COURT FILE NUMBER Q.B.G. No. 480 of 2019

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

PLAINTIFF ROYAL BANK OF CANADA

DEFENDANTS P.S. ELECTRIC LTD. and HARVEY KING

IN THE MATTER OF THE RECEIVERSHIP OF P.S. ELECTRIC LTD.

BRIEF OF LAW OF THE RECEIVER, BDO CANADA LIMITED

(Sale Approval and Vesting Order)

Hearing Date: Monday, December 14, 2020

MLT AIKINS

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TABLE OF CONTENTS

BRIEF OF LAW OF THE RECEIVER, BDO CANADA LIMITED

I. INTRODUCTION

1. This brief is provided in support of an application by BDO Canada Limited, the Court-appointed Receiver (the "**Receiver**") of the assets, undertakings and properties of P.S. Electric Ltd. (the "**Debtor**") pursuant to the Receivership Order granted in these proceedings on October 13, 2020 by the Honourable Mr. Justice R.W. Elson (the "**Receivership Order**"), for an Order (the "**Sale Approval and Vesting Order**"):

   (a) approving, authorizing and directing the Receiver to implement the auction process (the "**Auction Sale**") pursuant to the Equipment Sale Proposal between the Receiver and McDougall Auctioneers Ltd. (the "**Auctioneer**") dated December 8, 2020 (the "**Auction Contract**") respecting certain equipment in the possession of P.S. Electric Ltd. (the "**Assets**") attached to the Confidential Supplement to the First Report of the Receiver (the "**Confidential Supplement**"), in accordance with the Auction Contract;

   (b) vesting in the respective purchasers at auction of the Assets all right, title and interest in and to such Assets, free and clear of all liens, charges and encumbrances;

   (c) approving the activities of the Receiver; and

   (d) sealing the Confidential Supplement on the Court file.

II. FACTS AND BACKGROUND

2. The facts relied upon by the Receiver in relation to this application are set out in the First Report of the Receiver dated December 8, 2020, and the Confidential Supplement thereto.

III. ISSUES

3. This Brief of Law will address the following issues, namely:

   (a) Is it just and appropriate for this Honourable Court to exercise its discretion to grant the Sale Approval and Vesting Order to be granted, having regard to the factors relevant to the exercise of such discretion?

   (b) Has the Receiver established a valid legal basis for the assets claimed by Cobra Rentals Ltd. ("**Cobra**") to be included in the Auction Sale?

IV. ARGUMENT

A. It Is Just And Appropriate To Approve The Auction Sale And Grant The Sale Approval And Vesting Order

4. The Receiver respectfully submits that it is in the best interests of the stakeholders of the Debtor that the Auction Sale be approved by this Honourable Court and completed without delay.

5. The scope of the duty of a receiver in regard to conducting the sale of a debtor's assets is well established in Canadian insolvency law. The leading statement of the law in this regard is contained in the 1991 decision of the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.*, as follows:

> As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg ... 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 were obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.[1]

6. This four-part test has been adopted and applied by the courts in Saskatchewan including in the reported decision of Madam Justice Rothery in *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*[2]

7. Sale Approval and Vesting Orders approving auction sales in insolvency proceedings have recently been granted by this Honourable Court in *Re Beckerland Farms Inc.* and *Re Morris Industries Ltd.*[3]

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[1] (1991), 7 CBR (3d) 1, 1991 CarswellOnt 205 at para 16 (CA) [***Soundair***].

[2] 2016 SKQB 306 at para 27, 2016 CarswellSask 607.

[3] (28 October 2019), QBG 915 of 2019, Court of Queen's Bench for Saskatchewan, Judicial Centre of Saskatoon (unreported) (Rothery J); (6 March 2020), QB No 1884 of 2019, Court of Queen's Bench for Saskatchewan, Judicial Centre of Saskatoon (Elson J).

i. The Receiver Has Made A Sufficient Effort To Get The Best Price, And Has Not Acted Improvidently

8. As noted in *Soundair* at paragraphs 21-26, a receiver should make sufficient efforts to sell the assets and then make a business judgment on the reasonableness of an offer in a serious and responsible manner, based on the information available to it in the circumstances.

9. If the Court is satisfied that a receiver has acted in a commercially reasonable manner in its efforts to sell the debtor's assets, the appropriate outcome is for the Court to approve the proposed sale. To order otherwise in regard to a transaction arising out of a prudently conducted sales process improperly calls into question a receiver's expertise and authority in the process, thereby compromising both the integrity of the sales process and prospective purchasers' rightful expectations of fair treatment when submitting offers to purchase the assets.

10. The Receiver submits that it has made sufficient efforts to obtain the best price and that it did not act improvidently in regard to the proposed Auction Sale.

11. In particular, as described in the First Report and supplemented by the information in the Confidential Supplement:

(a) The Auctioneer assisted the Receiver with the recovery of the Assets. They are stored at the Auctioneer's facility near Regina, Saskatchewan. The Auctioneer is familiar with the Assets and is well placed to advise upon the timing and method of marketing and sale.

(b) The proposed Auction Sale comes with the benefit of a net minimum guarantee, which serves to minimize risk to stakeholders by ensuring that a minimum amount of proceeds is obtained, regardless of the respective prices for which the Assets are ultimately sold at auction.

(c) The Receiver obtained an appraisal from Canam-Appraiz Inc. which supports the amount of the net minimum guarantee put forward by the Auctioneer.

ii. The Receiver Has Considered The Interests Of All Parties

12. Although the primary interest is that of the creditors of the debtor, this is not the only or overriding consideration. The Receiver should also consider interests of the debtor and prospective purchasers (depending on the circumstances). If the Court is satisfied that the Receiver has given due consideration to the interests of all of the parties, then it is proper for the Court to approve the proposed sale.[4]

[4] *Soundair*, *supra* note 1 at paras 39-40.

13. In this case, the Debtor's senior secured creditor, Royal Bank of Canada ("**RBC**"), supports the proposed sale. Further, the Auctioneer has worked with the Receiver to prepare and enter into the Auction Contract, and has an interest in its approval.

iii. The Process By Which Offers Was Obtained Was Executed With Efficacy And Integrity

14. In *Uti Energy Corp. v Fracmaster Ltd.*, the Alberta Court of Appeal, applying *Soundair*, held that the process under which the sale agreement is obtained should be consistent with commercial efficacy and integrity.[5]

15. The Receiver has acted, and will continue to act, in accordance with good business practices. The Receiver took steps to ensure that the value of the Assets was fully and fairly evaluated, and accepted a proposal containing a net minimum guarantee in order to minimize downside risk for the benefit of all stakeholders.

iv. There Has Been No Unfairness In The Working Out Of The Process

16. The fourth *Soundair* factor involves a determination of whether the process was fairly conducted. One sign of unfairness is prejudice to a party as a result of negative, disparate or arbitrary treatment by the Receiver.

17. Due to the significant amount that remains owing to RBC by the Debtor, RBC is the primary stakeholder with a tangible claim to the value of the Assets. As noted above, RBC supports this application.

18. Nevertheless, the Receiver is giving notice of its intention to all secured creditors by way of this application for a Sale Approval and Vesting Orders. To the Receiver's knowledge, no party is opposed in principle to the liquidation of the Debtor's assets by means of an auction sale.

