Court File No. CV-18-596878-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(*Commercial List*)

B E T W E E N:

HSBC BANK CANADA

Applicant

- and -

INNOVATIVE STEAM TECHNOLOGIES INC. and IST BOILER COMPONENTS INC.

Respondents

FACTUM AND AUTHORITIES OF DELOITTE RESTRUCTURING INC.
(Returnable June 27, 2018)

June 21, 2018

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FACTUM AND AUTHORITIES OF DELOITTE RESTRUCTURING INC.
(Returnable June 27, 2018)

INDEX

Tab 1

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FACTUM OF DELOITTE RESTRUCTURING INC.

PART I - INTRODUCTION

1. Deloitte Restructuring Inc. (the "**Receiver**") was appointed as the receiver and manager over the assets, properties and undertakings of Innovative Steam Technologies Inc. ("**IST**") and IST Boiler Components Inc. ("**IST Boiler**" and together the "**Company**") by Order of Mr. Justice Wilton-Siegel on May 1, 2018 ("**Appointment Order**").[1] The Receiver moves for an order approving the sale of IST's assets to Propak Systems Ltd. ("**Propak**"), as well as various related relief including a vesting order, and limited sealing order.

2. The sale involves all of IST's assets. IST Boiler's assets were previously sold to another buyer, Canerector Inc., which was approved by Order of Mr. Justice Dunphy on June 12, 2018.

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[1] Appendix "A" to the Second Report to the Court of the Receiver, **Motion Record of Deloitte Restructuring Inc. ("Motion Record of Receiver") at page 35.**

3. The Receiver also seeks approval of its activities and conduct as set out in the First Report to the Court of the Receiver (the "**First Report**") and the Second Report to the Court of the Receiver (the "**Second Report**"), as well as approval of the Receiver's Interim Statement of Receipts and Disbursements for the period of May 1, 2018 to June 12, 2018.

PART II - FACTS

4. The facts with respect to this motion are more fully set out in the First Report and the Second Report, and the appendices thereto including the Affidavit of John Borch, sworn April 27, 2018.

A. BACKGROUND

5. IST is an Ontario corporation in the business of supplying heat recovery steam generators for medium size steam generators. IST operated out of two rented premises in Cambridge, Ontario. IST Boiler is a wholly-owned subsidiary of IST. IST Boiler is an Alberta corporation in the business of supplying emergency boiler parts used in steam boiler applications, and operated out of rented premises in Delta, British Columbia. IST Boiler generated approximately 10% of the consolidated Revenue of the Company.[2]

6. The Company sustained losses of $19 million under its current ownership structure and $1.7 million in the first quarter of 2018, causing it to cease ordinary course operations by May 1, 2018.[3] On its appointment, the Receiver terminated all of the Company's employees, including 8 unionized and 68 non-unionized workers.[4]

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[2] First Report at para. 20, **Motion Record of Receiver at page 63.**
[3] Second Report at para. 3, **Motion Record of Receiver at page 21.**
[4] Second Report at para. 9, **Motion Record of Receiver at page 23.**

7. The Company owed HSBC Bank Canada ("**Lender**") a secured debt in excess of CAD $13,122,309.32 and USD $2,998,840 as of April 27, 2018.[5] Fulcrum Capital Partners (Collector) V, LP ("**Fulcrum**") is the only other secured creditor of the Company and has subordinated its claims to the Lender. Fulcrum is also the Company's majority shareholder.

8. The Lender brought an application to appoint the Receiver, which was not opposed by the Company or Fulcrum.

B. IST'S BUSINESS WAS SEVERELY DISTRESSED

9. At the time of the Appointment Order, IST's financial position was dire because:

(a) IST suffered a loss of $1.7 million in the first quarter of 2018 ("**Q1 2018**");

(b) IST's immediate working capital deficit as of March 31, 2018 was in excess of $4 million;

(c) IST reported a total deficit of assets to liabilities of $11.2 million (including intangible assets and goodwill of $9.5 million) in Q1 2018;

(d) IST did not have working capital to pay its debts as they came due including approximately $13 million owed to the Lender, $6.7 million to suppliers, $301,000 in bi-weekly salary and $80,000 in monthly benefits obligations, $471,000 due monthly to contractors, and monthly rent obligations of $126,000; and

(e) the Company was estimated to require $1.5 million to meet its obligations for the next three weeks, and had available capital of just $400,000.[6]

[5] Affidavit of John Borch, sworn April 27, 2018, at para. 14, **Motion Record of Receiver at page 72.** The Receiver has been advised that the Lender obtained an insurance recovery of USD $2,998,840 from Export Development Canada.
[6] Affidavit of John Borch, sworn April 27, 2018, at paras. 43-46, **Motion Record of Receiver at page 81-82.**

C. SALE OF ASSETS

10. The anticipated recovery from the sale of the Company's assets will result in a significant shortfall to the Lender with no projected recoveries for Fulcrum or the unsecured creditors. The Lender strongly supports the sale of IST's assets to Propak.

11. The Receiver took steps to complete an expedited marketing process for the assets of the Company because of:

(a) the low value of a pre-receivership offer;

(b) the appraised value of the Company's assets;

(c) occupancy costs in excess of $100,000 per month;

(d) the risk of value dissipation of the Company's assets due to contractual defaults with customers and suppliers;

(e) the risk of contracts being completed by other competitors as a result of the business interruption; and

(f) the termination of the employees and the risk of the permanent loss of important employees needed for running the Company's business.[7]

12. The major features of the sales process adopted by the Receiver are:

(a) the Receiver communicated with thirty-four (34) parties that had expressed interest in carrying on some or all parts of the business or acquiring the assets of the Company;

(b) nineteen parties executed a non-disclosure agreement and were given access to an electronic data room where they could access certain of IST's documents;

[7] Second Report at para. 19, **Motion Record of Receiver at page 27.**

(c) nine parties conducted physical site visits; and

(d) nine parties submitted letters of intent in advance of the deadline, including six auctioneers.[8]

13. In consultation with the Lender, the Receiver elected to proceed with the transaction proposed by Propak because it offered more value than a third-party appraisal of IST's assets and the other offers.

14. Propak was a major customer of IST. The transaction contemplated by the proposed sale would partially revive IST's operations, with Propak rehiring up to 20 of IST's former employees (which benefits those employees), taking assignments of the leases for the premises where IST is located in Cambridge, Ontario (which benefits those landlords), and assuming some of IST's customer contracts (which benefits those customers). This transaction represents the best possible result for the stakeholders given IST's difficult financial circumstances.[9]

15. Propak worked diligently with the Receiver since May 17, 2018 to negotiate the Asset Purchase Agreement (the "**APA**"), complete due diligence, create a "going-forward" business plan, make offers of employment and obtain third-party consents from the landlords and others.

16. The Receiver also negotiated a separate asset purchase agreement with Canerector Inc. for the assets of IST Boiler which Propak did not wish to purchase. The sale to Canerector has received this Court's approval and closed on June 15, 2018. [10]

[8] Second Report at paras. 20-23, **Motion Record of Receiver at page 28-29.**
[9] Second Report at paras. 24-29, **Motion Record of Receiver at page 29-30.**
[10] Order of Mr. Justice Dunphy, dated June 12, 2018, **Motion Record of Receiver at Tab 2D.**

PART III - LAW AND ARGUMENT

A. THE SALE APPROVAL PRINCIPLES ARE MET

17. The proposed sale complies with the principles established in *RBC v. Soundair* for a motion for approval of the sale of assets in a receivership:

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

(b) the interests of all parties;

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

(d) whether there has been unfairness in the working out of the process.[11]

18. This Court held in *Eddie Bauer of Canada Inc. (Re)* that, absent a violation of the *Soundair* principles, the Court should place weight on the Court-appointed officer's recommendation with respect to a proposed transaction.[12]

19. The Receiver recommends this sale as being in the best interest of stakeholders for the following reasons:

(a) an appraisal of IST's assets was obtained and the Receiver had a good understanding of potential purchasers and likely recoveries from its role as the Lender's financial advisor before the receivership;

(b) the sales process was carried out in a manner typical of, and consistent with marketing processes that have been approved by the Court in many receiverships and other court-supervised proceedings, and the timelines provided for in the process were reasonable in light of the need for an expeditious process;

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[11] *RBC v. Soundair*, [1991] O.J. 1137 (C.A.) ("***Soundair***") at para. 16**, Receiver's Authorities at Tab 1**.
[12] *Eddie Bauer of Canada Inc. (Re)*, [2009] O.J. 3784 (Comm. List) at para. 22, **Receiver's Authorities at Tab 2**.

