2020 01G 2883

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

BETWEEN

SPROTT PRIVATE RESOURCE LENDING (COLLECTOR), LP

APPLICANT

AND:

THE KAMI MINE LIMITED PARTNERSHIP

FIRST RESPONDENT

AND:

KAMI GENERAL PARTNER LIMITED

SECOND RESPONDENT

AND:

ALDERON IRON ORE CORP.

THIRD RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE RECEIVER

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2020 01G 2883
Date of Filing Document:	July , 2024
Name of Party Filing or Person:	Deloitte Restructuring Inc., in its capacity as court-appointed receiver (the **Receiver")** of the First, Second and Third Respondents (the "**Companies**")
Applications to which Document being filed relates:	Interlocutory Application of the Receiver for an Order approving the sale of the Related Surface Rights, as defined in a Settlement and Assignment Agreement
Statement of Purpose in Filing:	Memorandum of Fact & Law in support of the Receiver's Application
Court Sub-File Number, if any:	N/A

FACTS

1. On June 17, 2020 (the "**Date of Receivership**") the Receiver was appointed by Order of this Court (the "**Receivership Order**") as the receiver of all of the assets, undertakings, and property (the "**Property**") of Alderon Iron Ore Corp. ("**Alderon**"), The Kami Mine Limited Partnership ("**Kami LP**"), and Kami General Partner Limited ("**Kami GP**") (collectively the "**Companies**") acquired for, or used in relation to the business carried on by the Companies (the "**Kami Project**").

2. On November 13, 2020, a Sale Approval and Vesting Order was issued by this Court approving the sale of certain assets of the Companies (the "**Kami Assets**") to Quebec Iron Ore Inc. and 12364042 Canada Inc. (collectively, the "**Purchaser**").

3. On April 1, 2021, the sale of the Kami Assets was concluded and the sale proceeds for the Assets were paid to the Receiver (the "**Initial Closing**")

4. After the Initial Closing, the Purchaser and the Receiver discovered that the Companies held certain real property and contractual rights on and around the area of the Surface Lease (as defined below) in relation to the Kami Project, including Licences to Occupy Crown Land and related contractual arrangements, and all of which related surface rights were acquired by the Companies for the purpose of securing surface titles necessary for the development and operation of the Kami Project (the "**Related Surface Rights**");

5. Several Related Surface Rights relate to surface areas located within the surface lease 142 issued to Kami GP on June 12, 2014 with respect to Mills Lake (the Kami Mine) (the "**Surface Lease**"). The Surface Lease was specifically included in the Kami Assets previously sold to the Purchaser;

6. Without prejudice, (a) it is the Purchaser's position that, *inter alia*, (i) had the parties been aware of the existence of the Related Surface Rights prior to the Initial Closing, the rights of the Kami Group and the Receiver in the Related Surface Rights would have formed part of the Kami Assets that were transferred to the Purchaser, and (ii) the rights in the Related Surface Rights relating to surface areas located on or within the Surface Lease are superseded by the Surface Lease or accessory to it, and can not be assigned separately, while (b) it is the Receiver's position that the Related Surface Rights were not included in the Purchase Agreement with respect to the sale of the Kami Assets and the Receiver can dispose of them separately, including to a third party (the "**Dispute**"); and

7. On December 18, 2023, the Receiver accepted an offer from the Purchaser for the settlement of the Dispute and confirmation of assignment of the Related Surface Rights to the Purchaser (the "**Offer**").

8. On June 19, 2024, the Receiver executed the Assignment Agreement pursuant to the terms of the Offer.

9. The Receiver now seeks an Order:

   (a) abridging the time for service, validating service, and dispensing with further service of the within Application;

(b) approving the activities, fees, and disbursements of the Receiver as described in the Fifth Report of the Receiver (the "**Fifth Report**"), including, without limitation, the steps taken by the Receiver pursuant to the Receivership Order, and the fees of the Receiver's legal counsel;

(c) approving the Receiver's Statement of Receipts and Disbursements for the period from June 17, 2020 to May 31, 2024;

(d) approving the sale of the Related Surface Rights pursuant to a Settlement and Assignment Agreement between the Receiver and the Purchaser dated the 19th day of June, 2024 (the "**Assignment Agreement**");

(e) directing that the Confidential Appendices attached to the Fifth Report (the "**Confidential Appendices**") be sealed with the Court unless otherwise ordered by the Court, until such time as the sale of the Related Surface Rights has been completed by the Receiver; and

(f) providing such further or other relief that the Court considers just and warranted in the circumstances.