B. The Assets Claimed By Cobra Rentals Ltd. Should Be Included In The Auction Sale

19. As described in the First Report, in October and November of 2020, Mr. Harvey King, the sole director and officer of the Debtor prior to the Receivership Order, sent an e-mail message to the Auctioneer in which (among other items of discussion) he claimed that Cobra Rentals Ltd. was the owner of certain equipment which had been removed by the Auctioneer from the Debtor's premises (the "**Claimed Equipment**").[6]

20. The Receiver's legal counsel responded by requesting that Mr. King provide proof of Cobra's ownership of the Claimed Equipment set out in the list (in the form of an Asset Continuity Report)

[5] 1999 ABCA 178 at paras 32 and 38, 11 CBR (4th) 230.

[6] See paragraphs 29-32 and Exhibits B-C.

provided by Mr. King. Mr. King provided a copies of invoices and cheques which, although incomplete, provide some evidence that Cobra could have been the owner of certain of the Claimed Equipment at the time the documents in question were generated. Most of the documents pertain to the time period from 2010-2012, with one boom lift apparently purchased by Cobra in 2015, and one sandblasting trailer with equipment purchased in 2017.

21. The Receiver's legal counsel responded to Mr. King by way of a letter dated November 10, 2020, and set out the Receiver's position that:

(a) It was and is not clear that Cobra remains the owner of the Claimed Equipment; rather, it appears that Cobra was content to let title to the equipment pass to the Debtor.

(b) Even if Cobra were still the owner of the equipment and the Debtor a mere lessee, such leases would have been for a term of more than one year, and accordingly were and are "security interests" within the meaning of *The Personal Property Security Act, 1993*.[7] As RBC had perfected its security interest in all of the Debtor's present and after-acquired personal property by registration in the Personal Property Registry, but Cobra's security interest had not been perfected, it appears that RBC has a security interest in the Claimed Equipment which has priority over any claim by Cobra to the same.

22. Cobra Rentals Ltd. was struck from the Saskatchewan Corporate Registry on January 30, 2020 (though apparently it was restored on November 25, 2020 in response to the November 10, 2020 letter from legal counsel to the Receiver). Harvey King is the President of, and is a director of, Cobra. The other directors, officers, and shareholders include Donna Fleck (an employee of the Debtor until the appointment of the Receiver), Ian (Bud) King (who appears to be personally close to Harvey King based upon the comments in Harvey King's October 20 e-mail), Brandy Cullen (a former employee of the Debtor), and one Tyson King.

23. The PPSA is clear that the interest of a lessor pursuant to a lease for a term of more than one year is a "security interest" within the meaning of that statute.[8] "Lease for a term of more than one year" is also a defined term within the PPSA, the relevant portions of which provide as follows:

> "**lease for a term of more than one year**" includes:
>
> (i) a lease for an indefinite term, including a lease for an indefinite term that is determinable by one or both of the parties not later than one year after the day of its execution;

[7] SS 1993, c 6.2 [**PPSA**].

[8] *PPSA*, *ibid* at s 2(1)(qq)(ii)(C).

(ii) a lease initially for a term of one year or less than one year, where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period of more than one year after the day on which the lessee, with the consent of the lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year; and

(iii) a lease for a term of one year or less where:

(A) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms; and

(B) the total of the terms, including the original term, may exceed one year;

but does not include:

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods; ...[9]

24. Accordingly, the statute affords some protection to lessors who are not regularly engaged in the business of leasing goods, by excluding the leases they hold from the statutory definition of "security interest" and thereby excusing them from the requirement that they perfect their interests.

25. A lessor need not be solely or primarily in the business of leasing goods in order to be ineligible for the protection of clause (iv) of the above definition. Nor are a large number of leases required for one to be considered to be "regularly engaged in the business of leasing goods". As long as leasing is a component of the lessor's business, the protection is not available, even if the majority of the lessor's business activities are activities other than leasing.[10] In fact, in one case, a single lease transaction was held by this Honourable Court to constitute regular engagement in the business of leasing.[11]

26. In *Concentra Financial Services Assn. v Kille*, the lessor was an individual named Albina Kille.[12] She was an employee of a company called Hertz Northern Bus (1993) Ltd. ("**Hertz**"), and was the common law spouse of the principal shareholder of Hertz. She purchased three buses from Hertz and leased them back to Hertz for a five-year period. She had not previously been involved in

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[9] *PPSA*, *ibid* at s 2(1)(y) [emphasis added].

[10] *East Central Development Corp. v Freightliner Truck Sales (Regina) Ltd.*, [1997] 5 WWR 231, 1997 CarswellSask 21 at paras 16 and 18 [WL Can], citing *Paccar Financial Services Ltd. v Sinco Trucking Ltd. (Trustee of)*, [1987] 5 WWR 492, 7 PPSAC 176 (Sask QB); *Karkoulas v Farm Credit Canada*, 2005 SKQB 367 at paras 17 and 20, 270 Sask R 291.

[11] *Bank of Montreal v Patchrite Inc.*, 2006 SKQB 519 at e.g. paras 18 and 29-30, 290 Sask R 132.

[12] 2008 SKQB 42, 43 CBR (5th) 245 [***Kille***].

leasing motor vehicles to anyone. She told the Court that her reason for entering into the leases was that her accountant told her that it would be a good investment.[13]

27. This Court held that, in the circumstances, Kille was "regularly engaged in the business" of leasing buses:

> Kille has three separate, independent and enforceable lease agreements for terms of five years. She utilizes the capital cost expense as an effective method of reducing taxable income. It appears that her accountant's advice that the buses were a good investment is correct. Her primary source of income as an employee of Hertz is complimented by her leasing business as she would have more immediate knowledge of the use of her buses and the financial stability of the company. In her personal circumstances, the leasing of the buses is a significant operation. I conclude that Kille was regularly engaged in the business of leasing within the meaning of s. 2(1)(y)(iv) of the Act and therefore, is not entitled to an exemption from registration. Concentra has a valid prior claim enforceable ahead of her lease.[14]

28. In the Receiver's respectful submission, *Kille* is directly on point and, in fact, the circumstances of this case lead to the inference that Cobra was "regularly engaged in the business of leasing goods" much more readily than was the case in *Kille*. In particular:

(a) The corporation is named "Cobra Rentals Ltd." and its corporate profile lists the nature of its business as "Equipment Rental".[15]

(b) The list provided by Harvey King appears to set out 16 items of equipment with a book value of approximately $180,000.00 in September of 2018.[16]

(c) There is no evidence that Cobra carried on any business other than leasing equipment to the Debtor, a related company to Cobra.

(d) Harvey King, the directing mind behind the Debtor and the President and apparent directing mind of Cobra, is an experienced businessman with expertise in the electrical and contracting industries. His choice to have Cobra purchase equipment and lease it to the Debtor, rather than having the Debtor purchase what it needed, was presumably deliberate.

29. It is necessarily implicit in the Receivership Order that RBC has a valid and perfected security interest in the Debtor's personal property. The precise nature of Cobra's interest in the Claimed Assets is not known, but what is known is that its interest is not perfected.[17]

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[13] *Kille*, *ibid* at paras 1, and 8-11.

[14] *Kille*, *ibid* at para 17.

[15] First Report at Exhibit C.

[16] First Report at Exhibit B.

[17] First Report at Exhibit C.

30. Accordingly, RBC has priority over whatever interest Cobra may have in the Claimed Equipment, pursuant to its prior perfected security interest.[18] Even if ownership of the Claimed Equipment does remain with Cobra, RBC would still have the legal right to seize and sell the Claimed Equipment, and to claim against the proceeds in priority to Cobra in respect of any amounts owing by P.S. Electric Ltd.