(c) the Lender is the only party with a real economic interest in IST's assets, and the Lender consents and strongly supports this sale transaction;

(d) the proposed sale will allow parts of IST's operations to be revived, approximately 20 of IST's former employees to be hired, both of IST's landlords to continue to enjoy occupancy, and certain of IST's customers to see their contracts with IST satisfied; and

(e) there was no unfairness in the working out of the sales process, nor has any other stakeholder asserted any alleged unfairness.

20. Based on the pre-receivership offer and the appraised value of IST's assets, the Receiver's conclusion (in consultation with the Lender) was that the stakeholders would not have benefited from a lengthy sales process and it was more likely that the value of the Company's assets would have deteriorated if a lengthy sales process was conducted. The risk of dissipation of asset value was high in light of IST's shutdown because long-term customers would have found other suppliers and experienced employees would have found other employment.

21. This Court has approved expedited sales processes on many occasions including in *Tool-Plas Systems Inc. (Re)* where Mr. Justice Morawetz (as he then was) simultaneously ordered a company into receivership, approved a sale of its property and vested the property in the buyer.[13] The Court endorsed the so-called "quick flip" approach to avert the risk that key customers of the insolvent company would move their business elsewhere. In *Tool-Plas,* an expedited process was found to benefit the stakeholders.

22. The present case involves a similar situation where a quick process was the only realistic path that would allow IST's business to be revived and customer relations to continue, to the benefit of IST's employees, landlords, customers and other stakeholders.

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[13] *Tool-Plas Systems Inc. (Re)*, [2008] O.J. No. 4217 and [2008] O.J. No. 4218 at paras. 10 and 18 (Comm. List) ("***Tool-Plas***"), **Receiver's Authorities at Tab 3**.

B. SEALING ORDER

23. The Receiver seeks to keep the third-party appraisal, the offers received and the sales price in the APA confidential in the event that the transaction does not close and a new sale must be negotiated. The Receiver has therefore redacted the following four documents: the pre-receivership offer, the appraisal of IST's assets, the Receiver's summary of the bids received, and the APA (collectively, the "**Confidential Appendices**").

24. In *Crate Marine (Re)*, Mr. Justice Pattillo approved a sales process and issued a sealing order with respect to appraisals of the property being sold and a document outlining the receiver's analysis of the value of the property.[14] The Court found it to be "commercially sensitive information which would seriously interfere with the sales process, causing harm to the Companies and the stakeholders if made public", and that sealing the documents was a permissible incursion on the open court principle. The redaction of the sales price was also approved by Mr. Justice Dunphy in *Romspen Investment Corporation* where the Court sealed an agreement of purchase and sale and a summary of prior offers in order to avoid impacting a future sales process.[15] The Court found that harm to the open court principle can be appropriately mitigated by serving redacted versions of the sealed documents along with a description of the sealed information, provided that the redactions are not excessive.

25. In this case, the Receiver served the APA with redactions limited to sale price and has provided descriptions of the other confidential appendices to the stakeholders including the fact that the APA negotiated with Propak is for a sale price that is superior to the pre-receivership offers, the appraised value of the assets and the other amounts offered by the other bidders.

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[14] *Crate Marine (Re)*, 2015 ONSC 1062 (Comm. List) at para. 27, **Receiver's Authorities at Tab 4**.
[15] *Romspen Investment Corporation v. Courtice Auto Wreckers Ltd. et al.*, 2018 ONSC 1591 (Comm. List), **Receiver's Authorities at Tab 5**.

C. APPROVAL OF FIRST AND SECOND REPORTS

26. The Receiver submits that the Receiver's First and Second Reports and the activities described therein ought to be approved. In *Target Canada Co.* (*Re),* Regional Senior Justice Morawetz held that approval of a court officer's activities is appropriate where mandated and authorized by the court.[16] The same principles were applied by Mr. Justice Myers to a sale approval motion in the context of a receivership in *Hanfeng Evergreen Inc. (Re).*[17]

PART IV - ORDER REQUESTED

27. For all of the foregoing reasons, the Receiver submits that it is appropriate for this Court to grant the orders sought substantially in the form at Tab 3 of the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2018.

John Pirie/Michael Nowina
Baker & McKenzie LLP

Lawyers for the Receiver

[16] *Target Canada Co.* (*Re),* [2015] O.J. No. 6837 (Comm. List) at paras. 12-18 and 22, **Receiver's Authorities at Tab 6**.
[17] *Hanfeng Evergreen Inc. (Re),* [2017] O.J. No. 6238 (Comm. List) at para. 15, **Receiver's Authorities at Tab 7**.

TAB A

SCHEDULE "A"

1. *RBC v. Soundair*, [1991] O.J. 1137 (C.A.)

2. *Eddie Bauer of Canada Inc. (Re)*, [2009] O.J. 3784 (Comm. List)

3. *Tool-Plas Systems Inc. (Re)*, [2008] O.J. No. 4217 and [2008] O.J. No. 4218 (Comm. List)

4. *Crate Marine (Re)*, 2015 ONSC 1062 (Comm. List)

5. *Romspen Investment Corporation v. Courtice Auto Wreckers Ltd. et al.*, 2018 ONSC 1591 (Comm. List)

6. *Target Canada Co. (Re)*, [2015] O.J. No. 6837 (Comm. List)

7. *Hanfeng Evergreen Inc. (Re)*, [2017] O.J. No. 6238 (Comm. List)

TAB A1

Royal Bank of Canada v. Soundair Corp., [1991] O.J. No. 1137

Ontario Judgments

Court of Appeal for Ontario

Goodman, Mckinlay and Galligan JJ.A.

July 3, 1991

Action No. 318/91

[1991] O.J. No. 1137 | 4 O.R. (3d) 1 | 83 D.L.R. (4th) 76 | 46 O.A.C. 321 | 7 C.B.R. (3d) 1 | 27 A.C.W.S. (3d) 1178 | 1991 CanLII 2727

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Counsel

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). 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 $65,000,000. 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 $50,000,000 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, 1991. 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.

I. 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, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.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 doing 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 ten 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 v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.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 (C.A.), at p. 11 C.B.R., p. 314 N.S.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 to 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 ten 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 v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.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. Bkcy.), 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. Bkcy.), 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. Bkcy.), 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 $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-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 that 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 (1986, Saunders J.), supra. 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, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), 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 (1986), 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 consideration 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 finding 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), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., 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., pp. 562-63 D.L.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., p. 548 D.L.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 the 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 order to make a serious bid.

51 The offering memorandum had not been completed by February 11, 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 top 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 seven 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, 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., p. 548 D.L.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., p. 550 D.L.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 [at p. 31 of the reasons]:

> They created a situation as of March 8, 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 debtors' 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 interlender 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 interlender 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 $6,000,000 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 interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 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 interlender 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-and- client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result)

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), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). 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 therefrom), 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 Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and

Canadian Insurers Capital Corporation (collectively 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 (the Bank). 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 Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., 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 having 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 $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, 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 [pp. 17-18]:

> 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 $3,000,000 to $4,000,000. 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 downpayment on closing.

79 In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.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 the 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. Bkcy.) 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. Bkcy.) Saunders J. heard an application for court approval for 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 C.B.R.:

> 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 the 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, at pp. 92-94 O.R., pp. 531-33 D.L.R., 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., p. 314 N.S.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 [p. 15]:

> 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 1. 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 this 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 "hard ball" 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 $18,000,000. 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 diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 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 $10,000,000 and $12,000,000.

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 $3,000,000 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 any 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 interlender 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 three 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 three 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 three 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 [p. 31]:

> They created a situation as of March 8, 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.

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 interlender 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 constitutes approximately 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 $3,000,000 to $4,000,000.

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 a 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, 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 with 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-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB A2

Eddie Bauer of Canada, Inc. (Re), [2009] O.J. No. 3784

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

C.L. Campbell J.

Heard: July 22, 2009.

Judgment: July 30, 2009.

Court File No. CV-09-8240-00CL

[2009] O.J. No. 3784 | 57 C.B.R. (5th) 241 | 2009 CarswellOnt 5450

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of Eddie Bauer of Canada, Inc. and Eddie Bauer Customer Services Inc., Applicants

(25 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Sanction by court — Application to approve the sale of assets of a group of companies that were under the protection of the Act, allowed — Sale was fair and reasonable — Accepted purchaser submitted the best offer for the assets.

