No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

—AND —

IN THE MATTER OF THE BUSINESS CORPORATIONS ACT,
S.B.C. 2002, C. 57, AS AMENDED

—AND —

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE
DEVELOPMENT LIMITED PARTNERSHIP

BRIEF OF AUTHORITIES

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INDEX TO THE BRIEF OF AUTHORITIES

TAB	DESCRIPTION
1	*Bank of Montreal v. Renuka Properties Inc.,* 2015 BCSC 2058
2	*Cox v. Seymour Village Management Inc.*, 2015 BCSC 275
3	*Quest University Canada, Re,* 2020 BCSC 1883
4	*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5	*Royal Bank v. Vaishnav,* 2005 BCSC 1783
6	*Westcoast Savings Credit Union v. Wachal,* 1988 CarswellBC 547 (BCCA)
7	*8450025 Canada Inc. and Teliphone Data Centers Inc. (Re),* 2017 BCSC 1291

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. Renuka Properties Inc.,* 2015 BCSC 2058

Date: 20151006
Docket: H150429
Registry: Vancouver

Between:

Bank of Montreal

Petitioner

And

Renuka Properties Inc., Whitehall Properties Ltd., Empress Management (2012) Ltd., The Chemist Holdings Ltd., Abbott (Renuka) Pharmacy Ltd., Costless Pharmacy Ltd., The Chemist #8 Pharmacy Ltd., Whalley Pharmacy Ltd., The Chemist #9 Pharmacy Ltd., 0998707 B.C. Ltd., 0926003 B.C. Ltd., Kamsan Holdings Ltd., Renuka Holdings Inc., Nikhil Kantilal Buhecha, Kamal Sandhu also known as Kamaldeep Kaur Sandhu, Sardis Pharmacy Ltd., Raven Pharmacy Ltd., Fusion Pharmacy Ltd., William Ard, 1210 Cameron Management Ltd., Saeid Shahram, Nakisa Holdings Ltd., Element Financial Corporation and Kohl & Frisch Limited

Respondents

Before: The Honourable Mr. Justice Blok

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	K.A. Robertson S. Nelligan
Counsel for the Bidder Mehdi Mirzaei:	M. Sennott R.R. Veerapen
Place and Date of Hearing:	Vancouver, B.C. September 29 and October 2, 2015
Place and Date of Judgment:	New Westminster, B.C. October 6, 2015

[1] **THE COURT:** I am about to give oral reasons in this matter. As with all oral reasons, should a transcript be ordered I reserve the right to edit it and to include such things as case citations and full excerpts of some of the sources to which I will refer, but of course without changing the actual decision or any of the underlying reasoning.

I. Background

[2] This is an application by a bank for approval of a receivership sale of the assets of three of the respondent companies to a purchaser, Royal Med Pharmacy Ltd. At the initial hearing of the application other prospective purchasers came forward and urged the Court to allow them to submit bids at that time.

[3] By way of general background, the present proceedings involve both the foreclosures of two mortgages and the enforcement of security pursuant to general security agreements granted by 13 of the corporate respondents. The companies operated a number of pharmacies in the Greater Vancouver area.

[4] According to the receiver's report to the Court dated September 17, 2015, in June 2015 Pharmacare, the provincial prescription drug subsidy program, revoked the Pharmacare licences of certain of the companies which caused them to be unable to pay their obligations as they became due. At that point the petitioner Bank of Montreal, as secured lender, was owed about $10.3 million.

[5] On August 25, 2015, this Court granted an order appointing the Bowra Group Inc. as receiver of all the assets, undertakings and properties of The Chemist Holdings Ltd., Abbott (Renuka) Pharmacy Ltd. and The Chemist #9 Pharmacy Ltd. The order appears to reflect standard powers granted to the receiver and more particularly included the following powers:

> 2. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
>
> …

> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the other business, or cease to perform any contracts of the Debtor;
>
> (d) to engage consultants, appraisers, agents experts, auditors, accountants, managers, counsel and such otherpersons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including, without limitation, those conferred by this Order;
>
> …
>
> (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
>
> > (i) without the approval of this Court in respect of any transaction not exceeding $10,000.00, provided that the aggregate consideration for all such transactions does not exceed $30,000.00; and
> >
> > (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,
>
> and in each such case notice under Section 59(10) of the *Personal Property Security Act,* R.S.B.C. 1996, c. 359 shall not be required;
>
> (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.
>
> …

[6] Summarizing the order briefly for today's purposes, the order granted the receiver the power to take possession of property, to preserve the property, to manage the businesses, to continue the businesses, to market any or all of the property, to sell any of the property -- with Court approval if over $10,000 -- and to apply for vesting orders.

[7] Following the making of the receivership order the receiver took possession of seven pharmacies. Although all employees were terminated it appears some were rehired because, as the Court was told, some pharmacies were required to

maintain certain minimum operating hours due to regulatory requirements of the College of Pharmacists. Other locations, it appears, were closed entirely.

[8] Commencing August 25, 2015, the receiver marketed the sale of the assets. Those activities are set out in the receiver's report at paras. 14 to 20:

> SALES PROCESS
>
> 14. The Receiver prepared a Request for Offer to Purchase information package ("ROP") for the assets of the Pharmacies and commenced a sales process on August 25, 2015. A copy of the ROP is attached as Appendix B.
>
> 15. The ROP prepared by the Receiver provided prospective purchasers of the Pharmacies the following:
>
> - the nature of the business;
> - location of the pharmacies;
> - assets available for sale, including inventory, furniture and fixtures, goodwill and leasehold interests;
> - the form of purchase and sale agreement for the assets proposed by the Receiver; and
> - the deadline for the submission of offers, set at September 11, 2015.
>
> 16. The Receiver marketed the assets for sale for a three week period as the realizable value and goodwill of the Pharmacies decreased daily as confirmed by the owner of the Companies and prospective purchasers in the pharmacy industry.
>
> 17. The Receiver's sales process of the assets of the Pharmacies and results were as follows:
>
> - Advertised the ROP on the Receiver's website;
> - Advertised in the business section of the Vancouver Sun on August 26, 2015;
> - Advertised the ROP in the Insolvency Insider publication;
> - Discussions and correspondence with prospective purchasers who had been in discussions to purchase certain pharmacies from the owner prior to the Receivership;
> - Discussions and correspondence with twenty-one potential purchasers;
> - Eighteen parties signed Confidentiality Agreements and received the ROP;
> - Seven parties entered into negotiations and conducted due diligence; and
> - Four parties attended the locations and toured the pharmacies.

- Assisted potential purchasers as they conducted due diligence by answering enquiries, holding conference calls, attending meetings and facilitating tours.
- Four offers were presented to the Receiver by September 11, 2015. A summary of the offers is as follows:

Offeror	Offer ($000's)	Offer For
Royal Med Pharmacy Ltd.	1,025	All 7 locations
Offer# 2	850	All 7 locations
Offer# 3	802	Excludes Abbott (Renuka)
Offer# 4	322	Excludes Abbott (Renuka)

- All offers were subject to having the premise leasehold interests assigned.

18. The Receiver accepted the offer from Royal Med Pharmacy Ltd. ("Royal Med") which is a company controlled by the former Pharmacy Manager of the Companies. Their offer, which was dated August 28, 2015 and accepted by the Receiver on September 14, 2015, includes:

- $1.025 million for the seven pharmacies marketed by the Receiver;
- The assignment of all premise leases to Royal Med;
- Royal Med provided pharmacists to the Receiver during the sales process to assist with the proper control and possession of narcotic and prescription drugs, to transfer patient files and prescriptions to operating third party pharmacies, and to attend all site tours as required by the BC College of Pharmacists, and
- If Royal Med is the unsuccessful bidder, the Receiver will have to reimburse Royal Med for costs of approximately $8,000.

19. A copy of the Royal Med offer is attached as Appendix C.

20. The Receiver has had conversations with all landlords who have agreed to assign their respective leases to Royal Med after Court approval. A form of assignment agreement has been provided to them.

[9] It is the offer of Royal Med Pharmacy Ltd. that the bank seeks to have approved by the Court.

[10] At the hearing of the petitioner’s application on September, 29, 2015, several other interested parties appeared and expressed the wish to address the Court. Counsel for Royal Med objected to the Court hearing from these persons

on the basis that they lacked standing. However, counsel did not develop that argument. Nor did he offer any authorities for that proposition.

[11] The objection seems counter to the well-established insolvency practice of this Court and indeed counter to various authorities in other jurisdictions where other or later offerors have made representations to the Court. Royal Med's objection on the basis of standing was therefore dismissed.

[12] The Court heard from three parties interested in the sale:

(a) *Mr. Pavondeep S. Dhillon, who spoke on behalf of Mr. Pal Sahota*

[13] In addition to being an interested party Mr. Sahota is evidently also a subsequent charge-holder on one of the mortgaged properties. Mr. Dhillon indicated the process was too hasty and they had insufficient time to gather the necessary information to make a bid. He said Mr. Sahota was in the process of making a bid but was led by the receiver to believe that there would be a later opportunity to bring an offer to court. Mr. Dhillon also said the marketing of the assets was insufficient insofar as the sale was never advertised through the pharmacy association.

[14] After a dialogue with the bank's counsel and a review by her of the emails said to have left Mr. Sahota with the impression of a later bidding opportunity it emerged that the emails from the receiver having to do with the application for court approval were all dated after the bidding deadline had passed.

(b) *Mr. Vince Sara*

[15] Mr. Sara also asserted the process was too hasty. He said that licensing and business issues were not easy to sort out and there was not enough time to address these and other issues related to the sale. Mr. Sara noted that tours of the premises were conducted by the person who has turned out to be the winning bidder. This person was the former general manager of the debtor companies whom the receiver had retained to assist with the sale. Mr. Sara said that this person's inside knowledge of the operations gave him an unfair advantage over outside bidders, particularly in view of the short timeframe available to gather information relevant to the sale.

(c) *Mr. Serge Biln*

[16] Unlike the other two parties, Mr. Biln was a bidder. He explained that prior to his involvement in the pharmacy industry as an owner he had been a commercial banker at the vice-president level. He had submitted what he described as a “lowball offer” with the expectation that he would be able to submit a further offer at the court approval stage. He questioned the short time set for the sale process and said while the receiver may know business generally he does not know the pharmacy industry in particular, and the timeframe was too short given the complexities.

[17] He too said the current high bidder had an unfair advantage in that he was the previous general manager for the operation.

[18] Mr. Biln said the interest of the Court should be in maximizing the proceeds from the sale, and his submission was to the effect that the present process had not done that.

[19] The authorities indicate that later offers may be considered for the limited purpose of assessing whether the receiver's sale process has been sufficient to realize the value of the assets being sold. Here the receiver had refused to receive any offers submitted after the deadline, based on the rationale or goal of maintaining the integrity of the sale process. While I do not question that otherwise laudable goal the refusal to even receive late offers left the Court without any information about what the amount of other bids might be.

[20] For that reason, at the hearing on September 29 I directed that any persons interested in submitting further bids should submit to the Court a form of bid, although not an actual bid, so as to test these waters. Two notional bids were received at the court hearing, accompanied by associated bank drafts for deposits. These were as follows: (1) a bid in the amount of $1,285,001; and (2) a bid in the amount of $1,499,000.

[21] The existing highest bid, that of Royal Med, is in the amount of $1,025,000, although counsel for the bank pointed out that Royal Med is by agreement paying rent and other costs in the interim, making the effective value of that bid $1,097,000 as of October 1, 2015.