V. CONCLUSION

31. For all of the foregoing reasons, the Receiver respectfully submits that it is appropriate for this Honourable Court to grant the relief sought in the Receiver's Notice of Application; namely, the Sale Approval and Vesting Order in substantially the form of the draft Orders filed by the Receiver.

ALL OF WHICH is respectfully submitted at Saskatoon, Saskatchewan, this 10th day of December, 2020.

MLT AIKINS LLP

Per: _____
Jeffrey M. Lee, Q.C. and Paul Olfert
Solicitors for the Receiver, BDO Canada Limited

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[18] See the PPSA at s 35(1)(a-b).

VI. LIST OF AUTHORITIES

As per the recently amended Rule 13-38(2-3), the authorities in this List of Authorities are available on <www.canlii.org> and are not enclosed, except where otherwise noted.

The summary statements of legal principles relied upon from each authority (required by the new Rule 13-38(1)(b)(ii)) are not intended to be exhaustive, and should be read in context with the body text of the Brief of Law.

	Name	Available on CanLII?	Pinpoint	Legal Principle
Legislation				
1	*The Personal Property Security Act, 1993*, SS 1993, c 6.2.	Yes	S 1(1)(y)	Definition of "**lease for a term of more than one year**", particularly carve-out at (iv) regarding lessors not regularly engaged in the business of leasing goods.
			S 2(1)(qq(ii)(C)	"'**security interest**' means ... the interest of ... a lessor pursuant to a lease for a term of more than one year; that does not secure payment or performance of an obligation;"
			S 35(1)(a-b)	A perfected security interest has priority over an unperfected security interest. Priority between conflicting perfected security interests is determined by granting priority to the first perfected security interest, in most circumstances.
Case Law				
2	*Bank of Montreal v Patchrite Inc.*, 2006 SKQB 519, 290 Sask R 132.	Yes	General, especially paras 18 and 29-30	In this case, a company was found to be "regularly engaged in the business of leasing" despite having only entered into a single lease.
3	*Re Beckerland Farms Inc.* (28 October 2019), QBG 915 of 2019, Court of Queen's Bench for Saskatchewan, Judicial Centre of Saskatoon (unreported) (Rothery J) (Schedule B omitted).	No (enclosed)	General	Appropriateness and form of Sale Approval and Vesting Orders to effect auction sales in Saskatchewan insolvency proceedings.

4	*Concentra Financial Services Assn. v Kille*, 2008 SKQB 42, 43 CBR (5th) 245.	Yes	Paras 1-3 and 8-17	On-point example of the application of the test for "regularly engaged in the business of leasing". None of the small number of leases, the fact that the lessor had a personal relationship with the principal of the lessee, the fact that the lessor had purchased the leased property from the lessee, the fact that the lessor was an employee of the lessee, or the fact that the lessor had never engaged in leasing other then the three leases in question, dissuaded the Court from reaching the conclusion that the lessor was regularly engaged in the business of leasing.
5	*East Central Development Corp. v Freightliner Truck Sales (Regina) Ltd.*, [1997] 5 WWR 231, 1997 CarswellSask 21	Yes (enclosed for pinpoints)	Paras 16 and 18 [WL Can]	A lessor need not be solely or primarily in the business of leasing goods in order to be considered to be in the business of doing so. As long as leasing is a component of the lessor's business, the protection is not available, even if the majority of the lessor's business activities are activities other than leasing.
6	*Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*, 2016 SKQB 306, 2016 CarswellSask 607.	Yes	Para 27	Adopting *Soundair* test in Saskatchewan.
7	*Karkoulas v Farm Credit Canada*, 2005 SKQB 367, 270 Sask R 291.	Yes	Paras 17 and 20	Frequency of leasing is not determinative. As long as leasing is a component of a business, it can correctly be said that leasing was regularly engaged. Only three leases existed in *Karkoulas*, but "it is not the number or frequency of the leases that determines the application of the *PPSA*; it is whether the lease involved a lessor who was regularly engaged in leasing the goods."

8	*Re Morris Industries Ltd.* (6 March 2020), QB No 1884 of 2019, Court of Queen's Bench for Saskatchewan, Judicial Centre of Saskatoon (Elson J) (Schedules B and C omitted).	No (enclosed)	General	Appropriateness and form of Sale Approval and Vesting Orders to effect auction sales in Saskatchewan insolvency proceedings.
9	*Royal Bank of Canada v Soundair Corp.*, (1991), 7 CBR (3d) 1, 1991 CarswellOnt 205 (CA).	Yes (enclosed for pinpoints)	Para 16	Factors for the Court to consider in approving a sale in insolvency proceedings: "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."
			Paras 21-26	General discussion of judicial approach to applications to approve sales in insolvency proceedings. Courts show a great deal of deference to the business judgment of the Receiver.
			Paras 39-41	When considering the interests of all parties under the second *Soundair* factor, the interests of the purchaser are relevant.
10	*Uti Energy Corp.v Fracmaster Ltd.*, 1999 ABCA 178, 11 CBR (4th) 230.	Yes	Paras 32 and 38	The process under which the sale agreement is obtained should be consistent with commercial efficacy and integrity.

COURT FILE NUMBER **QBG 915 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE **SASKATOON**

IN THE MATTER OF THE RECEIVERSHIP OF BECKERLAND FARMS INC.

SALE APPROVAL AND VESTING ORDER – AUCTION SALE OF WROXTON ASSETS

Before the Honourable Madam Justice A.R Rothery in chambers the 28th day of October, 2019.

On the application of MNP Ltd., in its capacity as the Court-appointed **receiver** (the "**Receiver**") of the assets, undertakings and properties of Beckerland Farms Inc. (the "**Debtor**") pursuant to the Order of this Court made on July 11, 2019 (the "**Receivership Order**"); and upon hearing from counsel for the Receiver and upon reading the Notice of Application dated October 23, 2019, the Second Report of the Receiver dated October 23, 2019 (the "**Second Report**"), the Confidential Supplement to the Second Report of the Receiver dated October 23, 2019 (the "**Confidential Supplement**") and a proposed Draft Order, all filed and the pleadings and proceedings having taken herein:

THE COURT ORDERS:

SERVICE

1. Service of the Notice of Application on behalf of the Receiver and the materials filed in support thereof (collectively, the "**Application Materials**") shall be and is hereby deemed to be good and valid and, further, shall be and is hereby abridged, such that service of such Application Materials is deemed to be timely and sufficient.

APPROVAL OF AUCTION SALE

2. The auction sale process (the "**Auction Sale**") contemplated in the Contract to Auction dated October 23, 2019 (the "**Ritchie Bros. Contract**") between the Receiver and Ritchie Bros. Auctioneers (Canada) Ltd. ("**Ritchie Bros.**") and appended to the Confidential Supplement, for the sale by Ritchie Bros. of the Debtor's right, title and interest in and to the assets described therein (the "**Purchased Assets**") is declared to be commercially reasonable and in the best interests of the Debtor and its creditors and other stakeholders and is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary.

3. The Receiver shall be, and is hereby, authorized and directed to sell all or substantially all of the assets described in **Schedule "B"** to this Order (the "**Wroxton Assets**") outside the ordinary course of business by public auction, upon substantially the same terms and conditions set out in the Ritchie Bros. Contract, and to execute such documents and to perform such acts as may be reasonably required in order to complete such sale(s) of the Wroxton Assets.

