Court File No. CV-19-616261-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.

BOOK OF AUTHORITIES OF THE APPLICANT/MOVING PARTY, HI-RISE CAPITAL LTD. (SALE APPROVAL MOTION RETURNABLE ON A DATE TO BE FIXED)

April 14, 2020

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Court File No. CV-19-616261-00CL

ONTARIO
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IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.

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Dugal v. Research in Motion Ltd.

2007 CarswellOnt 7565, [2007] O.J. No. 4535, 162 A.C.W.S. (3d) 220, 37 B.L.R. (4th) 112, 50 C.P.C. (6th) 398, 87 O.R. (3d) 721

Mark Dugal, Aaron Murphy, Doug Smees, John O'Malley, Gaetan Siguoin, William Jemison, Paul Mitchell, Steven Moffatt, David Thompstone and John Boote, as Trustees of IRONWORKERS ONTARIO PENSION FUND (Applicant) and RESEARCH IN MOTION LIMITED, JAMES L. BALSILLIE, MIKE LAZARIDIS, DOUGLAS E. FREGIN, DOUGLAS WRIGHT, JAMES ESTILL, E. KENDALL CORK, and JOHN RICHARDSON (Respondents)

C. Campbell J.

Heard: November 5, 2007
Judgment: November 15, 2007
Docket: 07-CL-6844

Counsel: Michael D. Wright, A. Dimitri Lascaris for Applicant
Robert W. Staley, Derek J. Bell for Research in Motion, James Estill, John Richardson

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Miscellaneous issues
Trustees of Pension Fund alleged improprieties in respect of option granting practices and accounting for same with respect to number of individuals — Trustees sought various relief under oppression remedy section of Business Corporations Act, including leave to commence derivative action in name of R Ltd. against individuals for breach of fiduciary duty and negligence in administration and financial reporting regarding R Ltd.'s stock option program — Parties negotiated settlement — Parties asked court to approve settlement between Trustees, R Ltd. and individual respondents — Parties also sought representative order under R. 10 of Rules of Civil Procedure in order to implement settlement — Settlement approved — Test for shareholder approval of settlement was met — There was arm's length bargaining without suggestion of collusion — Parties provided adequate notice of settlement hearing to all affected persons — Representative order was granted — Representative order was particularly appropriate given opt-out provision that had been exercised by very small minority of shareholders.

Table of Authorities

Cases considered by *C. Campbell J.*:

Hollinger International Inc. v. American Home Assurance Co. (2006), 34 C.C.L.I. (4th) 17, 2006 CarswellOnt 188 (Ont. S.C.J.) — considered

Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc. (2006), 2006 CarswellOnt 7072 (Ont. S.C.J.) — referred to

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) — referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — considered

Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board) (1997), 35 O.R. (3d) 177, 1997 CarswellOnt 3084, 17 C.C.P.B. 49 (Ont. Gen. Div.) — followed

Ryan v. Ontario (Municipal Employees Retirement Board) (2006), 51 C.C.P.B. 237, 29 C.P.C. (6th) 24, 2006 CarswellOnt 883 (Ont. S.C.J.) — referred to

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
s. 246(1) — referred to

s. 249 — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 10 — considered

REQUEST for court approval of settlement between parties and for representative order.

***C. Campbell J.*:**

1 The Court has been asked to approve a settlement reached between the Applicant, Ironworkers Ontario Pension Fund, and Research In Motion Limited ("RIM") and other individual respondents.

2 The Applicant alleged improprieties in respect of option granting practices and accounting for the same with respect to a number of individuals. Among other remedies, the Applicant sought various relief under the oppression remedy section of the *Business Corporations Act*, R.S.O. 1990 c. B. 16 (the "BCA"), s.247 (1). In addition, the relief sought leave to commence a derivative action in the name of RIM against certain individuals, including members of the audit committee, for breach of fiduciary duty and negligence in the administration of and financial reporting relating to RIM's stock option program.

3 During the period in which demands were made to RIM by the Applicant, certain changes were made on a voluntary basis at RIM by its Board of Directors. Many of the specific allegations contained in the Applicant's claim for relief were vehemently denied by RIM and individual directors, as was the grounds for the remedies of oppression and a derivative action. As the litigation documentation developed, the Court expressed concern that protracted hotly contested litigation could have the undesirable result of adversely affecting shareholder value regardless of the outcome.

4 To the credit of the parties and their counsel, they agreed to commence discussion and negotiation to see if a settlement could be achieved.

5 From progress reports to the Court from time to time, I am satisfied that the settlement that has been reached and for which approval is sought, is the product of difficult, protracted and contentious negotiations at every level. Counsel and their

clients are to be congratulated for achieving a resolution that did not risk shareholder value or faith in the Company.

6 Since the settlement is specifically without admission of wrongdoing on the part of the Company or named individuals, it is not necessary to comment on the allegations, but only on the terms of the settlement themselves and whether they meet the test for approval.

7 During the course of litigation and the negotiations, a Special Committee of RIM reviewed the facts and circumstances of stock options granted to RIM employees between December 1996 and August 2006.

8 As a result of the Special Committee Review, all directors and senior officers who benefited from incorrectly priced options agreed to return the benefits. Changes were made to stock option granting practices and organizational changes were made at the board level, including new independent directors.

9 In addition, Messrs Balsillie and Lazaridis each volunteered and paid $5 million to RIM to defray costs.

10 The essential terms of the Settlement Agreement are as follows:

(a) Balsillie and Lazaridis have each agreed to pay $2.5 million to RIM in order to defray the costs of the Review — this sum is in addition to the $5 million that each of them agreed to pay to RIM after the Application was commenced but before the Settlement Agreement was concluded;

(b) RIM will not compensate the independent members of its Board with stock options;

(c) RIM will retain Towers Perrin, a compensation consultant, to: (i) draft a new Compensation Committee Charter; and (ii) render an opinion to the Compensation Committee on whether it would constitute a material improvement to RIM's current corporate governance practices to assess the effectiveness of the Compensation Committee and its members;

(d) In drafting the new Compensation Committee Charter, Towers Perrin will be required to consult in good faith with a leading corporate governance expert retained by the Applicant, Dr. Richard Leblanc of York University;

(e) Dr. Leblanc will be permitted to make a presentation to the Compensation Committee about the use of position descriptions for members of the Board and its committees;

(f) At any Board meeting where the compensation of C-Level Officers is determined, the Board will meet in executive session and in the absence of inside directors and other RIM executives, and appropriate minutes will be maintained of matters addressed in the executive session;

(g) For so long as it is extant, the Oversight Committee of RIM's Board will, in cooperation with its Audit Committee, periodically review and assess the adequacy of internal controls over: (i) the use of corporate property by RIM management; (ii) directorial conflicts of interest; and (iii) related party transactions, and the review, approval and reporting thereof;

(h) RIM has agreed to pay legal fees and disbursements, inclusive of GST, to Ironworkers' counsel in the total amount of $1.09 million, and also to pay the costs of disseminating the notice of the settlement and the settlement approval hearing; and

(i) Ironworkers has given, subject to Court approval of the Settlement Agreement, a full and final release to RIM and to the Proposed Defendants in respect of claims relating to RIM's stock option practices and reporting thereof, is seeking herein a dismissal of the Application with prejudice and without costs, and is seeking herein a representation order whereby Affected Persons who do not validly exclude themselves will be bound by the release given by Ironworkers.

11 Because the relief sought in the oppression claim and proposed derivative claim was not unique to the Applicant (in that none of the allegations involved any allegations of special damage unique to the Applicant), the parties have agreed to seek a representation order from this Court.

