And the important points to draw to your attention in that period are really that the professional advisors, Miller Tate, which was a forensic accountant who was retained, Heenan Blakey (phonetic), and specifically Joseph Groya (phonetic), counsel -- former enforcement counsel of the OSC, and Pepper Hamilton, the U.S. counsel, started out on the basis that what they were going to do was answer the concerns of the Securities Commission. They were going to organize and obtain the evidence to prove that the transactions in question by Deloittes and by the Securities Commission and others were legitimate.

And as set out in the affidavit, to do that they expended considerable effort. Miller Tate and Heenan Blakey went to Hungary to seek to obtain documents, and they came back and reported to the board, and the extract from the report to the board is included at tab 25 of the affidavit. And they're kind of -- they are extensive and frank minutes for directors' minutes, but the gist of them is, is Mr. Groya reports on page 3 of the tab, and the third full paragraph down, They came back from Budapest with more questions than answers.

And they had went to seek documents, and they had not received any to substantiate the transactions, or hardly any. And not only that, what they had learned had heightened their concerns, and it now was not just a question of answering the OSC concerns, it was for the board to be advised that its professional advisors were having serious concerns about the underlying transactions.

And as a result of what the board didn't do as a result of the July 30 meeting, Heenan Blakey tenders its resignation on August 18th. The other lawyers for the company, Cassels Brock, tender their resignation on the same day. McCartney Tetrault was briefly retained at the end of August and resigns in early September.

And without multiplying examples, Mr. Groya, in his resignation letter which is at tab 28, makes it clear in the last full paragraph on the first page, that:

> His review has caused us to have serious concern that there are in fact significant problems in the company's accounting, financial statement and business.

And he goes out to spell out those concerns throughout the balance of the letter.

In early August, Mr. Peterson resigns from the board, and at that point there are discussions between representatives of Connor Clark, which is a 14.4 percent shareholder in the company, and members of the board about obtaining representation. The shareholders at this point are getting tired of waiting for the explanations as to what occurred in April and May.

And as set out in Mr. Vorheis's affidavit, there was an application before this court in September, 1998, beginning on September 18 and concluding on September 22nd, where the old board is removed, with the exception of Mr. Bogatin and Mr. Mitchell, and three new members, or the majority of the board, Mr. Vorheis, Mr. Coxford, and Mr. McDougall are appointed. So that's, in effect, the close of that period.

There's a new board, and their mandate is to go in and assess the situation, and obviously, in keeping with their duties, to maximize value for the shareholders, try and find out and establish and report back to the shareholders, and that's part of what we're doing here today, as to what they can find out about the situation, what the prospects and what the optimal way forward, if any, is for the company.

And immediately upon the appointment of the new board, there's a special committee set up, including Mr. Vorheis and Mr. Coxford, initially with Mr. Mitchell, but thereafter just the two. That committee met with everyone who would meet with them, as spelled out in Mr. Vorheis's affidavit.

They immediately tried to put in place financial controls, and Mr. Vorheis's affidavit makes reference to the types of controls they did, transaction controls, tried to repatriate all the money that was in the various bank accounts to Canada, and came up with a list of entities for which the transactions had to be approved by the board.

The management was supposed to come forward and justify to the board -- the transactions with these entities were put on the designated list that they were defined in -- in Mr. Vorheis's affidavit as suspect entities, but there was a long list, and if management wanted to do a transaction with those entities, they were supposed to come forward and justify that transaction was bona fide.

And as you'll see from the affidavit of Mr. Vorheis, those controls were followed in North America by Elizabethtown and in the U.K., but they were circumvented in UTL and in Eastern Europe, or not followed to some extent.

And that situation exists at present, and is one of the situations that is best addressed by an oppression remedy because, of course, the oppression remedy relates not only to the company but its affiliates, if the affiliates are being carried on --

if the business of the affiliates are being carried on in an oppressive manner.

And that's one of the factors that demonstrates the need for the oppression remedy, because as is set out in the affidavit of Mr. Vorheis, not only is our Eastern European management not following the controls, they are not consulting with the parent on such fundamental matters as closing the business of management RT -- closing the operations of Magnex RT until February, which was done a couple of days ago without any input or approval or advice from the main Board of Directors.

So one of the things they tried to do, with some success in North America, was put in financial management and control.