VESTING OF PROPERTY

4. Upon the Receiver determining that the sale by auction of any or all of the Purchased Assets has closed to the Receiver's satisfaction and on terms substantially as approved by this Honourable Court pursuant to this Order, the Receiver shall deliver to the purchaser of such Purchased Assets (or its nominee) a Receiver's Certificate substantially in the form set out in **Schedule "A"** hereto (each, a "**Receiver's Certificate**").

5. The Receiver may rely upon written communications from Ritchie Bros. regarding the closing of a sale of any or all of the Purchased Assets and shall have no liability with respect to the delivery of the Receiver's Certificate.

6. Upon delivery of a Receiver's Certificate all of the Debtor's right, title and interest in and to the assets described in that Receiver's Certificate shall, save and except for any "**Permitted Encumbrances**" set out in that Receiver's Certificate,[1] vest absolutely in the name of the purchaser named in the Receiver's Certificate (or its nominee), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, interests, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, judgments, enforcement charges, levies, charges, or other financial or monetary claims (collectively, "**Encumbrances**") and all rights of others, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by the Receivership Order; and

   (b) all charges, security interests or claims evidenced by registrations pursuant to *The Personal Property Security Act, 1993* SS 1993, c P-6.2, or any other personal property registry system

   and, for greater certainty, this Court orders that all of the Encumbrances (save and except for the Permitted Encumbrances) affecting or relating to the Purchased Assets named in any Receiver's Certificate shall be, and are hereby, expunged and discharged as against the Purchased Assets as at the time of the delivery of the Receiver's Certificate.

7. Upon delivery of the Receiver's Certificate to the Purchaser, the Receiver shall be and is hereby authorized to effect such discharges or revisions in the Saskatchewan Personal Property Registry as may be reasonably required to conclude a transaction of purchase and sale.

8. Pursuant to section 109 of *The Land Titles Act, 2000,* SS 2000, c L-5.1 and section 12 of *The Queen's Bench Act, 1998,* SS 1998, c Q-1.01 the Saskatchewan Registrar of Titles shall be and is hereby directed, upon receipt of a Receiver's Certificate naming the real property legally described as Surface Parcel #141199296, NE 29-26-31 W1 Extension 0 (the "**Real Property**") as a Purchased Asset to accept an application (the "**Land Titles Application**") to surrender the existing title to the Real Property and to set up a new title to such Real Property in the name of the purchaser named in the Receiver's Certificate (or its nominee) as owner free and clear of any and all Encumbrances, save and except for the Permitted Encumbrances as set out in the Receiver's Certificate.

9. Any and all registration charges and fees payable in regard to the Land Titles Application shall be to the account of the purchaser.

10. All net sale proceeds of the sale(s) of any Wroxton Assets ("**Net Sale Proceeds**") shall stand in place and stead of the respective Wroxton Assets from which they are derived.

11. From and after the delivery of a Receiver's Certificate, all Encumbrances and all rights of others shall attach to the Net Sale Proceeds from the sale of the Purchased Assets in question with the same priority as they had with respect to such Purchased Assets immediately prior to the sale,

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[1] For greater certainty, the Conservation Easement in favour of Ducks Unlimited Canada (Interest Register #112473626) shall be a Permitted Encumbrance in respect of the real property forming part of the Purchased Assets; namely, Surface Parcel #141199296, NE 29-26-31 W1 Extension 0.

as if those Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to closing of the transaction.

12. No purchaser (nor the nominee of any purchaser) shall, by virtue of the completion of a transaction of purchase and sale pursuant to this Order, have no liability of any kind whatsoever in respect of any Claims against the Debtor.

13. The Debtor and all persons who claim by, through or under the Debtor in respect of the Purchased Assets, save and except for the persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental and equity of redemption of the Purchased Assets and, to the extent that any such person remains in possession or control of any of the Purchased Assets, they shall forthwith deliver possession thereof to the purchaser of such assets (or its nominee).

14. A purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by the Debtor, or any person claiming by or through or against the Debtor.

15. Immediately after the closing of any transaction of purchase and sale pursuant to this Order, the holders of the Permitted Encumbrances shall have no claim whatsoever against the Receiver or the Debtor.

16. Forthwith after the delivery of a Receiver's Certificate to a purchaser (or its nominee), the Receiver shall file a copy of the Receiver's Certificate with the Court, and shall serve a copy of the Receiver's Certificate on the recipients listed in the Service List maintained with respect to these proceedings.

17. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, the Debtor and the Receiver are hereby authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Debtor's records pertaining to the Debtor's past and current employees. A purchaser receiving such information shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

18. Notwithstanding:

    a) the pendency of these proceedings;

    b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to such applications;

    c) any assignment in bankruptcy made in respect of the Debtor; and

    d) the provisions of any federal statute, provincial statute or any other law or rule of equity,

    the vesting of any of the Purchased Assets in a purchaser (or its nominee) pursuant to this Order and the obligations of the Receiver pursuant to the Ritchie Bros. Contract, shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 or

any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

19. Any transaction of purchase and sale pursuant to this Order is exempt from any requirement under any applicable federal or provincial law to obtain shareholder approval and is exempt from the application of any bulk sales legislation in any Canadian province or territory.

MISCELLANEOUS MATTERS

20. The Receiver, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing any transaction of purchase and sale, including, without limitation, an application to the Court to deal with interests which are registered against title to the Real Property after the time of the granting of this Order.

21. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders as to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

22. Service of this Order on any party not attending this application is hereby dispensed with. Parties attending this application shall be served in accordance with the Electronic Case Information and Service Protocol adopted in the Receivership Order.

ISSUED at Saskatoon, Saskatchewan, this 29th day of October, 2019.

JACKIE FREEBORN
DEPUTY LOCAL REGISTRAR

(Deputy) Local Registrar

CONTACT INFORMATION AND ADDRESS FOR SERVICE

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File No:	31617.33

SCHEDULE "A"
FORM OF RECEIVER'S CERTIFICATE

COURT FILE NUMBER **QBG 915 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE **SASKATOON**

IN THE MATTER OF THE RECEIVERSHIP OF BECKERLAND FARMS INC.

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Madam Justice A.R. Rothery of the Court of Queen's Bench of Saskatchewan (the "**Court**") dated July 11, 2019, MNP Ltd. was appointed as the receiver (the "**Receiver**") of the assets, undertakings and property of Beckerland Farms Inc. (the "**Debtor**").

B. Pursuant to an Order of the Court dated October 28, 2019 (the "**Sale Approval and Vesting Order**"), the Court approved the Contract to Auction (the "**Ritchie Bros. Agreement**") between the Receiver and Ritchie Bros. Auctioneers (Canada) Ltd. ("**Ritchie Bros.**") and provided for the vesting in the respective purchasers at auction of the Debtor's right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to such Purchased Assets upon the delivery by the Receiver to the purchaser of a certificate confirming (i) the payment by the purchaser of the purchase price for the Purchased Assets in question; and (ii) the transaction of purchase and sale has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Approval and Vesting Order.

THE RECEIVER CERTIFIES the following:

1. The Purchaser, _____ (or its nominee) has paid and the Receiver has received the purchase price for the following assets:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Permitted Encumbrances, if any:

_____

_____

_____

2. The conditions precedent to closing (if any) have been satisfied or waived by the Receiver and the Purchaser (or its nominee);

3. The purchase and sale transaction respecting the assets set out above has been completed to the satisfaction of the Receiver; and

4. This Certificate was delivered by the Receiver at [Time] on [Date].

MNP LTD., in its capacity as Receiver of the undertaking, property and assets of BECKERLAND FARMS INC., and not in its personal capacity.