12 The parties have provided adequate notice of this settlement hearing to all affected persons. In fact, much more direct notice was provided in this case than is customarily employed in class proceedings in this province. The notice took the form of:

a) *Press Release*: On October 5, 2007, RIM issued a joint press release of the parties announcing the settlement and describing its terms. The press release resulted in significant coverage in newspapers and newswires, including the *Globe and Mail*, *Report on Business*, Reuters, the Canadian Press, and the Associated Press.

b) *Newspaper Advertisements:* On October 15, 2007, RIM published a "short form notice" in English in each of the *Globe and Mail (National Edition)*, the *National Post*, the *Montreal Gazette* and the *Wall Street Journal* and in French in *La Presse*.

c) *Direct Shareholder Mailing:* RIM directly mailed a "long form notice" in English and French (along with an erratum correcting the domain name for the Applicant's counsel's website) to each RIM shareholder (representing approximately 560 million shares) as at October 5, 2007.

d) *Internet Publication:* A copy of the Settlement Agreement and the long-form notice was published on the websites of Siskinds LLP and Cavalluzzo Hayes Shilton McIntyre & Cornish LLP.

13 While an opt-out right is not necessary for a Rule 10 representation order, in order to ensure that any such order is binding outside of Ontario, the parties agreed to a 35-day opt-out period. That period began on October 15, 2007 (the date when newspaper ads ran and the long-form notices were mailed) and will expire on November 19, 2007. To date, 42 shareholders located throughout the U.S. and Canada, holding a combined 8,817 shares (0.0015% of the total issued and outstanding shares) have opted out. The fact that there have been opt-outs demonstrates that the notice has been effective in reaching shareholders. Some of the opt-outs appear to be motivated by a desire to have nothing to do with a lawsuit against RIM.

14 Section 249 of the BCA requires the Court to give approval to any settlement on such terms as the Court thinks fit and may take into account any shareholder approval.

15 Two lines of cases were put forward as setting the test for shareholder approval. The first test is found in *Sparling v. Southam Inc.*,[1] a derivative settlement hearing under s. 249. The criteria include (i) there is an overriding public interest in favour of settlement; (ii) on a settlement approval motion, the Court should be satisfied that the proposal is fair and reasonable to all shareholders; (iii) in considering the settlement, the Court must recognize that settlements by their nature are compromises and may not satisfy every single concern of all affected parties; (iv) acceptable settlements may fall within a broad range of upper and lower limits; (v) it is not the Court's function to substitute its judgment for that of the parties who negotiate the settlement; (vi) while the Court does not simply rubber-stamp the settlement, it is not the Court's function on a settlement approval motion to litigate the merits of the action; (vii) the Court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement; and (viii) the Court should also consider the nature of the risks involved in establishing the liability claimed.

16 The second line adopts the test enunciated by Winkler J. (as he then was) in *Ontario New Home Warranty Program v. Chevron Chemical Co.*[2] (a class action settlement) and adopted in *Hollinger International Inc. v. American Home Assurance Co.*[3] (an insurance settlement and related derivative class action), which includes (i) likelihood of recovery or likelihood of success; (ii) amount and nature of discovery, evidence or investigation; (iii) settlement terms and conditions; (iv) recommendation and experience of counsel; (v) future expense and likely duration of the litigation; (vi) recommendation of neutral parties, if any; (vii) number of objectors and nature of objections; and (viii) the presence of arm's length bargaining and the absence of collusion.

17 In my view, there is nothing inconsistent with the two lists of factors; indeed, they are largely compatible. Some, such as the number of objectors, are clearly restricted to Class Proceedings. The lists referred to in *Chevron* and in *Hollinger* reflect the emphasis on time and cost associated with modern-day litigation and the need for parties to be mindful of the extent to which continued litigation may take inordinate time and undue cost. That would certainly occur in this action but for

the settlement.

18 A Court in these circumstances should in my view be satisfied that there is likely merit in the claim and be aware that there are real risks that liability may not be established. As noted above, I am so satisfied and as well recognize that there was arm's length bargaining without any suggestion of collusion.

19 The settlement is therefore approved. To implement the settlement, the parties have sought a Representative Order under Rule 10 of the *Rules of Civil Procedure*, which gives the Court authority to appoint a person to represent others who may be affected by the proceeding.

20 The Rule is described as the "...'simplified procedure' version of proceeding under the *Class Proceedings Act*..." Rule 10 is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [*Class Proceedings Act*] order." As such, a number of Rule 10 orders have been issued since the advent of the *Class Proceedings Act*.[4]

21 The test for granting a Rule 10 representation order is a simple balance of convenience test. The court is to consider the inconvenience that would be experienced by each party if the order were or were not granted:

> .... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.[5]

22 I conclude that the Representative Order, which is hereby granted, is particularly appropriate given the opt-out provision that has been exercised by a very small minority of shareholders.

23 An Order will issue in terms of the draft Order filed as well as in the action in Court File No. 07-CL-6799. Once again, counsel are to be thanked for their effective efforts giving rise to this settlement.

Order accordingly.

Footnotes

1 *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.)

2 *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

3 *Hollinger International Inc. v. American Home Assurance Co.* (2006), 34 C.C.L.I. (4th) 17 (Ont. S.C.J.)

4 See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 190, R. 10; *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List]) at para. 42; *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.) at p. 183; *Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 29 C.P.C. (6th) 24 (Ont. S.C.J.); *Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.*, 2006 CarswellOnt 7072 (Ont. S.C.J.)

5 *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)*, *supra* at p. 183

COUNSEL SLIP

COURT FILE NO CV-19-00614404-00CL DATE FEB. 28/19

NO ON LIST 4

TITLE OF PROCEEDING HI RISE CAPITAL LTD.
-v-
SUPERINTENDENT OF FINANCIAL SERVICES

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APPLICANT(S)		F 416 640-3057
PETITIONER(S)		

COUNSEL FOR:		PHONE & FAX NOS
DEFENDANT(S)		
RESPONDENT(S)		

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F 519-352-0565

FINANCIAL SERVICES COMMISSION - JOHN FINNIGAN T-416-304-0558
f-416-304-1313

Hilary (Larry) Van Londersele 519-582-0535
(in person)

PIOTR ZORYLO
647-937-9486

February 28, 2019.

This Motion is opposed by Mr. Van Londersele and Mr.

Zonglo. Despite their submission I am satisfied that the Motion should be granted so that there can be a distribution, albeit a relatively small one, to all of the investors. Further the Motion is not opposed by the Superintendent of Financial Services. There shall therefore be an order issued on the terms of the attached Order.

The balance of my Endorsement is attached.

Harvey J.

Endorsement

Mr. O'Brien has requested information from the Applicant about 799 College St. Inc. in the Applicant's possession.

Mr O'Brien + the Applicant have agreed that the Applicant will provide reasonable financial information in its possession about 799 College St. Inc.

To the extent that Mr. O'Brien + the Applicant cannot agree on the scope of information to be provided, they may schedule a 9:30 appointment before me as a further attendance in this Application. Copies of materials given to Mr. O'Brien shall also be sent to Mr. Van Londersele + Mr. Zorylo.

Court File No. CV-19-00614404-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 28th
	)	
JUSTICE HAINEY	)	DAY OF FEBRUARY, 2019

B E T W E E N:

(Court Seal)

HI-RISE CAPITAL LTD.

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES and THE PARTIES LISTED IN SCHEDULE "A" HERETO

Respondents

APPLICATION UNDER Rules 14.05(2) and 14.05(3)(a) and (d) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and Section 60 of the *Trustee Act*, RSO 1990, c T.23

ORDER

THIS APPLICATION, made by the applicant was heard this day at the court house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

ON READING the Notice of Application and the affidavit of Noor Al-Awqati sworn February 13, 2019, filed, and on hearing the submissions of counsel for each of the Applicant, the Superintendent of Financial Services, Jerry F. O'Brien Professional Corporation, and the submissions of Hilary Van Londersele (appearing in person), no one else appearing,

1. **THIS COURT ORDERS AND DECLARES THAT** service of this application has been validly effected on each of the investors listed in Schedule "A" hereto other than Neilas Inc. (each a "**Remaining Investor**" and collectively the "**Remaining Investors**") by mailing a copy of the letter attached as Exhibit "W" to the Affidavit of Noor Al-Awqati sworn February 13, 2019 (the "**Al-Awqati Affidavit**") to each of the Remaining Investors and by mailing hard copies of the application materials to those Remaining Investors who have requested such copies, and this court further orders that no additional service of this Application on the Remaining Investors is required.