10. The Receiver relies on the facts as set out in the Fifth Report. Capitalized terms used herein, where not defined, have the same meaning as ascribed to them in the Fifth Report.

ISSUES:

(i) Should this Court approve the sale of the Related Surface Rights pursuant to the Assignment Agreement?

(ii) Should this Court issue the requested Sealing Order with respect to the Confidential Appendices?

LAW AND ARGUMENT

Approval of Sale

11. The factors set out by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.* remain the leading analytical framework followed by the courts in determining whether to approve a sale of assets by a court-appointed receiver. The court stated that it should be reluctant to second-guess the considered business decisions made by its receiver. The court then outlined the factors that it must consider:

> "As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:
>
> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.

> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process."

Reference: *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 at para 16 (Ont CA) [Tab 1]

12. The Ontario Court of Appeal cautioned against rejecting the recommendations of a receiver:

> "I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O.R.]:
>
> Its decision was made as a matter of business judgment *on the elements then available to it.* It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers."

Reference: *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 at para 21 (Ont CA) [Tab 1]

13. The *Soundair* decision has been routinely followed by this Honourable Court in these types of applications for court approval, including in *Sports Villas Resort, Inc. (Re)* wherein Justice Stack noted that the receiver is entitled to considerable deference by the court:

> "The Ontario Superior Court of Justice in *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 (Ont. S.C.J.), additional reasons at [2005] O.J. No. 2421, 140 A.C.W.S. (3d) 35 (Ont. S.C.J.), held that a receiver, as a court-appointed officer experienced in the insolvency field, is entitled considerable deference by the court relating to a sale of assets process and the adequacy of the receiver's efforts.
>
> This Court, citing Soundair, provided the following comments with respect to applications for approval and vesting in receivership proceedings at paragraphs 20 and 21 of Canadian Imperial Bank of Commerce (Re), 2018 NLSC 175 (N.L. S.C.):
>
> 20 Based on the information and evidence provided, I am satisfied that the Receiver took the necessary and reasonable steps to obtain the best price for the assets. Where the Receiver has achieved its main obligation in obtaining as high a value for the assets as it reasonably could, the Court is entitled to find that the Receiver has acted properly and according to the directions given to it by the Court (*Regal Constellation Hotel Ltd., Re* (2004), 128 A.C.W.S. (3d) 646, 37 C.L.R. (3d) 207 (Ont. S.C.J. [Commercial List])

> 21 The Court's authority to confirm the actions of the Receiver is recognized in its entitlement to rely on the Receiver's expertise in arriving at its recommendations as it is assumed that the Receiver is acting properly unless it is clearly shown to be otherwise (*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.))."

Reference: *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 at paras 33-34 (NLSC) [Tab 2]

14. In the present case, the Receiver has negotiated the best price obtainable for the Related Surface Rights with the only party that has any interest in these assets. Since the Purchaser has already purchased all of the other assets of the Companies, including the Surface Lease, it is the logical buyer for the Related Surface Rights. Notwithstanding the Purchaser's arguments that it should be entitled to the Related Surface Rights without any additional consideration being paid by the Purchaser, the Receiver took the position that it was entitled to seek to dispose of them separately, in an effort to maximize the return for the estate. The Receiver did not simply accept the arguments advanced by the Purchaser. Rather, the Receiver considered the interests of all parties that would have an interest in this process and it negotiated a settlement agreement that is fair and reasonable in the circumstances. As a result of the Receiver's efforts, the Receiver has successfully extracted additional value from the Related Surface Rights for the benefit of all stakeholders of the estate.

15. The Receiver submits that it has acted appropriately in maximizing the value for the estate. Accordingly, the terms of the proposed sale of the Related Surface Rights, as outlined in the Assignment Agreement, should be approved by this Honourable Court.

Sealing Order

16. The Receiver requests that an order be granted sealing the Confidential Appendices and that they remain under seal unless otherwise ordered by the Court, until such time as the sale of the Related Surface Rights has been completed by the Receiver. The Receiver has requested this sealing order in order to avoid any negative impact that could result from dissemination of the information contained in the Confidential Appendices. The Confidential Appendices contain commercially sensitive information pertaining to the offer that was submitted for the Related Surface Rights. Publication of the information contained in the Confidential Appendices would pose serious risks to the commercial interests of stakeholders and would irreparably harm the Receiver's efforts to maximize realizations from the Related Surface Rights should the proposed sale not close.

