Court / Estate File No. 31-2714011

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY & INSOLVENCY)
[COMMERCIAL LIST]

IN THE MATTER OF THE BANKRUPTCY OF 0932293 B.C. LTD
o/a CELLICON, OF THE CITY OF ABBOTSFORD
IN THE PROVINCE OF BRITISH COLUMBIA

BOOK OF AUTHORITIES OF MNP LTD.
(Returnable May 21, 2021 at 11:00am via "ZOOM")

May 19, 2021

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2011 ABCA 158
Alberta Court of Appeal

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.

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Ford Motor Company of Canada, Limited (Appellant / Applicant) and Welcome Ford Sales Ltd. and Royle Smith (Respondents / Respondents)

Ford Motor Company of Canada, Limited (Appellant / Applicant) and Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Myers Norris Penny Ltd. and Bank of Montreal (Respondents / Respondents)

Keith Ritter, Peter Martin, Myra Bielby JJ.A.

Heard: March 4, 2011
Judgment: May 27, 2011
Docket: Edmonton Appeal 1003-0089-AC, 1003-0362-AC

Proceedings: affirming *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.* (2010), 2010 ABQB 199, 2010 CarswellAlta 2518 (Alta. Q.B.)

Counsel: K.B. Mills, K.J. Bourassa for Appellant
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R.C. Rutman, A.L. Murray for Respondent, Bank of Montreal

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iv Miscellaneous
Headnote
Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — General principles
Bankruptcy trustee was granted permission to sell auto dealership agreement to third party over objections of other party to agreement, auto manufacturer — Manufacturer appealed — Appeal dismissed — Manufacturer would receive benefits parties intended to receive when agreement was created — All other rights and obligations under assigned dealership agreement were to remain unchanged but for change in identity of dealer — Chambers judge reasonably concluded that manufacturer unreasonably withheld its consent.
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Cases considered:
Alberta Health Services v. Networc Health Inc. (2010), 28 Alta. L.R. (5th) 118, 2010 ABQB 373, [2010] 11 W.W.R. 730, 2010 CarswellAlta 1017 (Alta. Q.B.) — considered
Bank of Montreal v. Phoenix Rotary Equipment Ltd. (2007), 53 R.P.R. (4th) 233, 72 Alta. L.R. (4th) 321, 2007 CarswellAlta 172, 2007 ABQB 86, 31 C.B.R. (5th) 201 (Alta. Q.B.) — referred to

Black Hawk Mining Inc. v. Manitoba (Provincial Assessor) (2002), [2002] 7 W.W.R. 104, 2002 CarswellMan 213, 2002 MBCA 51, 163 Man. R. (2d) 215, 269 W.A.C. 215, 29 M.P.L.R. (3d) 163 (Man. C.A.) — considered
Campbell v. Morrison (1897), (sub nom. *Maloney v. Campbell)* 28 S.C.R. 228, 1897 CarswellOnt 18 (S.C.C.) — considered
Canadian Western Bank v. 702348 Alberta Ltd. (2009), 472 A.R. 297, 2009 ABQB 271, 2009 CarswellAlta 641, 55 C.B.R. (5th) 298, 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 81 R.P.R. (4th) 288 (Alta. Q.B.) — considered
De Lage Landen Financial Services Canada Inc. v. Royal Bank (2010), 2010 ABCA 394, 2010 CarswellAlta 2428, 73 C.B.R. (5th) 22 (Alta. C.A.) — referred to
Kelly v. Watson (1921), 61 S.C.R. 482, [1921] 1 W.W.R. 958, 57 D.L.R. 363, 1921 CarswellAlta 97 (S.C.C.) — referred to
Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533, 172 O.A.C. 78, 226 D.L.R. (4th) 577, 38 B.L.R. (3d) 42, 2003 CarswellOnt 2038 (Ont. C.A.) — considered
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Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 397 N.R. 331, [2010] 1 S.C.R. 69, 281 B.C.A.C. 245, 475 W.A.C. 245, 315 D.L.R. (4th) 385, 2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, [2010] 3 W.W.R. 387, 100 B.C.L.R. (4th) 201 (S.C.C.) — considered
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Statutes considered:

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s. 84.1 [en. 2005, c. 47, s. 68] — considered

s. 84.1(3) [en. 2005, c. 47, s. 68] — considered

s. 84.1(4) [en. 2005, c. 47, s. 68] — considered

Landlord's Rights on Bankruptcy Act, R.S.A. 2000, c. L-5
s. 8(2) — considered

APPEAL by manufacturer from judgment reported at *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.* (2010), 2010 ABQB 199, 2010 CarswellAlta 2518 (Alta. Q.B.).

***Per curiam*:**

Introduction

1 This appeal was dismissed from the bench with reasons to follow.

2 This was an appeal from a decision granting permission to a bankruptcy trustee to sell an auto dealership agreement to a third party over the objections of the other party to the agreement, an auto manufacturer, pursuant to the provisions of the relatively new s. 84.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

3 Welcome Ford, owned by Royale Smith ("Smith"), operated a franchise dealership with the Appellant, Ford Motor Company of Canada, Limited ("Ford") in Fort Saskatchewan, Alberta pursuant to the terms of a written dealership agreement. The dealership ceased operations on January 13, 2010 after Ford Credit Canada Ltd. ("Ford Credit"), while conducting a physical audit on its premises, discovered a large defalcation apparently made by a senior employee of the dealership. The following day, the chambers judge, acting as *de facto* case manager, appointed Myers Norris Penny ("MNP") the Receiver of Welcome Ford on the application of Ford Credit.