2. **THIS COURT FURTHER ORDERS THAT** the Applicant has the power, pursuant to the Loan Participation Agreements and Mortgage Administration Agreements entered into with the Remaining Investors as described in the Al-Awqati Affidavit (collectively, the "**Agreements**") and at law, to grant a discharge of the mortgage bearing instrument number AT2609667 registered in the Land Registry Office for Toronto (No. 66) (the "**Syndicated Mortgage**") as well as the corresponding Notices (Instrument nos. AT2806029, AT2940913, and AT2940995) concurrent with the completion of the sale of the condominium unit known municipally as Unit 401, 799 College Street, Toronto, Ontario (the "**Remaining Unit**"), despite the fact that the proceeds from the sale of the Remaining Unit (the "**Proceeds**") will not be sufficient to repay all indebtedness secured by the Syndicated Mortgage.

3. **THIS COURT FURTHER ORDERS THAT** if a Remaining Investor requests a written assignment of their share of the overall deficiency claim in respect of the Syndicated Mortgage, the Applicant shall deliver such written assignment by regular mail

within 30 days of the date the request is made, and following such delivery, such Remaining Investor may pursue a deficiency claim at its own risk and expense.

4. **THIS COURT FURTHER ORDERS THAT**, ~~subject to paragraph 5~~ of this order, the Applicant shall, distribute the Proceeds (net of sale-related costs) to the Remaining Investors in the manner proposed in the distribution plan contained in Schedule "B" (the "**Distribution Plan**") to the Al-Awqati Affidavit.

~~5. **THIS COURT FURTHER ORDERS THAT** the fees and disbursements (together with HST) of Cassels Brock & Blackwell LLP ("**Cassels Brock**") in connection with this Application be paid first from the Proceeds prior to distribution to the Remaining Investors pursuant to the Distribution Plan.~~

6. **THIS COURT FURTHER ORDERS THAT** the Applicant shall send a copy of this order to each of the Remaining Investors and Neilas Inc. by regular mail within 30 days of the date of this order.

(Signature of Registrar)

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 0 1 2019

PER / PAR:

Schedule "A"

No.	Name of Investor	Type of Investment	Plan Administrator
1.	1248673 Ontario Inc.	Direct Investment	N/A
2.	1248677 Ontario Inc.	Direct Investment	N/A
3.	1784506 Ontario Inc.	Direct Investment	N/A
4.	3682145 Canada Inc.	Direct Investment	N/A
5.	Alan Hand	Registered Account	The Bank of Nova Scotia Trust Company
6.	Alice Chan	Registered Account	The Bank of Nova Scotia Trust Company
7.	Allan James	Registered Account	The Bank of Nova Scotia Trust Company
8.	Amanda Lewis	Direct Investment	N/A
9.	Andrew Pawlak	Registered Account	The Bank of Nova Scotia Trust Company
10.	Anita Hung	Registered Account	The Bank of Nova Scotia Trust Company
11.	Annie Yuen	Direct Investment	N/A
12.	Anthony Iagallo	Direct Investment	N/A
13.	Ariella Tsafatinos	Direct Investment	N/A
14.	Aurete Lavie Family Trust	Direct Investment	N/A
15.	Bang Luong	Direct Investment	N/A
16.	Bari W. Mizzi	Direct Investment	N/A
17.	Benny Li	Registered Account	The Bank of Nova Scotia Trust Company
18.	Bertrand Boatswain	Registered Account	The Bank of Nova Scotia Trust Company
19.	Beverley Hyde	Direct Investment	N/A

No.	Name of Investor	Type of Investment	Plan Administrator
20.	Brett Compton-Brown	Registered Account	The Bank of Nova Scotia Trust Company
21.	Brian Goodman	Registered Account	The Bank of Nova Scotia Trust Company
22.	Catherine Coplea	Direct Investment	N/A
23.	Catherine O'Neil	Direct Investment	N/A
24.	Christopher Martin	Direct Investment	N/A
25.	Cyrille Pineault	Registered Account	The Bank of Nova Scotia Trust Company
26.	Cyrille Pineault	Registered Account	The Bank of Nova Scotia Trust Company
27.	Darrell Davis	Registered Account	The Bank of Nova Scotia Trust Company
28.	Deborah Rocano	Direct Investment	N/A
29.	Dolores Lamont	Direct Investment	N/A
30.	Edwin Joseph	Registered Account	The Bank of Nova Scotia Trust Company
31.	Emilie Rychtera	Registered Account	The Bank of Nova Scotia Trust Company
32.	Emilie Rychtera	Registered Account	The Bank of Nova Scotia Trust Company
33.	Felicia Loh-koh	Registered Account	The Bank of Nova Scotia Trust Company
34.	Gabriela Drzadzewska	Direct Investment	N/A
35.	George Micevski	Registered Account	The Bank of Nova Scotia Trust Company
36.	Gordon Nash	Direct Investment	N/A

No.	Name of Investor	Type of Investment	Plan Administrator
37.	Harris Pleet	Direct Investment	N/A
38.	Harvey Donald Scott	Registered Account	The Bank of Nova Scotia Trust Company
39.	Hilary (Larry) VanLondersele	Registered Account	The Bank of Nova Scotia Trust Company
40.	Huu Buu (Peter) Ly	Registered Account	The Bank of Nova Scotia Trust Company
41.	Ida Kleinsasser (McFarlane)	Registered Account	The Bank of Nova Scotia Trust Company
42.	Jane Ho	Registered Account	The Bank of Nova Scotia Trust Company
43.	Jerry F. O'Brien Professional Corporation	Direct Investment	N/A
44.	Jim Neilas	Registered Account	The Bank of Nova Scotia Trust Company
45.	Jo-Anne Hebert	Registered Account	The Bank of Nova Scotia Trust Company
46.	John Adam Speers	Registered Account	The Bank of Nova Scotia Trust Company
47.	John Bulleid	Registered Account	The Bank of Nova Scotia Trust Company
48.	John Neilas	Registered Account	The Bank of Nova Scotia Trust Company
49.	Jon Leavens	Registered Account	The Bank of Nova Scotia Trust Company
50.	Jose Camara	Registered Account	The Bank of Nova Scotia

No.	Name of Investor	Type of Investment	Plan Administrator
			Trust Company
51.	June Eggert	Registered Account	The Bank of Nova Scotia Trust Company
52.	Kapilla Bulleid	Registered Account	The Bank of Nova Scotia Trust Company
53.	Katerina Sophocleous	Registered Account	The Bank of Nova Scotia Trust Company
54.	Kazimiera Bednarz	Direct Investment	N/A
55.	Kosanam Thiagarajan	Direct Investment	N/A
56.	Lisa Henry	Registered Account	The Bank of Nova Scotia Trust Company
57.	Lisa Ongaro	Direct Investment	N/A
58.	Lisa Ongaro	Registered Account	The Bank of Nova Scotia Trust Company
59.	Lorne Preston	Direct Investment	N/A
60.	Margaret Currie	Direct Investment	N/A
61.	Margaret Moffat	Registered Account	The Bank of Nova Scotia Trust Company
62.	May Mei Ying Ng	Direct Investment	N/A
63.	Michael Mctaggart	Registered Account	The Bank of Nova Scotia Trust Company
64.	Michael Rinaldo	Direct Investment	N/A
65.	Michael Singh	Registered Account	The Bank of Nova Scotia Trust Company
66.	Natasha Dingwall	Registered Account	The Bank of Nova Scotia Trust Company
67.	Neilas Inc.	Direct Investment	N/A

