Court File No. 56184/15

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

MARA TECH AVIATION FUELS LTD.,
MARA-TECH AVIATION SERVICES LTD.,
MARA TECH AVIATION FUELS (THOMPSON) LTD., and
MARA TECH AVIATION FUELS (SUDBURY) LTD.

Respondents

BOOK OF AUTHORITIES OF BDO CANADA LIMITED, RECEIVER OF MARA TECH AVIATION FUELS LTD. et al

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SimpsonWigle LAW LLP
Barristers & Solicitors
1 Hunter Street East
Suite 200
P.O. Box 990
Hamilton, ON L8N 3R1

David Jackson
Tel: (905) 528-8411
Fax: (905) 528-9008

Lawyers for the Receiver

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TAB 1

2011 ONSC 4634
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Dedicated National Pharmacies Inc.

2011 CarswellOnt 7972, 2011 ONSC 4634, 205 A.C.W.S. (3d) 388, 83 C.B.R. (5th) 155

In the Matter of an Application Under Section 243 (1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, as Amended

In the Matter of an Application Under Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C-43 and Rules 14.05(2), (3) (d), (g) and (h) of the Rules of Civil Procedure

Bank of Montreal (Applicant) and Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc. (Respondents)

Newbould J.

Heard: July 29, 2011
Judgment: August 2, 2011
Docket: CV-10-00008852-00CL

Counsel: Joseph Marin, Arthi Sambasivan for Receiver Grant Thornton Limited
B. Greenberg for OATC and Drs. Daiter and Varenbut
H. Whiteley for Bank of Montreal
J. Dietrich for Youngmill Group Inc.
S. Brotman for Haviland Drugs Limited and Centric Health Corporation
A. Dryer for 1171 St. Clair Ave. W. LP
John J. Adair, Alexa Sulzenko for Dani Diena, PAD and Home Street
M. Adilman for Joel and Rachel Diena

Subject: Insolvency; Estates and Trusts

Headnote

Bankruptcy and insolvency — Receivers — Powers, duties and liabilities

Arrangements under which respondents' business operated restricted assignment of certain leases and licenses — Receiver of respondents was appointed — Receiver conducted going concern sales process — Any sale of business would require purchaser to come to terms with main lessor and licensor ("OATC") regarding assignment of leases and licenses — Judge issued order approving sale to C Co. on terms — Sale did not close within time set out in judge's order — Receiver did not remarket respondents' business but negotiated further with C Co. and OATC — New sale agreement was reached on different terms — Receiver applied for order approving sale to designee of C Co. and approving related agreements — Application granted — In determining whether receiver acted properly in conducting sale, court should consider: whether sufficient effort has been made to obtain best price and that Receiver has not act improvidently; interests of all parties; efficacy and integrity of process by which Receiver obtained offers; and whether there was unfairness in process — Receiver acted in accordance with jurisprudential principles — Receiver was of view that new agreement with C Co. would maximize stakeholders' recoveries — Receiver's view was sound — Receiver had taken stakeholders' interests into account — Review of process in which receiver engaged after termination of first agreement indicated that in face of many obstacles, it acted in thoughtful and considered manner — Provided receiver has acted reasonably, prudently and not arbitrarily, as in present case, court should

not sit as in appeal from receiver's decision or review in every detail every element of procedure by which receiver made its decision.

Bankruptcy and insolvency — Administration of estate — Sale of assets — Miscellaneous

Respondents's business had unique structure — Arrangements under which respondents operated restricted assignment of certain leases and licenses — Receiver of respondents was appointed — Receiver conducted going concern sales process — Due to structure of respondents' business, any sale would require purchaser to come to terms with main lessor and licensor ("OATC") regarding assignment of leases and licenses — Judge issued order approving sale to C Co. on terms — Sale did not close within time set out in judge's order — Receiver did not remarket respondents' business but negotiated further with C Co. and OATC — New sale agreement was reached on different terms — Receiver applied for order approving sale to designee of C Co. and approving related agreements — Application granted — In determining whether receiver acted properly in conducting sale, court should consider: whether sufficient effort was made to obtain best price and that Receiver did not act improvidently; interests of all parties; efficacy and integrity of process by which Receiver obtained offers; and whether there was unfairness in process — Receiver acted in accordance with jurisprudential principles — Receiver's view was that new agreement with C Co. would maximize stakeholders' recoveries — Receiver's view was sound — It was important in present case, because of structure of respondents' business, that interests of OATC had to be considered — OATC's preference to deal with C Co. could not be ignored — Review of process in which receiver engaged after termination of first agreement clearly indicated that in face of many obstacles, it acted in thoughtful and considered manner.

Table of Authorities

Cases considered by *Newbould J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — considered

APPLICATION by receiver for order approving sale of respondents' assets and approving related agreements.

***Newbould J.*:**

1 The receiver of the respondents applies for an order approving the sale of substantially all of the assets of the respondents to Haviland Drugs Limited and approving a number of related agreements. The sale is objected to by the Diena interests, who controlled the respondents prior to the receivership and who are secured creditors, who would like the receiver to undertake a further sales process.

2 At the conclusion of the hearing I granted the order requested for reasons to follow. These are my reasons.

Business of the respondents

3 The respondent companies are in the business of operating traditional/non-methadone dispensing pharmacies including the provision of pharmacy services to nursing and retirement homes, methadone dispensing pharmacies that offer standard prescription drugs and methadone dispensing services, and satellite clinics located in various municipalities in Ontario.

4 The business of the companies is uniquely structured in that all of the premises from which they operate are not owned but are operated under lease or license arrangements under which they pay third parties for the use of the premises and for the use of the premises' staff, office facilities and other services necessary for the business. These premises consist of 23 pharmacy and clinic locations that are the subject matter of space licence and service agreements with Ontario Addiction Treatment Centres (OATC), a business controlled by Drs. Daiter and Varenblut, and 9 pharmacy and clinic locations that are the subject of the space licence and service agreements with other third parties other than OATC.

5 The lease and license arrangements under which the companies operate generally restrict the assignments of the leases and licenses that represent the enterprise value of the companies. Those restrictions range, in the case of the OATC licences, from an express and absolute prohibition on the assignments of the licenses to requirements, under a majority of the non-OATC licences, that the consents of the lessors and licensors to any assignments be obtained, generally on terms on which the lessors and licensors can arbitrarily or unreasonably withhold their consent.

6 The OATC licensing arrangements originated from a purchase of 18 locations from OATC by the Diena interests. The terms of the purchase and the right to acquire additional locations from OATC require certain payments to be made to each of Drs. Daiter and Varenblut A significant portion of the future value of the companies is tied to this right of first refusal under the OATC licensing arrangements.

7 Under the licensing arrangements with OATC, it is an event of default if there is any default in payment under any one or more of the OATC licences or default in payments under the share purchase arrangements with Dr. Daiter and Dr. Varenbut. OATC's position has been that amounts are owing to it that must be remedied as a condition for OATC's consent to the assignments of the OATC licences to a purchaser of the business. As a result, any amounts claimed to be owing to Dr. Daiter, Dr. Varenbut and OATC operate as an impediment to the sale of the business not only for the receiver who has disputed the obligation of the companies to pay the claimed amounts in full, but for any purchaser of the business that would require that these claimed defaults be remedied as a condition for the purchase of the business from the receiver.

8 There is a dispute between the receiver and OATC regarding the enforceability of an amending agreement regarding eight of the 23 OATC licences that were executed by the companies on August 30, 2010 and September 8, 2010, the date of the receiving order, increasing amounts to be paid to OATC. There is also a dispute between the receiver and OATC regarding seven new clinics opened since the receiver was appointed and amounts owing to OATC as a result, which are a substantial portion of the amounts claimed to be owing to OATC and Dr. Daiter and Varenbut and represent a significant operational cost to any purchaser of the business.

9 As is apparent, any sale of the business requires a purchaser coming to terms with OATC and Drs. Daiter and Varenbut.

Sales Process

10 The receiver was appointed receiver of the respondent companies by court order on September 8, 2010. On October 4, 2010 Campbell J. made an order approving a going concern sales process. The sales process was conducted by the receiver in these proceedings after Grant Thornton, in its capacity as a court appointed monitor, reviewed agreements to sell the business that the respondents had solicited and received in conducting its own sales process.

11 The receiver conducted an extensive marketing process. It was essential for securing OATC's consent to the assignments of the OATC licences to a purchaser that the purchaser be acceptable to OATC. OATC had the opportunity to meet with a number of the bidders in the sales process. It indicated a preference for Centric as a prospective purchaser of the business.

12 Eventually an agreement was reached under which Centric would purchase the business, with Haviland being its designee as purchaser. This agreement was conditional upon a number of things, including the assignment of the OATC

and non-OATC licences to Centric in a form and substance reasonably satisfactory to Centric. One of the premises was in Newmarket which the landlord prior to the receivership had alleged was being operated contrary to the lease which required it to be operated solely for a retail drugstore and pharmaceutical dispensary, and not to be a nuisance or detriment to other tenants. It was being used as a methadone dispensing clinic for patients and an adjacent day care clinic had made a number of complaints. Another premise was on Dufferin Street in Toronto, and there was a dispute whether there was a binding lease arrangement with the landlord.

13 The sale to Centric was approved by Marrocco J. on January 11, 2011. At that hearing, the sale was opposed only by Joel Diena and Rachel Diena, shareholders of one or more of the respondents. The other Diena interests did not oppose the sale but were critical of the receiver's conduct of the sale process. In approving the sale, Marrocco J. directed a trial of an issue as to the existence of a lease on the Dufferin Street property and directed an abatement of the purchase price if there was no long-term lease in existence.