[22] I turn to the submissions of counsel. Counsel for Royal Med emphasized that this receiver is very experienced. Because the receiver, in his judgment, felt goodwill was declining this meant the sale process could not be an extended one. Counsel said in these types of situations there are always purchasers who are not ready. The adequacy of the sale process must be evaluated at the time the process concluded, not today, and it is incorrect to compare an offer made today, made with the luxury of more time, with an offer made within the deadline, a time when there may be a comparative disadvantage in information available and consequently a greater risk discount.

[23] Counsel for Royal Med said that confidence in receivers' sales generally would be eroded if potential bidders can open up the process at the Court approval stage.

[24] Counsel for the bank reiterated the receiver's professional judgment that these were depreciating assets that called for a relatively short sale process. Despite the abbreviated timeframe, significant interest was generated and significant bids were received. As was noted by Royal Med's counsel, counsel for the bank also observed that with the additional time available to the late-coming bidders, those parties are faced with less risk and so it was not fair to directly compare the Royal Med bid with potential later bids.

[25] This matter was set for judgment to be given on October 2, 2015. However, on that day counsel for Royal Med submitted two affidavits, one of which was from the principal of Royal Med, Mr. Mehdi Mirzaei, and the other from the owner of the subject pharmacies, Mr. Nikhil Buhecha. Mr. Buhecha said in his affidavit that when Pharmacare withdrew billing privileges from these pharmacies Mr. Buhecha contacted over 50 parties to see if they were interested in buying.

[26] Mr. Mirzaei confirmed that he was the former general manager for the pharmacy group whose assets are being sold. He said each of Mr. Sahota, Mr. Sara and Mr. Biln expressed interest in purchasing all or some of the pharmacies as early as June 2015. The cancellation of the Pharmacare billing privileges had been posted on the Pharmacare website and this in itself generated significant interest from potential purchasers.

[27] In the case of Mr. Sahota, Mr. Mirzaei said: (1) Mr. Sahota discussed with him the possibility of joining together to make a joint bid; (2) Mr. Sahota was aware of the receiver's bid deadline; and (3) Mr. Sahota met with Mr. Mirzaei prior to the bid deadline to review the financial statements for the subject pharmacies.

[28] In Mr. Sara's case, Mr. Mirzaei was introduced to Mr. Sara as a potential buyer in late July 2015, and he too proposed a partnership with Mr. Mirzaei. Mr. Mirzaei told Mr. Sara if no partnership could be agreed upon between the two of them then Mr. Mirzaei would likely bid on his own.

[29] As for Mr. Biln, prior to the receivership Mr. Biln expressed to Mr. Mirzaei an interest in purchasing one or two of the pharmacies and he made an offer on them, but there was no further contact after the receiver was appointed.

[30] That concludes my review of the proceedings thus far.

II. Discussion

[31] I begin with a summary of the legal principles that guide the Court in applications of this type. There are a number of general principles:

1. when considering the efforts of a receiver in obtaining offers for the purchase of property the Court must consider the following factors:

    (a) whether the receiver has made sufficient efforts to get the best price and has not acted improvidently;

    (b) the interests of all parties;

    (c) the efficacy and integrity of the process by which offers were obtained; and

    (d) whether there was unfairness in the sale process.

    Royal Bank of Canada v. Soundair Corp., [1991] 46 O.A.C. 321, 7 C.B.R. (3d) 1 at para. 16 [*Soundair*].

2. In considering whether the receiver has acted providently the Court should examine the conduct of the receiver in light of the information in the possession of the receiver when it agreed to accept the offer. The Court

should be very cautious before deciding the receiver's conduct was improvident based on information that has come to light after the receiver made his or her decision: *Soundair*, at para 21.

3. there should be deference given to the receiver's judgment and his or her decision ought not to be set aside merely because a later and higher bid is made. This deference is appropriate because it allows for certainty and finality with receivership sales: *Cameron v. Bank of Nova Scotia* (1981) 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 313 (S.C.) at para. 36. I would add, however, that our Court of Appeal has suggested this deference is more of a factor where the difference in price is not significant and the later bid is, for example, less well secured than the recommended one:. See *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317 at para. 40.

4. late offers may be considered by the Court on an application to approve a sale only for the limited purpose of considering whether the price obtained by the receiver was a reasonable one. In some cases a disparity may be so great as to call into question the adequacy of the sale process: *Soundair* at paras. 26 and 30.

5. the primary interest to be considered by the Court is that of the creditors, and to see that the best possible price is obtained, though the interests of all parties, including the debtor and the receiver's recommended purchaser, must also be considered: *Soundair* at paras. 39-40. While the primary concern is the interests of the creditors, as noted earlier a secondary but still important consideration is the integrity of the process. Integrity of the process includes the object of reasonably ensuring that there is certainty and finality in sales by receivers: *Soundair* at paras 42-46.

[32] That concludes my review of the general principles.

[33] I deal first with the sale process adopted by the receiver in this case. First of all, when measured at the time the sale process was established there seems nothing unreasonable in the receiver's conclusion that an abbreviated sale process was necessary given his judgment that goodwill was diminishing. However, this in itself does not end the examination of the matter.

[34] Although it was my initial impression that the receiver's efforts in generating market interest were not as extensive as they might have been, the affidavit of Mr. Buhecha persuades me that the general availability for sale of these pharmacies was well-publicized even before the receiver was appointed. More perhaps could have been done to specifically publicize the receiver's sale to this niche market, or if in fact those efforts were done, more should have been done to particularize them in the receiver's report. I am, however, satisfied that the market was at least generally aware of the sale of these pharmacies.

[35] Two of the interested parties who addressed the Court spoke of their understanding that they would have a further opportunity to submit bids at the time of the court hearing to approve sale. I am satisfied that if these potential bidders had this understanding it was not as a result of anything the receiver said to them before the bidding deadline passed. There was nothing about the sale process or in any pre-deadline communication from the receiver that left them with that impression or would have caused them to regard the bid deadline as anything but final. I will, however, return to the sale process later.

[36] As to the interests of the parties it is of course in the interests of the secured creditor, any subsequent creditors, any guarantors of debt and ultimately the shareholders of the debtor companies to maximize the proceeds of sale. As to the position of those parties I was told by the bank's counsel that although the situation is complicated insofar as these assets form but one part of this insolvency file it appears the indebtedness to the bank may well be fully repaid once all assets have been realized. There is at least one subsequent charge-holder, but I was given no details about that debt or prospects for its repayment. Of guarantors and shareholders I heard nothing.

[37] The next party whose interests I consider is the high bidder, Royal Med. Royal Med has abided by the rules and submitted a bid within the deadline. By agreement with the receiver Royal Med has paid rent and other significant expenses in the interim, though the receiver will reimburse Royal Med for all those expenses should the assets ultimately be sold to another party.

[38] The disparity between the current high bid and the amount one of the interested parties is apparently willing to pay is of great concern. The difference is $474,000, or 46 percent higher using the face amount of the high bid, or $402,000

or 37 percent higher if the value of the high bid is to include the extra costs that have been borne by Royal Med.

[39] This is a substantial difference, and it tends to show that the sale process has failed to garner full market value for the assets. It is difficult to discern an identifiable aspect of the sale process that would account for this disparity, but two of the prospective bidders identified both the short sale period and the perceived unfairness of the high bidder having assisted the receiver with the sale and, as general manager for the debtor companies, having an advantage over outside bidders.

[40] These matters invoke three of the *Soundair* factors: sufficient sale efforts, efficacy and integrity of the sale process and possible unfairness. I do not conclude that it was improper for the receiver to have used the services of the former general manager in this way, nor that this party should have been denied the opportunity to bid, but nonetheless he had an advantage the others did not have and they may have been unable to make up that disadvantage in the short time available.

[41] Much was made in the submissions before me about maintaining the integrity of the receiver's sale process. I agree with those sentiments, but the rule is not absolute. In *Baron Enterprises* the Court of Appeal said that deference to the receiver's sale process has its limits:

> …The passage referred to by the chambers judge in this case was clearly *obiter* but was intended to emphasize that a receiver's decision to enter into an agreement for sale subject to court approval should not be set aside "simply because a later and a higher bid is made". I do not disagree with that point of view provided it is applied within reasonable limits. Where the later offer is higher, the court may refuse to entertain it and to approve the sale recommended by the receiver or other person given conduct of sale. But in practice, that is done only where the improvement on the price is not significant and, in most cases, where it also appears that the late bid is less firmly secured than the recommended one. I will add that the view of Macdonald J.A. depended in large part upon the element of deference which has traditionally been shown to a court appointed receiver who usually is a professional person whose skill and experience in these matters must be established by evidence as a condition of his appointment.
> …

[42] In my view, according deference to the receiver's decision to accept and recommend approval of Royal Med's bid, in circumstances where another bidder

appears to be willing to pay 37 percent more, would be to place excessive weight and too high a premium on the deference factor. The authorities make it clear that the interest of the creditors is still the primary factor. For those reasons I decline to approve the sale of the assets to Royal Med.

[43] In *Baron Enterprises* at para. 41 the Court of Appeal noted that where there is uncertainty whether the late bid or bids should prevail the usual course is to order sealed bids. I conclude that this is the appropriate course here. This course of action will also level the playing field and address any unfairness, whether real or merely perceived, of Royal Med having had advantages due to its inside familiarity, or of the later parties having had more time than Royal Med has had to ponder the risks and benefits of the sale.

[44] So I order that there be a sealed bid process with the following terms:

1. interested parties are to submit sealed bids to the receiver on or before 4:00 p.m. Thursday, October 8;

2. the bids shall be in the existing form prescribed by the receiver;

3. the other general terms and conditions under the receiver's sale process shall apply, except where I have changed them, including that the highest or any bid will not necessarily be accepted;

4. as with the earlier process, bids shall be accompanied by bank drafts for 20 percent of the bid amount;

5. there will be a reserve in the amount of $1,097,000, the value of the present highest bid. In other words, for a further bid to be considered it must exceed that sum;

6. any parties who have submitted bids already, including Royal Med, are at liberty to submit a further bid or bids;

7. the receiver is to publicize this further bidding process as best it can and in particular shall notify the 18 parties who signed confidentiality agreements and received the information package; and

8. a hearing for Court approval will take place at 9:15 a.m. on Friday, October 9. I am seized of that application.

[45] Those conclude my reasons. I look to counsel for any clarifications or comments, particularly to do with the bidding process that I have ordered.

[46] MS. NELLIGAN: My Lord, I just have one request. Because there are a number of parties that appeared in the various hearings, can we dispense with the signatures of all the parties that appeared other than the applicant's counsel?

[47] THE COURT: Yes.

[48] MS. NELLIGAN: Thank you.

[49] MS. VEERAPEN: My Lord, in these circumstances my client requests that we give -- be given slightly more time than this Thursday to submit bids. We are asking for a date no earlier than next Friday in order for our client to consider its position, including an appeal.

[50] THE COURT: Any submission from the petitioner?

[51] MS. NELLIGAN: Well, I think it knows its position as far as whether or not it wants this asset. I think the question is just whether it is willing to go any higher on its purchase price, and I do not agree that it is going to require that much more time to go with that.

[52] As far as whether or not they want to appeal I do not think it is within the realms of consideration of a sales process to provide for more time for that sort of a consideration.

[53] THE COURT: What has been emphasized in the submissions, including the submissions of Royal Med, is that the value of these assets is declining and that urgency is a primary consideration.

[54] I will vary the order that I had pronounced only to this extent: the bid deadline will remain 4:00 p.m. this Thursday. The application for court approval will be set for hearing at 4:00 p.m. on Friday, October 9 instead of 9:15 a.m. on the Friday.