No.	Name of Investor	Type of Investment	Plan Administrator
68.	Nerissa Wai Yin Suen	Direct Investment	N/A
69.	New Horizons Management Consulting Inc.	Direct Investment	N/A
70.	Norm Bowles Medicine Professional Corporation	Direct Investment	N/A
71.	Norma Khandaker	Direct Investment	N/A
72.	Pamela Morgner	Registered Account	The Bank of Nova Scotia Trust Company
73.	Patrick Gagne	Registered Account	The Bank of Nova Scotia Trust Company
74.	Paul Stubbert	Registered Account	The Bank of Nova Scotia Trust Company
75.	Peter Domanski	Direct Investment	N/A
76.	Peter Nooyen	Direct Investment	N/A
77.	Peter Nooyen	Direct Investment	N/A
78.	Piotr Zorylo	Direct Investment	N/A
79.	Raymond Compton-Brown	Registered Account	The Bank of Nova Scotia Trust Company
80.	Rebecca Au	Registered Account	The Bank of Nova Scotia Trust Company
81.	Richard Deschenaux	Registered Account	The Bank of Nova Scotia Trust Company
82.	Richard Gill	Direct Investment	N/A
83.	Richard Gill	Direct Investment	N/A
84.	Rob Giles	Direct Investment	N/A
85.	Robert Cherry	Registered Account	The Bank of Nova Scotia Trust Company
86.	Robert Hiemstra	Registered Account	The Bank of Nova Scotia

No.	Name of Investor	Type of Investment	Plan Administrator
			Trust Company
87.	Ryszard Sochon	Registered Account	The Bank of Nova Scotia Trust Company
88.	Sandro Genovesi	Direct Investment	N/A
89.	Sayal Dentistry	Direct Investment	N/A
90.	Shawn David Thomas	Registered Account	The Bank of Nova Scotia Trust Company
91.	Shu-Wei (James) Fung	Registered Account	The Bank of Nova Scotia Trust Company
92.	Stephen B. Martin	Direct Investment	N/A
93.	Tadeusz Palysa	Direct Investment	N/A
94.	Terence Hind	Direct Investment	N/A
95.	Todd Henry	Direct Investment	N/A
96.	Todd Henry	Registered Account	The Bank of Nova Scotia Trust Company
97.	Vladimir Zivkovic	Registered Account	The Bank of Nova Scotia Trust Company
98.	Wilfredo Farias	Registered Account	The Bank of Nova Scotia Trust Company
99.	William McGahern	Direct Investment	N/A

Schedule "B"

Distribution Plan

As set out in the Al-Awqati Affidavit, HRC proposes to distribute proceeds from the sale of the Remaining Unit on a *pro rata* basis based upon the actual amount of principal outstanding owing on the date that the sale of the Remaining Unit is completed. As such, the claim amount for the purposes of determining the entitlement of Incomplete Settlement Investors will be net of any actual principal payments that they have received under their settlements. Interest that has accrued or has already been paid will not be considered in the calculation.

There are 98 Remaining Investors. Of this group, 61 are Incomplete Settling Investors and 37 are Non-Settling Investors. The total aggregate amount, including accrued interest, owing to the Remaining Investors is $6,660,267. The total aggregate principal amount owing to the Remaining Investors is $5,460,775. The estimated net sale proceeds are $744,933.92. The estimated net sale proceeds are calculated by subtracting from the sale price of $989,000: (1) HST in the amount of $113,778.76; (2) the estimated closing fees and commission (inclusive of HST) in the amount of $56,085.65; (3) and Cassels Brock's Fees incurred to-date and estimated future fees, collectively in the amount of $74,201.67.

The Remaining Investors will recover approximately 13% of their principal investment (being the estimated net sale proceeds divided by the total principal outstanding owing on the date that the sale of the Remaining Unit is completed). This percentage will be multiplied by the principal amount owing to each Remaining Investor to calculate the funds that will be paid to each Remaining Investor from the proceeds of sale from the Remaining Unit.

HI-RISE CAPITAL LTD.
Applicant

SUPERINTENDENT OF FINANCIAL SERVICES *et. al.*
Respondents

Court File No. CV-19-00614404-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Applicant, Hi-Rise Capital Ltd.

2011 ONSC 1289, 2011 CarswellOnt 2744, 66 E.T.R. (3d) 255

2011 ONSC 1289
Ontario Superior Court of Justice

Gilchrist v. Deakin Estate

2011 CarswellOnt 2744, 2011 ONSC 1289, 66 E.T.R. (3d) 255

Robert Gilchrist, Marina Gilchrist and Murray Gilchrist and Wiebe De Jong, also known as Bill De Jong Estate Trustee of the Estate of Kathleen Patricia Deakin and in his personal capacity and Janice French

S. Healey J.

Heard: February 24, 2011
Judgment: March 8, 2011*
Docket: Newmarket CV-09-096128-00

Proceedings: additional reasons at *Gilchrist v. Deakin Estate* (2011), 2011 CarswellOnt 2631, 2011 ONSC 2386 (Ont. S.C.J.)

Counsel: Paul Trudelle for Defendant, Wiebe De Jong as Trustee of the Estate of Kathleen Patricia Deakin and in his personal capacity
Robert Watson for Defendant, Janice French
Kenneth Shugart for Plaintiffs

Subject: Estates and Trusts; Civil Practice and Procedure

Related Abridgment Classifications

Estates and trusts
I Estates
I.5 Construction of wills
I.5.a Fundamental issues
I.5.a.i General principles

Headnote

Estates and trusts --- Estates — Construction of wills — Fundamental issues — General principles
Deceased left will directing sale of cottage property — Direction stated that if beneficiary who was also estate trustee did not purchase cottage, that property was to be sold and proceeds divided equally between estate trustee and another beneficiary — Granddaughter who was third beneficiary was to receive any residue of estate — Estate trustee and granddaughter disagreed as to distribution of sale proceeds if estate trustee exercised his option to purchase property — Second beneficiary made offer to purchase property and parties acted under assumption that trustee would not exercise his option — Granddaughter claimed that purchase offer by second beneficiary was improper under terms of will, and that if sale was permitted half of proceeds should become residue — Estate trustee moved for direction of court as to proceeds of sale — Motion granted — Estate trustee's position was not binding and he could still make offer up to time that property was sold — Estate trustee did not have any conflict of interest with granddaughter and was prepared to abide by direction of court — Will was clear and unambiguous that in event of sale to outside party, estate trustee and second beneficiary would share proceeds — Court had jurisdiction to determine motion on merits and question posed to court was not hypothetical — Deceased clearly wished to pass on half of proceeds to designated beneficiaries.

Table of Authorities

Cases considered by *S. Healey J.*:

Anglo Canadian Fire & General Insurance Co. v. Robert E. Cook Ltd. (1973), [1973] 2 O.R. 385, 1973 CarswellOnt 941 (Ont. H.C.) — considered

Canada Trust Co. v. Ontario (Human Rights Commission) (1990), 69 D.L.R. (4th) 321, 12 C.H.R.R. D/184, 74 O.R. (2d) 481, 38 E.T.R. 1, (sub nom. *Leonard Foundation Trust, Re)* 37 O.A.C. 191, 1990 CarswellOnt 486 (Ont. C.A.) — referred to

Kaptyn Estate, Re (2009), 48 E.T.R. (3d) 278, 2009 CarswellOnt 2160 (Ont. S.C.J.) — referred to

McKay Estate v. Love (1991), 6 O.R. (3d) 511 at 519, (sub nom. *McKay Estate, Re)* 52 O.A.C. 159, 44 E.T.R. 190, 1991 CarswellOnt 549 (Ont. C.A.) — distinguished

296616 Ontario Ltd. v. Richmond Hill (Town) (1977), 14 O.R. (2d) 787, 1977 CarswellOnt 826 (Ont. C.A.) — considered

Statutes considered:

Trustee Act, R.S.O. 1990, c. T.23
s. 60 — considered

s. 60(1) — considered

s. 60(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 2.01(1) — considered

R. 14.05(3)(d) — considered

R. 74.15(1)(i) — considered

R. 75.06(1) — considered

MOTION for direction of court as to proceeds from sale of estate property.