14 In a subsequent endorsement on a request by the Diena interests to defer the approval of the receiver's activities and accounts, which he granted, Marrocco J. stated that while it appeared that both OATC and the receiver had an interest in a successful negotiation, it was impossible to conclude that the assignment agreements would be successfully negotiated. He stated that it was not a foregone conclusion that the sale would close and that a more appropriate time to consider the receiver's activities and fees was after the sale closed. He further stated, which is now relied on by all of the Diena interests:

> If the transaction fails to close at the end of January, a new commercial reality will arise. The asset sale process will have to be repeated once again triggering the commercially sensible time to review the Receiver's actions and pay the Receiver and counsel.

Termination of Centric agreement

15 The closing of the Centric agreement was to take place by January 31, 2011. It was extended on a number of occasions by agreement between Centric and the receiver to allow sufficient time for the receiver to satisfy the conditions to complete the sale of the business, including the condition that required the receiver to secure the consents of lessors and licensors to the assignments of the OATC and non-OATC licences to Centric.

16 On March 3, 2011, Centric refused to further extend the closing date and the sale to Centric terminated in accordance with its terms. Its deposit was returned to it. At the time not all of the conditions in the agreement had been satisfied.

17 In the view of the receiver, at the time of the termination, it had consensually resolved with OATC and Drs. Daiter and Varenbut the amount and terms on which the receiver would make payment of a portion of the amounts payable to them, and OATC and Centric had consensually settled an outline of a number of significant financial terms upon which Centric would enter into replacement licensing agreements with OATC for existing clinic locations. OATC and Centric were at that time negotiating, but had not yet reached, a consensus on an outline of the significant financial terms that would apply to new clinic locations and the non-financial terms that would apply to both existing and new clinic locations. As well, there had been no resolution of the issues surrounding the Newmarket lease, for which there was no abatement in price if it could not be assigned, and the trial of the issue regarding the Dufferin premises had not yet taken place.

Further steps leading to a new agreement with Haviland/Centric

18 Following the termination, the receiver was required to consider the option of remarketing the business. The receiver's view was that a remarketing of the business first required a consensus with OATC over amounts payable to OATC and Drs. Daiter and Varenbut and the licences that OATC would be prepared to assign to a purchaser given the dispute with the receiver as to the enforceability of some of the licences. The receiver initiated discussions with OATC on these issues, and came to the conclusion that an expeditious resolution with OATC could only be achieved if the receiver reduced the number of clinics that it would remarket by excluding those in which the receiver and OATC were in

dispute as to the enforceability of the licences. The receiver did not pursue this as its assessment was that a marketing of a reduced number of pharmacy and clinic locations and the exclusion of the right of first refusal to acquire future clinic locations would significantly reduce recoveries for the Companies' stakeholders. The receiver was also of the view that there was significant risk as to whether the terms of licensing arrangements with OATC and the assignments of the non-OATC licences could successfully be renegotiated if a reduced number of pharmacy and clinic locations were included in any remarketing of the business.

19 Before the first agreement with Centric, OATC had indicated a preference for Centric. In the discussions with OATC after the termination, OATC expressed the view that it thought it had made considerable progress on the issues prior to the termination. With the co-operation of OATC, the receiver resumed discussions with Centric.

20 Centric and the receiver were prepared to resume short-term discussions on the terms of an agreement for the sale of the business on the basis that they would not engage in further negotiations on the terms of a sale until a framework for the financial and non-financial terms of the replacement license arrangements had been established in discussions between Centric and OATC and that an agreement with the receiver would be conditional upon OATC first executing or agreeing to the forms of replacement license and related agreements with Centric on terms acceptable to Centric.

21 By the end of March, 2011, the receiver had successfully reduced to writing: (i) with OATC and Drs. Daiter and Varenbut, an outline of the terms and amounts that the receiver would pay to them to secure their agreement to enter into licensing arrangements with Centric and Haviland; and (ii) with Centric and Haviland, an outline of the financial terms that would be included in any agreement of purchase and sale with Centric and Haviland. By mid-April, 2011, Centric, with the involvement of the receiver, had successfully negotiated an outline of the financial terms that would be incorporated in ongoing licensing arrangements that would be acceptable to OATC. With the achievement of these objectives to which both the receiver and Centric had committed as a condition for their resumption of negotiations, the receiver elected not to pursue a remarketing of the business, based upon its previous analysis of risk and recoveries for the stakeholders and on the basis that OATC, Haviland and Centric had sufficiently negotiated an outline of the terms of the definitive agreements among them that would enable the receiver to negotiate a sale of the business without the requirement for a closing condition that OATC's consent be secured.

22 Since mid-April 2011, OATC, Haviland and Centric have negotiated the terms of the ongoing licensing arrangements between them. Those negotiations have involved concessions of a financial and non-financial nature agreed to by OATC, Centric and Haviland, and the receiver is satisfied that OATC, Centric and Haviland have been diligent in finalizing those arrangements, which are conditional upon the completion of the sale of the business to Haviland.

23 Centric and the receiver have also secured the consents of each of the lessors and licensors to the non-OATC clinics to the assignments of the licences to Haviland. As a result, the receiver is unaware of any material condition under the terms of the agreement with Centric and Haviland that will remain outstanding for the completion of the sale is approved.

24 Regarding the Dufferin lease issue, for which a trial of an issue was ordered by Marrocco J., there was an exchange of affidavits and cross-examinations, including the cross-examination of Daniel Diena. Prior to the order of Marrocco J., the receiver was not advised of the existence of written leases with respect to the Dufferin premises despite requests made of the Dienas and of the landlord to provide the receiver with copies of any written leases. Immediately after the order of Marrocco J., the landlord disclosed that there were two leases that had expired in 2007 and took the position that the lease after that was a month to month tenancy. While the Dienas insisted that a current written lease existed, they have never produced one.

25 The receiver has not been able to get the agreement of the landlord that there is a long-term tenancy that would be satisfactory to Haviland or any other purchaser. As a result, Haviland declined to include the Dufferin premises in its purchase. Based on legal advice received and the receiver's assessment of the evidence, including the cross-examination of Daniel Diena, the receiver decided not to pursue the trial of the issue and instead entered into minutes of settlement

with the landlord, subject to court approval, agreeing to dismiss the trial without costs and terminating the tenancy. The tenancy will cease upon the closing of the sale to Haviland.

26 Regarding the Newmarket lease, the Dienas have never provided a satisfactory explanation to the receiver as to why they agreed to a lease to use the premises as a full service pharmacy when they never operated or intended to operate the premises in accordance with that use and were aware that such uses were not commercially viable at that location. The receiver has concluded after lengthy discussions with the landlord that the landlord will not consent to an assignment of the lease to any purchaser of the business. As a result, the receiver has not included that lease as an asset to be purchased by Haviland and has agreed with the landlord that the lease be terminated, subject to court approval. The occupancy of the Newmarket premises will cease upon the closing of the sale to Haviland.

Analysis

27 It has been established since at least *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (Ont. H.C.) and *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) that when considering whether a receiver in conducting a sale has acted properly, the court should consider:

> (a) whether sufficient effort has been made to obtain the best price and that the Receiver has not act improvidently;
>
> (b) the interest of all parties;
>
> (c) the efficacy and integrity of the process by which the Receiver obtained offers; and
>
> (d) whether there has been unfairness in the working out of the process.

28 In *Soundair*, which dealt with the sale of an airline, Galligan J.A. made statements particularly apt to the complexities of this case:

> 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. 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.

29 Galligan J.A. also adopted the following statement of Anderson J. in *Crown Trust Co. v. Rosenberg*, *supra*, which is also apt to this case:

> 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.

30 In this case, I have no doubt that the receiver has acted in accordance with the principles in *Soundair*.

(a) Efforts of the receiver

31 Regarding the first test, whether the receiver made sufficient effort to get the best price in a provident manner, the issue is whether the receiver did so after the first agreement was terminated by the failure of Centric to agree to an extension of the deal on March 3, 2011. Centric had been chosen as the purchaser on terms that were approved by Marrocco J. OATC played a large role in that decision and was in a position to do so because of the structure of the business and the control that OATC had over assignments of the licences. OATC indicated that it wished to continue discussions with Centric after the termination and it would not be right for the court to second guess the receiver's decision to follow that path.

32 The revisions to the original purchase price were a long way down the road by the time of the termination of the first agreement with Centric. They were completed afterwards. Because of the complexities, the actions of the receiver were appropriate, and a reduction of the purchase price was inevitable. I am not in a position to second guess that on the record before me.

33 In their facta, the Diena interests contended that there should be a new marketing process, and they relied on the statement of Marrocco J. in his endorsement that if the transaction failed to close at the end of January, a new commercial reality would arise and the asset sale process would have to be repeated once more. However, I do not think that statement of Marrocco J. gets the Diena interests very far. First, there was no discussion by the parties before Marrocco J. as to what would have to be done if the first conditional deal did not close, and he cannot be taken to have considered what any particular form a new sales process should take. He was only dealing with whether to adjourn the approval of the receiver's actions and accounts. Second, Marrocco J. could not know what the commercial situation would be if and when the first agreement failed, and what is important is the situation that was facing the receiver when the deal was terminated in March.

34 At the hearing before me, the position of the Dienas was softened somewhat to assert that at the least, the receiver should go back to one particular bidder in the original sale process who had bid a price higher than the price Centric agreed to in the first agreement. At the hearing before Marrocco J. the Dienas did not assert that the receiver should have accepted the higher bid in question, but only that they would like to talk to that bidder in considering what position to take regarding the approval of the receiver's actions and accounts. I do not accept their submissions that the receiver should go back to that bidder. The receiver did not act on that other bid, and disclosed its reasons for not doing so on the motion before Marrocco J. and on this motion. It is not at all usual for a bidder to name a high price that is not acceptable to a receiver because of other conditions in the bid or for other commercial reasons. I am in no position to second guess the receiver in this regard, and there is no evidence whatsoever that any good would come of that. The receiver did go back to that bidder in the first sales process who advised that it would make no change to its bid.