[55] UNIDENTIFIED MALE SPEAKER: My Lord, which court would that be in? The Vancouver court, or?

[56] THE COURT: No. That is a very valid question. I have seized myself, which for those who are not lawyers means that I have required that the matter come back before me and not any other judge. It is to come back before me because I am familiar with it. I am going to be in New Westminster on Friday, so the application for approval will have to be heard here in New Westminster at 4 o'clock.

"Blok J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cox v. Seymour Village Management Inc.,* 2015 BCSC 275

Date: 20150130
Docket: S136523
Registry: Vancouver

In the Matter of the *Partition of Property Act*,
R.S.B.C. 1996, c. 347

and

In the Matter of the Application for the Sale of Lands known as Seymour Estates and legally described as:
P.I.D.: 009-073-086
Lot A Block X District Lot 580 Plan 11419

Between:

Beatrice Cox and
each of the individuals set out in Appendix "A" to this Petition

Petitioners

And

Seymour Village Management Inc. and
each of the persons set out in Appendix "B" to this Petition

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Petitioners:	P.J. Roberts M.C. Power
Counsel for Respondent Darwin Properties (Seymour) Ltd.:	W. McMillan
Counsel for Polygon Pacific Homes Ltd.:	O.J. James

Counsel for Respondent Seymour Village Management Inc.:	V. Santacroce
Appearing on behalf of Seymour Estates Land Holdings Ltd.:	C. Barbati
Appearing on own behalf:	F. Ansari
Appearing on own behalf:	D. Gunter
Appearing on own behalf:	R. Goodsell
Appearing on own behalf:	E. Shaw
Appearing on own behalf:	A. Wilson
Appearing on own behalf:	A. Khorsandi
Appearing on own behalf:	R. Cravioto
Appearing on own behalf:	M. Enthoven
Appearing on own behalf:	K. Richardson
Appearing on own behalf:	R. Pearson
Appearing on own behalf:	D. Cook
Appearing on own behalf:	D. Northcott
Appearing on own behalf:	S. Campbell
Appearing on own behalf:	A. Nuttuconaroe
Place and Date of Hearing:	Vancouver, B.C. January 30, 2015
Place and Date of Judgment:	Vancouver, B.C. January 30, 2015

[1] **THE COURT:** These are partition and sale proceedings in respect of certain strata lands and premises, known as Seymour Estates, located in North Vancouver, British Columbia. The present application is for court approval of an offer dated October 31, 2014 by Polygon Pacific Homes Ltd. ("Polygon") to purchase the entirety of Seymour Estates.

[2] There is quite a history of the lands and this proceeding. I will summarize the highlights. Seymour Estates is under a historical legal construct which no longer applies in British Columbia. It is a strata property governed through fractional interests, rather than the unit entitlement and common property regime that now applies under the *Strata Property Act*, S.B.C. 1998, c. 43.

[3] Seymour Estates is an older development and, as with a lot of other older developments in British Columbia, it is perhaps approaching its end of life. The evidence is that the development has required, or will require, substantial maintenance in the future.

[4] In 2011, Darwin Properties (Seymour) Ltd. ("Darwin"), a construction company, began approaching the owners of Seymour Estates with a view to purchasing their fractional interests. Its *modus operandi*, and this intention continues to this day, was to acquire all of the property so it could develop the lands and premises. It is my understanding that the current development has a fairly low density and, no doubt, a higher density redevelopment would see some return on an investment.

[5] Darwin made its first offers to some of the owners in the summer of 2012 and those offers were conditional upon acquiring all of the 114 fractional interests. That offer did not proceed. In March 2013, Darwin made second offers to the owners, which offers were accepted by some 104 owners (the "Second Contracts"). However, it is an important distinction that the Second Contracts were not conditional on obtaining all of the fractional interests, but only a majority of them.

[6] The Second Contracts have given rise to issues of enforceability of those contracts. Those issues do not arise for resolution in this action, however, they remain a principal factor on this application in considering the offers presented.

[7] Eventually, the council that governs Seymour Estates brought this petition proceeding in August 2013. Madam Justice Fenlon heard a contested hearing later that year and issued her reasons for judgment in January 2014: *McRae v. Seymour Village Management Inc.*, 2014 BCSC 714. Justice Fenlon's decision was that there was to be a sale of all the Seymour Estates interests in accordance

with the *Partition of Property Act*, R.S.B.C. 1996, c. 347. Issues concerning any offer that might be brought forward were to be addressed at that time.

[8] After the issuance of the reasons for judgment, there were continuing dealings between Darwin and various owners. In April 2014, there was a further application before Justice Fenlon to address issues that had arisen with respect to the sharing of any sale proceeds. What the resulting order ensured, at least in part, was that the 104 owners who had signed the Second Contracts with Darwin would at least obtain the sale price under those contracts and that any increase (or what was termed the "lift") in the price under any eventual sale would be held in trust, pending the determination of the issues concerning the enforceability of the contracts.

[9] The litigation concerning the enforceability of the Second Contracts is not before me. There are two separate actions concerning that issue: one is the representative action, which was commenced in May of 2014; the other was commenced earlier this month when Darwin commenced an action against the 104 owners seeking damages for repudiation of the Second Contracts.

[10] To summarize, two issues are not before me on today's application: the first is the enforceability of the Second Contracts arising in the two actions described above; in addition, the second, and potentially contentious issue among the Seymour Estates owners, concerns the sharing of any proceeds that will arise from a sale of the property.

[11] The issue before me today is whether the Polygon offer should be approved or whether a competing offer from Mosaic Homes ("Mosaic") should be approved. During the course of today's hearing, both offers were amended. At present, the two offers are identical, but for two distinctions: firstly, Mosaic's offer is $100,000 higher in terms of the base price to be paid; and, secondly, Mosaic's offer incorporates a side agreement with Darwin whereby the litigation concerning the enforceability of the Second Contracts will be resolved such that Darwin will abandon its claim to enforce the Second Contracts. I am advised that that side agreement between Mosaic and Darwin will provide some monetary compensation to Darwin but that amount has not been disclosed. Initially, there was some additional distinction between the two offers concerning a credit toward a purchase

at another Polygon development. However, Mr. Barbati, on behalf of Mosaic, has matched the credit offered by Polygon to the owners.

[12] The basis upon which this sale approval application is brought forward, of course, arises from Justice Fenlon's order from January 2014 that any offers are subject to court approval. Accordingly, this Court has a broad discretion to consider, not only the Polygon offer that has been brought forward, but any other offer that might be in play, such as what has now been received from Mosaic.

[13] There is no dispute about the law. The leading authority is *Royal Bank v. Soundair Corp.*, [1992] 7 C.B.R. (3d) 1 (Ont. C.A.). That decision has been applied in at least two decisions of this Court of which I am aware: *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1567 at para. 15, and *Leslie & Irene Dube Foundation Inc. v. P218 Enterprise Ltd.*, 2014 BCSC 1855 at para. 21.

[14] In *Royal Bank v. Soundair* at para. 16, the court discussed certain factors to be considered by the court on an application for approval of an offer:

1. Whether the party conducting the sale had made sufficient efforts to obtain the best price and has not acted improvidently.

2. The interests of all parties.

3. The efficacy and integrity of the process by which offers were obtained.

4. Whether there has been any unfairness in the sales process.

[15] The parties have argued the third and fourth factors together, and I will now address those factors in similar fashion.

[16] In accordance with Justice Fenlon's order, the council of Seymour Estates, quite properly, spent some time meeting to understand what was involved in a sale process in these very unique and difficult circumstances. The purpose of meeting was to discuss and fashion a process to meet the requirements that would be necessary in obtaining court approval of any offer. The council spent some time considering whether the council members could make efforts to sell the development on its own, but they decided, probably wisely, that it could not. As a

result, the council decided to engage the professional services of a real estate firm.

[17] The council spent some time considering the qualifications and selecting which real estate firm would be engaged to sell the development and ultimately, CB Richard Ellis (“CBRE”) was engaged. CBRE’s credentials are well-known in this community and were not questioned on this hearing.

[18] After CBRE was engaged, there was significant input from the firm and the council obtained advice as to how this sales process would occur. As a result, a bidding process was put in place by which bids, or tenders, were sought from interested parties. As a result of that process, six offers were received which the council, with CBRE’s assistance, then considered in detail. Those six offers included offers from Polygon, Darwin and Mosaic.

[19] After the first round of bids, the council decided, again with input from CBRE, that a second round of bids would be sought. During this second round of bidding, the two major contenders were identified as Polygon and Mosaic. I have not heard anything to question the credentials of either of those development companies. They are both well-known and well-respected real estate developers in the community.

[20] Importantly, Mosaic’s offer in the second round of bidding included a provision that addressed the Darwin litigation by essentially resolving that litigation in favour of the owners who had signed the Second Contracts.

[21] After a consideration of the offers in the second round of bidding, the council of Seymour Estates identified Polygon as the preferred bidder. It is quite evident that the council was well-aware of the Darwin litigation issue, and also aware of the considerable stress, uncertainty and cost that this litigation was causing or would cause in the future to the substantial (104) owners who had signed the Second Contracts. In any event, despite that consideration, the council selected Polygon, not Mosaic, as the preferred bidder.

[22] Even so, the council was not prepared to simply accept Polygon’s offer as presented. The council members went back to Polygon and then engaged in lengthy negotiations with Polygon to improve the offer. By all accounts, the council

was quite successful and an improved offer was negotiated in late October or early November 2014.

[23] It is this improved Polygon offer for which the council now seeks court approval.

[24] Mosaic's offer was presented in January 2015 after the application to approve Polygon's offer was filed with the court. I take it, from Mr. Barbati's submissions, that after reviewing Polygon's offer, Mosaic considered that it still had a shot at beating the presented offer. This approach by Mosaic arose after Mr. Barbati identified the provisions in Schedule C to the Polygon offer, which set out that, despite any offer being presented for court approval, the court still had the ability to consider other offers at the time of the application.

[25] Late offers, such as that now presented by Mosaic, are not completely unheard of in the courts of British Columbia. However, in my view, the court looks fairly askance at such late offers, for reasons that I will address below.

[26] Darwin's counsel has referred me to *Sun Life Savings and Mortgage Corp. v. Sampson*, [1991] 59 B.C.L.R. (2d) 355 (S.C.). In that decision, Madam Justice Huddart, as she then was, identified price as the most important factor in the sales process. In my view, this decision has to be put in context because it dealt with a residential foreclosure and the relevant sales process was far different from what applies here. Residential foreclosures are dealt with in this Court on a fairly, I would say, standard basis. Here, the court is addressing a very unique situation, and no doubt this unique situation was what drove the very considerable and detailed sales process the council of Seymour Estates embarked upon with the assistance of the professional real estate firm.

[27] The other distinguishing factor arising from the *Sun Life Savings* decision was that the new offer in that case was from a different person, as opposed to coming from a person who had already been involved in the sales process. In other words, the late offer considered in *Sun Life Savings* came from someone who should have been, but was not, for whatever reason, identified as a bidder in the earlier process. As such, the logical inference was the sales process was flawed in not producing the best offer that the market could produce.

[28] This is in contrast to someone who has gone through the entire process, in good faith, with a view to presenting its best offer. There is no suggestion that Mosaic was not told what the sales process was or that it was not treated fairly in terms of having an opportunity to put its best foot forward. One can only presume that Mosaic did put its best foot forward. But that best foot forward was not considered by the council to be the best offer in the circumstances. In my view, this brings forward issues of the fairness and efficacy of the process in terms of allowing someone who has gone through the entire process, along with Polygon, to now submit a last minute bid.