Application for sale approval and a vesting order in respect of an asset purchase agreement between Everest Holdings LLC as buyer and Eddie Bauer Holdings Inc. and each of its subsidiaries. On June 17, 2009 Eddie Bauer Canada Inc. and Eddie Bauer Customer Services Inc., which were two subsidiaries of Bauer Holdings, were granted protection under the Companies' Creditors Arrangement Act and a Monitor was appointed. The asset purchase agreement was dated July 17, 2009. The purpose of this application was to approve a process that would enable the Eddie Bauer Group to maximize the value of its business and assets in a unified, Court-approved sale process. Bauer operated in the United States and Canada. In the United States it sought bankruptcy protection. Everest made a bid for $286 million US, which was deemed to be the best offer. Canadian real property leases were to be assigned, assuming consent of the landlords and offers of employment would be made to all Canadian employees and ordinary course liabilities would be assumed. The value allocated to the Canadian purchased assets of $11 million US exceeded the net value of those assets on a liquidation basis. All parties represented at the hearing, including the landlords, either supported or did not oppose the order that was sought.

HELD: Application allowed.

The duties of a Court in reviewing the propriety of the actions of the Monitor, appointed under the Act, were applicable and were met in this case. The process utilized in this case was fair and reasonable and produced a fair and reasonable result. The seamless and orderly transfer contemplated by the process would protect the value of goodwill that attached to the Eddie Bauer name.

Statutes, Regulations and Rules Cited:

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

United States Code in Bankruptcy, Chapter 11

Counsel

Fred Myers, L. Joseph Latham, Christopher G. Armstrong for the Applicants.

Jay Swartz for RSM Richter.

Linda Galessiere for the Landlords.

Maria Konyukhova for Everest Holdings.

Alexander Cobb for Bank of America.

REASONS FOR DECISION

C.L. CAMPBELL J.

1 A joint hearing between this Court and the United States Bankruptcy Court for the District of Delaware was held on July 22, 2009 for Sale Approval and a Vesting Order in respect of an Asset Purchase Agreement dated as of July 17, 2009 among Everest Holdings LLC as buyer and Eddie Bauer Holdings Inc. ("EB Holdings") and each of its subsidiaries.

2 These are the reasons for approval of the Order granted.

3 On June 17, 2009, Eddie Bauer Canada Inc. and Eddie Bauer Customer Services Inc. (together, "EB Canada"), two of the EB Holdings subsidiaries, were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA") in an Initial Order of this Court, with RSM Richter Inc. appointed as Monitor.

4 On the same day, EB Holdings commenced reorganization under Chapter 11 of the United States Code in bankruptcy. A cross-border protocol was approved by this Court and the U.S. Court on June 25, 2009.

5 The purpose of what is described in the Orders as "Restructuring Proceedings" was a process to enable the Eddie Bauer Group to have an opportunity to maximize the value of its business and assets in a unified, Court-approved sale process.

6 EB Holdings is a publicly traded company with shares trade on the NASDAQ Global Market. Eddie Bauer branded products are sold at over 300 retail outlets in the United States and 36 retail stores and one warehouse store throughout Canada, together with online and catalogue sales employing 933 individuals in Canada.

7 The joint hearing conducted on June 29, 2009 before the U.S. Court and this Court approved a Stalking Horse

process and certain prescribed bidding procedures. Rainer Holdings LLC, an affiliate of CCMP Capital Advisors and indirectly of the buyer, became the Stalking Horse bidder.

8 The Stalking Horse offer of US$202.3 million was for substantially all of the assets, property and undertaking of the Eddie Bauer Group.

9 The Bidding Procedure Order provided that the Stalking Horse offeror would be entitled to a break fee and to have its expenses of approximately $250,000 reimbursed and would offer employment to substantially all of the Company's employees, assume at least 250 U.S. retail locations and all Canadian locations and pay all of the Group's post-filing supplier claims.

10 The bidding was completed in the early hours of July 17, 2009. The three stage basis of the auction process included (1) the best inventory offer from Inventory Bidders; (2) the best intellectual property offer of the IP bidders; and (3) the best going-concern offer from Going-Concern Bidders. The best inventory and intellectual offers were to be compared against the best going-concern offer.

11 The US$286 million bid by Everest (a company unrelated to Rainer) was deemed the best offer, yielding the highest net recovery for creditors (including creditors in consultation.) A US$250 million back-up bid was also identified.

12 The Canadian real property leases are to be assigned, assuming consent of landlords, and offers of employment to all Canadian employees to be made and ordinary course liabilities assumed.

13 The value allocated to the Canadian Purchased Assets of US$11 million exceeds in the analysis and opinion of the Monitor the net value on a liquidation basis, particularly as the only two material assets are inventory and equity (if any) in realty leases.

14 All parties represented at the joint hearing, including counsel for the landlords, either supported or did not oppose the Order sought.

15 The process that has been undertaken in a very short time is an example of a concerted and dedicated effort of a variety of stakeholders to achieve a restructuring without impairing the going-concern nature of the Eddie Bauer business.

16 The sale and purchase of assets assures a compromise of debt accepted by those debtholders (with a process of certain leases not taken up in the US), which to the extent possible preserves the value of the name and reputation of the business as a going concern.

17 Had it not been for the cooperative effort of counsel for the parties on both sides of the border and a joint hearing process to approve on an efficient and timely basis, the restructuring regime would undoubtedly have been more time-consuming and more costly.

18 I am satisfied that the statement of law that set out the duties of a Court in reviewing the propriety of the actions of a Court officer (Monitor) are applicable and have been met here.

19 The duties were set out by Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at pp. 92-94 and are as follows:

1. It should consider the interests of all parties.
2. It should consider the efficacy and integrity of the process by which offers are obtained.
3. It should consider whether there has been unfairness in the working out of the process.

20 Galligan J.A. for the majority in the Court of Appeal in Ontario in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at p. 8 further accepted and adopted the further statement of Anderson J. in *Crown Trust* at p. 551 that "its decision was made as a matter of business Judgment on the elements then available to it. It is 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."

21 What have come to be known as the *Soundair* principles have been accepted in a number of Ontario cases, including *Bakemates International Inc. v. Mormac Holdings*, [2004] O.J. No. 2463, 2004 CanLII 59994 (ON. C.A.) The same principles have been accepted to approval of Asset Purchase Agreements and Vesting Orders. See *Ivaco Inc. (Re)*, [2004] O.J. No. 3625, 2004 CanLII 21547 (ON. S.C.) In *Tiger Brand Knitting Co. (Re)*, [2005] O.J. No. 1259, 2005 CanLII 9680 (ON. SC), I declined to extend the time for a bid and directed the Monitor not to accept a bid it had received and to negotiate with another party.

22 The concern in *Tiger Brand*, as in this case, is that once a sales process is put forward, the Court should to the extent possible uphold the business judgment of the Court officer and the parties supporting it. Absent a violation of the *Soundair* principles, the result of that process should as well be upheld.

23 A Stalking Horse bid has become an important feature of the CCAA process. In this case, the fact that the Stalking Horse bidder promoted other bids and put in the highest bid satisfies me that the process was fair and reasonable and produced a fair and reasonable result.

24 One can readily understand that the goodwill attached to a recognized name such as Eddie Bauer will likely only retain its value if there is a seamless and orderly transfer.

25 For the foregoing reasons the draft Orders of Approval and Vesting will issue as approved and signed.

C.L. CAMPBELL J.

End of Document

TAB A3

Tool-Plas Systems Inc. (Re), [2008] O.J. No. 4217

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

G.B. Morawetz J.

Heard: September 29, 2008.

Judgment: September 29, 2008.

Released: October 24, 2008.

Court File No. CV-08-7746-00-CL

[2008] O.J. No. 4217 | 172 A.C.W.S. (3d) 113

RE: IN THE MATTER OF the Receivership of Tool-Plas Systems Inc. (Applicant) AND IN THE MATTER OF Section 101 of the Courts of Justice Act, as amended

(5 paras.)

Counsel

D. Bish, for the Applicant Tool-Plas.

T. Reyes, for the Proposed Receiver, RSM Richter.

R. van Kessel for EDC and Comerica.

C. Staples for BDC.

M. Weinczok for Roynat.

ENDORSEMENT

G.B. MORAWETZ J.

1 Tool-Plas Systems Inc. (the "Company") brings this application to place itself into receivership under s. 101 of the CJA.

2 Mr. Bish submits that the relief is necessary, in that the Company has no ability to carry on business as usual. It has no funding to continue operations. He also submits that there is a real risk of value dissipation. His submissions are based on the evidence set out in the affidavit of Mr. Claeys and reference was also made to the Richter Motion Record.

3 Section 101 of the CJA provides that the requested order can be made if the Court finds that it is just or convenient to do so. In the circumstances of this case I am satisfied that it is both just and convenient to make the receivership order. In making this order I am taking into account that the Company has disclosed that the purpose of the receivership is to implement an immediate sale transaction if same is approved by the Court. I have also taken into account the urgency of the matter, which is described in the Richter materials.

4 Mr. Szucs made submissions with respect to the status of his claim. In my view, these submissions are best addressed on the sale approval motion.