17. This Honourable Court has recognized that sealing orders in respect of commercially sensitive information are appropriate in the receivership context, particularly in respect of information related to the sale or proposed sale of assets:

> "I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed or upon further order of the Court. As a court of inherent jurisdiction, this Court has authority to seal part or all of a court record (*Barnes, Re*, 2016 NLTD(G) 106 (N.L. T.D.)). The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report and its appendices, until completion of the sale contemplated by this application.

....

> Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party."

Reference: *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 at paras 7-9 (NLSC) [Tab 2]

18. The Receiver submits that it is appropriate for the Court to grant the requested sealing order in this instance until the transaction contemplated by the Assignment Agreement has been completed.

Conclusion

19. The Receiver respectfully requests that this Honorable Court grant the relief requested, for the reasons set out in the Fifth Report and in this Memorandum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 9th day of July, 2024.

Geoffrey Spencer
McInnes Cooper
Solicitors for the Receiver
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

TO: **Supreme Court of Newfoundland & Labrador**
Trial Division (In Bankruptcy)
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

AND TO: **The Service List attached as Schedule "A" to the Application**

List of Authorities:

1. *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 (Ont CA)
2. *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 (NLSC)

TAB 01

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

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has 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, and 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. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. 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.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no 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.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) 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 by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); 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.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

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.:-- 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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.

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.

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.

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?

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.

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.

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.

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)

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)

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.

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.

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.

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.

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.

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.

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)

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.

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.

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.

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.

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.

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.

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.

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.

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

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".

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.

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

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.

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.

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.

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)

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.

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.

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?

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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):-- 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.

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):-- 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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".

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 02

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION
In Bankruptcy and Insolvency

Citation: *Sports Villas Resort, Inc. (Re)*, 2020 NLSC 109
Date: August 7, 2020
Docket: 201901G1157

IN THE MATTER OF the Receivership of Sports Villas Resort, Inc. and Twin Rivers Golf Inc.

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

APPLICANT

AND:

SPORTS VILLAS RESORT, INC. and TWIN RIVERS GOLF INC.

RESPONDENTS

AND:

83848 NEWFOUNDLAND AND LABRADOR INCORPORATED

FIRST INTERVENOR

AND:

PROJECT MANAGEMENT AND DESIGN LIMITED

SECOND INTERVENOR

AND:

NWS HOLDINGS INC.

THIRD INTERVENOR

AND:

CLARKE INC. MASTER TRUST

FOURTH INTERVENOR

AND:

BASIL DOBBIN

FIFTH INTERVENOR

Before: Justice Robert P. Stack

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: June 18, 2020

Summary:

The receiver's application for sale of the assets of the insolvent corporations was denied because the proposed sale included the interests of third parties in a condominium property. The receiver had not complied with the sale provisions of the *Condominium Act* and so could not convey the third party interests to the proposed purchaser.

Appearances:

Neil L. Jacobs, Q.C. and Kimberley A. Walsh	Appearing on behalf of the Applicant
No Appearance	On behalf of the Respondents
Gregory K. Pittman, Q.C.	Appearing on behalf of the First Intervenor
Gregory M. Smith, Q.C. and Shane R. Belbin	Appearing on behalf of the Second and Fifth Intervenors
John J. Hogan, Q.C.	Appearing on behalf of the Third Intervenor

Timothy W. Hill, Q.C. Appearing on behalf of the Fourth Intervenor

Authorities Cited:

CASES CONSIDERED: *Barnes, Re*, 2016 NLTD(G) 106; *Penney v. Newfoundland and Labrador (Service NL)*, 2017 NLCA 25; *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.); *White Birch Paper Holding Co., Re*, 2010 QCCS 4915; *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 (Ont. Sup. Ct. J.), additional reasons at [2005] O.J. No. 2421, 140 A.C.W.S. (3d) 35 (Ont. Sup. Ct. J.); *Canadian Imperial Bank of Commerce (Re)*, 2018 NLSC 175; *2475813 Nova Scotia Ltd. v. Ali*, 2001 NSCA 12.

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Condominium Act, 2009*, S.N.L. 2009, c. C-29.1; *Condominium Act*, R.S.N.S. 1989, c. 85.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] This matter deals with the proposed sale of the property of Sports Villas Resort, Inc. ("Sports Villas") and Twin Rivers Golf Inc. ("Twin Rivers"), the respondents, in the entities commonly known as the Terra Nova Golf Resort and Terra Nova Estates located in Port Blandford, Newfoundland and Labrador, in connection with receivership proceedings pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The property in question is referred to in the application as the Subject Property and I will describe it in more detail below.