[29] Does fairness dictate that, not having been successful, Mosaic should be allowed to have a second kick at the can? As I have said, it is not completely unheard of that these late offers are considered; but where they are truly considered, in terms of price being the primary factor, is where there has been a substantial increase in price beyond the price that has been garnered through the sales process. Again, this factor gains more prominence because it is likely indicative of the fact that the sales process did not work in the sense of bringing forward persons who were interested in a purchase and giving them an opportunity to participate in a fair sales process. There is no suggestion here that the sales process was unfair and, in particular, that Mosaic did not have the opportunity to present its bid in competition with other offers being submitted, such as from Polygon.

[30] That brings me to the second factor, price. Notwithstanding the amendments to both offers at the hearing, the difference is still $100,000. Some parties suggested in their submissions that this amount is fairly “nominal”. I agree that it is nominal in a sense of the overall price; however, I do not mean to suggest, in any way, that another $887 in the pockets of these families would not be significant in and of itself. I conclude, however, that the efficacy and integrity of the sales process becomes more important in the overall consideration here and rises above the difference in the price of the bid that has now been offered by Mosaic.

[31] Both the Polygon and Mosaic offers are supported by the appraisal evidence.

[32] While the dollar value of the sale price is important, what also remains to be discussed are the other numerous intangible factors that the council and the individual owners have considered. Two of the intangible factors have been discussed during the course of the hearing. The first intangible was the buy-back credit that would allow owners a monetary credit if they chose to buy a unit in another Polygon development, rather than buying back into the new Seymour Estates development. Mosaic has now matched that aspect of the Polygon offer, so that is no longer a distinguishing factor.

[33] The second intangible arises from the uncertainty about whether this redevelopment can occur at all. At the fore are issues about getting an experienced developer who can get this development done, if it can be done, and get it done as quickly as possible. Counsel for the applicants and Polygon have referred me to Polygon's proven track record in respect of its developments on the North Shore. However, Mosaic is a well-known developer too.

[34] Another factor here is the relationship with the District of North Vancouver (the "District"), who will approve any re-zoning of the lands. The council, and many of the owners, have fastened onto this factor in terms of something that will hopefully eliminate some, and I stress some, of the risk in terms of getting this development done and done quickly. The key is whether the developer can obtain the District's approval for a certain level of floor space ratio ("FSR"). A higher FSR will enhance the value of the development and will result in an increase in the base price under both the Polygon and Mosaic offers.

[35] There are no guarantees here, clearly, but importantly, the Seymour Estates council, again with the assistance of CBRE, has reviewed all of these intangibles and has decided that Polygon is the horse on which it wishes to place its bet.

[36] This sentiment was best stated by Mr. Santacroce when he said that this is not a matter of just selling the subject property, after which the owners will walk away and expect a cheque in return. This development process is going to be a long and involved one during which the parties will have to work together. Mr. Santacroce used the word "partner" and I think that is an excellent description of the relationship between the parties going forward. There is no doubt that good faith and trust in your partner through this process is going to be a critical one. It is

this aspect that the council and many of the owners have identified as being fairly critical here.

[37] On the flip side of Polygon's proven track record and relationship with the District is that of Mosaic. Who is Mosaic and, more importantly, who is Mosaic with? I have heard submissions and some evidence about the fact that there still appears to be some ties between Darwin and Mosaic. Mr. Barbati and Darwin's counsel have assured me that there is no relationship between them, and I take those submissions at face value. These submissions are somewhat contrary to the January 13, 2015 letter by which this Mosaic offer was presented which identified the offeror as "Darwin/Mosaic". Mr. Barbati has suggested that this may have been done in error. Even so, it has raised some uncertainty in the minds of the council and some owners about Mosaic and Darwin, for all that it might have been an unintended consequence.

[38] What is quite evident is that there is considerable mistrust of Darwin, and that mistrust has been now transferred onto Mosaic, whether unintentional or not. What remains, however, is that if you are going to have this partnership going forward, mistrust of your partner is not an ideal situation.

[39] Accordingly, while I accept that there is a $100,000 difference in price, I also accept that there are important intangibles in the offers that must be considered here.

[40] The last factor is the interests of all the parties. I have heard many different viewpoints during submissions from the parties. This is a divided community, which Mr. Campbell's heartfelt submissions, and the many others, highlight. It is clear that not everyone's interests can be satisfied here. With all of the other people involved in these various units, we probably have more than 114 different viewpoints. There is no solution here that is going to see everyone's position or interest, of which there are many, satisfied. The owners want to get the best price, understandably. They are also worried about where they are going to end up living after a sale of their homes and they are quite concerned about staying in their community, or quite possibly, not being able to afford new housing in their community.

[41] The owners are also worried about the Darwin litigation and that is a recurring theme here. No doubt a resolution of that litigation will take further effort, cause further stress and cause further expense into the future. I do not discount that factor, nor do I think that the Seymour Estates council discounted that factor. I accept, without reservation, the evidence that the council was well-aware that accepting Polygon's offer meant that this litigation was still to be addressed, while accepting the Mosaic offer meant that it would be resolved.

[42] I have heard from many of the individual owners. Darwin is an owner of a unit of Seymour Estates, however, I have significantly discounted the wishes of Darwin in supporting approval of the Mosaic offer. If the Mosaic offer is approved, Darwin obviously cashes in on its litigation risk that it has so recently reinforced to the owners by the new action commenced by it. In the event of a sale to Mosaic, Darwin will not be dealing with the very personal issues faced by the remainder of the owners.

[43] Looking at the numbers, as have been formulated through this process, 32 owners, from the 46 owners who have expressed an opinion, have indicated a preference for Polygon's offer. Therefore, 69.5% favour that offer.

[44] There is some dispute about whether or not certain owners, those who have not expressed an opinion, should be factored into this equation. I accept the submissions of Mosaic's counsel that the court cannot necessarily assume that these other owners are in favour of the Polygon offer. Since they have not responded at all, such an assumption is not reasonable. However, a considerable majority of the owners who have weighed in are in favour of Polygon's offer. As with the council, these owners have "voted" while knowing of the litigation risk that remains under that offer.

[45] I do not consider this tabulation of the "votes" to be determinative in any event. Many of the owners who are not in favour of Polygon have a legitimate reason for that decision, namely, risk arising from the Darwin litigation. They are in favour of Mosaic because they want to avoid the stress, uncertainty and cost of the litigation. I do not discount their positions. However, a decision has to be made, and all factors must be considered. The views of the various owners are but one factor to be considered.

[46] I have considered all of the above circumstances. This has been a very difficult process for the owners. Further, this decision is but one to be made in the course of this whole saga. After today, whichever offer is approved, there are obviously many further issues that will have to be addressed into the future.

[47] In conclusion, after weighing all of those factors, I consider that Polygon's offer is the one that warrants court approval. I therefore exercise my discretion and approve the Polygon offer, as presented and as amended, during this hearing.

[48] I direct that counsel file a further affidavit attaching the amended Polygon offer to reflect the increase in the base price by $100,000. I am dispensing with the approval as to form of the order of all counsel, save for the applicant, and all parties who spoke today.

[49] For the benefit of the owners in the courtroom, I realize this is a very difficult situation for all of you. I wish you well in your path forward. Thank you.

"Fitzpatrick J."

Most Negative Treatment: Check subsequent history and related treatments.

2020 BCSC 1883
British Columbia Supreme Court

Quest University Canada (Re)

2020 CarswellBC 3091, 2020 BCSC 1883, 326 A.C.W.S. (3d) 192, 85 C.B.R. (6th) 41

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

In the Matter of the SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA (Petitioner)

Fitzpatrick J.

Heard: November 12-13, 16, 2020
Judgment: November 16, 2020
Written reasons: December 2, 2020
Docket: Vancouver S200586

Proceedings: leave to appeal refused *Southern Star Developments Ltd. v. Quest University Canada* (2020), 2020 CarswellBC 3252, 2020 BCCA 364, Harris J.A., In Chambers (B.C. C.A.)

Counsel: J.R. Sandrelli, V. Cross, for Petitioner
V.L. Tickle, for Monitor PricewaterhouseCoopers Inc.
P. Rubin, G. Umbach, for Primacorp Ventures Inc.
K. Jackson, G. Nesbitt, for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.
P. Reardon, K. Strong, for Southern Star Developments Ltd.
C.D. Brousson, for Vanchorverve Foundation
D.V. Bateman, for Dana Hospitality LP
D. Lawrenson, for Halladay Education Group
K. Mak, for Capilano University
J. D. West, for Landrex Ventures Inc.
J. Sanders, S. Rogers, for Quest University Faculty Union
K. Davies, for Bank of Montreal
A. Welch, for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training
K.E. Siddall, for 1114586 B.C. Ltd.
L. Hiebert, for Association for the Advancement of Scholarship

Subject: Insolvency; Public

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Parties were involved in proceedings under Companies' Creditors Arrangement Act — Arrangement plan was approved, while approval of transaction and vesting order was adjourned — Creditor SS Ltd. formalized opposition to vesting order and brought application for order prohibiting debtor disclaiming certain subleases of university residences, which was required for transaction to proceed — Application dismissed; transaction approved — Certain lot on property of debtor was not subject to extant lease, and certain related charges were not intended to be registered until construction began — Jurisdiction existed under s. 11 of Act to approve transaction and to grant order sought by debtor to ensure that SS Ltd. did not assert any rights under lot lease, and authority existed under s. 36(6) of Act that allowed Court to exercise its jurisdiction to vest off other restrictions — Balance of equities regarding creditor C university's charges including mortgage security on certain lots favoured vesting off C university's right of first refusal to allow transaction to proceed — Creditor L Inc. was not entitled to further time to present offer for debtor's assets in competition with transaction — L Inc. had been fully engaged in discussions for some length of time and was given opportunity to participate in sale and partner search process — L had executed purchase and sale agreement when debtor had already signed purchase and sale agreement as part of transaction, but L had not secured rights of exclusivity — Transaction involved significant other benefits to debtor than L Inc.'s offer in terms of debtor's future operations, and was better for shareholders — Any hardship to SS Inc. from disclaiming leases was not shown to be significant, as there was no clear indication how mitigation matters might resolve — Revisions to transaction by parties deleted conditions precedent requiring creditor and court approval of plan, so that only condition precedent that remained before closing was granting of transaction's reverse vesting order — Effect of transaction was to achieve what debtor originally sought by way of restructuring, namely, sale of certain assets to buyer and continuation as going concern as academic institution, in partnership with buyer — Transaction at issue was only transaction that had emerged to resolve financial affairs of debtor and no other options were available — SS Ltd. and other creditors were working actively against goals of Act by their opposition to transaction.

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s. 11 — considered

s. 32 — considered

s. 32(2) — considered

s. 32(4) — considered

s. 32(4)(b) — considered

s. 32(9)(d) — considered

s. 36 — considered

s. 36(1) — considered

s. 36(3) — considered

s. 36(6) — considered

Property Law Act, R.S.B.C. 1996, c. 377
s. 9 — considered

APPLICATION by creditor for order preventing disclamation of leases in proceedings under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.*:**

INTRODUCTION

1 On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("*CCAA*") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

2 On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845 (B.C. S.C.).

3 I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

4 Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

5 In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

6 At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

7 This *CCAA* proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

8 Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately $30.7 million by the end of December 2020.

9 I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching $11 million.

10 Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands".) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").

11 Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").