35 It is also contended that the cash flow has improved since the first sale was terminated, and this factor should lead to a remarketing of the property. However, this improved cash flow is somewhat illusory. While there was a little under $1 million in cash at the end of May, net of amounts owed to BMO, this cash position did not reflect amounts owing to OATC and to Drs. Daiter and Varenbut for licence fees and for new clinics. The OATC and the doctors were not pressing for payment while negotiations were taking place with Haviland. Since the end of May there have been further expenses incurred but not paid.

36 The receiver gave consideration to marketing the business again as it had done after the initial sale process order of Campbell J. The receiver's view was that there was a significant risk that offers from other bidders in a remarketing process would be lower than the price achieved and that extensive discussions would be required, without any assurance of success, with OATC and the other lessors on the terms of an assignment of the licences. The receiver has no assurances in its discussions with OATC that the concessions given by OATC would be offered by OATC to another prospective purchaser. The receiver is of the view that from a timing and recovery point of view, the new agreement with Centric/Haviland will better maximize recoveries for stakeholders. I accept that view as being sound and am in no position on the evidence before me to quarrel with it.

(b) Interests of the parties

37 The primary interest is that of the creditors of the debtor. However, it is not the only consideration. In an appropriate case, the interests of the debtor must be taken into account, and where the purchaser has bargained at some length and doubtless at considerable expense with the receiver, and in this case with OATC, the interests of the purchaser ought to be taken into account. See *Soundair*, *supra*, per Galligan J.A.

38 Here is it clear that the receiver has taken into account the interest of the stakeholders. The Dienas assert that BMO will likely be paid in full, and that therefore their interests are paramount. They are critical that the receiver said to them sometime in April that it would be going back to the court with a report and then failed to discuss the bidding process with them or what he was doing. I cannot be critical of the receiver. It was negotiating a complex arrangement with both the buyer and OATC. It took more time than the receiver would have liked, but that is the commercial reality. It also had to deal with problems of the Dufferin and Newmarket leases, a good part of the problem being the actions of the Dienas. By this time, the receiver had spent months on this matter and obviously understood the complexities of the business. What good the Dienas could do at that stage is unclear to me. Their primary interest as asserted before me is that they want to go back to a new marketing process. They have not asserted that the deal negotiated with the purchaser and OATC was somehow not negotiated properly.

39 It is important in this case, because of the structure of the business, that the interests of OATC have to be considered. OATC and Drs. Daiter and Varenbut hold the key hand as their agreement to licence transfers and the amount they are to be paid in arrears is required. They have a right of first refusal on new locations and it is important to them that they have a partner they want and who they think would be able to grow the business. OATC has clearly expressed a preference to deal with Centric/Haviland. That cannot be ignored.

40 So far as Haviland is concerned, it has agreed to concessions with OATC to finalize licensing arrangements and conditions that could not be satisfied under the first agreement. Its negotiations have been lengthy, and are due some consideration.

(c) Efficacy and integrity of the process

41 There is no real issue here about the process. The original sale process as carried out was extensive. The process in question now is the process after the termination of the first agreement. A review of what the receiver did indicates clearly that in the face of many obstacles, it acted in a thoughtful and considered manner.

42 In this case, it was important that the purchaser know that if it was to act in good faith and bargaining seriously with the receiver and OATC to purchase business, a court would not lightly interfere with the commercial judgment of the receiver to sell the assets to it. The same can be said for OATC. This is particularly the case when the first agreement foundered and the pieces had to be picked up again by the parties.

43 Provided a receiver has acted reasonably, prudently and not arbitrarily, as is the case here, a court should not sit as in appeal from a receiver's decision or review in every detail every element of the procedure by which the receiver made its decision. To do so would be futile and duplicative. It would emasculate the role of the receiver. See *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) per Farley J. at para. 7. This is particularly important given the obstacles inherent in the business being sold in this case.

(d) Unfairness resulting from the process

44 None was argued and none appears from the record in this case. There had to be a delicate balancing of interests, and this occurred.

Conclusion

45 For these reasons, the sale and related agreements are approved, including the agreements relating to the Dufferin Street and Newmarket properties.

Application granted.

End of Document

TAB 2

Eston Dodge-Chrysler Ltd. v. Carlson et al.; Carlson et al. v. Big Bud Tractor of Canada Ltd.,[127] the court rejected the argument that a receiver's fees should be restricted to only five percent of the assets and allowed fees at "the going rate" that the receiver, as a chartered accountant, would charge all of its clients.[128]

Although the receiver can charge the usual professional accounting rates, the receiver may not be able to pass on amounts for secretarial and clerical staff as part of the professional services. Such non-professional charges are usually part of the receiver's overhead and ought not to be included in the account of professional services.[129] On the other hand, there is no principle of law that requires receivers to adhere to the same billing format as lawyers. The two professions are different in that accountants use more support staff than lawyers. Therefore, the receiver should be able to charge for secretarial and support staff separately.[130] To reconcile both positions, the court must carefully scrutinize the receiver's accounts for duplication of services and charges by the receiver and staff. The court must satisfy itself that the services were reasonably necessary having regard to the amounts involved for instances where the receiver retains agents, and shows such accounts as disbursements instead of part of the overhead. In short, subject to duplication, the receiver should be able to charge for support staff.[131]

If the receiver does not employ appropriate personnel to manage the debtor's affairs where their expertise is necessary, or does not manage the business properly, the court will reduce the receiver's fees.[132]

5. DISCHARGE OF RECEIVER AND MANAGER

(a) Grounds

Once the goals of the receivership have been achieved, the appointment of the receiver should be terminated. In addition, the appointment of the receiver may be terminated where there is a conflict of interest. A receiver ought not to continue the appointment if there is any apparent conflict of interest. For example, a receiver who accepts an appointment as trustee in bankruptcy or as trustee under a proposal pursuant to the *Bankruptcy and Insolvency Act*, or *vice versa*, may have a conflict of interest if the security instrument is defective, or if the enforcement thereof is being challenged or is preferential. However, subject to the consent of the creditors, or inspectors of the estate, the dual position may be taken.[133]

The appointment of the receiver is usually terminated when the estate has been completely administered or the appointment no longer serves any purpose.[134] The receiver will have taken possession of and disposed of all the debtor's assets, property and undertaking. At that time, the receiver will have no other function, except in the case of a court-appointment, to pass its accounts. In a court appointment, the receiver may be terminated upon judgment of the court unless there is provision to extend the receivership until the estate is fully administered. In a private appointment, the security holder may change or terminate the appointment of a receiver at will unless there is a prohibition in the security instrument.

Aside from the case of a conflict of interest, or where the estate has been completely administered, there are many other situations where a receiver may be discharged. In the case of a court appointment, there is a heavier onus on the debtor or third party who seeks to discharge or replace a receiver in the course of the administration than there is upon a party opposing the court appointment in the first instance. There will be increased costs in replacing a receiver in the course of administration.[135] The receiver may be discharged in the following situations:

(1) If the receiver has breached its duties or has not diligently fulfilled the powers entrusted to it by the court order or in enforcing the rights of the security holder.[136]
(2) If the receiver is negligent or incompetent.

Needless to say, the receiver will not be discharged for minor breaches. The court or the security holder must assess the nature of the breach and the consequences in terms of the receiver's duties and powers, and their effect on the debtor

127 (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.); *Northland Bank v. G.I.C. Industries Ltd.* (1986), 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, [1986] 4 W.W.R. 482 (Master).

128 See also *Peat Marwick Ltd. v. Farmstart et al.*, above, note 118, where the court obviously compared both techniques in determining the proper remuneration.

129 *Peat Marwick Ltd. v. Farmstart et al.*, above, note 113; *Chartrand v. De la Ronde*, above, note 122. The propriety of such charges was questioned, but not resolved in *Columbia Trust Co. v. Coopers & Lybrand Ltd.*, above, note 121.

130 *Peat Marwick Ltd. v. Farmstart et al.*, above, note 118.

131 *Northland Bank v. G.I.C. Industries Ltd.*, above, note 127; *Olympia Foods (Thunder Bay) Ltd. v. 539618 Ont. Inc.*, above, note 116; *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (3d) 315, 78 C.B.R. (N.S.) 85 (C.A.) allowing an appeal in part from (1988), 23 B.C.L.R. (2d) 316 (S.C.). For related proceedings, see *Bank of Montreal v. Nican Trading Co.* (1988), 68 C.B.R. (N.S.) 309 (B.C. C.A.).

132 *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.).

133 See Chapter 10, "Bankruptcy and Receivership", "6. Conflict of Interest". See also sections 13.3 and 13.4 [am. S.C. 1997, c. 12, section 10] of the *Bankruptcy and Insolvency Act*.

134 See *Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.* (1993), 79 B.C.L.R. (2d) 169 (Master), affirmed (October 25, 1993), Doc. Vancouver H910280 (B.C. S.C.), where the court dismissed an application to discharge the receiver as the receiver had not completed the administration of the estate, and in particular, it had not resolved warranty issues, obtained tax refunds, and disposed of some of the remaining units of a condominium project at the time of the application.

135 *Royal Bank of Canada v. Vista Homes Ltd.* (1985), 63 B.C.L.R. 366, 57 C.B.R. (N.S.) 80 (S.C.); *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.* (1992), 12 C.B.R. (3d) 220 (Ont. Gen. Div.).