Per;_____
Name:
Title:

1997 CarswellSask 21
Saskatchewan Court of Queen's Bench

East Central Development Corp. v. Freightliner Truck Sales (Regina) Ltd.

1997 CarswellSask 21, [1997] 5 W.W.R. 231, 12 P.P.S.A.C. (2d) 328, 153 Sask. R. 161, 68 A.C.W.S. (3d) 760

East Central Development Corporation (applicant) and Freightliner Truck Sales (Regina) Ltd. (respondent)

Gunn J.

Judgment: January 23, 1997
Docket: Yorkton Q.B. 20/96

Counsel: *D.H. Layh*, for East Central Development Corporation.
J.F. Rybchuk, for Freightliner Truck Sales (Regina) Ltd.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Personal property security
I Scope of legislation
I.6 True lease versus sales financing

Headnote

Personal property security --- Scope of legislation — True lease versus sales-financing

Personal property security — Scope of legislation — True lease versus sales-financing — Equipment rental agreement found to be true lease because it contained no option to purchase, contemplated return of vehicle, and contained no provision for transfer of title to lessee.

Personal property security --- Perfection of security interest — Registration — General principles

Personal Property Security — Perfection of security interest — Registration — Truck dealer doing most of its business in sales but using lease transaction on rare occasions — Dealer required to perfect interest in lease by registration because dealer not exempted by s. 2(y) "lease for a term of more than one year" (iv) of The Personal Property Security Act — The Personal Property Security Act, S.S. 1979-1980, c. P-6.1, s. 2(y) "lease for a term of more than one year" (iv).

ECDC was in the business of lending money to small businesses. It lent $5,000 to RH, who, in return, signed a promissory note and granted ECDC a security interest in a truck that he had acquired. The security interest was registered under *The Personal Property Security Act* (Sask.). ECDC believed that the truck purchase had been financed by MB, when in fact the truck had been leased from F Ltd. F Ltd. was primarily in the business of selling new and used trucks. It was not in the business of financing truck purchases; financing was usually carried out through MB.

When RH fell behind in his payments to F Ltd., he returned the truck. ECDC applied for an order declaring that it had priority over F Ltd. to the truck. The issues to be determined were whether the agreement between F Ltd. and RH was a true lease or a security agreement, whether F Ltd. needed to register its interest to maintain its priority over the truck, and whether ECDC voluntarily subordinated its security in the truck to F Ltd.'s deemed security interest.

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Held:

The application was granted, and the order was issued.

The agreement was a true lease because it contained no option to purchase, contemplated the eventual return of the truck to F Ltd., and did not provide for the transfer of title to RH upon his performance of the obligations under the lease.

Under s. 2(y) "lease for a term of more than one year" (iv) of the Act, leases for a term of more than one year should be registered unless the lessor is not regularly engaged in the business of leasing goods. Although F Ltd. did most of its business in other ways, the true lease transaction was available, and was used on rare occasions. Therefore, F Ltd. did not qualify as someone not regularly involved in leasing goods; F Ltd. was required to perfect its security interest by registration to maintain its priority.

ECDC did not knowingly subordinate its security interest in the truck to F Ltd.

Table of Authorities

Cases considered:

Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of), [1987] 5 W.W.R. 492, 7 P.P.S.A.C. 176, 69 C.B.R. (N.S.) 301, *(*sub nom. *Re Sinco Trucking Ltd. (Bankrupt); Paccar Financial Services Ltd. v. Touche Ross Ltd.)* 59 Sask. R. 198 (Q.B.), reversed 9 P.P.S.A.C. 7, [1989] 3 W.W.R. 481, 73 C.B.R. (N.S.) 28, 57 D.L.R. (4th) 438, *(*sub nom. *Paccar Financial Services Ltd. v. Touche Ross Ltd.)* 74 Sask. R. 181 (C.A.) — *applied*

Statutes considered:

Personal Property Security Act, The, S.S. 1979-1980, c. P-6.1 [rep. S.S. 1993, c. P-6.2, s. 72]

s. 2(y) "lease for a term of more than one year" (iv)*considered*

s. 3*considered*

s. 35(1)*referred to*

s. 39*referred to*

Personal Property Security Act, 1993, The, S.S. 1993, c. P-6.2

s. 66(1)*referred to*

APPLICATION for order pursuant to s. 66(1) of *The Personal Property Security Act, 1993* (Sask.), declaring priority of security interest.

***Gunn J.*:**

1 East Central Development Corporation ("ECDC") applies for an order pursuant to ss. 66(1) of *The Personal Property Security Act, 1993*, S.S. 1993 c. P-6.2 ("the Act") declaring that it has priority over Freightliner Truck Sales (Regina) Ltd. ("Freightliner") to a 1988 Freightliner truck, Serial Number 2FUPYXYB7JV299693, (the "truck").

Facts

2 Elroy Trithardt ("Mr. Trithardt"), the manager of ECDC said it is a business development centre and its mandate

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includes lending money to small businesses. In Mr. Trithardt's affidavit of January 2, 1996, he deposed that Randall Lloyd Hanson ("Mr. Hanson"), of Broadview, Saskatchewan, applied to ECDC in June of 1993 for a loan of $5,000.00. On June 11, 1993, ECDC agreed to lend the $5,000 to Mr. Hanson, who signed a promissory note for the said sum.

3 Mr. Hanson also granted to ECDC a security interest in the truck. The security interest was registered in the Personal Property Security Registry ("PPR") naming Mr. Hanson as debtor on June 15, 1993.

4 At paragraph 8 of this affidavit Mr. Trithardt said the following:

> 8. I am advised by Mr. Hanson and believe it to be true that the Respondent [Freightliner] is the registered owner of the Truck and I am advised and believe it to be true that the Respondent [Freightliner] leased the Truck to Mr. Hanson. Attached as Exhibit "E" to this affidavit is a true copy of an Equipment Rental Agreement between the Respondent [Freightliner] and Mr. Hanson, which Mr. Hanson provided to ECDC when he applied to ECDC when he applied for the $5,000 loan. Clause 11 of the Equipment Rental Agreement states that title to the Truck was to remain with the Respondent [Freightliner].

5 Mr. Trithardt then filed a second affidavit sworn February 14, 1996, in which he deposed that ECDC presented a Letter of Offer to Mr. Hanson dated June 4, 1993, a condition of which was that Mr. Hanson provide "a 'Personal Property Security Agreement' and registration against a 1983 Chev and 1988 Freightliner". Mr. Trithardt says he understood Mr. Hanson had or was about to purchase the truck which was to be financed by Mercedes-Benz. As a condition of the loan he was to provide a copy of the agreement for sale and confirmation of Mercedes-Benz financing. Mr. Trithardt further deposed that the security agreement provided by Mr. Hanson acknowledged certain charges against the truck as follows:

> **10. Warranties and Representations**
>
> The Debtor warrants, represents, covenants and acknowledges that the Secured Party is relying upon such warranties, covenants and representations, namely:
>
> > 10.1 Exclusive ownership and possession of the collateral, free and clear of all liens, charges and encumbrances, except subject to the following liens, charges, encumbrances or security interests, namely:
> >
> > BROADVIEW CREDIT UNION - 1983 CHEV SILVERADO TRUCK MERCEDES BENZ - 1988 FREIGHTLINER

Mr. Trithardt says the following at clause 11 of this affidavit:

> 11. At no time during the completion of the loan transaction did I become aware that Mercedes Benz did not finance the purchase of the Freightliner Truck and that, instead, the Respondent[Freightliner] and Mr. Hanson had entered into a lease agreement respecting the Freightliner Truck.