12 One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (B.C. S.C.) (the "Rent Deferral Reasons").

13 Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

14 Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

15 There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

16 The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

17 On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the party identified as the "Academic Partner". Unfortunately, that transaction did not proceed.

18 On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as "Academic Partner #2) as of July 29, 2020.

19 Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the "Primacorp PSA").

20 The Primacorp transaction, as originally presented, provided for:

a) Sufficient funds to pay Quest's secured creditors' claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

21 The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor's Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the

Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

22 The Primacorp transaction was subject to a number of significant conditions:

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the *CCAA*.

23 On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

24 The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

25 Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

26 In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these *CCAA* proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

27 The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under

s. 36 of the *CCAA*. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

a) *Lot E*: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) *ROFR*: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) *Other Offer*: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) *Disclaimers*: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) *RVO*: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

28 I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

29 As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

30 Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the "LP") to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

31 The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

32 In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

33 The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star's rights, if any, under the Lot E Ground Lease.

34 At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

35 Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

a) This Court has no jurisdiction to do so under the *CCAA*. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the *CCAA* expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the *CCAA*, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

> . . . in respect of real property or of an immovable if the company is the lessor.

b) If such jurisdiction exists under the *CCAA*, the relief sought is not fair and equitable in the circumstances.

36 I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

37 In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

38 Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied — in essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

39 Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

40 I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

41 The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services] at para. 70.

42 In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154 (B.C. C.A.); *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 (Ont. S.C.J.) at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 (Ont. C.A.) at para. 25.

43 Southern Star argues that the equities favour it, not Quest, in these circumstances.

44 Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star

were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

45 Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status *quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

46 Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position — facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

47 The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

48 While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

49 I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

50 Lot 1 and Lots A-E are subject to various charges in favour of CapU.

51 In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

52 Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

53 CapU has referred to two non-*CCAA* cases that discuss ROFRs generally.

54 In *Adesa Auctions of Canada Corp. v. Southern Railway of British Columbia Ltd.*, 2001 BCSC 1421 (B.C. S.C.) at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 (B.C. C.A.) at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

55 It is common ground, however, that different considerations may also apply in the *CCAA* context. Having said that, there is little case authority on the ability of a court in *CCAA* proceedings to vest off a ROFR, whether triggered or not.

56 In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103 (the "ROFR Article"), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia*, the monitor's views on these issues before making any such approvals.

57 At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

58 Quest has referred to *Bear Hills Pork Producers Ltd., Re*, 2004 SKQB 213 (Sask. Q.B.), additional reasons 2004 SKQB 216 (Sask. Q.B.). In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

59 However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

60 I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Arctic Glacier Income Fund, Re*, [2012] M.J. No. 451 (Man. Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

61 Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp.* (November 23, 2018), Doc. CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

62 Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

63 For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

> a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;
>
> b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of "Bona Fide Offer to Purchase" means, in part, an offer that is:

(iii) only for the entirety of the Property [the lands] and all chattels thereto and no other property, rights or assets

[Emphasis added.]

The definition of "Purchased Assets" in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, "change of control" provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp's expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest's assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe "chilling effect" on the market, with potentially disastrous results for Quest's restructuring efforts;

d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";

i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings. CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

64 If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

65 In *Bear Hills*, similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

66 As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid the "social and economic losses resulting from liquidation of an insolvent company": *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when "all stakeholders are treated as advantageously and fairly as the circumstances permit".

67 I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the *CCAA* in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

68 Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest's assets in competition with the Primacorp transaction.

69 As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex's interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

70 In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

71 On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the "Landrex PSA") providing for a purchase price of $51 million for most of Quest's assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star's rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

72 By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which "another party" (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

73 Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71 (S.C.C.). Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.).

74 Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

75 By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were "not currently at a stage such that they are capable of being accepted by Quest", those "other proposals" included the Landrex PSA.

76 By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest's counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

> 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor's Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party) . . .

77 Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

78 By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

79 On November 2, 2020, Landrex made a further offer for $53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

80 In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

81 I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

82 On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

83 On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

84 Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

85 The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

86 I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of $20 million.

87 Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it.

Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

88 In the overall circumstances here, I see no reason to delay, if not risk, the "bird in hand" transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

89 On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the "Disclaimers") to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

90 A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

91 Quest's rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately $236,218 per month.

92 Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest's Disclaimers of the Subleases in relation to Lots C-D be upheld.

93 The Ground Leases are registered against Lots A-D. BMO's security is registered against Southern Star's interest under the Ground Leases; in addition, Fivestone Capital Corp. ("Fivestone"), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

94 What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

> In deciding whether to make the order, the court is to consider, among other things,
>
> > (a) whether the monitor approved the proposed disclaimer or resiliation;
> >
> > (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
> >
> > (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

95 In *League Assets Corp., Re*, 2016 BCSC 2262 (B.C. S.C.), I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the

creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

96 The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd., Re*, 2012 ONSC 4471 (Ont. S.C.J. [Commercial List]) at paras. 51-52 and *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc., Re*, 2012 QCCS 6796 (C.S. Que.) at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

97 Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

98 In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;

2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,

2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

99 Southern Star advances a number of arguments in relation to the Disclaimers.

100 Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

101 I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone's guess.

102 In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

103 Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

104 I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

105 Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have

done so.

106 Southern Star refers to the statements in *Allarco Entertainment Inc., Re*, 2009 ABQB 503 (Alta. Q.B.) at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

107 Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

108 The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

109 As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

110 Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time — the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

111 I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

112 In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co., Re*, 2015 ONSC 1028 (Ont. S.C.J.) at paras. 27-28.

113 As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd., Re*, 2004 BCSC 733 (B.C. S.C.) at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

114 I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

115 At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court

upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

116 This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant — Southern Star under the Disclaimers — was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

117 In early November 2020, known unsecured creditor's claims were estimated at approximately $2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

118 Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or $1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated $1 million) and the Association for the Advancement of Scholarship (estimated $5 million).

119 As the Monitor notes, any of these claims could effectively veto the Plan.

120 Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

121 Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

122 The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

123 In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

> RVO Structure & Impact
>
> 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
>
>> 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
>>
>> 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
>>
>> 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
>>
>> 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;

2.6.5 All of Quests right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,

2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.

2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.

2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:

2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and

2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

124 As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

125 The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

126 Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the *CCAA*. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

127 There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

128 Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

129 In *T. Eaton Co., Re*, 2000 CarswellOnt 4502, 26 C.C.P.B. 295 (Ont. S.C.J. [Commercial List]), the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

130 It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

131 More recently, this structure was approved in *Plasco Energy, Re* (July 17, 2015), Doc. Toronto CV-15-10869-00C (Ont. S.C.J. [Commercial List]). In those *CCAA* proceedings, an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. . . .

132 Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corp., Re* (October 7, 2019), Doc. Montreal 500-11-057094-191 (C.S. Que.). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

133 In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

134 An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp., Re* (April 21, 2020), Doc. Toronto CV-19-00632079-00CL (Ont. Gen. Div. [Commercial List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

135 Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and

perhaps some amount for the first secured creditor.

136 The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc., Re* (July 13, 2020), Doc. Toronto CV-20-00642013-00CL (Ont. Gen. Div. [Commercial List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

137 In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the “only option” to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

138 Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc., Re* (Sep 18, 2020), Doc. Toronto CV-20-00642097-00CL (Ont. Gen. Div. [Commercial List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to “Residualco”, which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp* . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group’s assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

139 In *Beleave Inc.*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

140 Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc., Re* (October 16, 2020), Doc. Calgary 2001-05482 (Alta. Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor’s bench brief discloses the relevant facts.

141 As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

142 In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave Inc.*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to “cleanse” the

> debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

143 In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

144 By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

145 On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.); leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (C.A. Que.). The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

146 All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

147 In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

148 In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors'' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

149 Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO

are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

150 Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

151 As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

152 Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

153 At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

154 That said, the ability of a *CCAA* court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the *CCAA*: *Century Services*.

155 I find further support for Quest's position in the recent comments of the Court in *Callidus*. The Court was there addressing a different issue — whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" — but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure:

> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> [50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:
>
>> Good faith
>>
>> 18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>>
>> Good faith — powers of court
>>
>> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>>
>> (See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

. . .

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

. . .

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68) . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

. . .

[70] . . . The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

. . .

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . *If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.*
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

[Underline emphasis added; italic emphasis in original.]

156 Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

157 There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

158 As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances — that is the offer the Court must consider.

159 I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

160 Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could be not transferred.

161 Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest's ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation "composed of the members of the board" and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the "board" means the board of governors of the university.

162 It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these *CCAA* proceedings.

163 At para. 38, the court in *Nemaska Lithium* asked:

> . . . whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

164 I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana's unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

165 In that light, I would ask Southern Star and Dana a similar question to that of the QCCA — to what end is your veto if Quest's Plan is put presented for creditor approval?

166 Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while

significant other interests hang in the balance.

167 The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

> 2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

168 In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

169 Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the *CCAA*.

170 The granting of the RVO in these circumstances is in accordance with the remedial purposes of the *CCAA*. To use the words of Dr. Sarra, quoted above in *Callidus*, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

171 I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

172 Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

173 The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

174 Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

175 Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

176 The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6 are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp., Re*, 2015 BCSC 1204 (B.C. S.C.) at para. 25, referring to various authorities such as *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) at para. *13*. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

177 More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

178 I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

b) Quest ‘s Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the *CCAA* process toward finding a suitable academic partner and/or a purchaser/developer for Quest's lands;

c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;

d) The Primacorp transaction will see the repayment of Quest's secured creditors, now totalling approximately $42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;

e) Since August 7, 2020, the Interim Lender and VF, Quest's major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

f) There has been significant community and stakeholder involvement throughout the sales process;

g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;

h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;

j) The Primacorp transaction will fund a Plan for unsecured creditors;

k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the

$20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;

l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;

m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;

n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;

o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and

p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

179 I grant the RVO as sought by Quest, and as supported by the Monitor.

180 The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

Application dismissed.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
  VII.6 Conduct and liability of receiver
    VII.6.a General conduct of receiver

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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 assets to them.

Per McKinlay J.A. (concurring in the result): 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. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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 the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

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Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

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

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

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

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

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

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

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

[Emphasis added.]

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

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply

> because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world

> and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the

hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and

> make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

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

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

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

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

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

I agree.

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

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

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

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

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

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

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On

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

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

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

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

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

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

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

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

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

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other

creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

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

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

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

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

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

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

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

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its

negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

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

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

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

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

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

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

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

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

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

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

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

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

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

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

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

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

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately

triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

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

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

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

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

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

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

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

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

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

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

to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

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

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

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

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

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

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

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

Appeal dismissed.

2005 BCSC 1783
British Columbia Supreme Court [In Chambers]

Royal Bank v. Vaishnav

2005 CarswellBC 3036, 2005 BCSC 1783, [2005] B.C.J. No. 2766, [2006] B.C.W.L.D. 1500, 145 A.C.W.S. (3d) 713, 17 C.B.R. (5th) 222

Royal Bank of Canada (Petitioner) and Kalpana Vaishnav, Bhadrayu Vaishnav, Sharat Chande, Jyoti Chande, K S Financial Corporation, The Attorney General of Canada, representing the interests of Her Majesty the Queen in Right of Canada, A. Farber & Partners Ltd., Trustee of the Estates of Kalpana Vaishnav and Bhadrayu Vaishnav, bankrupts (Respondents)

Burnyeat J.