***S. Healey J.*:**

Nature of Motion

1 This is a motion for the advice and direction of the court with respect to the administration of an estate pursuant to subrule 74.15(1)(i), 75.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and section 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, with respect to the following questions:

(i) Can the estate trustee accept an offer to purchase made by the applicants for a cottage property owned by the estate; and

(ii) In the event that the answer to the preceding question is affirmative, to whom are the proceeds of sale payable under

the Last Will and Testament of the deceased?

Jurisdiction

2 The defendant Janice French ("French") argued that neither subrule 74.15(1)(i) nor subrule 75.06(1) should be applied in these circumstances to grant the relief requested. The moving party, the estate trustee Wiebe De Jong ("De Jong"), has a financial interest in this estate in his personal capacity and so satisfies the threshold requirement of each rule. Apart from that, I agree with French that neither of these rules applies to the situation at hand. The parties are not seeking direction on the procedural conduct of the action, to which subrule 75.06(1) applies, nor is this a non-contentious proceeding in which a party is seeking a routine order to assist in the administration of the estate, to which subrule 74.15(1)(i) applies.

3 However, this matter is also before the court by virtue of section 60(1) of the *Trustee Act*. De Jong, in his capacity as estate trustee, requires direction from this court in the face of an objection from French as to the disposition of the cottage property. This motion raises the issue of his administration and management of estate assets and therefore is properly brought before this court. See: *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (Ont. C.A.), as well as *Kaptyn Estate, Re* (2009), 48 E.T.R. (3d) 278 (Ont. S.C.J.), where at para. 26, D. M. Brown J. stated:

> 26 An executor may apply to the court for its opinion, advice, or direction on any question respecting the management or administration of the property or assets of a testator: *Trustee Act*, R.S.O. 1990, c.T.23, s. 60(1). The type of advice which a court may give to executors was explained in the following language of Middleton, J. in the case of *Re Fulford* (1913), 29 O.L.R. 375, which was adopted by Craig J. in *Re Wright* (1976), 14 O.R. (2d) 698 at page 707:
>
> > The executors are protected from all liability if they honestly and with due care exercised discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the court. The executors cannot come to the court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorized to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

4 French's counsel presents the case of *McKay Estate v. Love* (1991), 6 O.R. (3d) 511 at 519 (Ont. C.A.), at 519 as support for the proposition that it is not the court's function to intervene to give advice as to how an estate trustee should exercise his discretion respecting a proposed sale. The facts of that case are distinguishable in that the trustee sought the advice of the court on whether the sale price of land was acceptable. Such a decision, the court indicated, should generally be left in the discretion of the trustee. The matter before this court is entirely different, as the court is being asked to give directions on whether an offer can even be accepted, and secondly, to whom the proceeds should be allocated if such a decision may be made through an interpretation of the Will on motion. Unlike *McKay Estate*, *supra*, this is not a dispute about the reasonableness of the sale price. I take the remarks of the Court of Appeal to mean that, given the other mechanisms available for challenging the decisions and actions of a trustee, the courts should not become clogged with applications for approval of decisions that fall within a trustee's discretion. I do not accept that the remarks of the court in *McKay Estate*, *supra*, were meant to limit recourse to subsections 60(1) and (2) of the *Trustee Act*, where such applications are necessary to resolve conflicts that arise over the way in which a trustee proposes to manage or administer a testator's property.

5 Secondly, this motion by its nature requires the interpretation of a will. Such questions are usually brought before the court by application pursuant to subrule 14.05(3)(d) of the *Rules of Civil Procedure*, but it is understandable why the moving party did not follow mat procedure in this case. As will be explained below, this proceeding was initiated by such an application, and converted to an action by order of Bryant J. in January 2010. Given that the initiating proceeding is now a Statement of Claim, proceeding by motion was a reasonable manner by which to place this question before the court. Further, subrule 2.01(1) provides sufficient authority for this court to proceed with considering the relief requested even though requested by motion instead of by application.

The Last Will and Testament

6 The deceased Kathleen Deakin left a Will dated December 4, 2003 ("the Will"), the relevant portions of which provide as follows:

> 3(e)(ix) [The Estate Trustee is directed] To sell the cottage property being Lot 5, Plan 1105, Township of Tiny, County of Simcoe, including furnishings and real estate, conditional upon an opportunity given to BILL DE JONG to purchase the property at 50% of the sale price. In the event BILL DE JONG does not give notice of his intention to complete the purchase of the property within the conditional period and upon the expiration of the conditional period, my Trustee shall then complete the sale transaction and shall, pay, transfer and deliver the net proceeds from such sale as follows:
>
> > 1) one-half (1/2) of the net proceeds to MARINA GILCHRIST, wife of the late DONALD GILCHRIST and his sons ROBERT GILCHRIST and MURRAY GILCHRIST, in equal shares
> >
> > 2) one-half (1/2) of the net proceeds to WIEBE DE JONG also known as BILL DE JONG and BARBARA DE JONG in equal shares.
>
> ...Xx. my Trustee shall thereafter divide, transfer and assign the Residue, as the same shall then be, as follows:
>
> 1) To pay, transfer and assign the remaining residue of my estate to my granddaughter JANICE FRENCH, for her own use absolutely.

Positions of the Parties

7 French is the deceased's granddaughter. From the evidence placed before me on this motion, it appears that neither De Jong nor his wife Barbara De Jong, nor Marina and Donald Gilchrist or their sons ("the Gilchrists"), were related to the deceased. De Jong is the estate trustee.

8 The initial application was commenced because the parties were at odds regarding the appropriate distribution of the sale proceeds of the cottage in the event that De Jong exercised his option to purchase set out in paragraph 3(e)(ix). The advice and direction of the court was required with respect to the interpretation of the relevant paragraphs of the Will. One interpretation was that De Jong's cottage purchase payment would fall into the residue and benefit French. The competing interpretation was that De Jong's payment would be made to the Gilchrists. When the matter came before Bryant J. he determined that extrinsic evidence would be required to interpret the testator's intentions in order to address the ambiguity on the face of the Will, and that the conflicting affidavit evidence regarding her intentions required a trial.

9 The necessity for that interpretation is now moot, argues De Jong and the Gilchrists, because the Gilchrists have now made an offer to purchase the cottage. The offer is conditional upon an opportunity being granted to De Jong to exercise the option set out in paragraph 3(e)(ix) of the Will. There is no evidence before me that French is disputing the sale price of $400,000 as being too low. De Jong's affidavit sworn October 13, 2010 for this motion does not state that he will not exercise his option, but all parties are currently acting on the premise that he will not do so.

10 It is the position of French that a purchase by the Gilchrists is improper and not permissible under the terms of the Will, and alternatively, that the Will should be interpreted to provide that one-half of the sale proceeds fall into the residue in the event of a sale to the Gilchrists. French also argues that there is a conspiracy of sorts going on in that De Jong and the Gilchrists must have struck a deal, of which she asserts she has not been informed, with the intention of depriving her of the money that she would have received in the event of a purchase by De Jong. She argues that the pleadings filed in this action align De Jong with her, against her adversary the Gilchrists. Given that De Jong was previously litigating one position to her benefit, French argues that he cannot now "reverse field" with the effect that French is "cut out".

11 It is the position of the Gilchrists that the Will permits them to receive one-half of the proceeds of sale, such that they either pay the full $400,000 and are credited with a return of $200,000 on the Statement of Adjustments, or that they simply

pay $200,000, which should belong to De Jong under subparagraph 3(e)(ix)(2).