4 Ford Credit tendered evidence in support of that application showing that over $3.7 million to which it was entitled had been misappropriated. At that time, Welcome Ford owed Ford Credit approximately $7.7 million and owed the Bank of Montreal ("BMO") approximately $2.7 million. Ford Credit had priority in relation to the vehicle inventory, while BMO had a priority

claim to all other assets. As a result, Ford Credit seized and removed all vehicles over which it had security. It is an unsecured creditor for any shortfall on its debt remaining after the sale of those vehicles.

5 The order appointing the Receiver stayed all rights and remedies against Welcome Ford; in particular, it ordered that no agreements then in place, including the dealership agreement, be terminated without consent of the court. Ford advised as early as January 29, 2010 that it would not consent to the assignment/sale of the dealership agreement to any party. However, on March 23, 2010, the chambers judge granted an order authorizing MNP to market the dealership while adjourning Ford Credit's application to lift the stay so as to be able to terminate the dealership agreement ("the March order").

6 On May 19, 2010, BMO obtained an order placing Welcome Ford into bankruptcy with MNP as trustee, which had the effect of making the administration subject to the BIA, including s. 84.1 of that statute.

7 MNP marketed the dealership to existing Ford dealers only, receiving offers to purchase from the ultimate purchaser and two others. Ford maintained its refusal to consent to a sale, even to one of its own dealers, notwithstanding that the offer made by the ultimate purchaser, the highest bidder, would have produced sufficient funds to retire the debt to BMO in its entirely and produce a further $570,000 (before professional fees) to be distributed among the unsecured creditors. In comparison, liquidation of the assets without sale of the dealership agreement was expected to produce a far smaller sum, one which would leave more than $1 million of the debt to BMO unpaid and produce nothing for any other creditor.

8 On December 10, 2010, the chambers judge approved MNP's application to assign the rights and obligations of Welcome Ford under the dealership agreement to the ultimate purchaser pursuant to s. 84.1 of the BIA. At the same time, he dismissed Ford's application for a declaration that the dealership agreement could not be assigned without its consent and to lift the stay ("the December orders"). This appeal was then brought against each of the March and December orders.

9 The BIA was amended on December 15, 2009 by the addition of s. 84.1, which allows a court, upon being satisfied that certain prerequisites are met, to grant an order assigning the rights and obligations of the bankrupt under any agreement to a purchaser, even without the consent of the counter-party to the agreement.

10 The Respondents argued that the dealership agreement was properly assignable to the ultimate purchaser under this section, even absent Ford's consent. Ford argued that the dealership agreement had been terminated as a result of a fundamental breach occurring before the granting of the receivership order such that there was nothing left to assign to the ultimate purchaser. It, alternatively, argued that the dealership agreement is not assignable by reason of its nature and, as such, the issues of whether the ultimate purchaser is able to perform the obligations under it and whether it is appropriate to assign it are irrelevant.

11 The issues raised on appeal are:

(A) Has the dealership agreement terminated because of fundamental breach?

(B) How is s. 84.1 of the BIA to be interpreted?

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

(ii) Are the rights and obligations imposed by the dealership agreement not assignable by reason of their nature because:

(a) the estate will not benefit from the assignment?; or

(b) they are personal in nature?

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?

Standard of Review

12 The standard of review to be applied to the interpretation of s. 84.1 of the BIA, a question of law, is that of correctness. The chambers judge's findings of fact and application of facts to the law are subject to deference absent palpable and overriding error. The application of deference is amplified when, as here, the decision was not issued by a chambers judge in the normal course but by a case management judge whose decision is part of a series of decisions in relation to the same matter: see *De Lage Landen Financial Services Canada Inc. v. Royal Bank*, 2010 ABCA 394 (Alta. C.A.) at para. 13.

Analysis

(A) Has the dealership agreement terminated because of fundamental breach?

13 Ford argued that Welcome Ford "fundamentally breached" the dealership agreement before the appointment of the Receiver, with the result that the agreement came to an end such that nothing remained for the trustee to assign to the ultimate purchaser. It submitted the acts amounting to "fundamental breaches" include the abandonment of the business on January 13, 2010 and Smith's failure to properly supervise employees.

14 We note the decision of the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.) to the effect that the concept of fundamental breach no longer exists, at least in relation to exclusion clauses. The Court stated at 62:

> On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, ..."

and at 82:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. ...

15 As no party raised this issue, and the breaches in question here were not of exclusion clauses, we will proceed to our analysis on the basis of the case as argued. That said, it may well be that the simple answer to the issue of whether the dealership agreement was terminated as a result of fundamental breach must be "no" because no such breach was possible.