Heard: December 8, 2005
Judgment: December 19, 2005
Docket: Vancouver H050459

Counsel: L.D. Goldberg for Royal Bank of Canada
D.P. Hall for Sarwari Mohammed
B.C.E. Russell for Mohammad Fayaz Khan

Subject: Corporate and Commercial; Property; Insolvency

Table of Authorities

Cases considered by *Burnyeat J.*:

Abermin Corp. v. Granges Exploration Ltd. (1990), 45 B.C.L.R. (2d) 188, 42 C.P.C. (2d) 25, 1990 CarswellBC 82 (B.C. S.C.) — considered

Bank of Nova Scotia v. Yoshikuni Lumber Ltd. (1992), 74 B.C.L.R. (2d) 19, 99 D.L.R. (4th) 289, (sub nom. *Bank of Nova Scotia v. Yoshikumi Lumber Ltd. (Receivership))* 20 B.C.A.C. 134, [1993] 2 W.W.R. 695, 16 C.B.R. (3d) 10, (sub nom. *Bank of Nova Scotia v. Yoshikumi Lumber Ltd. (Receivership))* 35 W.A.C. 134, 1992 CarswellBC 526 (B.C. C.A.) — referred to

British Columbia v. A & A Estates Ltd. (2000), 2000 BCCA 317, 2000 CarswellBC 1007, 75 B.C.L.R. (3d) 107, 32 R.P.R. (3d) 1, 138 B.C.A.C. 52, 226 W.A.C. 52 (B.C. C.A.) — followed

CIBC Mortgage Corp. v. Schiel (2003), 2003 BCSC 1782, 2003 CarswellBC 2943 (B.C. S.C.) — considered

Island Savings Credit Union v. Ferguson (2003), 2003 BCSC 707, 2003 CarswellBC 1137 (B.C. S.C.) — considered

Royal Bank v. Derco Industries Ltd. (1988), 24 B.C.L.R. (2d) 202, 1988 CarswellBC 100 (B.C. S.C.) — referred to

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245, 1986 CarswellOnt 172 (Ont. S.C.) — referred to

Westcoast Savings Credit Union v. Wachal (1988), 32 B.C.L.R. (2d) 390, 71 C.B.R. (N.S.) 270, 1988 CarswellBC 547 (B.C. C.A.) — considered

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
App. B, s. 2(2)(c) — referred to

APPEAL by prospective purchaser from order approving sale of property upon foreclosure.

***Burnyeat J.*:**

1 Sarwari Mohammed appeals an Order made by Master Bolton on November 17, 2005 wherein a sale of certain mortgaged property to Mohammed Fayaz Khan for the sum of $600,000.00 was approved.

Background

2 These are foreclosure proceedings. On September 15, 2005, the Petitioner obtained an Order *Nisi* of foreclosure setting the last date for the redemption of the mortgage at September 16, 2005. There was also a declaration that the balance due and owing and required to redeem the mortgage was $424,633.11 together with interest at the rate of 4.519532% per annum, calculated half-yearly, not in advance. At the time of the Order *Nisi*, the Petitioner was also granted an order giving it exclusive conduct of the sale of the property, but with any sale being subject to the approval of the Court unless otherwise agreed to by all of the parties.

3 By a Motion heard November 17, 2005, the Petitioner sought approval of the sale of the Property to Mohammed Fayaz Khan for the sum of $600,000.00, pursuant to the terms and conditions of an October 22, 2005 Contract of Purchase and Sale which provided that the completion of the sale of the property and vacant possession of the property would be as at 12 o'clock noon on December 2, 2005. That application was opposed by the owners of the property who submitted that the sale price was too low and that, if the sale was to be approved, December 2, 2005, did not give them sufficient time to arrange to provide the proposed purchaser with vacant possession of the property.

4 Shortly before the hearing of the application, an offer was presented on behalf of Sarwari Mohammed in the amount of $600,101.00 with a completion date on December 16, 2005. After receiving the advice from Mohammed Fayaz Khan that he was not prepared to increase the amount of his $600,000.00 offer, upon receipt of an Addendum to his Offer moving the completion date and date of possession from December 1, 2005 to December 16, 2005, after being advised by counsel for the Petitioner that Mohammed Fayaz Khan had expended significant funds relating to the possible purchase of the property, upon being advised by counsel for the Petitioner that Mohammed Fayaz Khan was not prepared to increase his offer above $600,000.00, and after receiving the submissions of counsel for the Petitioner that the offer of $600,000.00 should be approved rather than the offer of $600,101.00, Master Bolton approved the sale of the property to Mohammed Fayaz Khan for a purchase price of $600,000.00.

5 While Reasons given by the Learned Master are not available, counsel for the Petitioner advises that the arguments he now advances were also advanced before Master Bolton and that, in his Reasons for Judgment, Master Bolton adopted the submissions of the Petitioner.

6 After the Order was made, Sarwari Mohammed announced to the Court that he was prepared to increase his offer so the small margin between the two offers would be increased. Counsel for the Petitioner advises that the response of Master Bolton was that this amendment to the amount of his original offer was "too late".

This Appeal

7 The grounds of appeal set out by Sarwari Mohammed are as follows: "The learned Master erred in not approving the offer made by Sarwari Mohammed as it was higher than the offer that was approved."

8 In opposition to the application of Sarwari Mohammed, Mohammed Fayaz Khan states that, prior to making an offer on the property, he "... reviewed the condition of the property, spent considerable time and money checking out its feasibility and remodelling and resale before making the above offer." Counsel for Mr. Kahn advises that this information was before

Master Bolton when he approved the sale of the property to Mr. Kahn.

9 Mr. Kahn also sets out the following information in his Affidavit regarding his activities since the sale to him was approved:

> On confirmation of the subject sale, I entered into arrangements with various contractors and renovators to repair, upgrade and remodel the property. I am now obligated to those parties to use and pay them to complete the necessary work. I relied on the Court Order in making these arrangements.
>
> I have also resold the subject property based on my completion of the purchase and my agreed repairs and remodelling. I also relied on the Court Order and am now open to a serious damages and costs or specific performance lawsuit if I am unable to complete the purchase as per the Court Order.
>
> I have incurred substantial and preliminary conveyancing, search and related fees respecting both my purchase and the sale, and the principal renovations.
>
> I have honestly relied on the Court Order and have incurred obligations, and will lose considerable money and expose myself to a lawsuit if I am um unable to deliver.

10 Leave was not sought to introduce new evidence and, accordingly, I am satisfied that I should not take into account the most recent Affidavit of Mr. Khan outlining what has occurred since the Order was made approving the sale of the property to him.

11 On December 8, 2005, I advised counsel that the Appeal was dismissed. These Reasons for Judgment set out my conclusions as to why it was appropriate to deny the Appeal of Sarwari Mohammed.

Discussion and Case Authorities

12 The standard of review on an appeal to a Judge from the decision of a Master depends on the nature of the order from which the appeal is taken. In *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (B.C. S.C.), Macdonald J. stated:

> An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the Master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his

> own views for that of the Master. (at p. 193).

13 Accordingly, is an order approving a sale (a vesting order) a "pure interlocutory matter" in which case an appeal should not be entertained unless it is shown that the Master was "clearly wrong" or a "final" order which carries with it the lower review standard?

14 It is often the case that the Court will avoid answering this question in order to provide some finality to the question of which offer will be approved. For instance, in *CIBC Mortgage Corp. v. Schiel*, [2003] B.C.J. No. 2697 (B.C. S.C.), Hood J. stated:

> In my haste I will leave for another day the determination of whether or not a court order of sale of mortgaged property to the highest bidder is or is not a purely interlocutory matter. In the case at bar, while I appreciate Mr. Schiel's concerns, I can find no reason for granting the appeal. If the appellants must satisfy me that the learned master was clearly wrong, they have not done so. On the other hand, if it is open to me to substitute my own views for those of the master, I find that our views are somewhat the same, including the usual procedure which he followed. Masters deal with foreclosure proceedings on a daily basis, and I defer to the learned master's advantages arising out of his great experience in matters of this kind. I would also add that in my opinion he was right on the evidence before him. (at para. 7)

15 The earliest view on this question was set out by the Court of Appeal in *Westcoast Savings Credit Union v. Wachal* (1988), 32 B.C.L.R. (2d) 390 (B.C. C.A.) where Macfarlane J.A., dealt with an application for leave to appeal an order approving a sale where there were competing offers, and the appeal of the highest bidder who argued that its original lower offer should be approved in order to preserve "... the integrity of the process under which the sale occurs". In dealing with the standard of review, Macfarlane J.A. stated:

> The court here was acting pursuant to the discretionary power found in Rule 50(5)(g) under which the court *may* order a sale of the mortgaged property. An appellate court will not presume to substitute its own discretion for the discretion already exercised by the judge or otherwise to interfere with such an order unless it reaches the clear conclusion that the discretion has been wrongly exercised in that no sufficient weight has been given to relevant considerations or that on other grounds it appears that the decision may result in an injustice: see *Taylor v. Vancouver Gen. Hosp.*, 62 B.C.R. 42, [1945] 3 W.W.R. 510, [1945] 4 D.L.R. 737 (C.A.).
>
> A shorter statement of the same rule is that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong.

(at pp. 393-4)

16 The more current statement by the Court of Appeal on this question is set out in *British Columbia v. A & A Estates Ltd.* (2000), 75 B.C.L.R. (3d) 107 (B.C. C.A.), where the Court dealt with three appeals brought from an order of the Chambers Judge who ordered that a sale at $492,160.00 should be approved while setting aside an order of a Master who had approved a sale of property at $1,150,000.00. In dealing with the question of whether a late bid should prevail because it is higher, Esson J.A. stated on behalf of the Court:

> At the time Macfarlane J.A. spoke [in ***Wachal***, *supra*], the present system by which masters deal with virtually all applications for approval of sale in foreclosure proceedings had not come into effect. In 1991, when Macdonald J.A. refused leave to appeal in Sun Life [***Savings & Mortgage Corp. v. Sampson*** (1991), 59 B.C.L.R. (2d) 355 (B.C.S.C.); 62 B.C.L.R. (2d) 399 (B.C.C.A.)], the system had been in effect for a very short time. It has now been in effect for almost a decade. In 1988, Macfarlane J.A. expressed the view that trial judges understood the proposition that judicial auctions should be discouraged. Since then, the masters, a relatively small and cohesive group, have heard the great majority of applications to approve sales. They have gained a level of experience in these difficult matters which is higher than that of most judges. That being so, it is appropriate that judges hearing appeals from masters in these cases should start with the assumption that the masters understand the legal principles and factual considerations applicable to such applications. (at para. 44)

17 In dealing with the question of whether the order appealed from was an interlocutory or a final order, Esson J.A. stated:

> In saying that, I should not be taken as suggesting that the principles laid down in *Abermin Corp. v. Granges Explor*. Ltd. (1990), 45 B.C.L.R. (2d) 188 should be modified. I assume, without deciding, that this was not a purely interlocutory matter and that it was therefore open to the judge to substitute her own view for that of the master. But, in deciding whether to give effect to a different view, a judge should give due recognition to the reality that masters have certain advantages arising out of their great experience in matters of this kind. (at para. 45)

18 In dealing with the general question of whether a lower offer can be approved, Esson J.A. stated:

> The passage referred to by the chambers judge in this case was clearly obiter but was intended to emphasize that a receiver's decision to enter into an agreement for sale subject to court approval should not be set aside "simply because a later and a higher bid is made".