The second thing they were looking at was the financial performance of the entities, and as set out in the affidavit, the monthlies, beginning for the end -- the monthly for August show that the company is bleeding cash. And whether that's because the transactions that were either -- are bogus are not continuing anymore, the transactions about which concerns of money laundering have been raised are not continuing, or it's because the Eastern European operations have been negatively impacted by the criminal overhang, for these purposes either of those is equally bad for the company. The company is losing money on a monthly basis and bleeding through its cash resources with no realistic prospect of reversing that situation.

And to demonstrate that, perhaps again multiplying examples, if you look at the board minutes from October, Exhibit 37, and these are the minutes of the board for a meeting held October 14, '98, and the operating situation is summarized on page 7 of those minutes, and Mr. Bogatin who reports the operating situation of the company's Eastern European subsidiaries has deteriorated badly, and that although some orders continue to be received, payments on new orders and aging accounts receivable are extremely slow, and that the business is now going into hibernation, and that the business will continue to suffer badly pending resolution of ongoing regulatory investigations.

And without reading through this in particular, both Mr. Bogatin and Mr. Gatti, the CFO, the existing CFO, on page 8, Mr. Gatti indicates that in his view the company is in dire straits and that, as set out on the top of the page, that Kentucky is either presently cash flow neutral or generating a nominal amount of positive cash flow, but everything else is negative.

So what happens in the fall is that the cash that exists or remained in the company of some -- as we sit here today some $30 million Canadian, has been repatriated to Canada through the efforts of the new board, but the stand-alone, the separate entities, are proceeding, but Kentucky is basically break alone -- break even or slightly positive, the U.K. is cash flow negative, but the entities about which the allegations are made have gone into hibernation or shut down. As Mr. Vorheis says in the affidavit, the latest report is that sales for UTL for this month will be zero. And either -- as I said before, either the -- if you'll recall, the engine of the profit or reported profit for the company was UTL and the European operations.

The third thing that the special committee and the new board did was continue and encourage the forensic accountants to come back with their report; and that report is at tab 50 of Mr. Vorheis's affidavit, and the executive summary which is set out in full in his affidavit begins at page 4, but to assist the reader and to assist, certainly, me, page 10, it's useful to start with the definition of money laundering and the unusual transactions that these forensic accountants are using.

And as he says -- the author of the report says that these -- the Deloitte Touche letter raised the concern that YBM may have been involved in money laundering. And the definition, I won't take the time to read it all, continues for the next two pages, and as he concludes at page 12:

In the course of its engagement, Miller Tate has reviewed numerous unusual transactions, certain of which are described below, which have the indicia of money laundering. While our initial approach was to seek appropriate documentation to be able to justify the legitimacy of these transactions, despite our repeated requests, we have not been provided with sufficient documentation to allay our concerns regarding the bona fides of the unusual transactions.

And in summary, back to page 4, they say:

We started, we asked, the issues are real. They require full explanation. We sought to get satisfactory explanation.

And then number two, they have been unable to get what they would consider normal, generic, supporting documentation that would be available in a legitimate or a public -- normally-managed public company, and in most instances these significant transactions involving substantial sums are not supported by corroborative evidence.

In paragraph 3, they say the directive that that documentation be provided to substantiate the transaction wasn't provided to them.

And skipping to five and six, they say:

During the course of the engagement, Miller Tate became aware of several transactions effected by United Trade involving the movement of substantial amounts of money through bank accounts controlled by United Trade. These transactions, which have several indicia of money laundering, were never adequately explained by YBM's management. And the apparent interrelationships, including shared addresses among parties which conducted business with United Trade during '96 and '97, and the unexplained nature of many of the transactions pursuant to which significant amounts of money flowed between these apparently related parties, raises the spectre, absence of properly documented explanation, that certain transactions conducted by United Trade may not have been bona fide.

And to date, they haven't received any such explanation, although they've been trying since June.

So, in that sense, the board has fulfilled that as best they can, the level of its -- of a part of its mandate by having a qualified forensic accountant seek the answers, and it hasn't got them in the time frame when they would have been expected if they were legitimate transactions and answers.

The next part of what was occupying the board in the period is dealing with the criminal overhang that the company faces. And the company was -- the board was informed that obviously the news of the raid and the public announcement of it and the continuing investigation by the Organized Crime Strike Force had a significant negative impact on the company, or has a significant negative impact on the company.