5 Order to go in the form presented.

G.B. MORAWETZ J.

End of Document

Tool-Plas Systems Inc. (Re), [2008] O.J. No. 4218

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

G.B. Morawetz J.

Heard: September 29, 2008.

Judgment: September 29, 2008.

Released: October 24, 2008.

Court File No. CV-08-7746-00-CL

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

RE: IN THE MATTER OF the Receivership of Tool-Plas Systems Inc. AND IN THE MATTER OF Section 101 of the Courts of Justice Act, as amended

(22 paras.)

Counsel

D. Bish, for the Applicant, Tool-Plas.

T. Reyes, for the Receiver, RSM Richter Inc..

R. van Kessel for EDC and Comerica.

C. Staples for BDC.

M. Weinczok for Roynat.

ENDORSEMENT

G.B. MORAWETZ J.

1 This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

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

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

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

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

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

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

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

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

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

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

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

13 This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result

of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

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

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

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

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

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

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

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

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

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

G.B. MORAWETZ J.

End of Document

TAB A4

Crate Marine Sales Ltd. (Re), [2015] O.J. No. 729

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

L.A. Pattillo J.

Heard: February 13, 2015.

Judgment: February 18, 2015.

Court File No.: CV-14-00010798-00CL

[2015] O.J. No. 729 | 2015 ONSC 1062 | 2015 CarswellOnt 2248 | 23 C.B.R. (6th) 202 | 250 A.C.W.S. (3d) 20

IN THE MATTER OF the Receivership of Crate Marine Sales Limited, F.S. Crate & Sons Limited, 1330732 Ontario Limited, 1328559 Ontario Limited, 128648 Ontario Limited, 1382415 Ontario Ltd., and 1382416 Ontario Ltd. AND RE: Crate Marine Sales Limited et al.

(29 paras.)

Counsel

M.B. Rotsztain and *R.B. Bissell*, for the Receiver and Trustee.

H. Chaiton and M. Poliak, for Crawmet, and 2450902 Ontario Ltd.

E. Bisceglia, for Cesaroni Management Ltd.

C. Prophet and *H. Murray*, for Romith Investments Limited and Uplands Charitable Foundation.

J.D. Marshall, for Marquis Yachts.

J. McReynolds, for 2124915 Ontario Inc.

ENDORSEMENT

L.A. PATTILLO J.

Introduction

1 On December 8, 2014, A. Farber & Partners was appointed as Receiver ("Receiver") and as Trustee in Bankruptcy ("Trustee") of Crate Marine Sales Limited, F.S. Crate & Sons Limited, 1330732 Ontario Limited,

1328559 Ontario Limited, 1282648 Ontario Limited, 1382415 Ontario Ltd., and 1382416 Ontario Ltd. (collectively the "Companies").

2 The Receiver brings this motion for various orders including approval of an agreement of purchase and sale dated February 8, 2015 (the "Stalking Horse Offer") and a sales process which includes an auction for all of the assets of the Companies save and except for certain excluded assets. Subsidiary issues are approval of the Receiver's first three Reports and its conduct as set out in the Reports and a sealing order of Confidential Appendices "A" and "B".

Background

3 The Companies are related companies that operate marinas at multiple locations including a large marina in Keswick, Ontario, on Lake Simcoe. Crate Marine Sales Limited ("Crate Marine") is the sole operating entity. The remainder of the Companies either own land used in the marina operations (primarily at Keswick) or own other of the Companies.

4 In addition to land, the assets of the Companies consist primarily of cash, accounts receivable, boats, parts and equipment as well as interests in other businesses or ventures involving members of the Crate family. The Receiver has obtained and filed certificates of pending litigation against certain properties in the vicinity of the Keswick marina location (the "Adjacent Properties") and against a property in Belleville, Ontario.

5 After review of the assets available for sale, the Receiver has determined that the best realizations are likely to be obtained from a sale of the business as an operating marina. Furthermore, the sooner a sale takes place, the more likely the value of the customer base to a new owner/operator will be maintained as the 2015 boating season is not far off. The Receiver also recognizes that the Companies' real estate in the Keswick area as well as the possible interest in the Adjacent Properties will also likely be of interest to real estate developers.

The Stalking Horse Offer

6 The negotiations to obtain the Stalking Horse Offer involved considerable time and were complicated due to a number of factors including (i) the Companies have different real estate holdings and multiple cross-collateralized mortgages; (ii) the uncertainty of potential claims on the Crate Marine owned boats; (iii) the state of the books and records; and (iv) the issues identified by the Receiver related to the Adjacent Properties and other business activities of the Companies.

7 The Stalking Horse Offer is in large part comprised of a credit bid through assumed debt. The purchaser under the Stalking Horse Offer is 2450902 Ontario Limited (the "Purchaser") whose principals, Benn-Jay Spiegel and Dwight Powell are the respective principals of Crawmet Corp ("Crawmet") and Dwight Powell Investments Inc. ("DPII") who in turn are secured creditors of the Companies.

8 The Stalking Horse Offer is for substantially all of the assets of the Companies. The three main exclusions are cash on hand at closing; boats in possession of the Companies where there are or were boat slip leases or other bailment arrangements; and anything the Purchaser may choose to exclude from the purchased assets without any adjustment of the purchase price. The assets to be sold also include the claims of the Companies and the Receiver and Trustee in respect of the Adjacent Lands, the Bellville property and other claims.

9 The Receiver estimates that the purchase price under the Stalking Horse Offer at the time of the anticipated closing date will be approximately $25,951,784.00 made up of assumed secured debt of Crawmet, DPII and Dwight Powell in the amount of $22,973,033.00; cash for all amounts secured by the Receiver's Charge and the Receiver's Borrowing Charge at Closing (approximately $2,000,000.00); cash for the estimated Receiver/Trustee fees and counsel fees from Closing to discharge (approximately $300,000); cash for realty tax arrears, utility arrears and

source deductions ($389,000.00); and cash amounts for two properties in Keswick known municipally as 7 and 8 Mac Ave ($550,000) and 210 Wynhurst Ave. ($710,000) (collectively the "Properties").

10 The Stalking Horse Offer contains no break fee or payment for the Purchaser's expenses.

11 The Receiver considered the value being offered in the Stalking Horse Offer and concluded, for the reasons noted in the Third Report, that it is appropriate value for the assets being purchased. Having regard to the consideration being offered in the Stalking Horse Offer and the benefit of a mechanism to coherently market the assets being conveyed, the Receiver concluded that the interests of the creditors and stakeholders of the Companies were, on the whole, best served by accepting the Stalking Horse Offer.

The Proposed Sale Process

12 The Receiver has proposed a sales process that involves notice to identified potential purchasers as well as more generally; a time period of approximately one month for submission of bids and if there are one or more superior bids to the Stalking Horse Offer, an auction at the Receiver's office involving the Purchaser and the superior bidders followed by a motion to the court for approval and a vesting order. The entire process is scheduled to take less than two months to complete.

Analysis

13 A stalking horse offer combined with a court-approved bidding procedure is commonly used in insolvency situations to facilitate the sale of businesses and assets.

14 In *Brainhunter Inc., Re:* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.) at para. 13, Morawetz J. sets out four factors that the court should consider in exercising its discretion to determine whether to authorize a stalking horse process. The case involved a stalking horse sales process under the *Companies Creditors Arrangement Act* but in my view, the same considerations are applicable here. The factors are: is the sale transaction warranted at this time; will the sale benefit the "economic community"; do any of the creditors have a bona fide reason to object to the sale of the business; and is there a better viable alternative.

15 The Receiver's Third Report makes it clear, in my view, that the sale is warranted at this time. I accept the Receiver's determination that the best realization of the assets will be achieved by the sale of the business as an operating marina. In order to accomplish that, the sale must take place as soon as possible to enable a purchaser to maintain the continuity of the business going forward into the 2015 boating season.

16 Further, in my view, the proposed sale will benefit the "economic community". In addition to maximizing value, which is of benefit to all the creditors and stakeholders of the Companies, the continuation of the operation of the marina will also be of benefit to the greater Keswick community by way of preservation of jobs, contracts and business relationships.

17 On the motion, the only creditors who objected to the Stalking Horse Offer were Cesaroni Management Limited ("Cesaroni"), Romith Investments Limited ("Romith") and Uplands Charitable Foundation ("Uplands") (collectively the "Objecting Creditors"). Cesaroni and Romith are mortgagees of 210 Wynhurst Ave. and Uplands is a mortgagee of 7 & 8 Mac Ave.