6 This directly contradicts paragraph 8 of his first affidavit. No explanation is provided for the discrepancy between Mr. Trithardt's first and second affidavit.

7 Dennis Zohner, the controller of Freightliner, deposed that Freightliner is a franchise dealer the primary business of which is the sale of new and used Freightliner trucks, along with accompanying parts and service. He said it was not in the business of financing truck purchases, and that financing was done through Mercedes-Benz Credit of Canada Inc. ("Mercedes-Benz Credit").

8 During 1991 to 1994 inclusive Freightliner sold a total of 602 new and used trucks and leased a total of nine used trucks for a total of 611 trucks. Of the 611 trucks, 75% were sold via Mercedes-Benz Credit Conditional Sales Contract-Security Agreement or Lease, 24% were sold for cash or financed through some other financial institution and 1% were leased directly to the customer. Mr. Zohner said Freightliner does not regularly engage in the business of leasing trucks and only occasionally leases a truck as part of carrying on its business.

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9 Freightliner has always been the registered owner of the truck and paid the yearly insurance on it during the term of the lease. Mr. Hanson fell behind in his monthly lease payments to Freightliner in March of 1995 and returned the truck to Freightliner. Mercedes-Benz Credit never entered into a lease or conditional sales agreement with Mr. Hanson.

History of the Proceedings

10 This application was initially brought in February of 1996. At that time Freightliner took issue with the second affidavit filed by Mr. Trithardt and invited the court to disregard it altogether, to direct a trial of the issue or to allow cross-examination on the affidavit. Both counsel submitted it would be essential for a proper determination of the issues to resolve the facts in dispute. ECDC sought to reduce the costs of the litigation and consented to the cross-examination of Mr. Trithardt on his affidavit. Accordingly Freightliner was given leave to cross-examine Mr. Trithardt on his two affidavits.

11 Counsel then requested leave to speak to this matter again at which time Freightliner advised it had not conducted the permitted cross-examination and it hoped the matter could be resolved without the necessity of doing so as the expense of the proceedings was a significant concern.

12 Three basic issues arise as a result of the facts.

1. Was the Lease a true lease or a security agreement?

2. Was Freightliner required to register its Lease at the PPR in order for Freightliner to maintain priority to the truck?

3. Did ECDC voluntarily subordinate its security in the truck to Freightliner's deemed security interest?

Re: 1. Was the lease a true lease or a security agreement?

13 Freightliner submits the lease has all the traditional hallmarks of a true lease and not a security agreement. It contained no option to purchase. It contemplated the ultimate return of the truck to Freightliner at the end of the lease. There was no provision providing for the transfer of title to Mr. Hanson upon performance of his obligations under the lease and in fact there was a specific provision stating that title was to remain with Freightliner. The document was entitled "Equipment Rental Agreement". I am satisfied that the lease was a true lease and not a security agreement.

Re: 2. Was Freightliner required to register its lease at the PPR in order for Freightliner to maintain priority to the truck?

14 Freightliner entered into a lease of the truck with Mr. Hanson on or before June 11, 1993. Subsequent to that ECDC entered into a security agreement claiming a security interest in the same truck with the same Mr. Hanson on June 11, 1993. A financing statement with respect to the Security Agreement was registered at the PPR on June 15, 1993. Freightliner submits that a priority dispute between these two agreements is governed by the provisions of the former PPSA ("the former Act").

15 Section 3 of the former Act provided as follows;

> *3.* Subject to sections 4 and 55, this Act applies to every security agreement, without regard to its form and without regard to the person who has title to the collateral, that creates a security interest including, but without limiting the generality of the foregoing:
>
> . . . . .
>
> (b) an assignment of accounts, transfer of chattel paper, consignment, or lease for a term of more than one year, notwithstanding that such interests may not secure payment or performance of an obligation.

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Therefore, a lease of goods for a term of more than one year should be registered at the PPR in order for that lessor to maintain priority. However, ss. 2(y)(iv) exempts from the definition of "a lease for a term of more than one year" leases entered into by a lessor who is not regularly engaged in the business of leasing. Section 2(y)(iv) provides as follows:

> (y) "lease for a term of more than one year" includes:
>
> . . . . .
>
> but does not include:
>
> (iv) a lease transaction involving a lessor who is not regularly engaged in the business of leasing goods; ... .

Therefore, a lessor who is not regularly engaged in the business of leasing goods or only occasionally leases goods as part of carrying on its business is not brought within the former Act and is not required to register the lease, whatever its duration, at the PPR in order for it to maintain priority.

16 The leading case in Saskatchewan on the issue of whether a lessor is regularly engaged in the business of leasing goods is *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)* (1987), 7 P.P.S.A.C. 176 (Sask. Q.B.) (reversed on other grounds at (1989), *(*sub nom. *Paccar Financial Services Ltd. v. Touche Ross Ltd.)* 74 Sask. R. 181 (C.A.)). Mr. Justice Vancise, at p. 192 said the following:

> ... Paccar submitted that it was not required to perfect its security under the P.P.S.A. by reason that it was not regularly engaged in the business of leasing goods in the province and was therefore exempt pursuant to s. 2(y)(iv) of the Act. The Chambers judge dealt with that issue fully and concluded that the exemption did not apply. He found that the exemption provisions in s. 2(y)(iv) were designed to exempt a person who occasionally leased goods but could not be described as making it his business. He found in this case that Paccar did not fit the description because it was a large financial institution regularly engaged in financing the purchase of Kenworth trucks, and that while leasing transactions were rarely used, they were in fact used for financing and as a result the exemption did not apply. I agree with that finding.

Noble, J. in the Saskatchewan Court of Queen's Bench had stated at p. 194:

> ... In my view, Paccar is not exempt. It is a large financial institution regularly engaged in financing the purchase of Kenworth trucks. It does most of its business by use of the conditional sales contract and lease with option to purchase agreements. Brouilette admits the true lease transaction was rarely used but was available. Paccar cannot qualify as someone not regularly involved in leasing goods. Leasing trucks has long been a significant part of its financing business. In any event, I am persuaded that the exemption provision in s. 2(y)(iv) was designed to exempt the person who occasionally leased goods but could not be described as making it his business. Paccar does not fit that description ...

17 Freightliner says in a typical lease situation, it sells a truck to Mercedes-Benz Credit, who in turn leases it to the customer. In other circumstances, Freightliner sells a truck to the customer and immediately assigns its interest as seller to Mercedes-Benz Credit, who in turn finances the purchase of the customer. In only 1% of cases between 1991 and 1994 inclusive did Freightliner directly lease a truck to a customer.

18 Accordingly, as in *Paccar, supra*, Freightliner does most of its business in other ways, but the true lease transaction was available and was used on rare occasions. On this basis Freightliner cannot qualify as someone not regularly involved in leasing goods. Leasing trucks is part of its business, even though a small part. The exemption provision in ss. 2(y)(iv) was not designed to exempt Freightliner, when it was part of its business to lease trucks. Accordingly, Freightliner was required to perfect its interest in the lease, in order to maintain priority, by registration.

Re: 3. Did ECDC voluntarily subordinate its security interest in the truck to Freightliner's deemed security interest?