And then specifically in late November, and November 17, in accordance with U.S. legislation, the company was informed of the existence of wiretaps on the company's phone lines from the period late '97 through to early '98.

And then on November 23, the board learns that the president and CEO has received a target letter from the Organized Crime Strike Force in terms of its ongoing investigation; and within two days, the president and CEO, Mr. Bogatin, who was also a director, resigns from those positions and as a member of all the boards of YBM and the subs.

In summary then, where we sit today is, on the -- and it maybe useful if I can ask you to turn to paragraph -- sorry, page 4 of Mr. Vorheis's affidavit, paragraph 9.

In terms of the summary of where we are today is that the company has been advised by its U.S. criminal counsel that it is certain to be indicted absent prior agreement, and that there is good reason to believe that they will be able to marshal substantial credible evidence of criminal wrongdoing by YBM's officers and other representatives.

Continuing, that the company at this point cannot demonstrate that its conduct was not criminal or legitimate, and may well not be able to defend a criminal indictment, and therefore, the cloud of uncertainty that hangs over the company will not be dispelled.

Thirdly, the issues facing the company have resulted in the resignation of its president and Chief Executive Officer, and you'll recall Mr. Fisherman had been -- the Chief Operating Officer had been earlier removed from the board by court order and terminated by the new board as well, so both previously existing senior managers had been terminated.

Next, that the board has concluded that they have tried but they have been unable to implement adequate and effective control and reporting mechanisms in respect of all of the business operations; specifically, as I averred to earlier, that Eastern Europe is ungovernable in this sense; and therefore, that the board which is charged with supervising the operations has a large -- or a portion of the operations that it can't supervise effectively or adequately.

The next conclusion, over the top of the page, is based on what they know and what the result of their forensic audit -- accounting firm is, is that there is no realistic possibility of getting audited 1997 financial statements. And that's the sine qua non for this company ever trading as a public company again to get the cease trade order lifted.

So if we start with -- if you can't get audited financials, we can't get the cease trade order lifted. And if you can't get audited financials, you can't have access to normal financial institutions or financing on commercial terms.

Looking forward then, the next conclusion they say is that since Eastern Europe was the generator of the reported -- and I stress the word "reported," profit in the past, it's not there anymore. As they say, there is a substantial risk that the operations will not be sustainable in the future, but that if the operationally separate businesses can be segregated and -- from those under the scrutiny of the Organized Crime Strike Force, or believed to be under that scrutiny, they could be marketed and provide some return to the shareholders.

And penultimately in (h), the only realistic assumptions remaining true in the status quo, the company is going to continue to bleed through its existing cash resources until they are gone, and asset insolvency of the company will inexorably arrive sometime mid-to-late next year. And so at that point there will be no prospect of return for the shareholders.

At the moment and -- and at the parent, there are no secured creditors and very few unsecured creditors. There's $30 million in cash, approximately, that's Canadian. There is some value or potential value in Kentucky if it can be marketed and sold, but a receiver manager, on the belief of the management of Kentucky itself, will augment the possibility of selling Kentucky, out from under the cloud of the company.

The receiver manager can address the U.K. and deal with that, and either close it down or -- or sell it and market it if possible, and at present what we are suggesting is that it will see if it can do anything with respect to Eastern Europe, but would then -- would come back and report before it took possession of those entities or attempted to take possession because they are in a different -- they are in a different category than the other two.

Turning, if I can, to the second area, which is the authority, I don't know if I need to spend a considerable length of time on it, however --

THE COURT: Well, I do have some questions.

MR. HOWARD: All right. I'll attempt to address them as best I can.

THE COURT: I am interested that you chose to use the vehicle of the BCA and the oppression section specifically. It seems to me that there may be other options available to you, and I am interested in perhaps why you have conjoined the BCA application with the Judicature Act in terms of the breadth of the power that I have there.

MR. HOWARD: The main reason for choice of the oppression section is because there are shareholders of this company -- looking down the road, the distribution will be to -- we hope to the shareholders of the company.

There are allegations, certainly raised with us by the criminal authorities, that current shareholders of the company are -- are involved in the wrongdoing, and the specific sections of the oppression remedy are aimed at -- and give the court the ability to carve out under 234(3), and I've included them in your binder, (h) and (l), to carve out that an order directing the corporation or other person pay to a security holder any part of the money paid by him for securities; and (l), an order compensating aggrieved persons.