18 The Objecting Creditors submit that the purchase price allocated in the Stalking Horse Offer for the Properties is not reflective of the fair market value for either of the Properties. Further, the allocated price will provide for less value than the respective charges registered against the Properties by the Objecting Creditors. In support of its position, Cesaroni has filed real estate appraisal indicating a value for 210 Wynhurst Ave. well in excess of the allocated purchase price. Uplands submits that it attempted to get an appraisal of 7&8 Mac Ave. but was unable to arrange it in the short notice given.

19 The Objecting Creditors submit that 7&8 Mac Ave. and 210 Wynhurst Ave. should be removed from the Stalking Horse Offer and the proposed sales process. To support their position, they seek a brief adjournment in order to provide better evidence of value. In Cesaroni's case, it submits it will provide a bona fide offer for 210 Wynhurst Ave.

20 The Objecting Creditors are not objecting to the sale of the business in general. They are objecting to the Properties that they have an interest in being included in the Stalking Horse Offer for the consideration proposed. But the Properties form part of or are adjacent to the properties that comprise the Companies marina operation in Keswick. For that reason, in my view, they should be included in the proposed sale and therefore remain part of the Stalking Horse Offer at this stage.

21 In reaching its conclusion that the interests of the creditors and stakeholders of the Companies on the whole are best served by accepting the Stalking Horse Offer, the Receiver considered the fact that the allocated purchase price for the Properties would likely provide for less value than the charges registered against them by the Objecting Creditors. The Receiver also considered information from the Purchaser that its investigations indicated that the market value for the Properties is considerably less than the amounts owing under the charges held by the Objecting Creditors as well as its understanding that the amounts owing by the Companies to Cesaroni and Romith were secured against other lands held by a principal of the Companies.

22 During the hearing, I was advised by counsel for the Receiver and the Purchaser that the Purchaser agreed that if its Stalking Horse Offer was the successful bid, it would still be bound by and complete the agreement of purchase and sale if one or either of the Properties were excluded from the sale subject to a price reduction based on the allocated amount.

23 The real issue raised by the Objecting Creditors is the fairness to them of including the Properties in the Stalking Horse Offer for the consideration provided. In my view, that issue cannot and should not be decided in advance of approval of the relief sought by the Receiver on this motion. The interests of all of the creditors and stakeholders of the Companies in a sale of the business as an operating marina override the concerns of the Objecting Creditors at this stage.

24 Accordingly, I am not prepared to adjourn the approval of the Stalking Horse Offer or the sale process at this stage or remove the Properties from the Stalking Horse Offer.

25 In my view, the issue of whether the Properties should be included as part of the final sale or not should be determined at the time approval of a proposed sale is sought and having regard to the factors set out in *Royal Bank v. Soundair Corp*. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

26 Accordingly, for the above reasons, I approve the Stalking Horse Offer and authorize the Receiver to enter into the agreement of purchase and sale in that regard. I also approve the proposed sales process. In my view, the process is transparent and the proposed timeline is fair and reasonable given the circumstances.

27 Confidential Appendices "A" and "B" contain appraisals obtained by the Companies prior to the litigation as well as the Receiver's analysis of the value of the assets being sold as compared to the purchase price under the Stalking Horse Offer and a detailed discussion of potential claims by the Companies. It is commercially sensitive information which would seriously interfere with the sales process, causing harm to the Companies and the stakeholders if made public. I conclude therefore that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) at para. 53 has been met. The Appendices will be sealed until final completion of the sales process or further order of the Court.

28 Finally, I approve the First, Second and Third Reports of the Receiver and the activities as set out therein.

29 To the extent that the time lines for the sales process as proposed by the Receiver at the hearing need to be altered given the delay in the release of these reasons, I may be spoken to.

L.A. PATTILLO J.

End of Document

TAB A5

Romspen Investment Corp. v. Courtice Auto Wreckers Ltd., [2018] O.J. No. 1294

Ontario Judgments

Ontario Superior Court of Justice

Commercial List - Toronto, Ontario

S.F. Dunphy J.

Heard: March 6, 2018.

Judgment: March 8, 2018.

Court File No.: CV-15-00011129-00CL

[2018] O.J. No. 1294 | 2018 ONSC 1591

RE: Romspen Investment Corporation, Applicant, and Courtice Auto Wreckers Limited, Northwood Recycling & Energy Inc., 800619 Ontario Limited, Power Grow Systems Inc., Courtice Energy Corp., Les Rebuts de Pates et Papiers de l'Outaouais Ltee, Les Amenagements Guirard Inc., Courtice Auto Industries Inc., 2254066 Ontario Inc. Lakes Terminals & Warehousing Ltd, Kawartha Downs Limited and Harvey Ambrose, Respondents

(23 paras.)

Case Summary

Creditors and debtors law — Receivers — Court appointed receiver — Sales by receiver — Motion by court-appointed receiver to approve sale of certain real estate assets allowed — Given lack of objecting stakeholders, support of largest secured creditor, receiver's recommendation and duration and effort of receiver's sale efforts, it was in interests of justice to approve sale — However, court expressed misgivings about receiver's late service and filing of motion and excessive redaction of materials — Sealing of two appraisals was not authorized and sealing of summary of prior offers and agreement of purchase and sale was only permitted until further order or closing of sale.

Motion by the court-appointed receiver to approve the sale of certain real estate assets.

HELD: Motion allowed.

The receiver entered the agreement of purchase and sale two months earlier, amended the agreement one month earlier, yet waited until the last possible second to obtain court approval. No explanation was offered for the delay and short notice should be reserved for truly urgent matters. Not only were stakeholders given little notice, the motion record they received excluded almost every detail of transaction. The motion materials were also filed with the court late. The receiver unilaterally sealed many documents that did not require it. The receiver did not describe the summary of rejected offers in any meaningful way. There was some rationale for withholding the actual purchase price, but not for withholding the entire agreement of purchase and sale. Sealing of two appraisals was not authorized. Sealing of the summary of prior offers and the agreement of purchase and sale was allowed, but only until further order or closing. The agreement of purchase and sale was approved but this was done with misgivings. The condition requiring court approval the following day left little room to maneuver. Given the lack of opposing stakeholders, support of the largest secured creditor, receiver's recommendation ant the effort and duration of the receiver's sales efforts, it was in the interests of justice to approve the sale.

Counsel

Michael Brzezinski, for Rosen Goldberg Inc, Court-Appointed Receiver of the Respondents.

REASONS FOR DECISION

S.F. DUNPHY J.

1 This motion came on before me as an unopposed motion to approve a sale by the Receiver of certain real estate assets. I approved the sale with reasons to follow as there were issues with the manner in which this routine sale approval were handled that warrant correction in future. These are those reasons.

2 The issues raised on this motion on which I feel comment is required are (i) timing of the notice of motion and service, (ii) lateness in filing of motion record with the court; and (iii) excessive sealing of evidence. All of these operate to impair the ability of stakeholders to assess their position on a pending motion and deprive the court of their input or the comfort of knowing their lack of objection represents an informed decision.

(i) Timing of Motion Record and service

3 The motion date was secured from the Commercial List office by a request form dated March 1, 2018. The Motion Record was finalized and served the next day (Friday March 2, 2018), but minus almost all of the information that might be required for a stakeholder to make an informed decision about their position on the matter.

4 The Agreement of Purchase and Sale was signed by the Receiver on January 17, 2018 and was subsequently amended on *February 8, 2018*. The Agreement of Purchase and Sale was subject to a condition requiring court approval to be secured by *March 7, 2018*. I have highlighted those two dates out of astonishment. Given one month to obtain court approval, the Receiver waited until the last possible second (or beyond) to seek it.

5 The Receiver was unable to explain to me why the motion to approve a transaction signed back almost two months prior and amended almost one month prior was not served on the Service List until the Friday before a Tuesday morning motion (and I shall refrain from guessing at what time on Friday service was actually effected). I cannot expect that stakeholders had more than a single business day to review the material and decide what if anything to do.

6 Absent exceptional circumstances, and none were offered to me or suggested in the evidence, a court-appointed receiver (or any party to a proceeding) should strive to give all stakeholders as much notice of an intended motion as is reasonably practicable. Short notice is reserved for truly urgent matters where it cannot be avoided. Even then, there is no harm in advising the service list that a motion is coming and of its general nature even before the motion is ready to be served if time is legitimately short. Neither the court nor stakeholders should be jammed with last-minute motions when there is no legitimate urgency. There was none here.

7 What urgency there was when the matter came before me was entirely a product of the leisurely pace taken to prepare it.

8 This court's approval of a transaction is not to be presumed. Rubber stamps are not used here. Stakeholders

should be given as much notice as the circumstances reasonably permit to assess and react to transactions the court is asked to approve. Their input -- or silence -- is often a very valuable and useful circumstance for judges who are asked to review complex transactions in very short time lines.