12 De Jong's position is that on a plain reading of the Will, the proceeds would be payable with one-half of the proceedings going to the Gilchrists and the other half to himself and his wife, but he seeks the advice and the direction of the court with respect to the questions raised at the outset of this endorsement.

Analysis of Questions Before this Court

13 French's argument is problematic for a number of reasons. First, De Jong is entitled to change his mind as frequently as he chooses about whether he will or will not exercise his option until such time as an offer is made and that option is exercised. Any prior statements made by him as to his intentions are not binding.

14 Second, it is clear from his Statement of Defence that De Jong is not "aligned" with French, as would be improper for a trustee. His pleading states: "De Jong is prepared to abide by any Order of the Court made with respect to the interpretation of the Will regarding the payment of the proceeds of his purchase of the cottage, and with respect to any determination regarding the proper procedure for effecting the sale."

15 Third, it is of no import that the Gilchrists made a decision to submit an offer after pleadings were exchanged; their decision to do so could be based on a myriad of practical or sentimental factors that are of no business to this court, or to French.

16 Fourth, there is no evidence that there have been any underhanded dealings between the Gilchrists and De Jong. Paragraph 8 of De Jong's affidavit indicates that a draft offer was circulated among counsel before the formal offer was made. This evidence was not contradicted. In any event, even if that had not occurred I would have found it proper for such offer to have been presented solely to the estate trustee.

17 Fifth, French's argument assumes that she would have been successful in persuading the court at trial that De Jong's sale proceeds would form part of the residue.

18 Sixth, she asserts that an agreement had been struck between De Jong and herself that would have had him purchase the property for $260,000, $130,000 of which would have been to her benefit. During submissions her counsel argued that De Jong could not now resile from that agreement and change his mind about the purchase. There is absolutely no merit to this position: there is no evidence of an offer from a third party for $260,000 that would have triggered De Jong's right to exercise his option. There is no contract between De Jong and French. She also presumes, again, that it is a foregone conclusion that the proceeds will belong to her. This point relates to the first point above. There has been no detrimental reliance on the part of French that can be shown to give rise to damages.

19 Last, and most importantly, French's argument ignores the fact that in the event of a sale to a non-party, the Will is clear and unambiguous that the Gilchrists and De Jong, together with his wife, will share equally the net proceeds of sale. Her counsel's factum characterizes the situation as: "the Gilchrists were not given any legacies". This is incorrect; there is a clearly expressed intention that the Gilchrists are to receive one half of the net proceeds of sale in the event of a sale to a non-party, and perhaps, in the event of a sale to De Jong.

20 Of central importance in this motion is whether or not the questions asked on the motion are different than the questions to be determined in the proceeding. French argues that this court has no jurisdiction to answer the questions posed on this motion in the face of the order of Bryant J. directing the trial of an issue. The question raised in the Statement of Claim concerning what is to occur with the sale proceeds if the option is exercised by De Jong arises because the Will is not entirely clear in its drafting as to what should occur following the exercise of that option. In my view the questions before me are different; I am being asked to interpret the Will under an entirely different scenario than that presented to Bryant J. On this motion, the questions being asked are whether De Jong can accept the Gilchrists' offer to purchase the cottage and if so, to whom the proceeds will be payable. The questions before me also involve a preliminary consideration, which is: is there anything in the Will that prohibits the purchase of the cottage by the Gilchrists?

21 French's counsel presents the case of *Anglo Canadian Fire & General Insurance Co. v. Robert E. Cook Ltd.*, [1973] 2

O.R. 385 (Ont. H.C.), and asserts that the case stands for the proposition that it is not the court's function on a motion to grant a ruling where such ruling would not necessarily end all proceedings. He alludes to further litigation, in which French would demand payment from De Jong if De Jong were to "pocket" the money himself. As indicted earlier, I can see no merit in any assertion that French has any cause of action against De Jong if such claim arises out of the facts that are now present before this court. Further, the spectre being raised of further litigation involving this estate is not going to prevent this court from determining the motion on its merits. In any event I do not agree that *Anglo Canadian Fire & General Insurance Co.*, *supra*, has any application to this case. Similarly the case of *296616 Ontario Ltd. v. Richmond Hill (Town)* (1977), 14 O.R. (2d) 787 (Ont. C.A.), which French's counsel referred to, has no application to this case, as it involved a ruling that the court should not entertain hypothetical questions. The question before me is not hypothetical; there is a real offer to purchase in play that has not been acted upon by the trustee because he awaits direction from this court.

Decision

22 On a plain reading of the Will, the testator envisioned a scenario in which the cottage would be sold, De Jong would not exercise his option, and the proceeds of sale would be shared equally by the Gilchrists and De Jong. French would not benefit from the cottage property. There is nothing unclear or ambiguous about the drafting of that aspect of the Will. That is entirely the scenario at hand, with the twist that it is the Gilchrists who have offered to purchase me cottage. Having reviewed the Will in its entirety, there is nothing in the Will that prohibits or limits the ability of the Gilchrists to purchase the cottage. It is argued by French that the Will does not state that the Gilchrists may purchase the cottage. Since such a provision was inserted for the benefit of De Jong, she argues that the testator intentionally did not provide such a right to the Gilchrists. Such an interpretation requires the court to read something into the Will that goes against common sense. The testator wanted to benefit the Gilchrists through her cottage. The testator obviously held the Gilchrists in high enough regard that she made a substantial gift to them in her Will, and it is easy to infer that she would be content that they become owners of her cottage in the event that De Jong chose not to purchase it.

23 To allow the sale to the Gilchrists does not run afoul of the testator's very direct, unambiguous wishes. Allowing this to occur permits the Gilchrists and De Jong and his wife to share equally the proceeds of sale, or their equivalent benefit, which is exactly what the testator wanted to occur. Accordingly, this court orders:

1. The trustee may accept the offer to purchase from the Gilchrists, or any subsequent reasonable offer that may be presented by them;

2. In the event that De Jong does not exercise his option to purchase the property, the proceeds of sale are payable as set out in subparagraph 3(e)(ix) under the Will as follows:

(i) one-half of the net proceeds to Marina, Robert and Murray Gilchrist, in equal shares;

(ii) one-half of the net proceeds to Wiebe and Barbara De Jong, in equal shares.

Action Moot and Appropriate for Court to Dismiss the Action

24 As earlier indicated, it is anticipated that De Jong will not exercise his option within the conditional period. If he changes his mind and does do so, the within action will need to proceed to resolve the initial question placed before Bryant J.

25 If he does not exercise his option to purchase within the conditional period, this action is moot and a trial is not necessary to determine the distribution of the proceeds of sale of the cottage in light of this ruling. A discontinuance or dismissal of the action would be appropriate if the sale to the Gilchrists is completed as anticipated.

26 If the parties are unable to agree upon the costs of this motion they may make submissions to me through the trial co-ordinator's office in Newmarket, the moving party by March 18, 2011, the plaintiffs by March 21, 2011 and the defendant French by March 24, 2011.

Motion granted.

Footnotes

[*] Additional reasons at *Gilchrist v. Deakin Estate* (2011), 2011 CarswellOnt 2631, 2011 ONSC 2386, 66 E.T.R. (3d) 263 (Ont. S.C.J.)

2011 ONSC 7693, 2011 CarswellOnt 14864, 211 A.C.W.S. (3d) 773, 75 E.T.R. (3d) 304

2011 ONSC 7693
Ontario Superior Court of Justice [Commercial List]

InnVest Real Estate Investment Trust, Re

2011 CarswellOnt 14864, 2011 ONSC 7693, 211 A.C.W.S. (3d) 773, 75 E.T.R. (3d) 304

InnVest Real Estate Investment Trust, InnVest Hotels GP Ltd., InnVest Properties London Ltd., InnVest Properties Truro Inc., IOT Trustee Corp., InnVest Hotels Trustee Corp. and InnVest Operations Trust, Applicants

D.M. Brown J.