> I do not disagree with that point of view provided it is applied within reasonable limits. Where the later offer is higher, the court may refuse to entertain it and to approve the sale recommended by the receiver or other person given conduct of sale. But in practice, that is done only where the improvement on the price is not significant and, in most cases, where it also appears that the late bid is less firmly secured than the recommended one. (at para. 40)

19 The statements of Esson J.A. in *A & A* regarding the standard of review have now been adopted by this Court. After concluding that the appeal from an order approving a sale required a re-hearing, Quijano J. in *Island Savings Credit Union v. Ferguson*, [2003] B.C.J. No. 1104 (B.C. S.C.) dealt with the standard of review as follows:

> In a number of cases in this jurisdiction it has been recognized that an order by a master approving sale is not an interlocutory order but is an order in the nature of a final order. Therefore, the appeal from such an order is by way of re-hearing. (at para. 19)
>
> It is clear that, at this point, appeals from such orders are to be by way of re-hearing but that there is deference to be paid to the masters in recognition of their "great experience" in matters of this kind. (at para. 21)

20 While the highest price is an important factor, it is not the sole factor which should influence the Court in exercising its discretion to approve a sale in foreclosure proceedings. For instance, where the Court has fixed a specific bidding process, the integrity of the court process might well override the obtaining of the best price: *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.); *Royal Bank v. Derco Industries Ltd.* (1988), 24 B.C.L.R. (2d) 202 (B.C. S.C.); *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.* (1992), 74 B.C.L.R. (2d) 19 (B.C. C.A.); and *Wachal*, *supra*. As well, the higher offer may not necessarily be approved where the "improvement on the price is not significant" or where it appears that the higher bid was "less firmly secured than the recommended on", per the comments of Esson J.A. in *A & A Estates*, *supra*.

21 In foreclosure proceedings, the order nisi is a final order. However, it is clear that an order approving a sale is also a final order. Unlike an order absolute foreclosure which can be reopened, the Court is without jurisdiction to reopen an order approving a sale after the property has been transferred to the approved purchaser. Having concluded that the order which approved this sale is a final order, that a rehearing of the matter is the appropriate form of appeal, and that I am in a position to substitute my views for that of the Learned Master, I can find no reason to grant the appeal. The difference of $101.00 represents an insignificant improvement on the proposed purchase price equivalent to less than .00017%. The lower offer came with the recommendation from the Petitioner that it be approved and with the advice that Mr. Kahn had spent considerable time and money checking out the feasibility of remodelling and reselling the property. While the completion dates were the same and despite the fact that the deposit by Mr.

Kahn to be made within 24 hours of court approval was $34,000.00 whereas the deposit to be paid by Mr. Mohammed within 24 hours of court approval was $35,000.00, I am satisfied that the offer of Mohammed Fayaz Kahn should be approved in all of the circumstances. The slight difference in the deposit and the insignificant difference in the two offers is not enough to persuade me that I should approve the offer of Mr. Mohammed.

22 Accordingly, the Appeal of Sarwari Mohammed is dismissed. The Petitioner, Royal Bank of Canada and Mohammed Fayaz Kahn will be entitled to their Party and Party (Scale 3) costs against Sarwari Mohammed.

Appeal dismissed.

1988 CarswellBC 547
British Columbia Court of Appeal

Westcoast Savings Credit Union v. Wachal

1988 CarswellBC 547, [1988] B.C.J. No. 2257, [1989] B.C.W.L.D. 177, [1989] C.L.D. 174, 12 A.C.W.S. (3d) 332, 32 B.C.L.R. (2d) 390, 71 C.B.R. (N.S.) 270

WESTCOAST SAVINGS CREDIT UNION v. WACHAL et al.

Macfarlane J.A. [in Chambers]

Judgment: November 7, 1988
Docket: Victoria No. V00747

Counsel: *P.G. Scambler*, for appellant, St. Laurent Properties (Alberta) Inc.
H. Rusk, for respondent.
R.C. Di Bella, for receiver-manager, G. Card.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered:

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.) — *considered*

F.B.D.B. v. Mission Creek Farm Inc. (1988), 25 B.C.L.R. (2d) 188, [1988] 5 W.W.R. 241, 28 C.P.C. (2d) 171, 50 D.L.R. (4th) 616 (C.A.) — *applied*

Royal Bank v. Derco Indust. Ltd. (1988), 24 B.C.L.R. (2d) 202 (S.C.) — *considered*

Salima Invt. Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473, 65 A.R. 372 (C.A.) — *considered*

Taylor v. Vancouver Gen. Hosp., 62 B.C.R. 42, [1945] 3 W.W.R. 510, [1945] 4 D.L.R. 737 (C.A.) — *referred to*

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 50(5)(g)

Application for leave to appeal order of Murphy L.J.S.C. approving sale of mortgaged premises.

Macfarlane J.A. **(orally):**

1 The appellant seeks leave to appeal the order of the Honourable Judge Murphy L.J.S.C., pronounced on 30th March 1988, in which he approved the sale of certain mortgaged premises. The appellant submits that the chambers judge erred in exercising his discretion by ordering the interested parties to file sealed bids.

2 The facts are that the property which was subject to the mortgage had been operating at a substantial loss. There was over $500,000 secured by mortgage. An order nisi was granted and a receiver-manager was appointed with power to accept offers to purchase subject to the approval of the court.

3 On 26th February 1988 the mortgagee confirmed that it was prepared to support a $200,000 cash offer made by St. Laurent Properties (Alberta) Inc. The receiver-manager accepted that offer subject to court approval, but before he had filed an application to approve the offer, he received another offer from James L. Ericksteen for $230,000. The receiver-manager accepted the second offer subject to approval of the court.

4 In an affidavit filed by the receiver-manager in support of the application to have an offer approved, the receiver-manager not only put forward the two offers that I have mentioned but said that a realtor by the name of Anaka had indicated that he had a client who intended to make an offer. The receiver-manager recommended to the court that an order be made that sealed bids be filed.

5 When the matter came before Judge Murphy, he heard submissions, and decided that was the proper course to follow. I should say that by that time a fourth offer from M.S.A. Holdings Ltd. was being advanced. The result of the bidding process was that the highest bidder was the appellant, St. Laurent Properties (Alberta) Inc. Its bid would produce a net price of $245,000 after payment of real estate commission. The Anaka offer was second in size and would have netted $239,505. The offer by M.S.A. Holdings Ltd. would have netted $243,000. The chambers judge approved the offer of St. Laurent.

6 Nevertheless, St. Laurent appeals that order submitting that its original offer of $200,000 cash ought to have been approved. The appellant takes that position upon the basis that the primary consideration on any application to court to approve a sale is to protect the interests of the creditors but that there is an important secondary interest in preserving the integrity of the

process under which the sale occurs. It is submitted that the process ought to be seen as fair to all concerned. Those two principles are taken by the appellant from *Royal Bank v. Derco Indust. Ltd.* (1988), 24 B.C.L.R. (2d) 202 at 203-204.

7 The integrity of the process was considered by the Nova Scotia Supreme Court (Appeal Div.) 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.). In that case, Macdonald J.A. said that the decision of a receiver to enter into an agreement of sale subject to court approval ought not to be set aside simply because a later and higher bid is made. He said that to do so would literally create chaos in the commercial world and receivers and purchasers would never be sure that they had a binding agreement.

8 Similar remarks were made in *Salima Invt. Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58 at 61, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473, 65 A.R. 372 (C.A.). In that case, Kerans J.A. said that although receivers should look for new and imaginative ways to get the highest possible price, the system ought not to be undermined by a judicial auction. He then went on to say what problems can be encountered when a judicial auction takes place. He said that the proper exercise of judicial discretion should be limited in the first instance to an inquiry whether the receiver has made a sufficient effort to get the best price and acted improvidently.

9 I should pause to say that in this case there is no suggestion that the receiver-manager has not made a sufficient effort to get the best price, nor is it seriously suggested that he acted improvidently. The property in this case was well exposed to the market. I am told that there were 50 offers or more that were made. It was a case where it was difficult to sell the property because the hotel was losing money each and every month that it operated. It is clear from the material that I have seen that all parties had concluded that there would be a substantial loss by the mortgagee in the circumstances of the case.

10 I agree with the judicial comments to which I have referred, that judicial auctions ought not to be encouraged and that if they are carried too far, it would create chaos in the commercial world and receivers and purchasers would never be sure what was going to happen. But the primary duty of the court is to see that the best possible price is obtained for the property in question. Often, there will be one offer and then there will be other offers made at or about the time the application is ready to be heard. What is a receiver-manager to do in those circumstances? It seems to me that his duty is to put all the information which he has before the court with his recommendations.

11 In this case, the receiver-manager did his duty. He placed the two offers, the St. Laurent and Ericksteen offers, before the court, informed the court of the possibility of the third offer by Anaka's client, and when he appeared before the court, presented the M.S.A. Holdings Ltd. offer. What is a judge to do when faced with that dilemma? Judges in this province have for quite some time now solved that problem by ordering that sealed bids be filed. That was what was done by Mr. Justice Bouck in *Royal Bank v. Derco Indust. Ltd.* That was the general

process which was given approval by this court, although in an obiter statement, in *F.B.D.B. v. Mission Creek Farm Inc.* (1988), 25 B.C.L.R. (2d) 188 at 199, [1988] 5 W.W.R. 241, 28 C.P.C. (2d) 171, 50 D.L.R. (4th) 616. In that case, the chambers judge had actually approved a sale but later set aside his order before it was entered and directed that four interested purchasers submit sealed bids. The result was the obtaining of the higher price. This court held that the judge enjoys a discretion to set aside or vary an unentered order, but concluded with this passage in the reasons of Mr. Justice Taggart at p. 199:

> In the circumstances of this case, I think Judge van der Hoop properly exercised his discretion. His reasons for judgment show that he was concerned by the "flurry of activity", after a long period when no offers for the purchase of the property in question had been forthcoming, with several prospective purchasers expressing interest in the property. I think the judge was right to set aside his order of 5th December and direct a submission of sealed bids. That I understand is the practice commonly followed where a number of purchasers are interested in making offers for the property.

12 The court here was acting pursuant to the discretionary power found in R. 50(5)(*g*) under which the court *may* order a sale of the mortgaged property. An appellate court will not presume to substitute its own discretion for the discretion already exercised by the judge or otherwise to interfere with such an order unless it reaches the clear conclusion that the discretion has been wrongly exercised in that no sufficient weight has been given to relevant considerations or that on other grounds it appears that the decision may result in an injustice: see *Taylor v. Vancouver Gen. Hosp.*, 62 B.C.R. 42, [1945] 3 W.W.R. 510, [1945] 4 D.L.R. 737 (C.A.).

13 A shorter statement of the same rule is that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong.

14 I think it extremely unlikely that a panel of this court would interfere with the discretion of the chambers judge in this case. This is particularly so in view of the comment of Mr. Justice Taggart in *F.B.D.B. v. Mission Creek Farm Inc. et al.* Although it is important that judicial auctions be discouraged, I think that the trial judges in this province understand that proposition and take it into careful consideration when deciding what to do in cases like the present one. For my part, I see no error at all in the decision of Murphy L.J.S.C. to order the filing of sealed bids in the circumstances of this case.