9 As shall be seen, not only were stakeholders given much less notice than the circumstances allowed, but the Motion Record they received excluded almost every detail of the transaction to be approved that might enable them to form a view about it.

10 This was inexcusable and I do not excuse it.

(ii) Lateness in filing motion record

11 The follow-on effect of late service on the service list was late filing with the court. The motion materials were not filed until Monday afternoon before a Tuesday morning motion. This ensured that the motion record did not find its way to my desk in time to be reviewed prior to the hearing. Tuesday March 6, 2018 happened to be a very charged day and there were a great number of 9:30 a.m. appointments in addition to the usual complement of 10:00 a.m. motions.

12 The Commercial List works when the professionals who use it don't take it for granted.

(iii) Excessive sealing of evidence

13 I recognize that opinions vary as to the degree to which it is appropriate to seal commercially sensitive documents in court filings. In the Commercial Court where a large number of motions are actually urgent and necessarily presented on relatively short notice, the practice has developed of redacting exhibits a moving party intends to ask the court to seal while the copy sent to the judge includes the un-redacted exhibits in a pre-sealed envelope the parties mark with self-drafted warnings enjoining they not be opened except by the judge.

14 While not strictly according to the letter or spirit of the Open Court principle or the guidelines contained in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522, 2002 SCC 41 (CanLII) this practice is a reasonable way of balancing the need to give notice against the potential impracticability of getting a sealing order in advance of service of the motion material. However, where this work-around is employed, the party doing so should do so (i) only where *necessary*; and (ii) only to the *extent* necessary.

15 In the present case, the Receiver adhered to neither of these requirements. An excessive number of documents were unilaterally "sealed" by exclusion, the descriptions of them were minimal in the Receiver's Ninth Report and the practice of filing redacted copies of documents intended to be sealed was not followed.

16 Four "Confidential Exhibits" to the Ninth Receiver's Report were withheld from the material served upon the Service List. In my view, this was excessive. The four exhibits were (i) two appraisals of the subject land that had been commissioned by the principal of one of the debtors more than three years ago; (ii) a summary of all offers received; and (iii) the actual Agreement of Purchase and Sale.

17 There was little reason to have sought to seal the appraisals. They were self-evidently dated. They also estimated a value that was materially higher than the values at which the Receiver listed the property for sale in 2016 and then again in 2017. Where, as here, the Receiver was relying upon its own sales efforts to justify the price obtained (i.e. in the absence of a pre-approved sales process order), it would be material for stakeholders to know that the Receiver listed the property at values below the appraised values and why. These facts were not disclosed nor were enough general details about them disclosed to enable stakeholders to know that there was even a possible issue they may wish to consider.

18 The summary of rejected offers was not described or summarized in any meaningful way in the Receiver's

Report. How many? When? Is there any informative description of the reason for rejection that might help stakeholders assess the adequacy of the Receiver's marketing efforts without compromising possible a future sales process should this sale fail to be approved or to be completed?

19 In this case, the Receiver *did* consult the secured creditor Romspen. Even so, the interests of other stakeholders cannot be assumed to be nil. They are entitled to be served with sufficient information to enable them to make an informed decision about their position. This is not a private receivership and ought not to be conducted as if it were.

20 While there was *some* rationale for withholding evidence of the actual purchase price, there was *none* for withholding the entire Agreement of Purchase and Sale. I recognize that knowledge of the price accepted by the Receiver might adversely impact a future sale process if this sale fails to be completed for any reason. However, this does not fully absolve the Receiver from the obligation to make disclosure to stakeholders. The practice of filing a redacted copy of commercial agreements has long been employed in the Commercial List where a sealing order is intended to be sought. This, along with a general description of the excluded information or even an offer to enable stakeholders to access the information via a non-disclosure undertaking for example, would go a long way to mitigating the departure from *Sierra Club*.

21 *Sierra Club* is the law of this land. The open court principle is not a trifling obstacle to be honoured in the breach. It is a fundamental and basic principle underlying our system of justice and the rule of law itself.

(iv) Conclusion

22 In the result, I did not authorize the sealing of the two appraisals. I *did* agree to seal the summary of prior offers and the Agreement of Purchase and Sale but only until further order or closing on March 31, 2018. If there is a reason to seal them thereafter, a separate order will have to be sought. I approved the Agreement of Purchase and Sale, but I trust these reasons make clear that I did so with misgivings.

23 The condition requiring court approval by the following day left little room to manoeuvre. The lack of any objecting stakeholders, the support of the largest secured creditor, the recommendation of the Receiver and the duration and extent of the Receiver's sales efforts satisfied me that it was in the interests of the estate to do so.

S.F. DUNPHY J.

End of Document

TAB A6

Target Canada Co. (Re), [2015] O.J. No. 6837

Ontario Judgments

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

December 11, 2015.

Court File No.: CV-15-10832-00CL

[2015] O.J. No. 6837 | 2015 ONSC 7574 | 2015 CarswellOnt 19174 | 31 C.B.R. (6th) 311

RE: IN THE MATTER OF a plan of compromise or arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

(26 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Monitors — Reports — Application by Monitor of Target Canada companies for approval of Monitor's reports in liquidation proceedings allowed — Landlords of Target estates opposed approval on basis it was premature, unnecessary and unfair — Approval served to protect Monitor during creditor protection process and allow stakeholder concerns to be addressed — Caution was required where, as here, Monitor sought general approval, due to broad application of res judicata and potential impact on stakeholders — Wording of approval accordingly limited to protecting Monitor in personal capacity.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, s. 11.7, s. 23(1), s. 23(2)

Counsel

J. Swartz and *Dina Milivojevic*, for the Target Corporation.

Jeremy Dacks, for the Target Canada Entities.

Susan Philpott, for the Employees.

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor.

Jeff Carhart, for Ginsey Industries.

Lauren Epstein, for the Trustee of the Employee Trust.

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals.

Linda Galessiere, for Various Landlords.

ENDORSEMENT

G.B. MORAWETZ R.S.J.

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities -- particularly in these liquidation proceedings -- is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

(2) Monitor not liable -- if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> ...
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > ...
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
> >
> > ...
> >
> > 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain

findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc*., [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.,* 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

G.B. MORAWETZ R.S.J.

End of Document

TAB A7

Hanfeng Evergreen Inc. (Re), [2017] O.J. No. 6238

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

F.L. Myers J.

Heard: November 20, 2017.

Judgment: November 30, 2017.

Court File No.: CV-14-10667-00CL

[2017] O.J. No. 6238 | 2017 ONSC 7161 | 2017 CarswellOnt 19036 | 286 A.C.W.S. (3d) 275 | 55 C.B.R. (6th) 211

IN THE MATTER OF an Application under Section 101 of the Courts of Justice Act, R.S.O. c. C.43 (as amended) AND IN THE MATTER OF Hanfeng Evergreen Inc., Applicant

(39 paras.)

Counsel

Daniel S. Murdoch and Haddon Murray, counsel for Ernst & Young Inc., receiver.

David C. Moore and Karen M. Mitchell, counsel for the Lei Lo and Xinduo Yu.

ENDORSEMENT

F.L. MYERS J.

ENDORSEMENT

1 Ernst & Young Inc. moves for approval of its activities as receiver and manager of Hanfeng Evergreen Inc. as described in the Supplement to its First Report, its Fourth Report, and its Fifth Report. It also seeks approval of its fees and disbursements including the fees and disbursements of its counsel here and abroad.

2 Xinduo Yu, the founder and former CEO of Henfeng Evergreen Inc. and his spouse Lei Li oppose the approval of the receiver's reports at this time. They seek, at minimum, the imposition of conditions to protect their positions in separate litigation that the receiver has brought against them. They also argue that the receiver has failed or refused to deliver sufficient evidence to support its claim for approval of its fees and disbursements. They invite the court to require the receiver to engage in a document disclosure process so as to create a sufficient factual record on which they can make submissions and the court can meaningfully assess the fees and disbursements of the receiver and its counsel.

3 For the reasons that follow the receiver's motion is granted on the terms set out below.

Brief Background

4 Hanfeng Evergreen Inc. is an Ontario public corporation. Henfeng was a financing vehicle to raise money from investors who were interested in investing in the fertilizer business operated by a subsidiary in the People's Republic of China. By 2014, Henfeng's sole operations were limited to the fertilizer business.

5 When this proceeding began, Mr. Yu was a member of the board of directors of Henfeng. He was a principal contact for the receiver. He controlled Chinese management of the business.

6 The receiver advises that in 2011, Henfeng's biggest customer was a company run by the state in China. It sought to buy 30% of the fertilizer business to ensure its control over its supply. By February, 2013, an agreement had been prepared whereby Henfeng would sell its shares in the fertilizer subsidiary to a company controlled by Mr. Yu. Mr. Yu agreed to sell 30% of that company's shares to the state actor. The transactions were expected to close in April, 2013.