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19 Section 39 of *The Personal Property Security Act*, S.S. 1979-80, c. P-6.1 (the PPSA), provides as follows:

> *39.* A secured party may, in the security agreement or otherwise, subordinate his security interest to any other security interest.

20 Freightliner submits ECDC voluntarily subordinated its security interest in the truck to Freightliner's deemed security interest. It is here that Mr. Trithardt's conflicting affidavits bear consideration. In his first affidavit Mr. Trithardt deposed that he was aware that Mr. Hanson had already entered into the Lease of the truck with Freightliner when he applied to ECDC for the $5,000.00 loan. Mr. Hanson provided him with a copy of the lease and Mr. Trithardt was aware that Freightliner was the registered owner of the truck when ECDC entered into its Security Agreement with him. Mr. Hanson could not give to ECDC any greater interest in the truck than the interest which he had — which was as a lessee under a lease. This could not defeat the interest of the lessor.

21 In his second affidavit Mr. Trithardt retreated from this position and says that at no time did he become aware that Mercedes Benz did not finance the purchase of the Freightliner Truck. He denied any knowledge that Mr. Hanson had entered into a lease agreement respecting the Freightliner Truck with Freightliner. No explanation was given by Mr. Trithardt for this inconsistency.

22 Freightliner submits that a review of the security agreement, paragraph 10, supra, would lead to the conclusion that ECDC intended to subordinate its security interest to Mercedes-Benz. Given that Mercedes-Benz had no interest in the truck, but that Freightliner did, then the inclusion of "Mercedes-Benz" should be considered a clerical error and Freightliner should obtain the benefit of the subordination.

23 ECDC says clause 10.1 of the Security Agreement was never intended to alter the priority which would otherwise be determined by the PPR. It was intended only to acknowledge that the Broadview Credit Union and Mercedes-Benz had or would have charges against the assets. Even if it could be said that ECDC was prepared to subordinate its security interest to Mercedes-Benz under a conditional sales contract, such alleged subordination could not have been intended to benefit Freightliner, an unrelated lessor. Under the contract for sale, ECDC's security interest would have attached to Mr. Hanson's equity in the truck while under a true lease, ECDC would have no interest in the truck as lease payments were made. Upon expiration of the lease term the truck would simply have been returned to Freightliner. ECDC would have had no interest in it. For this reason it cannot be said that a willingness to subordinate to Mercedes-Benz was also a willingness to subordinate to Freightliner.

24 I find that ECDC did not knowingly subordinate its security interest in the truck to Freightliner. Section 35(1) of the former Act is then applicable:

> *35*(1) If no other provision of this Act is applicable, priority between conflicting, perfected security interests in the same collateral is determined by the order of:
>
> (a) registration;
>
> (b) possession of the collateral by the secured party pursuant to section 24
>
> (c) perfection;
>
> whichever is earliest, and, as between unperfected security interests, by the order of attachment.

25 There will be an order pursuant to ss. 66(1) of the Act declaring that the security interest of ECDC has priority over the security interest of Freightliner in the 1988 Freightliner truck, Serial Number 2FUPYXYB7JV299693. ECDC will have its taxable costs.

Application granted.

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End of Document

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DUPLICATE ORIGINAL

COURT FILE NUMBER **Q.B. No. 1884 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE **SASKATOON**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND

IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF 101098672 SASKATCHEWAN LTD., MORRIS INDUSTRIES LTD., MORRIS SALES AND SERVICE LTD., CONTOUR REALTY INC., and MORRIS INDUSTRIES (USA) INC.

SALE APPROVAL AND VESTING ORDER - AUCTION SALE OF CERTAIN ASSETS OF MORRIS SALES and SERVICE LTD.

Before the Honourable Mr. Justice R.W. Elson in Chambers the 6th day of March, 2020.

Upon the application of Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed monitor (the "**Monitor**") within these proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c c-36 (the "**CCAA**") by 101098672 Saskatchewan Ltd., Morris Industries Ltd., Morris Sales and Service Ltd. ("**MSS**"), Contour Realty Inc. and Morris Industries (USA) Inc. (collectively, "**Morris Group**") pursuant to the Initial Order of the Honourable Mr. Justice R.S. Smith granted in the CCAA Proceedings on January 8, 2020 (the "**Initial Order**"), the Amended and Restated Initial Order of the Honourable Mr. Justice R.S. Smith granted in the CCAA Proceedings on January 16, 2020 (the "**ARI Order**") and pursuant to the Order (Enhancement of Monitor's Powers) of the Honourable Mr. Justice R.W. Elson granted in the CCAA Proceedings on February 18, 2020 (the "**EMP Order**"), and upon hearing from counsel for other interested parties, and upon reading the Notice of Application of the Monitor dated March 3, 2020 (the "**Notice of Application**"), the Third Report of the Monitor dated March 3, 2020 (the "**Third Report**"), the Appendix to the Third Report of the Monitor dated March 3, 2020 (the "**Appendix**"), the Confidential Appendix to the Third Report (the "**Confidential Appendix**"), the Brief of Law on behalf of the Monitor, and a proposed Draft Order, all filed, and the pleadings and proceedings had and taken herein:

THE COURT ORDERS:

SERVICE

1. Service of the Notice of Application on behalf of the Monitor and the materials filed in support thereof (collectively, the "**Application Materials**") shall be and is hereby deemed to be good and valid and, further, shall be and is hereby abridged, such that service of such Application Materials is deemed to be timely and sufficient.

APPROVAL OF AUCTION SALE

2. The auction sale process (the "**Auction Sale**") contemplated in the Contract to Auction dated March 4, 2020 (the "**Ritchie Bros. Contract**") between MSS, by and through the Monitor, and Ritchie Bros. Auctioneers (Canada) Ltd. ("**Ritchie Bros.**") and appended to the Confidential Appendix, for the sale by Ritchie Bros. of the right, title and interest in and to the assets described therein (the "**Purchased Assets**") is declared to be commercially reasonable and in the best interests of MSS and its creditors

and other stakeholders and is hereby authorized and approved, with such minor amendments thereto as the Monitor may deem necessary.

3. MSS, by and through the Monitor, shall be, and is hereby, authorized and directed to sell all or substantially all of the assets described in **Schedule "B"** to this Order (the "**MSS Assets**") outside the ordinary course of business by public auction, upon substantially the same terms and conditions set out in the Ritchie Bros. Contract, and to execute such documents and to perform such acts as may be reasonably required in order to complete such sale(s) of the MSS Assets.

3A. Without limiting the generality of the foregoing, the Ritchie Bros. transaction fees set out in **Schedule "C"** to this Order, to be charged to the ultimate purchasers, shall be and are hereby authorized and approved.

VESTING OF PROPERTY

4. Upon the sale by auction of any or all of the Purchased Assets, the Monitor shall deliver to Ritchie Bros. a Monitor's Certificate substantially in the form set out in **Schedule "A"** hereto (each, a "**Monitor's Certificate**").

5. The Monitor may rely upon written communications from Ritchie Bros. regarding the closing of a sale of any or all of the Purchased Assets and shall have no liability with respect to the delivery of the Monitor's Certificate.

6. Upon delivery of a Monitor's Certificate, all right, title and interest in and to the assets described in that Monitor's Certificate shall vest absolutely in the name of the purchaser named in the Monitor's Certificate (or its nominee), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, interests, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, judgments, enforcement charges, levies, charges, or other financial or monetary claims (collectively, "**Encumbrances**") and all rights of others, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by the ARI Order and the EMP Order; and

   (b) all charges, security interests or claims evidenced by registrations pursuant to *The Personal Property Security Act,* CCSM, c P35, or any other personal property registry system

   and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets named in any Monitor's Certificate shall be, and are hereby, expunged and discharged as against the Purchased Assets as at the time of the delivery of the Monitor's Certificate.