15 Accordingly, I would dismiss the application for leave to appeal.

16 Costs in the case to follow the event.

Application dismissed.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*8640025 Canada Inc. and Teliphone Data Centers Inc. (Re),* 2017 BCSC 1291

Date: 20170718
Docket: S1610905
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as Amended

And

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

Petitioners

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for Ernst & Young:	Sean F. Collins Walker W. MacLeod Robyn Gifford
Counsel for Bank of Nova Scotia:	Mary I.A. Buttery
Counsel for TELUS Communications Company:	John R. Sandrelli Jordan D. Schultz
Counsel for Teliphone Corp.	H.C. Ritchie Clarke
Counsel for Cascade Divide Enterprises:	Daniel F. Hepburn
Counsel for Bell Canada, Northwestel Inc., Bell Mobility Inc., Bell Aliant Regional Communications Inc.:	Lisa C. Hiebert
Counsel for SBA Canada ULC:	Peter J. Reardon Linda G. Yang

Counsel for TNW Networks Corp.	George F.T. Gregory
Counsel for Bond Capital Fund V Limited Partnership:	Ronald J. Argue
Counsel for 10276375 Canada Inc.:	Heather M.B. Ferris
Place and Dates of Hearing:	Vancouver, B.C. July 13–14, 2017
Place and Date of Judgment:	Vancouver, B.C. July 18, 2017

[1] The Monitor in this proceeding, Ernst & Young, seeks certain asset sale orders which I will further describe below.

[2] In addition to the Petitioners named in the present style of cause, Teliphone Data Centers Inc. is a Petitioner pursuant to an order of this Court made on April 26, 2017. On the applications before me, Mr. Clarke appeared for Teliphone Corp. and Mr. Gregory appeared for TNW Networks Corp. I also heard from Mr. Sandeep Panesar, who is not a lawyer but is a senior executive for one or more of the companies on the Petitioners' side in this dispute. All of the entities named or referred to above in this paragraph formed the opposition to the orders sought by the Monitor, and I shall refer to them together as the Respondents.

[3] The Monitor applies for the orders found in the sale approval and vesting order, which is Schedule B to its application filed July 10, 2017. The main order the Monitor seeks is the approval of the sale of certain assets to 10276375 Canada Inc., which carries on business as Distributel.

[4] The Monitor has the support of the secured creditors and certain other companies who were doing business with certain of the Respondents. The debt owing to the secured creditors totals approximately $20 million. No matter what the outcome in these applications, I am advised the secured creditors will experience a substantial shortfall.

[5] The underlying business at the center of these applications is the resale, by one or more of the Respondents, of telephone, communication and data services using the networks and infrastructure of Telus and Bell Canada.

[6] This proceeding has come before the Court several times in its relatively short life. Although some of the resulting orders were made by consent, the consent was often the product of heated negotiation. Matters have now come to that point, often reached in receivership proceedings, in bankruptcy proceedings, and, in this case, proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-44, as amended ("*CCAA*"), where one side submits that a sale must now take place and the other side says, give us more time to carry on somehow. Although the Respondents raise arguments against the proposed sale being approved, they take no position against the Monitor's submission that the sale now before the Court represents the best of the offers the Monitor has received.

[7] Having reviewed the positions of both sides, including the legal basis for the Monitor to seek the orders it now seeks, I am of the opinion that the requested sale should proceed. I noted above that no better sale appears to be available. That is after a rigorous canvassing of the market by the Monitor, pursuant to his powers under this Court's earlier orders and s. 36(3) of *CCAA*. At this stage, the decision reduces itself to the approval of this one sale, or an alternative outcome, which is difficult to know or define. There is no evidentiary base from which to conclude that the Respondents are in a position to carry on. They are about to run out of money and have no credit. Their business relationships with those they must deal with to carry on business, Telus being a prime example, are damaged beyond repair. The Distributel deal, on the other hand, can likely save the employment of dozens of employees, and allow a business to carry on. I do not see a viable alternative to the requested orders.

[8] As noted above, s. 36(3) of the *CCAA* sets out factors to be considered on this application:

> **Factors to be considered**
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> > (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> >
> > (b) whether the Monitor approved the process leading to the proposed sale or disposition;
> >
> > (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be

> more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[9] It can be seen that s. 36(3) is not intended to set out a list of factors that is exhaustive. However, in considering what is listed in paragraph (a)–(f), factors (b) through (f) cannot be said to be in issue on any reasonable interpretation of the evidence, and I will say little more about them. It can be seen in paragraphs (b) and (c) that Parliament intended the Monitor's opinion and approval to be given substantial weight, and in paragraphs (d) and (e), that among the other stakeholders, it is the creditors who are named exclusively for being consulted and who are named specifically for assessing the effects of the proposed sale. In my view, from the arguments presented, only paragraph (a) in s. 36(3) was seriously put in issue, dealing with process, and I will address it further, later in these reasons.

[10] Both sides directed me to the majority judgment of Galligan J.A. in *Royal Bank v. Soundair Corp*. (1991), 83 D.L.R. (4th) 76 (O.C.A.), as the leading case authority to consider. The Monitor relies on para. 14 of the decision, and would seek to apply it to monitors as well as receivers, which I accept:

> 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.

[11] The Respondents, along with the Monitor, stress the four duties upon the Court in considering sale applications, as listed in para. 16 from *Soundair*:

> 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.

[12] When the evidence on these applications is considered, I find that only points 3 and 4 call for close examination in this case. Points 3 and 4 overlap with s. 36(3)(a), quoted above at para. [8], and I shall address the process and fairness questions together below.

[13] Before leaving *Soundair*, I note, again from Galligan J.A.'s reasons, his observation in para. 40 that the interests of the debtor in an appropriate case must be considered, but also that the interests of the party in Distributel's position are very important. Finally, from his paras. 42 and 43, one sees that the primary concern of the party in the Monitor's position is protecting the interests of the creditors, while a secondary but very important consideration is the integrity of the sale process.

[14] Mr. Clarke also relied on the decision of Blok J., of this Court, in *Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058 at para. 31, where his Lordship summarized the applicable principles as follows:

> I begin with a summary of the legal principles that guide the Court in applications of this type. There are a number of general principles:
>
> 1. When considering the efforts of a receiver in obtaining offers for the purchase of property the Court must consider the following factors:
>
>   (a) whether the receiver has made sufficient efforts to get the best price and has not acted improvidently;
>
>   (b) the interests of all parties;
>
>   (c) the efficacy and integrity of the process by which offers were obtained; and
>
>   (d) whether there was unfairness in the sale process.
>
> *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ON CA), [1991] 46 O.A.C. 321, 7 C.B.R. (3d) 1 at para. 16 [*Soundair*].

2. In considering whether the receiver has acted providently the Court should examine the conduct of the receiver in light of the information in the possession of the receiver when it agreed to accept the offer. The Court should be very cautious before deciding the receiver's conduct was improvident based on information that has come to light after the receiver made his or her decision: *Soundair*, at para 21.

3. There should be deference given to the receiver's judgment and his or her decision ought not to be set aside merely because a later and higher bid is made. This deference is appropriate because it allows for certainty and finality with receivership sales: *Cameron v. Bank of Nova Scotia* (1981) 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 313 (S.C.) at para. 36. I would add, however, that our Court of Appeal has suggested this deference is more of a factor where the difference in price is not significant and the later bid is, for example, less well secured than the recommended one:. See *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317 (CanLII) at para. 40.

4. Late offers may be considered by the Court on an application to approve a sale only for the limited purpose of considering whether the price obtained by the receiver was a reasonable one. In some cases a disparity may be so great as to call into question the adequacy of the sale process: *Soundair* at paras. 26 and 30.

5. The primary interest to be considered by the Court is that of the creditors, and to see that the best possible price is obtained, though the interests of all parties, including the debtor and the receiver's recommended purchaser, must also be considered: *Soundair* at paras. 39-40. While the primary concern is the interests of the creditors, as noted earlier a secondary but still important consideration is the integrity of the process. Integrity of the process includes the object of reasonably ensuring that there is certainty and finality in sales by receivers: *Soundair* at paras 42-46.

[15] As can be seen, Blok J., relied largely on what the Ontario Court of Appeal had found in *Soundair*.

[16] The legal findings in *Soundair* and *Renuka* support the orders the Monitor seeks. I say that, given my view that the integrity of the sale process was not jeopardized.

[17] From the date of this Court's order on December 21, 2016, the Monitor was authorized both to work with the Respondents to see if a viable form of reorganizations could be achieved with them, and also to take the assets to the marketplace to see if a sale could be realized at an acceptable price.

[18] The Respondents argue that the Monitor placed itself in a conflict of interest by the fact that it stands to gain a percentage payment from selling the assets, which would be unavailable to it if a form of reorganization was undertaken instead. The Monitor submits that such a percentage payment is common in the circumstances. I am not sure that could form a complete answer. However, the Monitor is also able to show that in January of this year, the required Respondents consented in writing to the Monitor receiving a percentage payment component from an asset sale. Furthermore, the Monitor assures me that the orders it seeks in these applications do not address or determine the appropriate fees payable to the Monitor. That, I am told, is for another day if it remains in issue.

[19] The Respondents also argue that the Monitor lacked the authority to sell the assets which are the subject of the Distributel agreement. However, para. 6, in one of this Court's orders made on April 26, 2017, contains a presumption against the assets being the property of an entity whose assets the Monitor could not sell. Moreover, the Monitor further addressed the asset question in its seventh report, dated June 27, 2017, at paragraphs 110–123. I quote here paragraphs 122 and 123:

> Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any, was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the security interests of the Secured Creditors.
>
> If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking.

[20] In my view, the further work offered by the Monitor in paragraph 123, quoted above, would be wasteful of time and money, and the Court does not require it. The ownership and transfer of assets among the group of companies owned and controlled by the Respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I

also note Appendix A to the Monitor's eighth report, dated July 7, 2017, which contains an acknowledgment and undertaking on behalf of the Respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor.

[21] The Respondents' other main argument, having to do with process, is essentially that Distributel came along too late as the buyer. The Court, through its order of December 21, 2016, and the solicitation plan (1AR5) made pursuant to that order, established a careful sequence and calendar of events for the Monitor attracting potential buyers, assessing their offers and eventually reaching an agreement with one of them. Distributel did not participate in parts of that protocol because of the late timing of its arrival as a potential buyer. In my view, however, the question is whether the Monitor was authorized to ultimately proceed with Distributel as the asset purchaser, despite the timing of its appearance or offer. The Respondents have not demonstrated a bar against the Monitor making the agreement it did. I observe that s. 13 of the solicitation plan, giving the Monitor a reservation of rights, supports the Monitor on this question. It would be surprising if there was a barrier against the Distributel agreement given that the Monitor, in seeking to sell the assets, should try for the sake of the secured creditors to obtain the highest available price. Further, I do not see how the Respondents are prejudiced by the Monitor getting the best price instead of the second-best price. The Respondents point to s. 7.6 in the solicitation plan, which speaks of the Monitor consulting with management and possible offerors, but that consultation provision appears to be discretionary. Equally important, s. 7.6 allows the Monitor, in its business judgment, to waive the process contemplated in the earlier part of 7.6, including consultation with management.

[22] In summary, on the questions of integrity and fairness, I do not see evidence of the Monitor going offside at any stage. Of course, the Respondents are disappointed to be now having to exit in this matter, but that began with the repeated earlier difficulties they appear to have faced in meeting their obligations as borrowers, and as customers of services, when they could not meet their payment obligations.

[23] I have perhaps not addressed here the Respondents' arguments in the detail they deserve, which is due to the tight timelines associated with this

application. I am satisfied, however, in considering all of the Respondents' able submissions, that the Distributel transaction should not be blocked. In my view, in the circumstances shown by the facts of this case, the Distributel transaction should be approved, and I approve it.

[24] Subject to hearing from counsel now on the particulars of the order to be made, I grant the orders as contained in Schedule B to the Monitor's notice of application, which is the proposed sale approval and vesting order, and dismiss the applications of Mr. Clarke's and Mr. Gregory's clients.

"MACINTOSH J."