7 The deal did not close as expected. Eventually Henfeng established a special committee representing shareholders independent of management. Acrimony developed between the special committee and Mr. Yu. In December, 2013, the purchaser terminated the transaction. The board of directors proceeded to fire Mr. Yu.

8 A proxy battle ensured. During the proxy battle, Henfeng's auditor KPMG resigned. Thereupon, the rest of the board of directors resigned. Ultimately, Mr. Yu regained control of the public corporation.

9 In April, 2014, Mr. Yu brought forward a transaction to sell the operating subsidiary to an established third party business in China for a price of approximately $40 million. The transaction would have provided meaningful recovery to shareholders. The transaction required shareholder approval. However, without an auditor, Henfeng could not produce the material required to call a shareholders' meeting under Ontario securities laws. Therefore, this receivership was proposed as a way to convey title in a solvent transaction.

10 Negotiations with the buyer proved difficult. The receiver retained the Mayer Brown law firm to help it obtain a deposit of approximately $2.4 million required by the agreement and to deal with some Chinese regulatory matters that arose. The purchaser was also supposed to put funds in escrow. With Mayer Brown's assistance some funds were escrowed. But then they were released back to the purchaser by the escrow agent ostensibly with Mr. Yu's cooperation. In addition, the receiver says that the buyer's name seems to have changed subtly in the documents over time. While initially Mr. Yu represented that the buyer was an established third party, the ultimate buyer may have been a company with a similar name that is actually a shell controlled by Mr. Yu. Further, the receiver alleges that while the transaction was playing out, Mr. Yu obtained very substantial loans in China on the credit of the subsidiary so that they he has effectively taken the value of the business leaving the other shareholders with nothing.

11 The receiver has sued Mr. Yu and Ms. Li for damages exceeding $100 million.

12 In addition, the ostensible purchaser has sued the receiver in China for the return of the $2.4 million deposit. Mr. Yu is a defendant in that case as he is a guarantor under the terms of the relevant agreement. Whether he is also behind the plaintiff/purchaser remains to be proven.

13 The purchaser succeeded against the receiver at first instance in China. But an appellate court overruled the first decision. As of this moment therefore, the deposit has been forfeited and is properly counted among the funds realized by the receiver. The purchaser has appealed from that decision however and the further appeal is pending.

14 In this receivership proceeding, Mr. Yu is concerned to ensure that the receiver does not consume the deposit on its own fees and disbursements in case it is required to return the deposit to the purchaser by the ultimate appeal court in China. If the purchaser succeeds in China, there may be a priorities dispute between the purchaser

and the receiver over which has a better claim to the deposit funds in the receiver's hands. In any event, Mr. Yu argues that as guarantor of the return of the deposit, he has an interest in protecting the deposit in the receiver's hands and in minimizing or delaying the receiver's use of the deposit to pay its fees and disbursements until the Chinese litigation ends.

Approval of the Receiver's Activities

15 In *Target Canada Co. (Re)*, 2015 ONSC 7574 (CanLII), Morawetz RSJ discussed the process for approval of the reports of a court officer. In that case the court dealt with a Monitor under the CCAA. The same principles apply in a receivership in my view.

16 In *Target*, Morawetz RSJ recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, such as a sale transaction, express findings of fact may be required to support the relief being sought. An affidavit may be delivered to support the findings or not. In either case, the court is called up to address squarely specific facts and to make specific findings that will be binding in future.

17 However, the context of a general approval of activities, such as the motion that is currently before me, is different. As discussed by Morawetz RSJ:

> [20] The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.
>
> [21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.
>
> [22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.
>
> [23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:
>
> (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
>
> (b) brings the Monitor's activities before the Court;
>
> (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
>
> (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
>
> (e) provides protection for the Monitor not otherwise provided by the CCAA; and
>
> (f) protects the creditors from the delay and distribution that would be caused by:
>
> (i) re-litigation of steps taken to date, and
>
> (ii) potential indemnity claims by the Monitor.
>
> [24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

18 In this case, Mr. Yu and Ms. Li do not want the approval of the receiver's activities to impact on their litigation with the receiver including their desire to counterclaim against the receiver in that litigation. Apparently they have sought directions regarding a possible counterclaim although no motion for leave to proceed has been heard as yet. Regional Senior Justice Morawetz held that the general approval of a court officer's activities should not affect third party dealings generally. He accepted however that the approval of the receiver's activities does affect the court officer's own status. For example, there is case law suggesting that a stronger showing on the merits is required to obtain leave to sue a receiver in respect of activities that have been approved than for unapproved activities.[1]

19 Mr. Yu and Ms. Li argue that if they are prejudiced by the approval of the receiver's activities, then they would be required to contest in this motion the substance of their concerns in order to protect themselves in their other litigation. I agree that it is not the purpose of this summary proceeding to engage in fact finding that might prejudge or affect the fact finding process in other litigation. As such, there is no need to delve deeply into the concerns raised by the objectors with the receiver's characterization of their behaviour or the other details of specific issues of fact that may become the subject matter of proceedings later. There will be no findings of contested facts that might bind Mr. Yu or Ms. Li elsewhere.

20 The receiver argues that it seeks broad, general approval for its decisions to bring litigation against Mr. Yu and Ms. Li and to defend the litigation in China. It notes that its prior activities have already been approved in relation to the approval of its earlier reports.

21 Under the terms of its appointment order, the receiver is already authorized to litigate on behalf of the debtor generally. As such, Mr. Yu and Ms. Li argue that it does not need any further approval of its litigation activities. But, I agree with Morawetz RSJ that there are additional proposes to a court officer's reporting and the court's approval functions such as those listed in para. 23 of T*arget* above. In this case for example, concerns of stakeholders can be considered and addressed in real time rather than waiting until matters are concluded some years hence. Moreover, stakeholders are given an opportunity to bring to the fore any concerns with the receiver's prudence and diligence in the issues under consideration. Here, for example, no one -- not even Mr. Yu or Ms. Li - contest the prudence of the receiver's decisions to defend the deposit in China or to commence the litigation here against Mr. Yu and Ms. Li.

22 The receiver also argues that is wants its activities approved so as to protect it from personal liability for costs in the event that it is later determined that the deposit must be returned to the purchaser with the result that the receiver may not have any assets left in the estate to fund any costs liability that it may incur. The receiver refers to the decision of Pattillo J. in *Essery Estate (Trustee of) v Essery*, 2016 ONSC 321. At para. 72 of that decision, Pattillo J. wrote:

> [72] In receiverships, the general rule is that costs are awarded against a receiver personally in rare cases. Where a receiver engages in litigation in its capacity as receiver in the normal course of the receivership, is it is subject to the costs in accordance with s. 131 of the CJA and Rule 57.01. To the extent that costs are awarded against a receiver they are normally covered by receivership funds or by an indemnity agreement with a secured creditor. It is only when the receiver embarks on a course of action extraneous to the credit-driven relationship which effectively undermines its neutral position as an officer of the court and turn itself into a "real litigant' [*sic*] that a receiver exposes itself to costs personally: see *Akagi v Synergy Group (2000)*, 2015 ONCA 771 (Ont. C.A.), at para. 18.

23 In my view, the receiver reads too much into this quotation. I do not read *Essery* as altering the receiver's risk of personal liability for costs. Rather, Pattillo J. explains the court's historic hesitation to award costs against receivers because they can bear personal liability for costs. In my view *Essery* does not create any special protection for receivers' costs liability. Neither does the approval of a receiver's activities provide it with any special protection in relation to costs awards in subsequent litigation. That is the reason that Pattillo J. noted that before undertaking litigation, receivers typically will consider the sufficiency of the assets under their charge to meet a costs award or obtain an indemnity from a creditor to protect themselves from the risk of adverse costs.

24 It is clear therefore that in approving the receiver's general activities broadly and summarily in this motion, I am not finding any facts beyond expressing satisfaction with the general scope and direction of the receiver's activities as set out in the three reports that are before me. However, if the law post-*TCT* still provides that the approval of a receiver's conduct raises the bar for those who seek to sue a receiver, as referenced in the footnote above, that is indeed a consequence of approval and nothing I say or do not say should affect that outcome. The fact that approval may have some effect is not a basis to withhold or deny approval. Rather it reflects the intention of the law as it applies in circumstances where the court is satisfied with the activities undertaken by its officer and with the protections that the law affords court officers in such circumstances as discussed by Morawetz RSJ above.