16 Ford agreed the test for fundamental breach and its application to a franchise agreement is that relied upon by the chambers judge, established in *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.) at paras. 113 and 114 as follows:

> [113] In *Majdpour v. M & B Acquisition Corp.* (2001), 56 O.R. (3d) 481, 206 D.L.R. (4th) 627 (C.A.), the event alleged to have triggered a fundamental breach of the franchise agreement by the franchisor was a bankruptcy. Because the franchisee was able to carry on the commercial purpose of the agreement intact after the bankruptcy, MacPherson J.A. dismissed the franchisee's claim [sic] it was discharged from further performance. That reasoning is equally applicable in this case.
>
> [114] In dismissing the claim for fundamental breach, MacPherson J.A. noted that the test was a restrictive one, namely, whether the conduct of one party deprived the other party of "substantially the whole benefit of the contract" as stated by Wilson in *Hunter Engineering*, *supra*. This is the classic formulation of the test as set out by Diplock L.J. in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474, [1962] 2 Q.B. 26 (C.A.) at p. 66 Q.B.:
>
> > [D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the benefit which it was the intention of the parties as expressed in the contract that he should obtain in consideration for performing those undertakings?

17 In application of this test to the facts in this case, the question becomes whether the "abandonment" of the business or Smith's failure to supervise employees, leading to the defalcation, deprived Ford of the ability to carry on the commercial purpose of the dealership agreement.

18 The chambers judge concluded that the reason Welcome Ford had not operated since mid-January, 2010 was not for lack of trying by the Receiver, but rather because it was met at every step by resistence from Ford. Without receipt of new product and manufacturer's support of that product, the Receiver could not operate the dealership. He found that the proposed sale of the dealership including the dealership agreement would substantially, if not entirely, cure all of the alleged defects under that agreement.

19 It is not clear from the evidence that the dealership business was "abandoned", as suggested by the Appellant. Rather, Ford Credit arrived unannounced to conduct an audit in early January, 2010. The manager, Greg Duffy, sent the staff home on January 13. He remained on the premises both that day and the next, when the receivership order was obtained. He advised the Receiver that he had been involved in improprieties relating to cars, money or business arrangements on the premises for the past eight years and that the owner of the dealership had for years been residing in the Dominican Republic.

20 MNP did not reopen the dealership. It pressed Ford for its consent to a sale/assignment of the dealership agreement. On January 29, 2010, Ford advised that it would not consent, a position it consistently maintained thereafter. It advised by letter dated February 12, 2010 that it had no obligation under the dealership agreement to do business with the Receiver or its assignee. Ford Credit removed the vehicles upon which it had security. For the first time on February 24, 2010, Ford took the position that there had been a fundamental breach of the dealership agreement.

21 Ford argued the dealership agreement provided that a closure of the business for seven days constituted an event allowing for termination of the agreement (see clause 17(b)(3)(ii)). However, clause 17(b) of that agreement also provides that termination is only effective upon such an event occurring where Ford elects to terminate and gives the dealer 15 days written notice of its intention to do so. In this case, the first notice of termination given by Ford was six weeks after the Receiver was appointed, well after Ford had taken the position it would not cooperate with any assignment.

22 Ford argued this situation is akin to that faced by Yamauchi, J. in *Canadian Western Bank v. 702348 Alberta Ltd.*, 2009 ABQB 271, 472 A.R. 297 (Alta. Q.B.), commonly known as the *Guild* decision, where he found fundamental breach of various leases of a commercial building in relation to a builder who went into receivership prior to the completion of construction. The Receiver did not have sufficient funding to complete construction and did not do so. Justice Yamauchi declared that two of the tenants had properly terminated their leases, finding fundamental breach had occurred because of the indefinite delay in construction. The Receiver had provided no evidence as to when a potential purchaser might recommence construction.

23 The chambers judge properly distinguished *Guild* by noting that there the Receiver decided not to remedy the lease breaches through completion of construction, whereas here Ford advised the Receiver early on that it would not consent to the Receiver's operation of the dealership. Here, in other words, it was the counter-party to the agreement who refused performance rather than the Receiver. He found that it was Ford which was blocking the breach from being remedied by refusing to cooperate with the reopening of the business by the Receiver.

24 In *Guild*, it was not clear when, if ever, the buildings which were the subject of the leases in question would be completed (i.e., when the tenants would obtain the commercial benefit they were intended to receive under the leases). Here, Ford would obtain the commercial benefit under the dealership agreement immediately upon its consenting to the Receiver operating it or, alternately, to its sale to a party who could operate it. Ford's refusal to cooperate was the only reason the agreement could not be performed. It, as franchisee, was capable of carrying on the commercial purpose of the dealership agreement; it simply chose not to do so, which falls far short of meeting the test for fundamental breach established in *Shelanu*.

25 In relation to the argument that Smith failed to properly supervise his employees with the result that the defalcation occurred, Ford tendered a Statement of Claim which maintained that a Welcome Ford manager misappropriated over $1.2 million by way of fraud. The chambers judge noted the lack of evidence that Smith was involved in the fraud or any convincing evidence of resulting damage to Ford's reputation. Needless to say, the manager in question was no longer employed by the time the sale was approved. There was no evidence before the chambers judge to support the suggestion that the manager's alleged prior activities would cast a pall over the operation of a Ford dealership in Fort Saskatchewan in the future.

26 The ultimate purchaser stood ready to reopen the dealership for business upon receiving court approval of the purchase. Any deficiencies in Smith's supervision disappeared with his removal from the business. Upon the reopening of the dealership, there is nothing to suggest that Ford would not be able to carry on the commercial purpose of the dealership agreement. It would not be deprived of the benefits it was intended to receive; indeed, the sooner the sale was effected, the sooner the flow of those benefits would resume.