136 In *Investors Group Trust Co. Ltd. v. Nussbaumer* (1980), 25 B.C.L.R. 133 (S.C.), the receiver had improperly performed her duties in a mortgage receivership. She failed to take prompt action to find tenants for the properties and took no steps to renegotiate any leases. In view of the fact that the mortgage was going to be redeemed within a short period of time, the court dismissed the application to discharge the receiver.

and other interested persons. The court reviews the receiver's actions as they unfold, rather than reviewing its actions with the benefit of hindsight.[137]

(3) If the receiver dies, is dissolved or becomes insolvent.
(4) If there are sufficient facts to show partiality and bias.
(5) If the receiver is dishonest or fraudulent.
(6) If after the appointment, there appears to be no reason to continue with the receivership as, for example, there are no substantial assets to administer or where the estate would be better administered under the *Bankruptcy and Insolvency Act*.[138]

In *Kotler et al. v. Bayshore Investments Ltd. et al.*,[139] the court discharged the receiver on the basis that the costs of the receivership would lead to a dissipation instead of a preservation of assets.

However, in conflicts between the security holder and the debtor as to who should be the receiver, the court considers the fact the debtor is suing the receiver, the nature of the claims being made against the receiver and the costs to be incurred in substituting a new receiver.[140] In *Prince Albert Fashion Bin et al. v. Prince Albert Credit Union Ltd. et al.*[141] the debenture holder appointed a private receiver who allegedly was selling the debtor's inventory at less than cost. The debtor sued the debenture holder and receiver for damages, obtained an *ex parte* injunction and then applied to substitute a court-appointed receiver for the privately appointed receiver. Although the court refused to substitute the receiver on the grounds that the added cost did not justify another receiver, the court did impose a condition on the privately appointed receiver not to sell below cost without an order of the court or the consent of the debtor.

(7) If a prior encumbrancer appoints its own receiver or applies to the court for a court-appointed receivership for a receiver.[142]
(8) If the receiver requests its own removal where, for example, the receiver is a natural person and is ill or becomes incapable of fulfilling the duties of a receiver.

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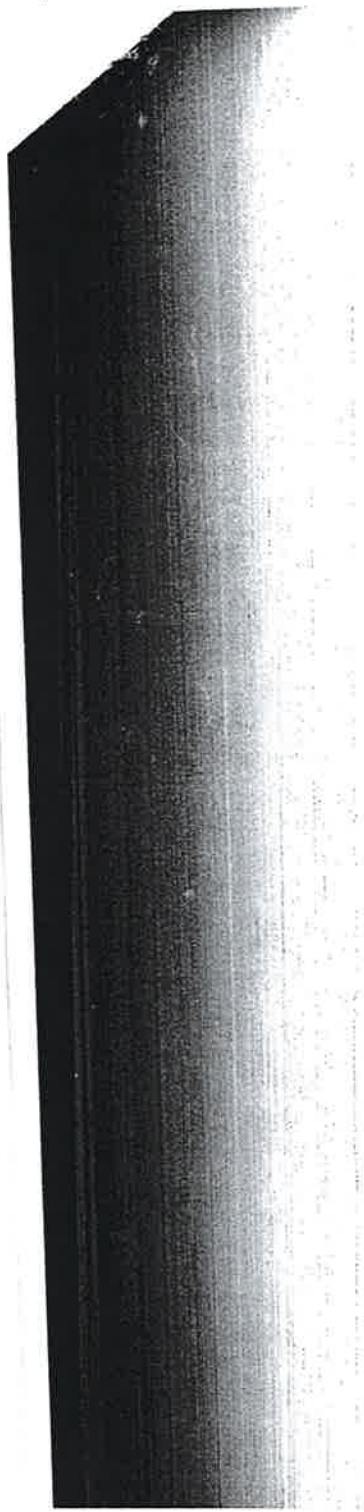
137 *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.*, above, note 135.
138 In *Re United Maritime Fishermen Co-op.* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), reversed on other grounds (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, (*sub nom. Canadian Co-op Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.), the court



liable for damages. The receiver remains accountable and becomes a fiduciary until the time when the receiver returns the business to the debtor.[149]

(b) Court Appointment

In most cases, a court-appointed receiver proceeds to administer the estate in receivership until completion. Thereafter the security holder can move for an order terminating the appointment and requiring the passing of the receiver's final accounts. However, there are situations where the receivership may be terminated earlier or the receiver may be substituted. Once the receiver obtains the order for terminating the appointment, the receiver then passes its accounts while the successor receiver continues. The terminated receiver retains the right to apply to the court under the original order for directions.[150] When the accounts are passed, the receiver obtains an order of discharge. The discharge order protects the receiver from claims for maladministration and any disputes as to the validity of the appointment especially when it is on consent.[151]

The parties to the receivership action may settle or otherwise provide security to the court's satisfaction, thereby rendering the position of the receiver ineffective or unnecessary. Similarly if the costs of a continued receivership may lead to a dissipation of assets, the court may consider terminating the receivership where there is no likely benefit to be derived.[152]

In the situation where the receiver may be substituted or replaced, the receiver must still act honestly and in good faith and the receiver should deal with the property in a commercially reasonable manner. Where the debtor or other persons interested in the equity allege acts of impropriety, the court has the inherent power to remove its own officer and substitute another in its place prior to the completion of the administration.

If a motion for the receiver's termination is brought for cause, the court requires the receiver to report to the court as to the status of the administration in a timely manner. If the receiver does not present an accurate record of receipts and disbursements, the court is unable to assess the receiver's remuneration, let alone order the discharge.[153]

On the motion for termination, notice should be given to all defendants in the action. In many cases, only the debtor and guarantors are the defendants although, depending upon the practice in the particular court, subordinate secured parties and execution creditors may have been joined if they have not been paid.

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149 See *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (C.A.), affirmed [1897] A.C. 180 (H.L.).

150 *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)* (1992), 97 Sask. R. 170, 10 C.B.R. (3d) 61, [1992] 3 W.W.R. 106 at p. 115 (C.A.).

151 *Re Abacus Cities Ltd.* (1986), 45 Alta. L.R. (2d) 113, [1986] 4 W.W.R. 564 (C.A.).

152 See *Kotler et al. v. Bayshore Invts. Ltd. et al.*, above, note 139; *Chartrand v. De la Ronde* (1996), 41 C.B.R. (3d) 193 (Man. C.A.), additional reasons at (1996), 42 C.B.R. (3d) 266 (Man. C.A.), where the court considered the enormous financial drain as a factor in terminating the receivership. See above, "5.(a) Grounds".

153 *Guar. Trust Co. of Can. v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd. et al.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90 (Master).

TAB 3

1992 CarswellOnt 168
Ontario Court of Justice (General Division), Commercial List

Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.

1992 CarswellOnt 168, 12 C.B.R. (3d) 220, 33 A.C.W.S. (3d) 72

CANADA TRUSTCO MORTGAGE COMPANY v. YORK-TRILLIUM DEVELOPMENT GROUP LTD., DOUBLE Y HOLDINGS INC., HOWARD HURST, MARTTI PALOHEIMO and CONFEDERATION LIFE INSURANCE COMPANY; CONFEDERATION LIFE INSURANCE COMPANY v. DOUBLE Y HOLDINGS INC., YORK-TRILLIUM DEVELOPMENT GROUP LTD., HOWARD HURST, MARTTI PALOHEIMO and CANADA TRUSTCO MORTGAGE COMPANY

Farley J.

Heard: April 8, 1992
Judgment: April 9, 1992
Docket: Docs. 77328/91Q, 91-CQ-72; Commercial List Nos. B255/91, B254/91

Counsel: *Paul S.A. Lamek, Q.C.* and *Angus T. McKinnon*, for receiver Deloitte & Touche Inc.
J.B. Berkow and *R. Sokoloff*, for Canada Trustco.
D. Boudreau, for Municipality of Metropolitan Toronto.
M. Steiner, for lien claimants.
B.L. Grossman, for Confederation Life.
Timothy Pinos and *Julie Thorburn*, for Double Y Holdings Inc. et al.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Discharge of receiver — Grounds for discharge

Receivers — Setting aside appointment — Court-appointed receiver — Onus.

The court appointed a receiver-manager to manage the affairs of a company. The defendants brought a motion to replace the receiver, alleging that it had allowed itself to be placed in a position of conflict regarding the *Planning Act* (Ont.) problems of the mortgagees. The defendants further alleged that the receiver had shown a lack of neutrality in its negotiation of a settlement and in its attempt to implement an indemnity agreement regarding certain lands.

Held:

The motion was dismissed.

There is a heavy onus on the party seeking to remove a receiver; it is heavier than that on a party seeking to oppose the court appointment in the first place. If the receiver is engaged in blatant, intentional acts contrary to the interests of any group involved, the court will readily step in and replace the receiver. The receiver would then be required to show why it should not compensate parties suffering a loss because of its wrongdoing. The receiver owes a duty to exercise its responsibilities in a careful manner, considering the circumstances. However, the measuring of the

action of a receiver is one that must take place as the events unfold, and not with the benefit of hindsight. In this case, there was no evidence that the receiver was the "handmaiden" of the lenders.

Table of Authorities

Cases considered:

Ontario Potato Distributing Inc. v. Confederation Life Insurance Co. (March 4, 1991), Docs. RE 1740/90, 2435/90, Henry J. (Ont. Gen. Div.) — *referred to*

Royal Bank v. Vista Homes Ltd. (1985), 57 C.B.R. (N.S.) 80, 63 B.C.L.R. 366 (S.C.) — *referred to*

Statutes considered:

Planning Act, R.S.O. 1990, c. P.13 —

s. 57

Motion to replace court-appointed receiver.

Farley J.:

1 The defendants moved to replace Deloitte & Touche Inc. ("DT") as receiver-manager ("receiver") of the York Mills Centre ("YMC"). The grounds alleged were:

(a) The receiver DT has allowed itself to be placed in a position of conflict regarding the *Planning Act* problems of the mortgagees, Confederation Life and Canada Trust ('lenders');

(b) DT has shown a lack of neutrality in its manner of negotiating a settlement in the Cantel litigation and in attempting to implement an Indemnity Agreement respecting the Metro lands; and

(c) DT has not properly and prudently managed the project.