So in terms of the available avenues, it appeared to us that the oppression section was where this was going. The conduct of the individuals involved in the criminal activity who are also shareholders, if there is a distribution ultimately by the receiver manager, will hopefully be addressed by carving them out pursuant to those sections. And that would be the main -- the main reason.

The other reason is that the corporation is arguably not insolvent at present. There may be an argument -- there are no civil actions with respect to its prospectuses maintained at present, that we're aware of, but the prospect of that occurring, of course, is there.

But if it's a solvent or arguably solvent corporation, the bankruptcy statutes are perhaps less appropriate; and in any event, as a receiver manager is specifically contemplated under the oppression section, and what we're concerned with, if I could ask you to look to 234(2), that is any act or omission of the corporation or any of its affiliates that has -- and similarly with the next, (b), the business or affairs of the corporation or any of its affiliates. And affiliates under the Act, section 2, includes subsidiaries. And the ongoing conduct of the affiliates is what we're concerned with.

THE COURT: Well, let's start out with the application of this portion of the statute in terms of definition of complainant.

MR. HOWARD: Yes.

THE COURT: It seems to me that the wording of the provision under 231(b)(iii) talks about any other person who, in the discretion of the court, is a proper person to make an application under this part --

MR. HOWARD: Yes.

THE COURT: -- does contemplate potentially a corporation making the application, although it needs to be established, it seems to me, that the conduct has been oppressive, unfairly prejudicial or unfairly disregard of someone.

MR. HOWARD: The shareholders.

THE COURT: Generally speaking.

MR. HOWARD: Yes.

THE COURT: One would have thought, but not necessarily. In these circumstances, can the company be a proper complainant? And assuming that the answer to that is yes, do I need to make the finding of oppression, unfairness or unfairly prejudicial conduct to grant any of the remedies you're seeking?

Because I take -- that takes me then to the next question, which is to what extent, if any, ought there to be notice to those parties whose conduct, in fact, will be the subject of that determination? And if there needs to be notice, what are my powers on an interim basis under this statute, as opposed to the powers that I might broadly have under the Judicature Act?

MR. HOWARD: All right. Those are -- there are four or five there, but answering your first question, Justice McDonald, in the case I've provided to you, indicate -- in the **Gainers** case, indicates at tab 3 that the corporation can be a proper complainant. And I've highlighted the portions that I set out -- that set that out.

Now, as you say, that is -- that was at the preliminary point, and all he -- he didn't say in that case that it was, just that it -- it could be, in certain circumstances, a proper complainant. And we're under the -- the basket clause, as My Lady has identified, 231(b)(iii), and that's what Justice McDonald said where the corporation would be the proper complainant.

Now, to address the second part of your question, or the second question that I choose to address --

THE COURT: Sorry, I didn't mean to fire them off at you all at once, but they were all in my mind so I thought --

MR. HOWARD: -- in which order, is that in three, you may make any interim or final order, and we propose, vis-a-vis anyone who -- who -- the standard order that they be able to come back after being served and seek to -- seek to vary or -- or address the order be included.

So this would not -- the granting of this order in this form as an order today would not preclude someone, should it be likely, come -- from coming forward and saying -- sorry, no matter how unlikely it is, coming forward and saying, Hey, wait. If you're saying that all these things that Mr. Vorheis is saying about the conduct of UTL are unsubstantiated and I wish to address them, they would have that ability by reason of that part of the order.

So it's not --

THE COURT: Well, they would to the extent that the order was -- was suggested to be a without-prejudice order.

MR. HOWARD: Yes.

THE COURT: But if the court actually makes the finding of oppressive conduct in the circumstances, to some extent they are limited in their rights to be heard.

MR. HOWARD: And we have no trouble -- since we're coming back to this court, we have no trouble with it being without prejudice to anybody coming back and saying, No, vis-a-vis me, that's -- that is inappropriate.

But you remember that it's the company itself coming and saying its conduct and its affiliates conduct, its subsidiaries in the corporate chain, so I would suggest, number one, that it is unlikely; and number two, with the preservation of the possibility of coming back, that's in my submission more than sufficient.

The third part of my answer to you, and my overlong answer, is that if you look at the receivership portion itself, section 95, which is in tab 1, specifically contemplates in that case the application by an interested person for the appointment of a receiver. So if -- if authority be needed somewhere else in the Act, that certainly -- the corporation can be the -- an interested person for the appointment of a receiver under (a).