[2] The respondents defaulted on certain secured obligations to Business Development Bank of Canada ("BDC"). On application by BDC, BDO Canada Limited was appointed receiver of the respondents pursuant to an order of this Court dated March 20, 2019. By order dated June 18, 2020, Grant Thornton Limited was substituted as the receiver.

[3] The first intervenor, 83848 Newfoundland and Labrador Incorporated, is the proposed purchaser of the Subject Property and will be referred to as the "Purchaser". Each of the second, third and fifth intervenors is an owner of a condominium unit in the TNCC Property, as described below. They will be referred to as "Project Management", "NWS", and "Dobbin", respectively. The fourth intervenor, Clarke Inc. Master Trust, holds mortgages on certain of the condominium units. I will refer to the fourth intervenor as the "Encumbrancer".

[4] The receiver seeks an order:

(1) approving the first report of the court-appointed receiver (the "Receiver's First Report") and the receiver's activities as outlined therein;

(2) approving the receiver's recommendation to sell the Subject Property (as defined by the receiver) to the Purchaser;

(3) authorizing the receiver to complete the sale of the Subject Property to the Purchaser pursuant to its Invitation for Offers, with such minor amendments as the receiver may deem necessary or appropriate;

(4) vesting the Subject Property in the Purchaser free and clear of all encumbrances pursuant to an approval and vesting order to be effective upon the receiver's filing of the receiver's certificate;

(5) waiving the requirement of the receiver to obtain a release pursuant to section 61(1)(b) of the *Condominium Act, 2009*, S.N.L. 2009, c. C-29.1 (the "*Act*") from the Encumbrancer, and if not waived, provide direction to the receiver;

(6) authorizing the receiver to execute conveyances to the Purchaser in respect of the condominium units owned by Sports Villas, Project Management, Dobbin, 68861 Newfoundland and Labrador Inc., ALJO Holdings Inc. and NWS, or alternatively, waiving the requirement pursuant to section 61(2) of the *Act* to have the conveyance executed by all the owners, or in the further alternative, provide direction to the receiver;

(7) approving the receiver's Interim Statement of Receipts and Disbursements dated July 31, 2019; and

(8) sealing the Receiver's First Report and all appendices thereto, such that the materials may be filed with the Court on a confidential basis until completion of the receivership of the respondents.

[5] The intervenors, other than the Purchaser, oppose their condominium units being included in the proposed sale.

Approval of the Receiver's First Report and the Receiver's Activities

[6] At the hearing, upon agreement by the parties, I approved the Receiver's First Report and the receiver's activities as described in it except as they relate to:

(1) the proposed sale of the Subject Property; and

(2) approval of the receiver's Interim Statement of Receipts and Disbursements which will be determined at a later date.

Sealing the Receiver's First Report

[7] I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed or upon further order of the Court. As a court of inherent jurisdiction, this Court has authority to seal part or all of a court record (*Barnes, Re*, 2016 NLTD(G) 106). The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report and its appendices, until completion of the sale contemplated by this application.

[8] The information contained in the Receiver's First Report describes in some detail the operations of the respondents, as well as the efforts undertaken by the receiver since being appointed privately by BDC. It also contains details of the respondents' financial circumstances, the financial circumstances of Terra Nova Resort Condominium Corporation ("TNCC"), details of bids, and asset appraisals.

[9] Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party.

[10] It is ordered that the Receiver's First Report be sealed until the proposed sale closes or further order of the Court.

ISSUE

[11] The remaining issues identified by the receiver all relate to the receiver's proposed sale of the Subject Property to the Purchaser. The sole issue to be decided, therefore, is whether that sale should be approved. In particular, can the receiver include in the proposed sale condominium units owned by Project

Management, NWS, Dobbin and ALJO Holdings Inc., as well as the units over which the Encumbrancer holds a security interest?

MATERIAL FACTS

[12] BDC financed the respondents commencing on August 22, 2003. Details of this financing relationship and related security are set out in the receiver's originating application for the appointment of a receiver. The respondents were indebted to BDC jointly and severally for $3,228,664 as of March 20, 2019.

The Subject Property

[13] For the purposes of the proposed sale, the receiver has defined the Subject Property as those assets that are collectively required to operate Terra Nova Golf Resort and Terra Nova Estates as follows:

(1) Property of Sports Villas:

(a) the majority of the real property known as the Terra Nova Golf Resort, subject to a first charge of BDC;

(b) the real property known as the Eagle Creek golf course, subject to a first charge of BDC;

(c) the 38 unsold lots in an adjacent residential real estate development known as Terra Nova Estates, subject to a first charge of BDC; and

(d) 45 of the 54 condominium units in TNCC (25 of the 34 residential units and all of the 20 commercial units), subject to a first charge of BDC.