27 The chambers judge concluded at para. 95 of the December decision: "I am comfortable that the proposed sale of the Welcome Ford dealership will substantially cure the breaches of the [dealership agreement], of which Ford Motor complains". The proposed sale cured the effect of those breaches in that it put a financially sound, experienced person in charge of the resumed operation in the form of a new business operating outside of the receivership. The chambers judge also expressly observed that Ford's rights and remedies will continue unchanged, including the right of first refusal and the right to take steps to terminate the dealership agreement if the purchaser defaults in the future.

28 The standard of review in relation to the chambers judge's findings of fact and application of facts to the law are subject to deference absent clear and palpable error. The application of deference is amplified when, as noted above, the judge is a case management judge whose decision is part of a series of decisions. His decision that no fundamental breach of the dealership agreement had occurred was reasonable and is entitled to our deference. Indeed, had we been required to consider the issue of correctness, we would have concluded his decision to be correct. The ultimate purchaser will be able to perform the dealers obligations under the agreement such that its commercial purpose will be effected. Ford will receive the benefit the parties intended it to receive when that agreement was created.

(B) How is s. 84.1 of the BIA to be interpreted?

29 The position at common law was always that if one party breached a condition (and not a mere warranty) in a contract, the other party to that contract had an election, either to treat the contract as continuing and insist on future performance, or to accept the repudiation and bring the contract to an end. In the latter case certain obligations survived the termination depending upon the construction of the contract.

30 The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.

31 Ford argues that the provisions of s. 84.1 which are prerequisite to granting permission to assign have not been met.

32 Section 84.1 reads in part:

> (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> . . .
>
> (3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature ...
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
>
> (b) whether it is appropriate to assign the rights and obligations to that person.

33 The Appellant did not argue, nor did the chambers judge find, that s. 84.1 expressly excludes auto dealership agreements from its operation. Indeed, the word "agreement" found in that section is wide enough to cover this type of agreement. The chambers judge correctly concluded, therefore, that he had jurisdiction under s. 84.1 to order the assignment (sale) in the proper circumstances.

34 Ford argued, rather, that those proper circumstances did not exist, as discussed below.

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

35 Ford argued that whether the rights and obligations of an agreement are assignable "by reason of their nature" pursuant to s. 84.1(3) must be decided before, and independently of, any consideration under s. 84.1(4) as to whether the proposed assignee is capable of performing the obligations and it is appropriate to assign the rights and obligations. If so, it is irrelevant that the ultimate purchaser is an otherwise approved dealer and a proven performer. The issue of whether the nature of the agreement precludes its assignment would thus have to be resolved independently of any consideration of whether the agreement's commercial purpose would be achieved in the hands of the proposed assignee.

36 This interpretation is not supported by the literal words found in s. 84.1 which do not make a determination under s. 84.1(3) an independent precondition to a determination under s. 84.1(4). Legislative intent may be taken into account as an aide to interpretation only in the case of ambiguity in the words of the statute. Even if such an ambiguity existed here, and one is not apparent, Parliament's intent does not support Ford's interpretation. The chambers judge concluded that s. 84.1 should be interpreted in light of Parliament's intention that the provision be used to protect and enhance the assets of the estate of a bankrupt by permitting the sale/assignment of existing agreements to third parties for value: see Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 2009) vol. 2 at 3-499. He purported to interpret s. 84.1 in the context of its role as remedial legislation.

37 Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a result, a bankrupt estate was vulnerable to losing the benefit of a valuable contract to the detriment of the estate and often to the detriment of third parties.

38 The estate of a bankrupt may include various forms of property. Sometimes the most valuable property in an estate will be the contractual rights possessed by the bankrupt as of the date of bankruptcy. Those rights may be embodied in, for example, a franchise agreement, a purchase agreement, a license agreement, a lease, a supply agreement or an auto dealership agreement.

39 The clear intent of Parliament in enacting s. 84.1 of the BIA was to address this vulnerability; it made a policy decision that a court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding the objections of the counter-party.

40 A statutory provision analogous to s. 84.1 is that of s. 8(2) of the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5. It provides that, notwithstanding the legal effect of a provision in a lease purporting to terminate the lease upon the tenant becoming bankrupt, the trustee in bankruptcy may elect to retain the leased premises for some or all of the unexpired term of the lease. The trustee may then, upon payment of all overdue rent, assign the lease to a capable third party upon securing an order to that effect from the Court of Queen's Bench. The purpose of the legislation is to enable the trustee to maximize realization without putting the landlord in any worse position that it would have been under the lease before the bankruptcy: see *Bank of Montreal v. Phoenix Rotary Equipment Ltd.*, 2007 ABQB 86 (Alta. Q.B.) at para. 51, (2007), 72 Alta. L.R. (4th) 321 (Alta. Q.B.).

41 Similarly, s. 84.1 of the BIA allows a court to approve the assignment (sale) of any agreement to obtain maximum benefit for creditors upon payment of any monetary breaches and upon concluding that the rights and remedies of the counter-party will be preserved.