25 I also do not see the existence of an outstanding appeal in China as a basis to defer or withhold approval of the receiver's activities, especially its activities in defending and participating fully in that case. Approval does not affect the ongoing litigation in China. Neither does it affect the priorities in the deposit or authorize or embolden the receiver to distribute to itself or to its counsel funds that it currently holds. If the court in China rules that the funds are a deposit that are to be returned to the purchaser, legal results flow. As noted above, if that creates a priority issue here, that issue may have to be determined.

26 As argument of this aspect of the motion was drawing to a close, it appeared that counsel might be able to agree upon language to resolve the issues in dispute. I invited them to advise me within 48 hours if they reached agreement. On November 22, 2017, counsel advised that while they had not agreed to resolve the objections of Mr Yu and Ms. Li, they had agreed upon some language to limit the relief granted should I determine to approve the receiver's activities.

27 The term agreed upon by counsel reflects the limitations that I have discussed above as follows:

> THIS COURT ORDERS that the approval of the Fourth Report and the Fifth Report shall be without prejudice to any of the procedural or substantive rights of the Receiver, Xinduo Lu and Lei Li in respect of Action No. CV-16-11325-00CL, and, without limiting the generality of the foregoing, shall be deemed not to constitute any finding or determination of any kind whatsoever in respect of any allegations, issues or defences in said Action.

28 While this term does not satisfy all of the concerns of Mr. Yu and Ms. Li, it does satisfy mine. Accordingly, it is appropriate to approve the activities of the receiver as set out in the three reports that are before the court on the term set out in the immediately preceding paragraph.

Receiver's Fees

29 In accordance with the principles set out in *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), the receiver delivered affidavits supporting its fees and disbursements including those of its counsel. Cross-examinations ensued. Mr. Yu and Ms. Li argue that there is insufficient disclosure of information to enable the court to determine the reasonableness of the receiver's fees and disbursements. They say they have delivered letter after letter for months seeking production of documents relating to matters set out in the receiver's invoices so as to be able to understand the work performed by the receiver and to make proper submissions on the fees and disbursements sought in relation to the work. In addition, the receiver delivered dockets (belatedly in some cases) that are heavily redacted to prevent disclosure of the subject matter of much of the work that is the subject of the docket entries.

30 The receiver argues that the scope of its discussions with its counsel and the work being performed by its counsel on its behalf are privileged -- both under lawyer client privilege and litigation privilege. I agree. Disclosing the subject matter of a meeting is essentially disclosing the communication from client to lawyer (or vice versa) concerning the topic on which advice was being sought or given. That does not mean however that the receiver is entitled to approval of its fees or disbursements without providing proper supporting evidence. If the claims of

privilege prevent the court from making the assessment required, then the motion will not succeed until sufficient evidence is duly adduced to meet the required standard.

31 In *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), the Court of Appeal discussed the test for assessment of a receiver's fees as follows:

> [32] In *Bakemates*, [2002] O.J. No. 3569 this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:
>
> > The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.
>
> [33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea* [2002] O.J. No. 3569 : *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:
>
> * the nature, extent and value of the assets;
> * the complications and difficulties encountered;
> * the degree of assistance provided by the debtor;
> * the time spent;
> * the receiver's knowledge, experience and skill;
> * the diligence and thoroughness displayed;
> * the responsibilities assumed;
> * the results of the receiver's efforts; and
> * the cost of comparable services when performed in a prudent and economical manner.
>
> These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

32 The Court of Appeal also noted in *Diemers* that while the calculation of billable hours times hourly rates is not the most desirable metric for conducting this review, it is the predominant methodology in the case law. Moreover, while counsel for Mr. Yu and Ms. Li submitted that this is not to be a mathematical exercise, the bulk of their complaints are essentially directed to the question of whether there has been duplication in the dockets or, more specifically, whether the claims of privilege prevent them and the court from determining with any degree of precision whether there is duplication in the dockets that ought to be excluded from the value calculus. While I certainly do not dismiss the risk of duplication in an assessment of the reasonableness of the fees, it is but one factor and not an especially important one in my view. Duplication might suggest a lack of value-added but not necessarily so in a holistic review. If an issue takes time to resolve, there may be several docket entries that look similar. That does not make them duplicative. More than one person may be involved providing different services and docket to the same issue -- either at different levels of seniority or different subject matters. Reading brief docket descriptions years after complex work is performed is a poor method to learn precisely what was accomplished by any single person on any given day. A full assessment of the file accompanied by oral narrative is required to assess professional accounts. That is what assessment officers routinely do in formal cost assessment hearings. But that is not what is anticipated or even desirable in fee approval hearings of this type.

33 It is not lost on me that what was also at play on Mr. Yu's side of the table is possibly a desire for discovery in the other litigation or at least opening up a threat to the receiver's remuneration as a strategy to provide bargaining

leverage. Thus, rather than responding to the receiver's request for the specifics of documents required or bringing their own motion (or 9:30 appointment) seeking production of documents that they actually need, Mr. Yu and Ms. Li were content to make request after request and then graciously offer to allow the receiver an adjournment to give it time to make yet further production. I have little doubt that were any further documents produced, Mr. Yu and Ms. Li would just ask for more. After all, if you want to assess what every person acting for counsel and the receiver have done every day, then every draft of every document and communication is ostensibly relevant. The eight, non-exhaustive *Belyea* factors do not require or anticipate a full fee assessment process. Mr. Yu and Ms. Li's digging for more and ever more documents ostensibly to allow them to review in minute detail the receiver's fees was misdirected from the outset.

34 Mr. Yu and Ms. Li make much of the fact that the receiver's Ontario counsel had 27 billers on the file over a period of three years. Counsel for the receiver took me through each biller's name and role. Apart from a few students, there was one partner and an associate in each relevant area at each time. The associate generally performed the bulk of the work. As the project evolved from a consensual corporate transaction to contested litigation, the identities and focus of the partners involved changed. There is nothing untoward or even suspicious in the identification of the lawyers engaged despite the effort to evoke an emotional reaction to the overall number of billers. I am perfectly satisfied that given the complexity and evolution of the matter over time, staffing raises no significant concerns. Given the limited numbers of people involved in each specialty area, and the swing from corporate to contested litigation, duplication is not a significant issue in my view.

35 The receiver has not provided docket level evidence of activities from its litigation counsel in China. However that lawyer was retained on a fixed fee of $100,000. The litigation involved securing the receiver's right to keep the deposit of approximately $2.4 million. A fee of 4% of the fund whose preservation is in issue strikes me as quite reasonable. Dockets would not assist the understanding of the flat fee account in this circumstance.

36 Other counsel were retained for other specific purposes. Each had to be briefed so, once again, it is not surprising to see docket entries where people discuss similar things. They are instructing or reporting back to each other. Mr. Yu and Ms. Li pointed to docket entries in which telephone inter-firm communications are set out but only by one firm. The unstated implication is that unless both sides docketed the call, then the docket that was recorded is suspect and may be fraudulent. I do not know a more innocent word to characterize a docket of a call that did not happen. But Mr. Yu and Ms. Li forgot to account for the International Date Line. When one looks to see if telephone calls from this side of the globe were docketed in China on the next day, many of the calls were indeed recorded. I cannot draw an inference of fraud, or even suspicion from noting that a firm did not record every single telephone call it ostensibly received or made. Docketing practices can differ. I did not look to see if the calls that were not recorded by both sides were recorded as being short or long duration for example. In any event, I do not see how a few calls has much impact on the assessment of the *Belyea* factors.

37 The receiver's counsel has provided a lengthy assessment of the *Belyea* factors in para. 60 of its factum. Again, without making findings of fact on the level of cooperation or the lack thereof by Mr. Yu and Ms. Li, in my view in para. 60 the receiver provided a very fair analysis of the relevant factors and I adopt it in full.

38 In all, I am satisfied that the fees and disbursement of the receiver, including those of its counsel, are fair, reasonable and ought to be approved as sought.

39 Costs should be agreed upon. Barring exceptional circumstances, I would expect them to follow the event on a partial indemnity basis. If counsel cannot agree on costs then they should exchange Costs Outlines and schedule a telephone case conference through my Assistant for oral argument of costs.

F.L. MYERS J.

1 Compare and contrast for example, *Bank of America Canada v Wilann Investments Ltd*. (1993), 23 CBR (3d) 98 (Ont. Gen. Div) with *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII). See also: Houlden, Morawetz & Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act*, (Thomson Reuters, Toronto) at Ls.26. Whether *Wilann* remains good law after *TCT* is an issue that is not before the court today.

End of Document

HSBC BANK CANADA
Applicant

-and-

INNOVATIVE STEAM TECHNOLOGIES INC. et al.
Respondents

Court File No. CV-18-596878-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(*Commercial List*)

PROCEEDING COMMENCED AT TORONTO

FACTUM AND AUTHORITIES OF DELOITTE RESTRUCTURING INC.
(Returnable June 27, 2018)

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