2 The parties were all agreed as to the general law obligations of a receiver:

(a) it is a fiduciary as to all interests of concerned parties and as such it is to act as an appointee of the Court in good faith; with candour; disclosing all relevant material facts affecting the parties; avoiding any real or objectively perceived conflicts of interest; and

(b) it has a general duty to exercise its obligations with prudence, diligence, due care and skill.

3 Similarly they were all agreed that my order of September 3, 1991 appointing DT as receiver required DT to:

(a) preserve the asset and maximize its value;

(b) finish the construction;

(c) lease out the project as much as possible;

(d) make arrangements to get the transit facilities finished and operational;

(e) deal with the outstanding litigation, particularly the Cantel litigation.

4 There has been an extensive wrangling amongst the parties and other interested entities leading up to the appointment of DT; this is unfortunately continued to date. Counsel for the defendants acknowledged that his clients were not happy about the situation generally. The project is a large complex one and the receivership is a compound of that. The receiver must be involved with multiple facets of matters at the same time. Economic conditions have not made its job any easier.

5 There is a heavy onus on the party seeking to remove a receiver. It is heavier than on a party seeking to oppose the court appointment in the first place (*Royal Bank v. Vista Homes Ltd.* (1985), 57 C.B.R. (N.S.) 80, 63 B.C.L.R. 366 (S.C.) at p. 90 [C.B.R.]). It seems to me that if the receiver is engaged in blatant intentional action contrary to the interests of one involved group, this would be a situation where the court would readily step in to replace the receiver notwithstanding that such replacement may have cost and other dislocation repercussions. If such were the case why should the receiver not be obliged to show why it should not compensate the parties suffering a loss because of its "wrongdoing"? On the other hand if it is shown that the receiver inadvertently caused a problem, then I would think the court would be more concerned about weighing the balance for removal. By this I do not advocate any policy of allowing a receiver to turn a blind eye to matters or the receiver to engage in relaxed negligence. The receiver owes a duty to exercise its responsibilities in a careful manner considering the circumstances. However the measuring of the action of the receiver is one that must take place as of the events as they unfold — not with the benefit of the ever perfect hindsight.

6 The defendants were very quick off the mark — I assume they felt that they had to be. We have motion record a week ago, a supplementary motion record and a second supplementary motion record within five days thereafter. The quality of the defendants' material has suffered it would appear from such haste. For example, (i) an opinion letter was wrongly assumed from docket entries which do not mention same; (ii) it was suggested that the TTC facilities should have been physically completed in six weeks versus my September 3, 1991 reasons mentioning that it was indicated it would take seven weeks with a 20 man crew (whereas two to six men had been the previous norm) — I do not find the November 29 substantial completion situation out of line when one considers that the receiver had to get up to speed; and (iii) it was alleged that Canada Trustco's counsel was retained by the receiver to draft the Cantel settlement lease whereas it appears that Cantel merely turned back an earlier draft from days in which Canada Trustco was in negotiation with it. Where a moving party alleges conflict of interest or impartiality the court should be concerned that such allegations are well founded after a reasonable investigation as opposed to being part of a scattergun smear — even if parts of the allegations have been "checked out" in some reasonable manner.

7 Counsel for the defendants indicated that the *Planning Act* [R.S.O. 1990, c. P.13] issue was of the greatest concern, followed by the lack of neutrality concerning the Cantel litigation and the rest was supplemental to these points. I think that his submission that I consider the cumulative effect of the complaints is correct if the complaints are found to be valid. However if any of them are not found to be validly founded, I am of the view that they should not be considered for cumulative weight. Rather only those validly proved should be considered to see if on a cumulative basis the receiver should be removed. Depending on the gravity of the infraction, this is not a general situation of "one strike and you are out".

Planning Act Issue

8 It appears that work on the title to the YMC property suggested to the receiver's counsel that there may be a *Planning Act* problem — but not for the receiver's ongoing work or appointment, rather it may have affected the lenders' security. This issue did not affect the covenant aspect of the loan. On February 12, 1992 the receiver's counsel advised the lenders' counsel of same and asked for their views (and information, I assume) before the receiver took a position. Within a reasonable time on February 25, 1992 Confederation Life's counsel responded, raised certain items, suggested that a curative approach under what is now s. 57 of the *Planning Act* might be in order after further inquiry. Pending such inquiries the letter went on to say:

> In these circumstances, we trust that the receiver will take no precipitate steps to bring any question as to the validity of our client's security to the attention of parties adverse in interest, or before the court for adjudication.

A court adjudication would cause a problem in invoking s. 57 at a later date. The receiver did not signify that it would not advise "parties adverse in interest" (the defendants, one would presume); rather it did not do anything for a month except indicate that it would take no position re a curative order. The lenders decided to institute the curative order process on their own. At virtually the same time the receiver determined what was happening, the defendants also found out.

9 The defendants charge conflict of interest. When asked what disadvantage they suffered as a result of the receiver not advising them as it had the lenders on February 12, their counsel was only able to point to the inability to make representations. But representations to what end? It would be repugnant to their covenants to try to impugn the lenders' security. See *Ontario Potato Distributing Inc. & Harzuz Holdings v. Confederation Life Insurance Company*, unreported decision of Henry J., released March 4, 1991 [Docs. RE 1740/90, 2435/90 (Ont. Gen. Div.)].

10 While in my view it would have been better to have made disclosure to the defendants at the same time as to the lenders, that is with the benefit of feeling the defendants' present outrage. No doubt the receiver will be more sensitive in the future if not for anything but to avoid a repeat performance. Yet the receiver should not be expected to perpetually walk on eggshells — such would only slow down the process and increase costs beyond their already high level. I pause to note that the receiver did not attempt to hide from the defendants such issue; if they had, would it have presented the dockets to the court (and therefore the defendants) before the cure was effected?

Cantel Litigation

11 Unfortunately the wrangling in this case resulted in my order of November 27, 1991 concerning the Cantel litigation monitoring the defendants Cantel lawyers not being "resolved" until March 2, 1992, at which time I addressed and revised a letter of proposed terms by the defendants Cantel lawyers. I am given to understand that even as yet all parties have not yet consented to the form of order. (If necessary I will finally resolve same; one would trust that this would be the exceptional situation.) Until that time it was apparently unclear as to whether the monitoring should extend to being informed of settlement negotiations. The Cantel settlement proposal came shortly after. Given that I had already given a confidentiality order at close to that time I do not think that the settlement proposal coming would have been too much of a surprise. In any event the defendants Cantel counsel had the settlement proposal by March 13. While it may seem narrow on first impression, I conclude that until March 2, it was not established that the defendants had any access to settlement information and that there apparently was no settlement negotiation during the intervening period to March 13 except the receipt of the settlement proposal. I do not therefore see that the defendants have cause for complaint — especially as claimed as to a lack of neutrality. (As to the question of communication — bad communication is better than no communication but not, of course, as good as good (and timely) communication.)

Other Areas

12 As to the lack of neutrality in the negotiation of the indemnity agreement with Metro concerning the lien claims (versus bonding of these claims), how can there be a lack of neutrality in favour of the lenders when the lenders oppose the giving of such?

13 I have previously commented on the physical completion of the transit facilities. It appears that the delayed opening of same was caused by difficult and lengthy negotiations with Metro/TTC.

14 As to the conclusion of proper and prudent management, the defendants protest the hiring of Baylys and its charges — apparently forgetting that the defendants were among those consenting to such hiring on November 27. I think it adds little as well to suggest that landscaping should have been completed during the winter months.

15 In conclusion I do not find that the receiver is the handmaiden of the lenders nor would it appear to be so to an objective observer after a reasonable investigation. The defendants' motion is dismissed. I do however remain concerned about the question of effective communication amongst the parties. It would be wrong to suggest a hook-up that delivers "a stream of consciousness" — such would be too onerous on the receiver and completely worthless to any party. I am

also mindful that there is the natural psychological reluctance to export lead if one has the uneasy feeling it will come back in the form of bullets.

16 Costs against the defendants jointly and severally payable forthwith to the receiver for $6,500, the lenders $2,500 each, the lien claimants collectively $1,000 and Metro $1,000.

Motion dismissed.

End of Document

TAB 4

CHAPTER 12

DISCHARGE OF A RECEIVER

On his own application. Unless the minutes of the order appointing or continuing a receiver, or a receiver and manager, contain a provision for his discharge,[1] an application to the court is generally necessary, in order to divest his possession.[2] The appointment of a receiver made previously to the judgment in an action will not be superseded by it, unless the receiver is appointed only until judgment or further order.[3] But an order to put a purchaser into possession is in itself a discharge of a previous order for a receiver as to the lands mentioned in the subsequent order.[4]

As a general rule, where a receiver has been appointed and has given security, he will not be discharged upon his own application, without showing some reasonable cause why he should put the parties to the expense of a change[5]; otherwise he may have to pay the costs of his removal and of the appointment of his successor. If, however, he can show reasonable cause for his discharge, such as ill-health, he may be discharged and allowed to deduct the costs of and incidental to the application for discharge out of any balance in his hands.[6] As an alternative, if his indisposition be but temporary, he may obtain the leave of the court to appoint an attorney for a limited period.

Under modern conditions, a manager may find himself in a situation where, without the wholehearted co-operation of some party to the action, which is not forthcoming and cannot be compelled, he is unable to function effectively as a manager. In these circumstances, it is proper for him to apply in the alternative to be discharged or to have his functions restricted to those which it is possible for him to carry out.[7]

Similarly, if it transpires that there is no advantage to be obtained by continuing to carry on a particular business, either because it cannot be run at a profit, or because the profits which can be made do not justify

[1] *Day* v. *Sykes, Walkers & Co.* (1886) 55 L.T. 733; [1886] W.N. 209.
[2] *Thomas* v. *Brigstocke* (1827) 4 Russ. 64.
[3] See *ante*, pp. 123, 124.
[4] *Ponsonby* v. *Ponsonby* (1825) 1 Hog. 321; *Anon.* (1839) 2 Ir.Eq.R. 416.