7. Upon delivery of the Monitor's Certificate to the Purchaser, the Monitor shall be and is hereby authorized to effect such discharges or revisions in the Manitoba Personal Property Registry and any applicable motor vehicle registry as may be reasonably required to conclude a transaction of purchase and sale.

8. All net sale proceeds derived from the sale(s) of any MSS Assets ("**Net Sale Proceeds**") shall stand in place and stead of the respective MSS Assets from which they are derived.

9. From and after the delivery of a Monitor's Certificate, all Encumbrances and all rights of others shall attach to the Net Sale Proceeds from the sale of the Purchased Assets in question with the same priority as they had with respect to such Purchased Assets immediately prior to the sale, as if those Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to closing of the transaction.

10. No purchaser (nor the nominee of any purchaser) shall, by virtue of the completion of a transaction of purchase and sale pursuant to this Order, have any liability of any kind whatsoever in respect of any Claims against MSS.

11. MSS and all persons who claim by, through or under MSS in respect of the Purchased Assets shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental and equity of redemption of the Purchased Assets and, to the extent that any such person remains in possession or control of any of the Purchased Assets, they shall forthwith deliver possession thereof to the purchaser of such assets (or its nominee).

12. A purchaser (or its nominee) shall be entitled to hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by MSS, or any person claiming by or through or against MSS.

13. [Intentionally deleted]

14. Forthwith after the delivery of a Monitor's Certificate to Ritchie Bros., the Monitor shall file a copy of the Monitor's Certificate with the Court, and shall serve a copy of the Monitor's Certificate on the recipients listed in the Service List maintained with respect to the CCAA Proceedings.

15. Notwithstanding:

    a) the pendency of the CCAA Proceedings;

    b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of MSS and any bankruptcy order issued pursuant to such applications;

    c) any assignment in bankruptcy made in respect of MSS; and

    d) the provisions of any federal statute, provincial statute or any other law or rule of equity,

    the vesting of any of the Purchased Assets in a purchaser (or its nominee) pursuant to this Order and the obligations of the Monitor pursuant to the Ritchie Bros. Contract, shall be binding on any trustee in bankruptcy that may be appointed in respect of MSS and shall not be void or voidable by creditors of MSS, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. Any transaction of purchase and sale pursuant to this Order is exempt from any requirement under any applicable federal or provincial law to obtain shareholder approval and is exempt from the application of any bulk sales legislation in any Canadian province or territory.

APPROVAL OF THE ACTIVITIES OF THE MONITOR AND RELATED MATTERS

17. All activities, actions and proposed courses of action of the Monitor (collectively, the "**Actions of the Monitor**") to date in relation to the discharge of its duties and mandate as Monitor pursuant to the Initial Order, the ARI Order, the EMP Order and this Order (collectively, the "**Monitor's Mandate**"), as such Actions of the Monitor are more particularly described in the First Report of the Monitor dated January 14, 2020 (the "**First Report**"), the Second Report of the Monitor dated February 14, 2020 (the "**Second Report**") and the Third Report of the Monitor dated March 3, 3020 (the "**Third Report**") (and the Appendices thereto) shall be and are hereby approved and confirmed.

SEALING OF CONFIDENTIAL DOCUMENTS

18. The Confidential Appendices to the Third Report shall be kept sealed and confidential and shall not form part of the public record, but rather shall be placed, kept separate and apart from all other contents of the Court file, in a sealed envelope which shall bear a notice which sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further order of the Court or upon the filing of a Monitor's Certificate.

MISCELLANEOUS MATTERS

19. The Monitor, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing any transaction of purchase and sale pursuant to this Order.

20. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or Australia to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders as to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

21. Service of this Order on any party not attending this application is hereby dispensed with. Parties attending this application shall be served in accordance with the Electronic Case Information and Service Protocol adopted in the ARI Order.

ISSUED at Saskatoon, Saskatchewan, this 6th day of March, 2020.

(Deputy) Local Registrar

CONTACT INFORMATION AND ADDRESS FOR SERVICE:

Name of firm:	MLT Aikins LLP
Lawyer in charge of file:	Jeffrey M. Lee, Q.C. and Paul Olfert
Address of firm:	1500, 410 22nd Street E, Saskatoon SK S7K 5T6
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File No:	35572.3

SCHEDULE "A"

FORM OF MONITOR'S CERTIFICATE

COURT FILE NUMBER **Q.B. No. 1884 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE **SASKATOON**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND

IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF 101098672 SASKATCHEWAN LTD., MORRIS INDUSTRIES LTD., MORRIS SALES AND SERVICE LTD., CONTOUR REALTY INC., and MORRIS INDUSTRIES (USA) INC.

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to the Amended and Restated Initial Order of the Honourable Mr. Justice R.S. Smith granted in these proceedings on January 16, 2020 (the "**ARI Order**"), Alvarez and Marsal Canada Inc. was appointed monitor (the "**Monitor**") within these proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c c-36 (the "**CCAA**") by 101098672 Saskatchewan Ltd., Morris Industries Ltd., Morris Sales and Service Ltd. ("**MSS**"), Contour Realty Inc. and Morris Industries (USA) Inc. (collectively, "**Morris Group**");

B. Pursuant to the Order (Enhancement of Monitor's Powers) of the Honourable Mr. Justice R.W. Elson granted in the CCAA Proceedings on February 18, 2020 (the "**EMP Order**"), the Monitor was empowered to carry out certain powers and to exercise certain rights for and on behalf of Morris Group in the manner more specifically described therein;

C. Pursuant to the Sale Approval and Vesting Order – Auction Sale of Certain Assets of Morris Sales and Service Ltd. granted within the CCAA Proceedings on March 6, 2020 (the "**Sale Approval and Vesting Order**"), the Court approved the Contract to Auction (the "**Ritchie Bros. Agreement**") between MSS, by and through the Monitor, and Ritchie Bros. Auctioneers (Canada) Ltd. ("**Ritchie Bros.**") and provided for the vesting in the respective purchasers at auction of the right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to such Purchased Assets upon the delivery by the Monitor to Ritchie Bros. of a certificate confirming (i) the payment by the purchaser of the purchase price for the Purchased Assets in question; and (ii) the transaction of purchase and sale has been completed.

D. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Approval and Vesting Order.

THE MONITOR CERTIFIES the following:

1. The Purchaser, _____ (or its nominee) has paid and the Monitor has received the purchase price for the following assets:

_____

_____

2. The conditions precedent to closing (if any) have been satisfied or waived by the Monitor and the Purchaser (or its nominee);

3. The purchase and sale transaction respecting the assets set out above has been completed; and

4. This Certificate was delivered by the Monitor at [Time] on [Date].

ALVAREZ and MARSAL CANADA INC., in its capacity as Monitor of Morris Sales and Service Ltd., and not in its personal capacity.

Per:_____

Name and Title:

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

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Debtors and creditors

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

Headnote

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

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Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

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

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

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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

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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:

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> (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?

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(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.

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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.

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[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

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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.

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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.

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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.

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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.

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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

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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

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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

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> 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.

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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

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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

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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

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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

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

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

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

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

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

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

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

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

Appeal dismissed.

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