Heard: December 23, 2011
Judgment: December 23, 2011
Docket: CV-11-9517-00CL

Counsel: J. Bunting, B. McLeese, for Applicants

Subject: Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications

Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation

Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.k Supervision by court
III.2.k.ii Business decisions

Headnote

Estates and trusts --- Trustees — Powers and duties of trustees — Supervision by court — Business decisions
Applicants were combination of trusts and corporations incorporated under Canada Business Corporations Act (CBCA) — Applicants proposed plan of arrangement under which one trust applicant split off some of its holdings into second trust (original plan) — Decision was issued approving original plan (original decision) — One year later, applicants proposed second plan of arrangement (second plan), which effectively reversed transactions in original plan — Second plan unwound stapled unit structure of one applicant trust, transferred assets and liabilities of one applicant trust to another, and reorganized certain applicant corporations — Applicants brought motion for interim order with respect to second plan under s. 192 of CBCA and s. 60(1) of Trustee Act (TA) — Motion granted — It was proper exercise of court's jurisdiction under s. 60(1) of TA and s. 192 of CBCA to grant order sought — Second plan, on its face, fell within categories of arrangement recognized by s. 192 of CBCA as proper subject matter of plan of arrangement proceeding — Second plan involved either exchange of securities of corporation for money or amalgamation — Applicant trusts could be joined as co-applicants under s. 192 of CBCA because second plan involved trust-related transactions for which applicant trusts certainly enjoyed standing — Inquiry into fairness and reasonableness of trust-related steps in second plan fell within court's jurisdiction under s. 60(1) of TA — This was so despite fact that trustees of trust applicants had power to call meetings of unit holders to consider second plan — Case at bar was exceptional, given overall complexity of proposed transaction — Moreover, original decision

sanctioned process by which such complex transaction could proceed — It was important for health of our economy that participants could expect reasonably consistent application by courts of processes involving financial and commercial transactions.

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation
Applicants were combination of trusts and corporations incorporated under Canada Business Corporations Act (CBCA) — Applicants proposed plan of arrangement under which one trust applicant split off some of its holdings into second trust (original plan) — Decision was issued approving original plan (original decision) — One year later, applicants proposed second plan of arrangement (second plan), which effectively reversed transactions in original plan — Second plan unwound stapled unit structure of one applicant trust, transferred assets and liabilities of one applicant trust to another, and reorganized certain applicant corporations — Applicants brought motion for interim order with respect to second plan under s. 192 of CBCA and s. 60(1) of Trustee Act (TA) — Motion granted — It was proper exercise of court's jurisdiction under s. 60(1) of TA and s. 192 of CBCA to grant order sought — Second plan, on its face, fell within categories of arrangement recognized by s. 192 of CBCA as proper subject matter of plan of arrangement proceeding — Second plan involved either exchange of securities of corporation for money or amalgamation — Applicant trusts could be joined as co-applicants under s. 192 of CBCA because second plan involved trust-related transactions for which applicant trusts certainly enjoyed standing — Inquiry into fairness and reasonableness of trust-related steps in second plan fell within court's jurisdiction under s. 60(1) of TA — This was so despite fact that trustees of trust applicants had power to call meetings of unit holders to consider second plan — Case at bar was exceptional, given overall complexity of proposed transaction — Moreover, original decision sanctioned process by which such complex transaction could proceed — It was important for health of our economy that participants could expect reasonably consistent application by courts of processes involving financial and commercial transactions.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Acadian Timber Income Fund, Re (2009), 2009 CarswellOnt 8086 (Ont. S.C.J. [Commercial List]) — followed

First Marathon Inc., Re (1999), 1999 CarswellOnt 2295 (Ont. S.C.J. [Commercial List]) — referred to

Innvest Real Estate Investment Trust, Re (2010), 72 B.L.R. (4th) 98, 2010 CarswellOnt 5664, 2010 ONSC 4292 (Ont. S.C.J.) — considered

Kaptyn Estate, Re (2009), 48 E.T.R. (3d) 278, 2009 CarswellOnt 2160 (Ont. S.C.J.) — followed

Olympia & York Developments Ltd., Re (1993), 1993 CarswellOnt 197, *(*sub nom. *Olympia & York Developments Ltd. v. Royal Trust Co.)* 18 C.B.R. (3d) 176, 102 D.L.R. (4th) 149 (Ont. Gen. Div.) — referred to

1768248 Ontario Ltd., Re (2009), 2009 CarswellOnt 71 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 192 — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Securities Act of 1933, 15 U.S.C. 2A
s. 3(a)(10) — referred to

Trustee Act, R.S.O. 1990, c. T.23
s. 60(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 14.05(2) — referred to

R. 14.05(3)(a) — referred to

MOTION for interim order with respect to proposed plan of arrangement under s. 192 of *Canada Business Corporations Act* and s. 60(1) of *Trustee Act*.

***D.M. Brown J.*:**

I. Ex parte motion for an Interim Order involving a CBCA plan of arrangement and opinion, advice or directions under the Trustee Act

1 On August 4, 2010, Hoy J., as she then was, in her decision in *Innvest Real Estate Investment Trust, Re*[1] approved, under section 192 of the *Canada Business Corporations Act*[2] and section 60(1) of the *Trustee Act*,[3] a plan of arrangement under which the applicant, InnVest Real Estate Investment Trust ("REIT"), split off some of its holdings into a second trust, the co-applicant, InnVest Operations Trust ("IOT"). Those transactions were prompted by amendments to the *Income Tax Act of Canada* regarding the taxation of "specified investment flow-through entities", the so-called SIFT Rules.

2 Now, a little over a year later, REIT and IOT wish, in effect, to reverse those transactions. Again, the driver is a change to the tax regime which, when enacted, will impose a materially less beneficial tax regime on real estate investment trusts, like InnVest, that have issued "stapled securities". The applicants are proposing a reorganization which ultimately would result in the unwinding of the stapled unit structure of InnVest and the transfer of substantially all of the assets and liabilities of IOT to the REIT, with IOT becoming a wholly-owned subsidiary of the REIT. The reorganization would involve, in part, the reorganization of certain *CBCA* subsidiary corporations.

3 The draft Plan of Arrangement identifies 11 events, or steps, which would occur within the Plan. Of those, four are defined as "Corporate Steps", and section 2.1(a) provides that such steps would constitute an arrangement within the meaning of section 192 of the *CBCA*. The remaining steps involve the REIT and IOT trusts, or associated entities. Accordingly, the plan of arrangement for which this Interim Order is sought is a hybrid plan — or dare I say a "stapled plan" - involving both trust and corporate transactions.

4 At the hearing this morning I granted the order sought, but stated I would release brief reasons explaining my decision. These are those reasons.

II. Analysis

5 In seeking the Interim Order the applicants rely on two sources of the court's jurisdiction — the jurisdiction under the *CBCA* s. 192 plan of arrangement regime and the jurisdiction of the court to provide opinion, advice or directions to trustees pursuant to section 60(1) of the *Trustee Act*.