TAB 5

1996 CarswellOnt 2185
Ontario Court of Justice (General Division)

Nash v. C.I.B.C. Trust Corp.

1996 CarswellOnt 2185, [1996] O.J. No. 1833, 63 A.C.W.S. (3d) 357, 6 O.T.C. 368, 7 W.D.C.P. (2d) 279

Dr. Lawrence Nash, et al. (Plaintiffs) and C.I.B.C. Trust Corporation (Defendant)

Ground J.

Heard: May 8, 1996
Judgment: May 27, 1996
Docket: 94-CQ-58919CP

Counsel: *Ronald G. Chapman* and *Harvey Strosberg*, for plaintiffs.
Paul Schabas and *Bonnie Tough*, for defendant.

Subject: Civil Practice and Procedure

Headnote

Barristers and solicitors — Relationship with client — Conflict of interest — Lawyer acting for more than one party — General

Barristers and solicitors — Relationship with client — Conflict of interest — Lawyer acting for more than one party — Solicitor not having conflict of interest in representing both receiver-manager and party applying for appointment of receiver.

The plaintiff commenced an action seeking a determination of whether or not the defendant bank had been entitled to apply for the appointment of a receiver-manager of M, and whether or not it was liable for damages to the plaintiffs for having done so. The plaintiffs moved for an order removing the defendant's solicitors of record on the basis that the firm had also acted for the receiver-manager of M's assets and property. The plaintiffs contended that the law firm representing the defendant was in a conflict of interest position. The plaintiffs also submitted that the receiver would be required to produce documents, and might seek the law firm's advice on that issue. The plaintiffs also argued that the defendant, if successful, would move to have its legal costs paid out of the assets of the trust.

Held:

The motion was dismissed.

The law firm was not in a conflict of interest situation. The question of how or on what basis the assets were maximized and disposed of had nothing to do with whether or not the defendant was entitled to apply for a receiver. The receiver, as an officer of the court and a fiduciary to the plaintiffs, would be required to act in a fair and even-handed manner. There would not be any basis for the receiver to withhold documents relevant to the issues from the plaintiffs, nor any grounds for the law firm to advise the receiver on the withholding of documents. Any claim for costs by the defendant was purely speculative at this stage. Once such a claim had been made, the issue of the law firm representing the receiver in determining that issue could be dealt with at that time.

Table of Authorities

Cases considered:

Ostrander v. Niagara Helicopters Ltd. (1973), 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (S.C.) — *applied*

Royal Bank v. Vista Homes Ltd. (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124 (S.C.) — *applied*

MOTION to remove solicitor from record.

Ground J.:

1 This motion is brought by the plaintiffs in the within action for an order to remove Blake, Cassels and Graydon ("Blake") as solicitors of record for the defendant on the grounds that Blake acts for Pete Marwick Thorne Inc. in its capacity as receiver and manager (the "Receiver") of the assets and property of Mater's Management Ltd. and related corporations (collectively "Mater's").

2 The issues in the within action are whether the defendant ought to have made an application for the appointment of a receiver of Mater's and whether the defendant is liable in damages to the members of the class for having sought and obtained such an appointment. The submissions of counsel for the plaintiffs were that Blake is in a conflict of interest in acting as counsel to the Receiver and, at the same time, acting as counsel to the defendant in this action which raises the issue of the appointment of such Receiver. Counsel for the defendant have submitted that a lawyer or law firm can only have a conflict of interest if the lawyer is or is likely to be in possession of confidential information obtained from a party adverse in interest to the party represented by the lawyer or if the lawyer is representing two parties who are adverse in interest in the same action or transaction. They submit that neither situation pertains in this case.

3 In my view, a conflict of interest on the part of a lawyer is not so limited. The first guiding principle to Rule 5 of the *Rules of Professional Conduct* of the Law Society of Upper Canada provides as follows:

> A conflicting interest is one which would be likely to affect adversely the lawyer's judgment on behalf of, or loyalty to a client or prospective client, or which the lawyer might be prompted to prefer to the interests of a client or prospective client.

4 Proceeding from that definition of conflict of interest, it is necessary to examine the role of Blake in acting as counsel to the Receiver to determine whether such role is likely to create a conflict of interest as so defined. I have some trouble with the concept that acting for or advising a receiver in the conduct of the receivership would create a conflict of interest where the lawyer is also representing a party to an action where the issue in the action is the propriety of such party taking steps to have the Receiver appointed.

5 Counsel for the defendant submits that Blake will be advising the Receiver on questions relating to the maximization of the assets of Mater's and the disposition of such assets and that the plaintiffs in this action, being investors in Mater's, have an interest in the manner in which such assets are maximized and disposed of. Although this is certainly true, it seems to me that the interests of the Receiver and of the investors are identical in ensuring that the assets are maximized and disposed of on the most beneficial terms. In addition, the question of how or on what basis the assets are maximized and disposed of seems to me to have nothing to do with whether or not C.I.B.C. Trust ought to have taken steps in the first place to have the Receiver appointed.

6 Counsel for the plaintiffs also submits that, in the within action, production will be required of documents in the hands of the Receiver and the Receiver may seek the advice of Blake with respect to such production. Clearly, any documents in the possession of the Receiver which are relevant to the issues in this action and which are in the possession

of the Receiver will have to be produced. Such documents would appear to me to be comprised of documents in existence at the time of the application for appointment of a receiver and would relate to the financial condition of Mater's at that time and the manner in which Mater's was applying the monies invested by the plaintiffs in various Mater's projects. To the extent that any such documents are in the hands of the Receiver, a court-appointed receiver is an officer of the court and as stated by Stark, J. in *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (S.C.) at 286, such a receiver "is very definitely in a fiduciary capacity to all parties involved in the contest". In *Royal Bank of Canada v. Vista Homes Ltd.* (1984), 54 C.B.R. (N.S.) 124 (B.C. S.C.), Macdonald, J. stated at p. 127 that a court-appointed receiver is "obliged to make the same information available to all parties". In my view, this duty is commensurate with the ongoing fiduciary obligations of the Receiver to all the parties involved in the litigation. Since the court-appointed receiver is not an agent of any one party, it does not owe a greater or special duty to one party over another. It follows that, in the circumstances of the case before this court, the Receiver will be obligated to act in the best interests of all the parties including the investors. If the investors require production of certain documents, the Receiver, as an officer of the court and a fiduciary to the investors, will be required to act in a fair and even-handed manner to ensure that the investors receive the same information as the other parties. I would not have thought, therefore, that there is any basis on which the Receiver could withhold from the plaintiffs any documents relevant to the issues in this action or any basis on which Blake could advise the Receiver to withhold any such documents.

7 Counsel for the plaintiffs has also submitted that the defendant will seek to have its legal costs, if successful in this action, paid out of the assets of the trust. There is no such claim made by the defendant in the pleadings in this action and it appears to me to be purely speculative at this stage that the defendant would seek to have its costs paid out of the funds being administered by the Receiver. If such a claim is made, the issue of Blake representing the Receiver in determining that issue would arise at that time and could be dealt with at that time.

8 I do not find on any of the submissions made by counsel for the plaintiffs a basis on which to find a conflict of interest on the part of Blake in representing the Receiver of Mater's and acting as counsel to the defendant in this action. Moreover, the plaintiffs have been aware since 1990 that Blake was acting as solicitors for the Receiver in respect of the receivership and have been aware since this action was commenced in December 1994 that Blake was representing the defendant in this action. There have been a number of motions and appearances in this action and in other litigation arising out of the receivership and at no time until March of this year was a question of a conflict of interest on the part of Blake raised by the plaintiffs. In view of this history, and in view of the hardship and additional cost and inconvenience which the defendant would incur in retaining new counsel at this stage of the within action, the plaintiffs are, in my view, estopped from raising the question of conflict of interest on the part of Blake at this time.

9 The motion is dismissed. Counsel are invited to make written submissions to me with respect to the costs of this motion on or before June 15, 1996.

Motion dismissed.

TAB 6

1982 CarswellBC 502
British Columbia Supreme Court

Atlantic Travel Service Ltd., Re

1982 CarswellBC 502, [1982] B.C.W.L.D. 2217, 44 C.B.R. (N.S.) 218

Re ATLANTIC TRAVEL SERVICE LTD.

MacKinnon J. [in Chambers]

Judgment: October 29, 1982
Docket: Vancouver No. A791965

Counsel: *J.G. Fitzpatrick*, for receiver and manager.
L.R. Jackie, for Famee Furlane.

Subject: Corporate and Commercial; Insolvency

Headnote
Receivers — Discharge of receiver — General

Receivers — Discharge of receiver — Opposed — Additional funds to be recovered — application adjourned.

Application for order discharging receiver and manager.

***MacKinnon J.*:**

1 The receiver and manager applies for an order discharging him. Counsel for Famee Furlane opposes this, requesting that the motion be adjourned for approximately two months.

2 It serves no useful purpose to review the complicated history of this action. It is sufficient to say that there are funds in Italy worth approximately $40,000 (Canadian) which Famee Furlane hopes to recover.

3 I have concluded that this is not an appropriate time to grant his discharge. A large amount of time and effort and money has been spent by him to date. There is some reason to hope that the situation in Italy will shortly come to a close. On balance, I conclude it is better that this motion be put over to Thursday, 6th January 1983 and I so order.

4 Further, I specifically authorize the receiver and manager to take reasonable steps to attempt to realize upon the money in Italy.

Application adjourned.