(2) Property of Twin Rivers:

(a) the interest in the Parks Canada lease for the Twin Rivers golf course, subject to the consent of Parks Canada and a first charge of BDC; and

(b) power carts and accessories, grass mowers and accessories, tractors and related attachments, and small tools, primarily leased from the Royal Bank of Canada and De Lage Landen Financial Services Canada Inc., or subject to a first charge of BDC.

(3) Properties owned by Third Parties:

(a) Nine of the TNCC Property units as described below.

[14] The Subject Property is subject to certain security interests as set out in the application. To the extent that any are relevant for the purposes of this decision, they are identified later.

Proposed Sale of the Subject Property

[15] The receiver submits that this application is in furtherance of its powers set out in the receivership order to continue the commercial viability of the Subject

Property and to achieve maximum value in accordance with its obligations under the receivership order and the *BIA*.

[16] The receiver states that its objective in conducting the sales process was to find a bidder who would operate the Terra Nova Golf Resort. This is because the receiver and its appraiser determined this approach most likely to: (a) maximize the recovery to creditors in the estate; and (b) provide a future return to other stakeholders such as suppliers, employees, third party creditors, and other interested parties.

[17] The receiver advises that it took the following steps to market and sell the Subject Property:

(1) retained competent and experienced property and golf course management, made appropriate repairs on the buildings as required to maintain the properties in a condition similar to that when appointed, or to improve the saleability of the assets, and entered into Operations Agreements with the Purchaser which require the Purchaser to continue to maintain the assets, pay all operating costs, and insure the assets;

(2) offered for sale the property of the respondents, and the property comprising the TNCC, through an Invitation for Offers process as detailed in Section 6 of the Receiver's First Report;

(3) secured an appraisal by Altus Group, dated April 22, 2019, in respect of the lands, excluding the golf courses, the Terra Nova Resort hotel, and the 38 residential lots, as detailed in Section 7.0 of the Receiver's First Report;

(4) secured an appraisal by Castle Appraisal Limited, dated November 29, 2018, in respect of the equipment of the respondents as detailed in Section 7.1 of the Receiver's First Report;

(5) entered into agreements with Royal Bank of Canada and De Lage Landen Financial Services Canada to include in the sale of the Subject Property the equipment of Twin Rivers over which they have a valid security interest;

(6) obtained the consent of Parks Canada to the assignment of the lease to the Purchaser;

(7) exercised the rights of Sports Villas to vote and/or consent to the sale of units at a meeting of TNCC, in accordance with the by-laws and declaration of TNCC;

(8) negotiated the sale of the Subject Property to the Purchaser pursuant to the receiver's Invitation for Offers (the "Purchase Agreement") and the Operations Agreements with the Purchaser;

(9) insured the Subject Property and negotiated continued services to the Subject Property with utility providers and the Town of Port Blandford for the continued operation of the Subject Property; and

(10) met with interested parties such as condominium unit owners, other creditors, and pension claimants in respect of the respondents.

Terra Nova Condominium Corporation (TNCC)

[18] Sports Villas registered a declaration with a legal description in the Registry of Condominiums on July 22, 2011, thereby creating TNCC. As a result, TNCC is governed by the *Act*.

[19] Sports Villas is the declarant of TNCC. By section 2(1)(k) of the *Act*, "declarant" means:

> … a person who owns the freehold estate in the land described in the description and who submits for registration under this *Act* a declaration and description that are registered under this *Act*, and includes a successor or assignee of that person, but does not include a purchaser in good faith of a unit who pays fair market value or a successor or assignee of the purchaser.

[20] The legal description of the property comprising TNCC is attached to the declaration (the "TNCC Property"). The TNCC Property consists of the Terra Nova Park Lodge building and adjacent lands. The adjoining parking area is not included in the TNCC Property, title to it being held by Sports Villas. The description of the land associated with the TNCC Property suggests that there is a right-of-way or other easement over other lands of Sports Villas to permit access to it.