42 Ford suggested the contrary, offering an extract from the Briefing Book placed before Parliament when it considered this amendment. The Briefing Book gives as a reason for the enactment of the language "not assignable by reason of its nature" (then

subsection 3(d)) that it "is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment". It further states, "[s]ubsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations". These stated purposes are not, however, mutually exclusive.

43 Rather, to the extent that legislative intent is at all relevant, it is as described by the chambers judge as well as Justice Romaine of the Alberta Court of Queen's Bench in *Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373 (Alta. Q.B.) at para. 20, (2010), 28 Alta. L.R. (5th) 118 (Alta. Q.B.):

> The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547 at 556, the Supreme Court commented:
>
> > Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

44 Ford has suggested no business reason to support its interpretation of s. 84.1(3) and (4). There is no apparent reason as to why appropriateness of the assignment or the capability of the proposed assignee would not be relevant to determining whether the rights and obligations are assignable by their nature. Rather, the opposite would appear to be true.

45 Therefore, I conclude that s. 84.1(3) is to be interpreted upon considering, among other things, the capacity of the proposed assignee and whether it is appropriate to assign the rights and obligations as set out in s. 84.1(4).

(ii)(a) Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because the estate will not benefit from the assignment?

46 Ford argued that a court should not exercise its discretion under s. 84.1 to override the Appellant's clear contractual rights to withhold consent to the sale of the dealership in the absence of very clear evidence that the bankrupt estate will benefit: see *Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*, 2005 ABQB 324 (Alta. Q.B.) at para. 11, (2005), 382 A.R. 383 (Alta. Q.B.); *Kelly v. Watson* (1921), 61 S.C.R. 482 (S.C.C.) at 490, [1921] 1 W.W.R. 958 (S.C.C.). However, unlike the Courts in these two cases, the chambers judge here was not asked to re-write or make the parties' contract by implying missing terms in the existing contract. All other rights and obligations under the assigned dealership agreement were to remain unchanged but for the change in the identity of the dealer from Welcome Ford to the ultimate purchaser.

47 Ford suggested that the chambers judge lacked clear evidence that the proposed assignment would benefit the estate. However, he described the supporting evidence at para. 52 of the December decision, which he found in the addendum to MNP's fourth report. Concluding that an assignment of the dealership agreement would benefit the creditors and enhance the value of the estate, the addendum confirmed that an *en bloc* sale of the assets of Welcome Ford which included the dealership agreement would result in full satisfaction of its indebtedness to BMO, would not prejudice Ford Credit's recovery on its secured collateral, and might make funds available for the unsecured creditors. Ford submitted that this evidence is nonetheless inadequate, criticizing MNP's method of marketing the land on which the dealership was located and the fact that the proposed sale would not, as a certainty, assure any recovery for the unsecured creditors.

48 This criticism falls far short of being persuasive given that the alternative, termination of the dealership agreement, would not generate sufficient funds to satisfy even the secured creditors. The chambers judge's conclusion that the proposed assignment (sale) would benefit the estate is therefore reasonable and deserving of deference.

(ii)(b) Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because they are personal?

49 The dealership agreement expressly provides, among other things, that:

> (a) Ford reserves the sole discretion to determine, from time to time, the numbers, locations and sizes of its franchised dealers;
>
> (b) The dealership agreement is personal in nature and Ford expressly reserves the right to execute dealership agreements with individuals and others specifically selected and approved by it;
>
> (c) Ford has the right to approve or decline to approve any transfer or change in voting control of a dealer based on the character, automotive experience, management, capital and other qualifications of the acquirer of the voting control, or the equity or beneficial interest, or the dealership business or its principal assets;
>
> (d) Ford acknowledges a responsibility to ensure that dealers are owned and operated by qualified individuals of good reputation who are able to meet the requirements of the dealership agreement and the challenges of the marketplace;
>
> (e) The dealership agreement may be terminated upon the happening of a number of events, including any transfer or attempted transfer by the dealer of any interest, right, privilege or obligation under the dealership agreement, or transfer by operation of law or otherwise of the principal assets of the dealer without the consent of Ford which "shall not be unreasonably withheld"; and
>
> (f) Where there is a change in voting control of the principal owners of the dealership or a transfer of the dealership business or its principal capital assets, Ford's written approval is required; in declining any such approval (not to be unreasonably withheld), Ford has the right to consider the character, automotive experience, management capital and other qualifications of the proposed acquirer.

50 Ford argued that these provisions characterize the dealership agreement as "personal" to the parties who executed it, and therefore non-assignable notwithstanding the express provision permitting assignment with Ford's permission. The chambers judge concluded otherwise. The dealership agreement was not a "personal contract" which by its "nature" could not usefully be performed by another. Instead, he described it as "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing" (para. 73). As such, it did not fall within the s. 84.1(3) exception.

51 The dealership agreement is the same type of agreement as that found to be distinguishable from an employment or "personal service arrangement" by the Ontario Superior Court of Justice in *Struik v. Dixie Lee Food Systems Ltd.*, 2006 CarswellOnt 4932 (Ont. S.C.J.) at para. 69.

52 Parties to a contract cannot insulate it from the effect of s. 84.1 simply by including a clause describing it as creating "personal" obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties.

53 Ford correctly pointed out that s. 84.1(3) does not speak of a personal contract as being the only type of contract which contains rights and obligations that are not assignable by their nature. It argued that the above terms of the dealership agreement evidence that it is not assignable by reason of its nature even if it is not a personal contract.