And I should tell you that we have followed the practice in -- as set out in the **Vulcan** case, which is also here in terms of informal or notice to other interested parties prior to coming here, in the sense that we have provided informal notice to -- and in fact obtained comments from some parties as to the terms of the order from the Organized Crime Strike Force, the U.S. authorities, the Ontario Securities Commission, the R.C.M.P., the Alberta Securities Commission, and all those entities have received copies of the material, and some of them have received a copy -- an opportunity to comment upon the order.

And in terms of potentially other -- other potentially-interested parties, the order provides specifically that we're going to serve the order on all the shareholders, so that any shareholder would -- would assume be within the group that might potentially have some complaint about -- about -- as it relates to them, could come back and seek to have the order varied or such further or other order as they may come back and seek. But the existing situation of the company, in our submission, mandates a court appointment.

I want to make sure I've answered all your questions before --

THE COURT: Well, let me -- let me take you back to -- to my question. What under the BCA do you have that you don't have under the broad power that I might have under the Judicature Act?

MR. HOWARD: Nothing alternative.

THE COURT: All right. The question then is, in a circumstance where the court has to make the finding of oppression and there is some degree of concern about interested parties having notice of that, and that after the fact perhaps may not as -- be as procedurally as fair as before the finding is made, what -- if there's no limitation in the Judicature Act with respect to the power, at least on an interim basis, why would -- and there isn't an issue about whether the company is a proper complainant, what would prevent the court from making an order simply under the Judicature Act?

MR. HOWARD: Nothing. However, we would wish the ability, obviously, to come back later under the oppression section for the remedy we may need ultimately; but nothing. If it's just and convenient under the Judicature Act, and that's -- that seems to be the more appropriate way to go as opposed to an interim order under the oppression section, as far as we're concerned, we're --

THE COURT: Okay.

MR. HOWARD: -- content with either. We've included in the authority provided up to you the authority with respect to the Judicature Act and its broad and discretionary powers as to what's just and convenient, but I don't think I need trouble you with that. Just and convenient means what it says.

And perhaps now would be the appropriate time to go through the order and maybe draw your attention to some of the portions that have been included that are special to this situation or not in the standard order.

And the first is in paragraph 1, is that the entity be appointed as Ernst & Young YBM Inc., and I should inform, My Lady, that's an Alberta corporation. The director of that company is David Richardson, who's the chairman of the ENY (phonetic) Canadian Insolvency Practice, and that that company has the same insurance as ENY, and Mr. Richardson is a trustee in bankruptcy and has the same insurance as the ENY Inc. entity that is entrusted in bankruptcy.

But it's a purpose-created entity for this assignment.

And that, also in number one, that the -- there had been a shareholders' resolution in the Top-co (phonetic) -- we're only seeking the appointment over Top-co, and the powers of a number of the subsidiaries have been previously taken up to Top-co by a shareholders's resolution on November 9. And it's the intent of the receiver to -- intent of this order that the receiver manage those or effect the management of those entities through that power.

In terms of what might be seen to be a bit unusual or -- or not standard, in 3(f), at the end of 3(f), we make specific reference to the intention of the receiver to engage a Mr. Robert Zogelman (phonetic), and that's -- he's made reference to in Mr. Vorheis's affidavit. He is -- somebody's got to know something about magnets here. He's from the Kentucky operation, and he is a person in whom the current board and the receiver propose confidence as to his integrity and ability.

Turning to 3(i), it's proposed initially only that the receiver be able to fund the U.S. and U.K. subs on such terms and security as the receiver believes appropriate, and you need to read 3(i) in conjunction with 3(l), which is that for the balance of the subsidiaries what the receiver is to do is to professional advisors and such. In these circumstances the receiver is going to assess them, come back and make recommendations as to a mechanism to, in effect, hand them off to interested shareholders, if -- if that's how they wish to pursue it. That is, will not itself pursue those matters.

It is intended as well, and as is addressed in 3(t), if necessary, to seek a recognition order in the United States under section 304.

I should also draw to your attention, there is the usual charge for the receiver. There are no secured creditors in this instance, but in paragraph 7, we do make specific reference that the receiver has priority for its costs and expenses to any fines or claims that could be advanced by the U.S. authorities and Canadian authorities, and as I say, informal notice of that portion of the order has been given to those authorities.