[21] For the purposes of this application, there are 54 units in the TNCC Property, 20 commercial units and 34 residential units. The percentage of the common elements referable to each unit is as listed in Schedule D of the declaration. The receiver advises that according to a search at the Registry of Deeds, none of the commercial units has been sold by Sports Villas. The following residential units (together with their corresponding percentage of the common elements) are currently owned as follows:

(1) Unit 310 - Project Management – 2.47%

(2) Unit 210 - Dobbin – 2.52%

(3) Unit 109 - 68861 Newfoundland and Labrador Inc. – 1.27%

(4) Unit 208 - 68861 Newfoundland and Labrador Inc. – 1.77%

(5) Unit 209 - 68861 Newfoundland and Labrador Inc. – 1.27%

(6) Unit 309 - 68861 Newfoundland and Labrador Inc. – 1.27%

(7) Unit 211 - 68861 Newfoundland and Labrador Inc. – 2.47%

(8) Unit 308 - ALJO Holdings Inc. – 1.77%

(9) Unit 311 - NWS – 2.45%

[22] ALJO Holdings Inc. played no role in the application.

[23] The Encumbrancer holds first ranking mortgages over the units owned by 68861 Newfoundland and Labrador Inc.

[24] The residential units conveyed by Sports Villas account for 17.26% of the common elements of the TNCC Property, resulting in Sports Villas, as declarant, retaining 82.74%.

THE LAW

[25] This case involves principles of statutory interpretation as they relate to the *Act*. It takes place at the intersection of bankruptcy and insolvency law and condominium law.

Statutory Interpretation

[26] As we have seen, the *Act* governs condominium developments in this jurisdiction. In this case, the principal point of departure between the receiver, the Purchaser, and the other intervenors is on how the *Act* should be interpreted as it relates to the proposed sale of the Subject Property, and particularly, the TNCC Property.

[27] In *Penney v. Newfoundland and Labrador (Service NL)*, 2017 NLCA 25, at paragraphs 17 to 20, White, J.A. reiterated the proper approach to statutory interpretation:

> [17] In order to determine whether, in light of the application of the Regulations, the context of section 46 indicates "court" can, in this case, mean Court of Appeal, it is necessary to employ the principles of statutory interpretation. The approach to the interpretation of provincially enacted statutes is explained by Green J.A. , as he then was, in Archean Resources Ltd. v. Newfoundland (Minister of Finance), 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, leave to appeal to SCC refused, 29390 (March 20, 2003) at paras. 19 and 22:
>
> > 19 The starting point for interpretation of any statute enacted by the legislature of this province is the legislature's own directive to the courts as found in s. 16 of the Interpretation Act:
> >
> > > Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.

. . .

> 22 Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. Obviously, if the bare words of the relevant provision appear to be straightforward and seem on their face to admit of only one meaning, they may end up controlling the result, but even in such a case, it is not sufficient to stop the interpretive exercise at this "plain" meaning; s. 16 requires that at the very least this plain meaning be given a "reality check" by being tested against other relevant sources of meaning to ensure that there is not some nuance or variation in the normal or apparent meaning that might indicate a different meaning in the particular context under consideration. "True" meaning is not plain meaning; it is a conclusion arrived at by reconciling all the appropriate indicators of meaning that the court is directed to consider.

[18] In Chapter 11 of the *Construction of Statutes* Sullivan explores what constitutes the “context” of a statutory provision. While the text indicates that context is a vague and malleable term, it includes the immediate context (the language of the particular section); the statute as a whole, including related regulations; the statue book and related legislation; the common law; international law; the external context; and extrinsic aids. Courts in this province have adopted Sullivan’s definition of “context”. For example, in Wnek v Witless Bay (Town), 2003 CanLII 68653 (NL SC), 2003 NLSCTD 17, 222 Nfld & P.E.I.R. 149 at para 21, Mercer J., as he then was, referenced several aspects of Sullivan’s definition when dealing with a matter to which the URPA, 2000 applied.

…

[20] Further, in Archean Resources it is clearly stated that interpreting a statutory provision requires determining the objective of the act.

[28] At the hearing, no reference was made by counsel for any of the parties to any extrinsic sources, excerpts from Hansard for example, as to the objective of the legislature when it enacted or amended the *Act*. As a result, I am left with basing my interpretation of the *Act* on the principles in *Penney* by examining the *Act* itself.