54 However, those express provisions — including those which describe it as personal in nature as well as Ford's reservation of the right to execute dealership agreements with those specifically selected and approved by it — are not sufficient to attract the application of s. 84.1(3) if other circumstances suggest the contrary. Otherwise, s. 84.1(4) would have no meaning, if a simple contractual provision to the effect that it was not "by reason of its nature" capable of unilateral assignment would be enough to make that so.

55 Ford accepted that the test to be applied to determine if the dealership agreement contains rights and obligations which by their nature are not assignable is that set out in *Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)*, 2002 MBCA 51

(Man. C.A.) at paras. 79, 81- 82, [2002] 7 W.W.R. 104 (Man. C.A.). At para. 82 of *Black Hawk Mining*, the Manitoba Court of Appeal cited *Campbell v. Morrison* (1897), 28 S.C.R. 228 (S.C.C.) at 233 as follows:

> Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.

56 Ford argued that it requires its dealers to have special personal characteristics, including specific requirements of knowledge, capital and experience. It led evidence that the value of a dealership is based primarily on the ability of the person operating it. However, the test for "non-assignability" found in *Black Hawk Mining* is not that it is important to Ford who would be performing the rights and obligations of Welcome Ford in the future, but rather whether those rights and obligations cannot be performed by the proposed assignee.

57 In any event, the evidence did not support the argument that it was important to Ford to have Smith and no other act as the Welcome Ford dealer. The chambers judge relied upon the fact that there was no evidence Ford had made any inquiry in respect of Smith, the owner of Welcome Ford, before signing the original dealership agreement or its most recent renewal in 2007, even to the extent of a credit check or confirmation as to his or the dealership's financial status from their bankers. Indeed, Ford did not know that Smith had relocated to the Dominican Republic well before the receivership order was granted; there was no evidence that it monitored him or stayed in regular contact with him throughout the period he controlled Welcome Ford.

58 Ford responded that it had no ability to review the qualifications of dealers when the 2007 renewal was signed; it was the dealers alone who had the obligation of signing onto the new form or continuing with the extant form of agreement. However, Ford was presumably responsible for the drafting of the original dealership agreement signed by Smith. If it failed to provide for ongoing proof of financial and other stability, that is an indicator that Ford did not consider those factors to be important.

59 The gist of the dealership agreement is that Ford agreed to provide automobiles to Welcome Ford, who in turn agreed to purchase and pay for them, and thereafter to promote their sale and provide after-market service. The operation of this agreement unfolded in a commercial manner. The evidence did not disclose anything which Smith alone could or did provide. The conclusions of the chambers judge that nothing in the agreement rendered it unassignable, either because it was said to be "personal" or not to be assigned without Ford's consent, are reasonable and should be accorded deference.

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?

60 Section 84.1(4) of the BIA directs a judge, in determining if an order approving an assignment (sale) is to be made, to consider whether the party to whom the rights and obligations are proposed to be assigned can perform those obligations in the same manner as the original dealer. If not, court approval of the assignment should be withheld.

61 Ford argued the chambers judge did not have sufficient evidence to be able to conclude that the principal of the ultimate purchaser, the proposed assignee, would be able to perform the dealership obligations in the same fashion as had Smith. Notwithstanding the fact that principal was already successfully operating another Ford dealership in the area, Ford argued there was no evidence before the chambers judge as to i) the financial capability of its principal (even though he was proposing to make the purchase without the need of financing), ii) a business plan for operating multiple dealerships, or iii) his ability to satisfy Ford's criteria for owning and operating multiple dealerships.

62 Presumably some, if not all, of this evidence would have been internally available to Ford, yet it led no evidence to show any disability on the part of the ultimate purchaser. The chambers judge expressly relied on unchallenged affidavit evidence from another local Ford dealer to the effect that the proposed assignee had an excellent track record in terms of operating a profitable Ford dealership and had received many national awards from Ford over the years; the quality of its business premises met Ford's standards, unlike those which Ford had permitted Welcome Ford to operate. From this, the chambers judge inferred that the proposed assignee had both the capital and relevant experience in automotive retailing to enable him to operate the Welcome Ford dealership.

63 Ford went on to argue that the "good faith" obligation imposed on the parties under the dealership agreement takes into account the particular dealer. It is akin to the duty of good faith found in an employment contract: see *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.) at para. 46. This means Ford would have a right of action for damages where a dealer breached the duty of fair dealing in the performance or enforcement of the dealership agreement: see Frank Zaid, *Canadian Franchise Guide*, looseleaf (Toronto: Thomson Reuters, 1992) at 2-142Z.36.

64 An assignment to any third party could conceivably increase the risk of that party not honouring its good faith obligation. However, the dealership agreement will be assigned only upon the court finding the appropriate prerequisite capability, with the resulting reduction in risk that the new dealer will be less honest than the old. Indeed, in this situation where the former dealership encountered a significant problem with employee misappropriation, these risks will likely be well reduced by the proposed assignment to an existing Ford dealer who presumably operates its other dealerships under a similar "good faith" obligation.

65 Section 84.1(4) of the BIA also directs a judge, in determining if an order approving an assignment (sale) should be made, to consider whether it is appropriate to assign the rights and obligations under the agreement.