Paragraph 23 is a matter I should also bring to your attention. I'm sorry, paragraph 21 first, because that's a bit unusual, is that there is a retainer agreement with the company that exists for ENY at present, where ENY has $2 million from the company to apply against its fees and disbursements and those of its professional advisors once there is a settlement, if there is, with the U.S. -- with the authorities, and otherwise we will keep it till its discharge and then distribute it as part of the final distribution.

And paragraph 23 is the advice and directions powers, but in this case, in light of the particular matters involved, if it ever arose, the receiver wants the ability to come back on notice to the various authorities, in appropriate circumstances in chambers, to apply for a discharge, and -- and in light of the individuals involved with this company and the possibility of something arising with respect to the receiver, that is a power the receiver thinks is appropriate, and the authorities have no problem with that.

And I should say, paragraph 24 isn't what -- is not the standard order and should have the vary power in it. And I was -- even before your questions, I was intending to bring it in to your -- My Lady's attention, and it should be included to -- to vary or seek such further order.

And paragraph 27, with Your Ladyship's direction, we might expand that to include without prejudice to their ability to -- to bring back -- bring on a motion to seek to vary or otherwise amend the particular order. But it is the intention -- the shares have been -- there's been a cease trade order since May, so we have the list.

THE COURT: Yes, I would expect it's pretty current.

MR. HOWARD: Yes. And subject to any questions, My Lady, those are the parts of the order that I think are -- oh, there is one other thing that we should do as well, and that is in the preamble, on the top of page 2, we should delete the Department of Justice on behalf of Her Majesty. We have provided it to the R.C.M.P., but not to the Department of Justice, so that should be -- after "and," that should be deleted.

THE COURT: All right. What I would like to do is take some time to review the authorities, and I propose that we reconvene at three.

MR. HOWARD: Three, thank you.

(ADJOURNMENT)

THE COURT: The circumstances of this case, as set out in Mr. Vorheis's affidavit, are indeed unique. The company itself is applying for the appointment of Ernst & Young YBM Inc. as receiver manager of its assets. The application is grounded, alternatively, under the Business Corporations Act of Alberta and the Judicature Act, section 13(2).

The company at this time does not appear to be insolvent. There are no secured creditors. The evidence before me satisfies me that in these unique circumstances, on an interim basis, it would be just and convenient to appoint a receiver manager on the terms proposed under section 13(2) of the Judicature Act and under section 95 of the Business Corporations Act.

I decline to rule on whether the applicant is a proper complainant under the Business Corporations Act or whether the conduct alleged is oppressive, unfairly prejudicial or unfairly disregards the interests of the company in the absence of notice to other interested parties.

The applicant has leave to bring that aspect of its application forward on notice, and may seek court direction with respect to the time and manner of service, if necessary.

The order appointing the receiver manager is granted as requested, subject to amending the preamble as to the foundation of the application and with respect to service on the Department of Justice, and it will be amended to reflect, both in paragraphs 24 and 27, a right of interested persons to move to set aside or vary the order on seven clear days' notice.

I do not know how long it will take you to prepare that order, but I will be available to sign it.

MR. HOWARD: Thank you, My Lady. If we could go back to the office and then could send someone over for -- to sign it, it would be much appreciated because we have a plane this afternoon, if that were possible.

THE COURT: That will be fine.

MR. HOWARD: There is one matter about which I seek clarification, not directions at this point, but clarification as to service. It's the intention to serve all the shareholders from the shareholders list, and if there were anyone else whom My Lady had in mind or any other entities you had in mind at present, I'm not sure that we --

THE COURT: I am not aware of all of the circumstances of the allegations with respect to oppression, although I think they have been well set out in the affidavit. I am going to leave it to the applicant to make that determination.

However, it seems to me to the extent that there are individuals against whom the conduct specifically is alleged, or affiliates to the extent that there are individuals one might think would be interested or affected by it, or perhaps the affiliates themselves if necessary, I think consideration should be given to them.

MR. HOWARD: And as you say, if we need direction as to the ability, it may be that in these circumstances we will need -- as to the manner and ability, we will be back and seek those directions.

THE COURT: That's right.

MR. HOWARD: Thank you.

THE COURT: All right.