A. CBCA s. 192

6 The jurisprudence recognizes that the statutory plan of arrangement mechanisms afford a "flexible and broad concept of reorganization and arrangement between a corporation and its shareholders",[4] and, as put by Pepall J. in *Acadian Timber*

Income Fund, Re, the word "arrangement":

> is to be given its widest character, limited only by the corporation's own by-laws or general legislation. The purpose of an arrangement is to provide a flexible mechanism that can be adapted to the needs of a particular case. As Farley J. stated in *Re Fairmont Hotels & Resorts*: "... I think it is an error to forget that the very flexibility of the arrangement provision was designed to allow the solution of difficult and awkward situations." In the Policy Statement of the Director, the Director endorses the position that the arrangement provisions of the Act are intended to be facilitative, should not be construed narrowly, and further recognizes that the term arrangement is not exhaustively defined.[5]

7 In recent years the courts have utilized statutory plan of arrangement regimes to deal with arrangements involving tax-driven moves to convert income trusts into corporations. Most of those cases involved transactions in which the end-products were dividend-paying corporations. The decision of Pepall J. in *Acadian Timber* provided the most detailed discussion about the availability of statutory plans of arrangements to effect such results:

> In my view, the arrangement provisions should be available to all of the Applicants in this case. It seems to me that the current income trust conundrum is the sort of exceptional situation contemplated by the dicta in *Re Fairmont*. Assuming that there is compliance with the provisions of the trust deed (a fact that should be addressed at the approval hearing), there is no apparent prejudice to anyone. I also note that a number of income funds that have recently converted into corporate structures have proceeded by way of an arrangement under the CBCA or other comparable provincial statutes. Lastly, while the Director did raise the issue of the ability of the Fund, AT Trust and Acadian Timber LP to be applicants, the Director advised in writing that no position was being taken on this issue for the purposes of this transaction.[6]

8 Justice Hoy's decision in *Innvest* authorized resort to section 192 of the *CBCA*, in conjunction with resort to section 60(1) of the *Trustee Act*, for a hybrid plan of arrangement involving both corporations and trusts whose end product was not a corporation, but a trust. The applicants, which are a combination of trusts and corporations, rely on that precedent for their proposed course of action in the present case.

9 As has been stated in previous cases, the purpose of an interim order is simply to set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings to consider approval of the arrangement in accordance with the statute.[7] In order to grant such preliminary directions a court need only satisfy itself that reasonable grounds exist to regard the proposed transaction as an "arrangement"; it will be at the final hearing that the court examines whether the applicant has met the applicable statutory criteria, including whether the proposal constitutes an "arrangement", and whether the plan of arrangement is fair and reasonable.

10 In the present case Corporate Steps 3, 4 and 5 in the applicants' proposed plan of arrangement involve either an exchange of securities of a corporation for money or an amalgamation and, on their face, fall within categories of arrangement recognized by section 192 of the *CBCA* as the proper subject-matter of a plan of arrangement proceeding before the court. Although the Director under the *CBCA*, in a letter to the applicants dated December 22, 2011, took the position that the trusts could not be co-applicants under section 192 since only *CBCA* corporations can make such an application, the proposed plan involves trust-related transactions for which the applicant trusts certainly enjoy standing and can be joined as co-applicants in this hybrid proceeding.[8]

B. Trustee Act, s. 60(1)

11 What is singular about the present motion is not the substance of the Corporate Steps, but the fact that the Interim Order sought by the applicants contains no directions in respect of the Corporate Steps. The applicants do not seek directions under section 192 of the *CBCA* regarding the calling of any meeting involving persons with an interest in the affected corporations. What the applicants seek are directions involving the affairs of the two trusts, such as the calling of a meeting of unit holders.

12 At the hearing it became evident that the trustees of the REIT and IOT Trusts possess the necessary powers under the respective trust declarations to call and hold meetings of unit holders to consider the proposed transaction. I therefore asked whether it was necessary, given those powers, to seek the assistance of the court under section 60(1) of the *Trustee Act*. I raised that question in light of the case law referenced in my decision in *Kaptyn Estate, Re*[9] which indicated that the proper resort to section 60(1) is to seek "advice as to legal matters or legal difficulties arising in the discharge of the duties of

executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern." From what I can see, in the present case no uncertainty exists about the powers of the trustees to call the meeting they propose.

13 Applicants' counsel submitted that the Court's opinion, advice or directions were required for two reasons: (i) a court order would sanction, in effect, the sequence of the complex steps which will be required to complete the proposed transaction, and (ii) a final order hearing would consider whether the trust-aspects of the proposed transaction were fair and reasonable, a finding the applicants require in order to obtain an exemption under the *U.S. Securities Act*.[10] Counsel pointed out that in the *Innvest* decision Hoy J. applied, under section 60(1) of the *Trustee Act*, "a test analogous to that applicable in approving an arrangement in approving the non-Corporate Steps in the Plan of Arrangement".[11]

14 On reflection I concur with Hoy J. that an inquiry into the fairness and reasonableness of the trust-related steps in the proposed plan of arrangement falls within the Court's jurisdiction under section 60(1) of the *Trustee Act*. The hesitation I expressed at the hearing related to the danger of the Court opening its door to applications by trustees for orders approving that which arguably they possess the power to do in any event. However, on a review of the evidence filed, I appreciate that the present case is exceptional in its nature, given the overall complexity of the proposed transaction.

15 Moreover, as I stated at the beginning of these Reasons, what the applicants propose is in large part to reverse that which they did just over a year ago. In *Innvest* this Court sanctioned a process by which such a complex transaction could proceed. It is important for the health of our economy that participants can expect a reasonably consistent application by the courts of processes involving financial and commercial transactions.

III. Conclusion

16 I therefore was satisfied that it was a proper exercise of this Court's jurisdiction under section 60(1) of the *Trustee Act* and section 192 of the *CBCA* to grant the Interim Order sought for this hybrid plan of arrangement.

Motion granted.

Footnotes

1 2010 ONSC 4292, 72 B.L.R. (4th) 98 (Ont. S.C.J.).

2 R.S.C. 1985, c. C-44.

3 R.S.O. 1990, c. T.23: "A trustee...may...apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property..."

4 *Olympia & York Developments Ltd., Re* (1993), 102 D.L.R. (4th) 149 (Ont. Gen. Div.), p. 163b.

5 *Acadian Timber Income Fund, Re*, [2009] O.J. No. 5517 (Ont. S.C.J. [Commercial List]), para. 8.

6 *Ibid.*, para. 11. See also the April 12, 2010 endorsement of Hoy J. in *Re Futuremed Healthcare Income Fund*, SCJ CV-10-8659-00CL; the August 15, 2008 Interim Order of Horner J. in *H&R Real Estate Investment Trust*, Alberta Queen's Bench, 0801-09491; *1768248 Ontario Ltd., Re*, [2009] O.J. No. 74 (Ont. S.C.J. [Commercial List]); December 22, 2008 endorsement of Pepall J. in *Re CI Financial Income Fund*, SCJ CV-08-7843-00CL.

7 *First Marathon Inc., Re*, [1999] O.J. No. 2805 (Ont. S.C.J. [Commercial List]), para. 9; *Acadian Timber*, *supra.*, para. 6.

8 Joinder is proper under a combination of Rules 14.05(2) and 14.05(3)(a) of the *Rules of Civil Procedure*.

[9] [2009] O.J. No. 1685, 48 E.T.R. (3d) 278 (Ont. S.C.J.), paras. 26 to 31.

[10] *United States Securities Act of 1933*, s. 3(a)(10).

[11] *Innvest*, *supra*., para. 41.

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

Headnote

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

Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the

unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

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

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

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

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

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*
British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*
Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*
Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*
Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*
Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*
Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto.

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to

accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

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

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

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

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

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

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

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

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

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

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

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

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or

> *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition

required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

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

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

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

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

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

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

McKinlay J.A. **:**

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

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also

true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

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

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

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

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

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

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

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

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

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

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the

> parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided

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

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

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

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering

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

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

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

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

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

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

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

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

offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

HI-RISE CAPITAL LTD.
Applicant/Moving Party

SUPERINTENDENT OF FINANCIAL SERVICES *et. al.*
Respondents

Court File No. CV-19-616261-00CL

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BOOK OF AUTHORITIES OF THE APPLICANT/MOVING PARTY, HI-RISE CAPITAL LTD. (SALE APPROVAL MOTION RETURNABLE ON A DATE TO BE FIXED)

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