66 The chambers judge assumed, for the purposes of his decision, that "the consent of Ford Motor to the proposed assignee is required", and that the unreasonable failure to provide that consent is a consideration in determining that it is appropriate to nonetheless assign (sell) the agreement. There is nothing in s. 84.1 which expressly requires that the consent of the contracting party be canvassed as a prerequisite to the application for approval of an assignment of an agreement. The chambers judge did not find that such canvassing was required; he simply assumed it was for the purpose of his analysis. There is no reason to interpret the section as containing such an implicit prerequisite. Rather, an unreasonable withholding of consent is simply one factor to consider in determining whether it is otherwise appropriate to assign the agreement pursuant to s. 84.1(4).

67 The chambers judge found that Ford would never consent to the assignment of this dealership agreement because it would not consent to the assignment of any dealership agreement where a dealership had ceased operation. In withholding consent, Ford had not taken into account the merits of the proposed assignee. The chambers judge therefore concluded that Ford had unreasonably withheld its consent.

68 Ford argued that a wider investigation needed to be undertaken when determining the appropriateness of assigning the dealership agreement than simply one of its refusal to consent. This investigation would canvass the terms of the agreement, the departing dealer's misconduct, the Receiver's failure to continue to operate the dealership pending approval of the proposed sale, Ford's standard criteria when considering a request to assign a dealership agreement outside of an insolvency context, and the results of an analysis it had done subsequent to the closure of Welcome Ford which concluded that future direct representation of the Ford brand was not warranted in the Fort Saskatchewan area.

69 While the chambers judge described his investigation into these issues as "limited", he did consider factors in addition to Ford's unreasonable refusal to consent. Those other factors were the uncontradicted evidence that the ultimate purchaser was up to the job, his conclusion that the proposed assignment would substantially cure the breaches which Ford argued were fundamental, and that all of Ford's rights and remedies under the dealership agreement would be preserved against the proposed assignee. There was no obligation upon the chambers judge to expressly address each additional factor which Ford argued should bear on his determination. His approval of the assignment conveys the results of his assessment of those arguments.

70 Ford argued that the chambers judge should not have considered its failure to consent to any assignment as a factor at all; to do so would amount to a limitation on access to justice in a new area in which it wished to test the effects of s. 84.1 of the BIA. Even if that is so today, it does not counteract the other reasons given by the chambers judge for concluding that it was appropriate to approve the assignment.

71 In summary, the chambers judge concluded the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing the proposed assignee would be able to discharge the dealer's obligations thereunder and upon concluding that it was appropriate to assign the agreement based on evidence that Ford unreasonably withheld its consent, that

the effect of earlier breaches of the agreement would be remedied through its assignment, and that Ford's rights and remedies under the agreement would carry on unchanged. That decision was reasonable; deference should be accorded to it.

Conclusion

72 The appeal is dismissed.

Costs

73 The parties advised they had agreed each should bear their own costs of this appeal given that it involved the interpretation of a hitherto uninterpreted statutory provision. For that reason, the normal rule that the victor is entitled to costs will not be followed. Each party is to bear its own costs of this appeal.

Appeal dismissed.

TAB 2

1992 CarswellBC 535
British Columbia Court of Appeal

Gray, Re

1992 CarswellBC 535, [1993] B.C.W.L.D. 003, 16 C.B.R. (3d) 251, 20 B.C.A.C. 111, 35 W.A.C. 111, 36 A.C.W.S. (3d) 1073, 75 B.C.L.R. (2d) 107

Re Bankruptcy of LAWRENCE THOMAS GRAY

McEachern C.J.B.C., Seaton and Rowles JJ.A.

Judgment: October 27, 1992
Docket: Doc. Vancouver CA016121

Counsel: *J. Shatford*, for appellant Coopers & Lybrand and Lindsay Kenney.
A.W. Basile, for respondent Lawrence Thomas Gray.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale
Headnote
Bankruptcy --- Administration of estate — Sale of assets — Jurisdiction of Court to approve sale
Property of bankrupt — Sale of assets — No reason existing to reject approval of sale of real property where proper efforts made to get offers and where appropriate price offered.
The bankrupt had five creditors with claims totalling about $99,000. He owned a four-and-one-half-acre parcel of land and listed it for sale at about $400,000. The property was subsequently transferred to the trustee in bankruptcy and relisted with the same realtor for about $260,000. An offer for $110,000 was received by the trustee and rejected. Another offer of $215,000 was received and accepted by the trustee. The trustee then applied to the court for approval of the sale. The bankrupt gave notice of appeal and a stay was granted. The sale did not proceed.
A fresh offer of $197,500 was made by the same prospective purchasers. The trustee accepted the offer and again applied for approval. The trustee accepted the offer and again applied for approval. The chambers judge adjourned to allow the bankrupt an opportunity to produce evidence of his efforts to obtain financing. When the matter came back before the chambers judge, no such evidence was tendered. The chambers judge dismissed the application for approval, stating that he was not totally satisfied that the bankrupt had attended properly to his responsibility of discharging the debts against the property.
The trustee appealed.
Held:
The appeal was allowed and the sale was approved.
Once the receiving order was made, the trustee had a duty to sell the assets of the estate in an expeditious manner. The chambers judge erred in rejecting the application for approval. Given that the price was appropriate and proper efforts had been made to get offers, there was no good reason to reject the offer.
Table of Authorities
Cases considered:
Katz, Re (1991), 6 C.B.R. (3d) 21 (Ont. Bktcy.) — *referred to*
Statutes considered:
Bankruptcy Act, R.S.C. 1985, c. B-3.