Bankruptcy and Insolvency Law

[29] The applicable bankruptcy and insolvency provisions are set out in the *BIA*. Paragraph 3 of the receivership order, made under section 243(1) of the *BIA*, empowers the receiver to sell the property of the respondents as defined therein:

> 3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without limiting the generality of the foregoing, the Receiver is hereby empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> (a) to take possession and control of the Property and any proceeds or receipts arising from the Property but, while the Receiver is in possession of any of the Property, the Receiver must preserve and protect it;
>
> …
>
> (l) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part of parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (m) to sell, convey, transfer, lease, or assign the Property or any part or parts thereof out of the ordinary course of business
>
> (i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided the aggregate consideration for all such transactions does not exceed $500,000; and,
>
> (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

> and in each such case notice under section 60 of the *Personal Property Security Act* shall not be required subject to the Receiver obtaining the consent of Parks Canada to lease the Twin Rivers Property….

[30] The receiver submits that the property referred to in the receivership order encompasses the Subject Property. It also says that in discharging its powers to sell the Subject Property, it is acting in accordance with its obligations under section 247 of the *BIA* to deal with the respondents' property in a commercially reasonable manner.

[31] The Ontario Court of Appeal in *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.), enumerates the following factors to be considered by a court when considering the sale of assets in the course of a receivership:

> 16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:
>
> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

[32] *Soundair* was followed in *White Birch Paper Holding Co., Re*, 2010 QCCS 4915, where, in a slightly different context, the Quebec Superior Court held at paragraph 49, that in deciding whether to grant authorization, the overarching consideration is whether the transaction is appropriate, fair, and reasonable.

[33] The Ontario Superior Court of Justice in *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 (Ont. Sup. Ct. J.), additional reasons at [2005] O.J. No. 2421, 140 A.C.W.S. (3d) 35 (Ont. Sup. Ct. J.), held that a receiver, as a court-appointed officer experienced in the insolvency field, is entitled considerable deference by the court relating to a sale of assets process and the adequacy of the receiver's efforts.

[34] This Court, citing *Soundair*, provided the following comments with respect to applications for approval and vesting in receivership proceedings at paragraphs 20 and 21 of *Canadian Imperial Bank of Commerce (Re)*, 2018 NLSC 175:

> 20 Based on the information and evidence provided, I am satisfied that the Receiver took the necessary and reasonable steps to obtain the best price for the assets. Where the Receiver has achieved its main obligation in obtaining as high a value for the assets as it reasonably could, the Court is entitled to find that the Receiver has acted properly and according to the directions given to it by the Court (*Regal Constellation Hotel Ltd., Re* (2004), 128 A.C.W.S. (3d) 646, 37 C.L.R. (3d) 207 (Ont. S.C.J. [Commercial List])
> 21 The Court's authority to confirm the actions of the Receiver is recognized in its entitlement to rely on the Receiver's expertise in arriving at its recommendations as it is assumed that the Receiver is acting properly unless it is clearly shown to be otherwise (*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.)).

[35] It is through this bankruptcy and insolvency lens that I will view the receiver's application for approval of its sale process.

Condominium Law

[36] In order to understand the position of the receiver and the positions of the intervenors who oppose the sale of their interests in the TNCC Property, it is necessary to consider the legal nature of a condominium development. A useful primer is provided by Cromwell, J.A. at paragraphs 3 to 6 of *2475813 Nova Scotia Ltd. v. Ali*, 2001 NSCA 12:

3 The term “condominium” refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), *Estates* § 195, Vol. 31, p. 260.

4 As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

5 From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the *Condominium Act*, R.S.N.S. 1989, c. 85 (the “*Act*”). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units: see s. 27(2) of the *Act*. The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements: see s. 28(1). The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. The law relating to corporations is also of importance because the condominium is administered by the condominium corporation in which the unit holders are in a position analogous to shareholders: see, e.g., ss. 13 and ff and s. 25. While the *Condominium Act* enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the *Act*. As has been said, “[i]n its legal structure, the condominium first combines elements of several concepts ... and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other.” *Corpus Juris Secundum*, *supra* at p. 260.

> 6 Not all condominium developments succeed or last indefinitely. The *Act* provides for termination and sale.

[37] Although *Ali* is a case from Nova Scotia, these general principles apply to condominium developments in this province as well. Where differences between the Nova Scotia *Condominium Act*, R.S.N.S. 1989, c. 85 (the "Nova Scotia Act") and the *Act* are important, I will address them later in this decision.

[38] Let us look now at some of the specific provisions of the *Act*.

[39] By section 16(2) of the *Act*, the unit owners are entitled to exclusive ownership of their respective units. By section 16(3), each unit owner is a tenant in common with the other unit owners of the title to the common elements. The percentage ownership of the common elements is set out in Schedule D to the Declaration and conforms to the information provided by the receiver as set out above.