TAB 7

1992 CarswellBC 490
British Columbia Court of Appeal

Philip's Manufacturing Ltd., Re

1992 CarswellBC 490, [1992] 5 W.W.R. 549, [1992] B.C.W.L.D. 1683, 12 C.B.R. (3d) 149, 15 B.C.A.C. 247, 27 W.A.C. 247, 34 A.C.W.S. (3d) 443, 69 B.C.L.R. (2d) 44, 92 D.L.R. (4th) 161

PHILIP'S MANUFACTURING LTD. v. COOPERS & LYBRAND LIMITED (Receiver-Manager of PHILIP'S MANUFACTURING LTD.) and HONGKONG BANK OF CANADA

Hinkson, Taylor and Cumming JJ.A.

Heard: June 4, 1992
Judgment: June 23, 1992
Docket: Doc. Vancouver CA015543/CA015587

Counsel: *Murray A. Clemens* and *Gordon Turriff*, for appellants.
David Lunny, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Headnote

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangements Act

Receivers — Actions by and against — Actions against receiver

Receivers — Costs and remuneration — Advances — Receiver-manager entitled to pay itself only "reasonable amounts".

The company obtained an ex parte order for protection under the *Companies' Creditors Arrangement Act*, staying proceedings against it and authorizing it to file a plan of reorganization within six months. A bank that held a debenture of the company successfully applied to have the stay lifted. An interim receiver was appointed in the bankruptcy proceeding and the bank appointed a receiver-manager; one party served for both appointments. The company's appeal from the order setting aside the stay was later allowed and the receiver-manager was ordered to return control of the company to its officers and directors. By that time, the receiver-manager had advanced more than $320,000 to itself for its fees and legal expenses. Of that amount, $146,204 was taken in reliance on a discretionary-advances provision in the order appointing the receiver-manager on the eve of its removal from control of the company's affairs. On application by the company, the receiver-manager was ordered to return the $146,204. The receiver-manager and the bank appealed.

Held:

The appeals were dismissed.

The order allowing discretionary advances was not a right, but a special privilege. As an officer of the court the receiver-manager had to exercise such privilege fairly and with due regard to its fiduciary duties. The receiver-manager had no right to advance itself moneys in fear that the order by which it was appointed would be terminated

or stayed. The advances taken were not reasonable ones, fairly taken for the purposes for which the privilege was granted.

Table of Authorities

Cases considered:

Canada Deposit Insurance Corp. v. Greymac Mortgage Corp. (1991), 2 O.R. (3d) 446 (Gen. Div.) [affirmed (1991), 4 O.R. (3d) 608 (C.A.)] — *referred to*

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.) [additional reasons at (1991), 8 C.B.R. (3d) 31 at 55, 84 Alta. L.R. (2d) 257, 86 D.L.R. (4th) 567, 3 C.P.C. (3d) 100, 120 A.R. 309, 8 W.A.C. 309 (C.A.), leave to appeal to S.C.C. refused (1992), 8 C.B.R. (3d) 31n, 7 C.E.L.R. (N.S.) 66n, 83 Alta. L.R. (2d) 1xvi (note), 86 D.L.R. (4th) 567n] — *referred to*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160 (P.C.) — *referred to*

Royal Trust Co. v. Montex Apparel Industries Ltd., 17 C.B.R. (N.S.) 45, [1972] 3 O.R. 132, 27 D.L.R. (3d) 551 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Appeals from order reported at 12 C.B.R. (3d) 133, 91 D.L.R. (4th) 105, 68 B.C.L.R. (2d) 162, [1992] 5 W.W.R. 537 (S.C.), additional reasons at (1992), 91 D.L.R. (4th) 766 (B.C. S.C.) directing receiver-manager to return advances that it had paid to itself.

The judgment of the court was delivered by *Taylor J.A.*:

1 These are appeals from a decision of Mr. Justice Macdonald [12 C.B.R. (3d) 133, 68 B.C.L.R. (2d) 162, 91 D.L.R. (4th) 105, [1992] 5 W.W.R. 537 (S.C.), additional reasons at (1992), 91 D.L.R. (4th) 766 (B.C. S.C.)] directing that the receiver-manager appointed by court order in a bank debenture action repay $146,204 which it took from the debtor in advances against its charges and legal expenses during and after the hearing of an appeal to this court which resulted in the receivership being stayed.

2 A partial account of the history of this action and the related litigation is necessary in order to explain the unusual problem which has led to the appeals.

3 The respondent Philip's Manufacturing Ltd., a building materials supplier, having fallen into financial difficulty, obtained ex parte on September 3, 1991, an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, appointing a "monitor" and restraining legal proceedings against the company for six months so that it might make an arrangement with its creditors. The existence of this order made it impossible for the appellant Hongkong Bank of Canada, the company's principal creditor, to enforce its debenture securing the company's indebtedness to it of more than $2,500,000. The period of protection has since been extended to August 28, 1992.

4 On December 9, 1991 the Hongkong Bank brought on an application to set aside Mr. Justice Macdonald's order and this application was granted by Mr. Justice Scarth [(1991), 9 C.B.R. (3d) 17, 4 B.L.R. (2d) 134 (B.C. S.C.)].

5 On that same day another of the company's creditors obtained an order under the *Bankruptcy Act* [R.S.C. 1985, c. B-3] appointing the appellant Coopers & Lybrand interim receiver of the company's assets pending hearing of its petition. On the following day, December 10, 1991, the bank commenced action on its debenture. On December 11, 1991 the company applied for leave to appeal Mr. Justice Scarth's order and that application was denied the next day by a judge of this court in chambers. On December 13, 1991 the bank obtained from Mr. Justice Josephson an order in its debenture action appointing the appellant Coopers & Lybrand receiver-manager. The order authorized the bank to take advances in a "reasonable amount" from time to time against its fees and disbursements prior to the fixing of its remuneration and passing of accounts.

6 Less than a week later, on December 19, 1991, the company applied to this court for a review of the refusal of the chambers judge to grant leave to appeal the order of Mr. Justice Scarth. Coopers & Lybrand (to which I shall refer simply as "the receiver") had by then assumed its duties as interim receiver and receiver-manager. On December 30, 1991 the company was declared bankrupt, and the receiver appointed trustee.

7 On January 17, 1992 this court reversed the decision of its chambers judge and granted the company leave to appeal the order of Mr. Justice Scarth.

8 Shortly thereafter, on January 29, 1992, Mr. Justice Lambert made an order in chambers, to which I shall later refer, staying the order of Mr. Justice Scarth and rendering the receiver's function that of a "caretaker" pending disposition of the appeal. The appeal was heard on March 16 and 17, and allowed on March 18, 1992 [(1992), 67 B.C.L.R. (2d) 84, 9 C.B.R. (3d) 25, 4 B.L.R. (2d) 142 (C.A.)]. The result was to revive the order of Mr. Justice Macdonald under the *Companies' Creditors Arrangement Act*, with the consequence that all further proceedings against the company including those in the bank's debenture action were again stayed. The order was made effective two days later, so as to allow for orderly re-transfer of control of the business from the receiver to the directors of the company.

9 During the period of just over three months for which it had been in control of the company's affairs — that is to say, from December 9, 1991 to March 20, 1992 — the receiver withdrew more than $320,000 in advances against its fees and disbursements from funds received from customers of the company in payment of their accounts. Of this sum $171,204 was taken during the hearing in this court of the appeal against the order of Mr. Justice Scarth or after the appeal was allowed. The result was that on resumption of its efforts to reorganize its affairs under the *Companies' Creditors Arrangement Act* the company found itself with greatly reduced receivables and funds on hand, and with significantly diminished prospects of being able to achieve a reorganization as contemplated by the statute.

10 The matter of the advances taken by the receiver came before Mr. Justice Macdonald on April 16 and 28, 1992, and on May 4, 1992, he made the order which is the subject of the two appeals before us, one by the receiver and one by the bank.

11 Mr. Justice Macdonald noted that of the $171,204 taken by the receiver during the last five days of its control of the business $25,000 was taken without authority as an advance against its fees and expenses in the capacity of trustee in bankruptcy and that it had returned this to the company five weeks later, on April 24, 1992. The judge ordered the receiver to pay interest on that sum for the period of the withholding. The receiver's appeal against that part of Mr. Justice Macdonald's order was abandoned during the hearing before us.

12 In respect of the balance of the moneys taken, being $146,204, the receiver relied as its authority on the provision for discretionary advances contained in the order of Mr. Justice Josephson of December 13, 1991.

13 The order of Mr. Justice Josephson provides, among other things, that the receiver might "employ such assistance as it may consider necessary for the purpose of preserving the assets or carrying on the business" and that its proper expenditures should form a charge on the company's assets in priority to the debenture. The order concludes as follows:

> THIS COURT FURTHER ORDERS that the Receiver Manager shall pass its accounts from time to time before a District Registrar of this Honourable Court and at the time of passing such accounts, the District Registrar may fix the remuneration and indemnification of the Receiver-Manager, who shall be at liberty before passing its accounts and applying to have its remuneration fixed *to pay itself in respect of its services as Receiver-Manager of the Assets a reasonable amount, either monthly or at such longer intervals as it deems appropriate, which amounts shall constitute an advance against its remuneration and its own expenses when fixed* and which said remuneration together with its own expenses shall form a charge upon the Assets in priority to all other charges, save and except those imposed by statute which cannot be postponed to the charge thus created.
>
> THIS COURT FURTHER ORDERS that the requirement of a Receiver-Manager's Bond or Security be dispensed with.
>
> THIS COURT FURTHER ORDERS that the Receiver Manager may from time to time apply to This Honourable Court for directions and guidance in the discharge of its duties hereunder.

It is under the provision which I have emphasized, contained in the third-from-last clause of the order, that the receiver has sought to justify the taking of the funds in issue.