MR. HOWARD: Thank you very much for seeing us during the lunch hour and on such short notice.

THE COURT: Thank you for providing me with the materials and your thorough argument.

PROCEEDINGS CONCLUDED

Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages 1 to 37 are a true and faithful transcript of the proceedings taken down by a mechanical recording device and transcribed to the best of my skill and ability.

Dated at the City of Calgary, in the Province of Alberta this 31st day of July, 2000.

T. Miner

T. Miner

Transcriber

TAB 4

Case Name:
Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.

RE: Montrose Mortgage Corporation Ltd., Applicant, and Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc., Kingsway Arms (Carleton Place) Inc., Respondents

[2013] O.J. No. 5055

2013 ONSC 6905

Court File No. CV-13-10298-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: November 5, 2013.
Judgment: November 6, 2013.

(14 paras.)

Counsel:

J. Dietrich, for the Applicant.

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited.

REASONS FOR DECISION

D.M. BROWN J.:--

I Application for approval of a "pre-pack" credit bid sale in a proposed receivership

1 Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

2 On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

3 The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013, advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

4 The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

5 As of August 31, 2013, the Debtors owed Montrose close to $36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

6 In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

7 The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

8 Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

9 In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

III. Analysis

10 "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.[1] In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*[2] and *Royal Bank v. Soundair Corp.*,[3] respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
>
> > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[4]

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

11 In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

12 Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

13 Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

14 Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

D.M. BROWN J.

cp/e/qlmss/qlrdp

1 *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.).

2 (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List).

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

4 *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

TAB 5

Indexed as:

Royal Bank of Canada v. Soundair Corp.

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

[1991] O.J. No. 1137

4 O.R. (3d) 1

83 D.L.R. (4th) 76

46 O.A.C. 321

7 C.B.R. (3d) 1

27 A.C.W.S. (3d) 1178

1991 CanLII 2727

Action No. 318/91

Court of Appeal for Ontario

Goodman, Mckinlay and Galligan JJ.A.

July 3, 1991

Counsel:

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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1 **GALLIGAN J.A.**:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). 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 $65,000,000. 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 $50,000,000 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, 1991. 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.

I. 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, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.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 doing 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 ten 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 v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment <u>on the elements then available to it</u>. 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 (C.A.), at p. 11 C.B.R., p. 314 N.S.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 <u>at the time existing</u> 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 to 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 ten 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 v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.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. Bkcy.), 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. Bkcy.), 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. Bkcy.), 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 <u>where there are substantially higher offers which would tend to show that the sale was improvident</u> 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 $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-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 that 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 (1986, Saunders J.), supra. 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, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), 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 (1986), 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 consideration 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 finding 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), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., 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., pp. 562-63 D.L.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. <u>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</u>.

(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., p. 548 D.L.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 the 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 order to make a serious bid.

51 The offering memorandum had not been completed by February 11, 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 top 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 seven 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, 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., p. 548 D.L.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., p. 550 D.L.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 [at p. 31 of the reasons]:

> They created a situation as of March 8, 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 debtors' 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 interlender 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 interlender 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 $6,000,000 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 interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 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 interlender 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-and- client scale. I would make no order as to the costs of any of the other parties or interveners.

72 MCKINLAY J.A. (concurring in the result):-- 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), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). 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 therefrom), 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.

74 GOODMAN J.A. (dissenting):-- 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 Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively 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 (the Bank). 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 Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., 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 having 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 $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, 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 [pp. 17-18]:

> 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 $3,000,000 to $4,000,000. 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 downpayment on closing.

79 In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.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 the 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. Bkcy.) 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. Bkcy.) Saunders J. heard an application for court approval for 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 C.B.R.:

> 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 the 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, at pp. 92-94 O.R., pp. 531-33 D.L.R., 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., p. 314 N.S.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 [p. 15]:

> 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 1. 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 this 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 "hard ball" 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 $18,000,000. 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 diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 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 $10,000,000 and $12,000,000.

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 $3,000,000 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 any 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 interlender 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 three 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 three 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 three 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 [p. 31]:

> They created a situation as of March 8, 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.

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 interlender 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 constitutes approximately 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 $3,000,000 to $4,000,000.

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 a 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, 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 with 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-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. c. C.43 (as amended)

Court File No.

AND IN THE MATTER OF HANFENG EVERGREEN INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANT
(returnable August 15, 2014)

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