Appeal from order dismissing application by trustee for order approving sale of real property.

Seaton J.A. **(Excerpt from the transcript):**

1 This is an appeal from an order dismissing an application by the trustee for an order approving the sale of real property.

2 The receiving order was made on March 6th of this year and Coopers & Lybrand were appointed trustees of the estate. It was established that Mr. Gray had not met his liabilities generally when they became due, and that he had permitted execution against his property to remain unsatisfied. There were five creditors with claims totalling about $99,000.

3 Mr. Gray has a four and one half acre parcel of land at Langley that is the subject of the proposed sale.

4 In April of this year Mr. Gray listed the property for sale at about $400,000. In May the property was transferred to the name of the trustee according to the *Bankruptcy Act* and the trustee re-listed the property with the same realtor for about $260,000. The property was advertised. It was in the Multiple Listings service and on the Fraser Valley computer system. There was an open house for realtors. An offer was received on June 10th for $110,000 which the trustee rejected.

5 Mr. and Mrs. Dool offered $215,000 on July 9th and it was rejected because of the financing arrangements. On July 10th there were negotiations with Mr. Gray's solicitor hoping that he would be able to retire his obligations. The Dools made a revised offer of $215,000 which the trustee accepted. The trustee applied for approval and approval was granted by the Supreme Court. Mr. Gray gave notice of appeal and a stay was applied for and granted. That ended that sale.

6 Later Mr. and Mrs. Dool made a fresh offer, this time of $197,500, and that is the offer that the trustee has accepted and applied for approval. The chambers judge, when the matter first came before him, adjourned to give Mr. Gray an opportunity to produce evidence of his efforts to obtain financing. The judge was stern in his statement that this was a limited time Mr. Gray would have and that thereafter the property would be sold. When the matter came back before the chambers judge there was no evidence that Mr. Gray had arranged to raise money so as to pay out his creditors. The chambers judge in the course of his judgment said:

> The value of the property currently is the price which has been offered by Mr. and Mrs. Dool in their current offer to purchase, namely, the $197,500.

Later on at the same page:

> I must consider, from a balance of convenience perspective, what would be lost to Mr. Gray were I to agree with the sale of this property to Mr. and Mrs. Dool at $197,500, and that causes me to look closely at the appraisal prepared by Patent agency.

I interject that it is not an unusual circumstance that there are various appraisals. In this case they go from $190,000 to something like $250,000. Later in his reasons the chambers judge said:

> I turn once again to the troublesome aspect of the case, and that is the balance of convenience. It is with great reluctance, Mr. Gray, that I dismiss this application. I say 'reluctance' because I am not totally satisfied that you have attended properly to the responsibility you have to discharging the debts against this property.

7 In my view, after the receiving order was made in March the trustee had a duty to sell the assets of the estate in an expeditious manner. There are other requirements that are conveniently found in *Re Katz* (1991), 6 C.B.R. (3d) 211 (Ont. Bktcy.) at pp. 213 and 214.

8 In my view, the chambers judge took the wrong approach. This was no longer Mr. Gray's property. Provided the price was appropriate, which it was, proper efforts had been made to get offers, which they were, and there was no other good reason to reject this offer, which there was not, he should have approved the sale. In my view, the court ought to have approved this sale.

9 I would allow the appeal.

***McEachern C.J.B.C.*:**

10 I agree. I only wish to add that the reason for the reduced offer by the purchasers was because it was discovered between these two offers that there was no septic field on the property and the amount of the difference would have been required to install such a field.

11 I also wish to say that in my judgment the learned chambers judge had a limited discretion to give the bankrupt time to try and bring forward a better offer but that had clearly been done in this case and the most that the learned chambers judge could have done in my view would have been to give even more time but as my brother Seaton has said, there were no grounds to dismiss this application and for those reasons I, too, would allow the appeal and make the order that I think should have been made below which would be to approve the sale.

***Rowles J.A.*:**

12 I agree with the reasons given by both of my colleagues.

***McEachern C.J.B.C.*:**

13 The appeal is allowed and the sale which was the subject matter of the application is approved.

14 Vacant possession must be given by Mr. Gray on the date specified in the interim agreement which we understand is the end of this month.

Appeal allowed.

End of Document

TAB 3

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

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

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

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

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

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

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

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

Table of Authorities

Cases considered:

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

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

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

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

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

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

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air

Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not*

> *be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I

am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a

similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

McKinlay J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the

amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

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

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

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

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

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

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

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

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

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

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership

proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

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IN THE MATTER OF THE BANKRUPTCY OF 0932293 B.C. LTD o/a CELLICON, OF THE CITY OF ABBOTSFORD IN THE PROVINCE OF BRITISH COLUMBIA

Court/Estate File No.: 31-2714011

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY & INSOLVENCY)
[COMMERCIAL LIST]
Proceeding commenced at **TORONTO**

BOOK OF AUTHORITIES OF MNP LTD.
(*returnable May 21, 2021 at 11:00am via "ZOOM" videoconference***)**

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