14 The funds which Mr. Justice Macdonald ordered returned to the company consist of moneys taken between March 16 and 20, 1992, that is to say during the two days on which the appeal against the decision of Mr. Justice Scarth was being heard and, after it had been decided adversely to the bank and the receiver, during the two-day transitional period allowed by the court. The advances taken during this period amounted to more than half of the total in advances taken by the receiver during the period of slightly over three months for which it had control of the company's affairs and included $35,000 paid directly from the company to the law firm which represented the receiver in its unsuccessful efforts to resist the company's appeal. No disclosure was made to the court of the receiver's intention to make these withdrawals, nor was any direction or guidance sought from the court with respect to the taking of advances. They were taken at a time when it was known to the receiver that the *Companies' Creditors Arrangement Act* proceedings might soon be reinstated, and after this had happened. They were taken with knowledge that the result would necessarily be to reduce significantly any possibility that those proceedings could prove fruitful.

15 At the time the advances were taken there had for almost two months been in place the order of Mr. Justice Lambert of January 29, 1992, which stayed the effect of the order of Mr. Justice Scarth pending disposition of the appeal and reduced the role of the receiver to that of a "caretaker" until the appeal had been decided. The order of Mr. Justice Lambert, if it did not suspend the order of Mr. Justice Josephson, significantly modified its effect by limiting the receiver's function.

16 In giving reasons for the decision now under appeal, Mr. Justice Macdonald dealt first with the company's contention that no funds at all could be retained by the receiver in view of the reversal of the order of Mr. Justice Scarth, which he rejected. That matter has yet to be argued in this court. The judge then continued with the following three paragraphs which relate to the issues raised on these appeals [p. 171 B.C.L.R.]:

> 3. The right to make advances contained in the December 13, 1991 order is limited to 'reasonable amounts.' In my view, the final two groups of advances totalling $146,204.86 made during argument on the appeal and after the decision thereon were unreasonable and cannot be retained.

4. In the circumstances, it was incumbent on the receiver-manager to seek directions before taking those final advances. My view is that permission to do so would have been denied, considering the amount involved in relation to the time period and the existence of the January 29, 1992 partial stay.

5. I have little confidence, considering the investigative work done by the receiver-manager, which was more properly a function of the trustee in bankruptcy, and several other factors which I have only glimpsed, that neither the receiver-manager nor its legal advisor will be able to retain, in the long term, the total of the advances now in issue. Thus it is fair in the interim that the bank, by virtue of its indemnity of the receiver-manager, should bear half of the load.

The central issue before us is whether in so deciding the judge erred in principle or in his understanding of the facts.

17 It is necessary, in my view, in disposing of these appeals, to look to certain fundamental principles governing the office of a court-appointed receiver-manager in the light of which the order of Mr. Justice Josephson is to be interpreted and applied. They are as follows:

1. A receiver-manager appointed by the court in a debenture-holder's action is an officer of the court responsible to the court and not to the holder of the debenture at whose instance the appointment is made: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.); *Royal Trust Co. v. Montex Apparel Industries Ltd.*, [1972] 3 O.R. 132, 27 D.L.R. (3d) 551, 17 C.B.R. (N.S.). 45 (C.A.).

2. A receiver-manager so appointed owes fiduciary duties to all parties, including the debtor: see *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.) , and cases there referred to.

3. Such a receiver-manager is at all times subject to the supervision of the court and entitled to the court's directions: see above authorities, also *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.), and cases there cited.

An examination of the relevant parts of the order of Mr. Justice Josephson in the light of these basic principles leads, in my view, to the following conclusions.

18 The authority given by that order to the receiver to make discretionary advances to itself is not in the nature of a right but, as counsel properly conceded before us, a special privilege. The receiver-manager must therefore exercise this privilege fairly, as an officer of the court, and with regard to its fiduciary duties, especially those owed to the debtor and the creditors as a whole. The exercise of the privilege is necessarily subject to supervision by the court. The authority to take advances is not given as security for the payment of the receiver's fees and disbursements when approved by the court; these are, by the terms of the order, secured on the assets of the company. The authority to take advances serves rather as a convenience to the receiver, so that it would not need to have frequent takings of accounts in order to avoid accumulating its charges.

19 A receiver-manager has therefore no right to advance to itself the debtor's money because it fears that the order appointing it may be terminated or stayed, or may turn out to be invalid, and any advance made for purposes of that sort would not be within the scope of the order of Mr. Justice Josephson. It is, of course, to the debenture holder, not to the debtor, that the receiver must look for any assurance it requires that its fees and disbursements will be paid even though its appointment is set aside or suspended, or the assets on which they are secured prove inadequate to discharge them when fixed and approved. The receiver in this case, as would be expected, obtained an indemnity from the bank in respect of its charges.

20 The matter before Mr. Justice Macdonald was obviously an urgent one, because the company's survival was at stake. An onus in my view lay on the receiver to give a prompt account to the court of its reasons for taking the advances,

and to satisfy the court that they fell within the contemplation of the order of Mr. Justice Josephson in that they were both reasonable in amount and reasonable also in the sense that they were taken fairly and in accordance with the receiver's duties to the parties and the court. As an officer of the court subject to its supervision the receiver had not only to act fairly in exercising this privilege, but had also to be seen to be acting fairly.

21 The timing of the advances suggested, of course, that they had been taken without concern for the financial position in which the company would find itself upon the creditors' arrangements proceedings being reinstated.

22 The receiver adduced no evidence showing that the advances were taken for any reason other than a desire to see its position secured before the legal basis on which its appointment rested was removed by this court. This would, of course, enable it to enter into the inevitable dispute over its entitlement to fees and disbursements with the advantage of having the debtor's funds in its hands, and the assurance that these funds would not be available for use during the reorganization effort under the creditors' arrangement statute. In order to be seen to have acted reasonably the receiver had an obligation, in my view, to satisfy the court that it was not so motivated.

23 The position taken before us on behalf of the receiver and the bank is that the propriety and reasonableness of the advances can only be determined after the fixing of remuneration and taking of accounts is completed. That position, in the circumstances of this case, is inconsistent, in my view, with the principles to which I have referred. It would mean that the privilege of taking advances could be exercised in the absolute discretion of the receiver, without supervision by the court, and this cannot, in my view, be so. The receiver's position that the matter could only be dealt with in the bank's debenture holder's action — which had, of course, by then been stayed — and could not properly be dealt with in these proceedings, was not taken below and cannot, in my view, now be acceded to.

24 It seems to me that on the basis of the evidence before him, Mr. Justice Macdonald was entitled to find that the funds taken by the receiver had not been shown to be reasonable advances fairly taken for the purposes for which the privilege was granted, and was right, in the exercise of the court's supervisory jurisdiction, to order that the funds be returned.

25 These appeals have been concerned solely with the advances taken by the receiver on the eve of its removal from control of the company's affairs. We are told that a cross-appeal is pending in which the right of the receiver to be remunerated at all will be in issue, and the validity of earlier advances will be challenged. In those proceedings issues will arise which were not the subject of argument before us, and on which I would therefore not wish to be thought to express an opinion.

26 I would dismiss these appeals.

Appeals dismissed.

End of Document

TAB 8

2008 CarswellOnt 6258
Ontario Superior Court of Justice [Commercial List]

Tool-Plas Systems Inc., Re

2008 CarswellOnt 6258, [2008] O.J. No. 4218, 172 A.C.W.S. (3d) 112, 172 A.C.W.S. (3d) 113, 48 C.B.R. (5th) 91

IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, AS AMENDED

Morawetz J.

Heard: September 29, 2008
Judgment: October 24, 2008
Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, Tool-Plas
T. Reyes for Receiver, RSM Richter Inc.
R. van Kessel for EDC, Comerica
C. Staples for BDC
M. Weinczok for Roynat

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors — Receivers — Conduct and liability of receiver — General conduct of receiver

Debtor manufactured auto parts — Debtor wished to appoint receiver and execute "quick flip", including terms that purchaser would acquire assets of debtor and hire same employees, and assume debt to secured lenders — Receiver brought motion for approval of transaction — Motion granted — Transaction was best available option, and was reasonable — Plan was in best interests of shareholders — Certain parties would benefit, including secured lenders, certain lessors, and certain employees — Certain employees and suppliers would have no possibility of recovery, but were unlikely to recover under any scenario — Price proposed was higher than liquidation value or value of going concern — Secured lenders supported transaction and subordinated secured lenders did not object — Harm could be caused by delay in that relationship with customers could be harmed by disruption.

Table of Authorities

Cases considered by *Morawetz J.*:

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

MOTION by receiver for approval of purchase of debtor corporation.

***Morawetz J.*:**

1 This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new

corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

2 The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position — which recommends approval of the sale.

3 The transaction has the support of four Secured Lenders — EDC, Comerica, Roynat and BDC.

4 Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers — namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

5 Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

6 Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

7 The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

8 The only substantial condition to the transaction is the requirement for an approval and vesting order.

9 The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

10 The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

11 The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

12 Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

13 This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

14 Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order — specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

15 A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

16 In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally — the customers of the mould division who stand to benefit from continued supply.

17 On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

18 I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

19 I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

20 In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) have been followed.

21 In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

22 The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

Motion granted.

End of Document

TAB 9

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

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.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

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.) — *referred to*

Crown Trust Co. v. Rosenburg (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.) — *applied*

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) (C.A.) — *referred to*

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

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

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.

Court File No. 56184/15

ROYAL BANK OF CANADA -AND- **MARA TECH AVIATION FUELS LTD. ET AL**
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT
ST. CATHARINES

BOOK OF AUTHORITIES
OF BDO CANADA LIMITED, RECEIVER OF MARA TECH AVIATION FUELS LTD. ET AL

SimpsonWigle LAW LLP
Barristers & Solicitors
1 Hunter Street East
Suite 200
Hamilton, Ontario
L8N 3W1

David J. Jackson
LSUC No. AO15656-R

Telephone: (905) 528-8411
Facsimile: (905) 528-9008

Lawyers for the Receiver