[40] By section 17(1) of the *Act*, the registration of the declaration created a corporation without share capital, the members of which are the owners of the units. The owners, therefore, each wear two hats – one as an owner of a unit (section 16) and the other as a member of the condominium corporation (section 17(1)).

[41] By section 18(1) of the *Act*, the objects of the corporation are to manage the property and assets of the condominium. That is, its role is that of a management corporation, managing the condominium property on the collective behalf of the unit owners. By section 27(1), a board of directors elected by vote of the unit owners manages the affairs of a condominium corporation itself.

[42] As can be seen from the foregoing, the object of the *Act* is to permit the creation of condominiums and to provide for their governance in accordance with

the general principles set out in *Ali*. The language of the *Act*, read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme and object of the *Act*, requires that the distinction be maintained between the roles of the unit owners and the role of the corporation. The unit owners own the condominium property and are members of the condominium corporation; the condominium corporation manages the property and assets of the condominium.

[43] The corporation is governed through votes by the members, primarily by voting for a board of directors which has direct authority over its day to day affairs. Issues related directly to the property interests of unit owners are decided by consent of the unit owners. It is important, therefore, not to conflate the two.

[44] For example, the allocation of one vote per unit holder as a member of the corporation (section 21(1) of the *Act*) has no application to a unit holder providing or withholding consent as an owner. That these functions are distinct is confirmed by section 21(4) of the *Act* which refers to "[p]owers of *voting* conferred by, or *consent* required to be given or document required to be *executed* under this *Act*" (emphasis added). These same three actions are referred to in section 21(5). Sections 21(4) and (5) distinguish between the acts of voting and providing consent. Consequently, I find that the "one vote per unit" provision under section 21(1) applies only to the owners' powers of "voting" conferred by the *Act* and not to any "consent" of owners required to be given under the *Act*.

[45] Another example of the distinction between the requirement to obtain consent as opposed to an entitlement to vote is the consent required by an encumbrancer under section 61(1)(b) of the *Act*. An encumbrancer is not a member of the condominium corporation and plays no role in its governance; therefore, it is not given a vote on corporation issues.[1] I will discuss this provision in more detail later in this decision.

[1] Unless it is a mortgagee in possession under section 2(1)(t)(i) of the *Act*.

Approval and Authorization of the Proposed Sale of the Subject Property

[46] It is against this backdrop of the relationship among unit owners, as owners of the condominiums and as members of the corporation, that I will asses the receiver's application.

[47] As we have seen, paragraph 3 of the receivership order empowers the receiver to sell the property of the respondents. The receiver advises that the proposed sale of the Subject Property will require conveyances of:

(1) the receiver's interest in the Subject Property, including 100% of the interests in TNCC Property;

(2) the receiver's interest in the Twin Rivers Golf Course land lease with Parks Canada; and

(3) the interests of Royal Bank of Canada and De Lage Landen Financial Services Canada in leased golf carts and maintenance equipment.

[48] No opposition is taken to the ability of the receiver to convey the property of Sports Villas and Twin Rivers or the property interests of third parties who have consented to the sale. Project Management, Dobbin, NWS and the Encumbrancer object to the attempt by the receiver to convey their property rights in the TNCC Property.

Section 61 of the *Act*

[49] The receiver claims that its authority to convey the TNCC Property, including the nine condominium units owned by third parties, comes from section 61 the *Act* which provides in relevant part:

> 61(1) Sale of the property or a part of the common elements may be authorized by the consent of
>
> (a) 80% of the owners of the common elements; and
>
> (b) the persons having registered claims against the property or the part of the common elements created after the acceptance for registration of the declaration and description.

[50] There are two ways that the property of a condominium can be sold. The first is by a unit holder to a purchaser.[2] A unit holder can do this in the ordinary course by way of a direct sale of the unit owned by them. The second method is by a sale of the entirety of the condominium property instigated pursuant to section 61 of the *Act*, provided that the consents contemplated by sections 61(1)(a) and (b) are obtained. [3]

Dissenting unit owners – Section 61(1)(a)

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[2] Including the right of an encumbrancer to sell a condominium by virtue of title derived from the unit owner.

[3] It was suggested at the hearing that a sale of the condominium property can also be made by the condominium corporation (presumably acting through the board of directors) as provided for in section 18(3):

> (3) A corporation may, with the consent of the owners of at least 66% of the common elements,
>
> …
>
> (c) mortgage or pledge its property or rights, including a future right to be paid money as a result of a levy made under this Act, in order to secure repayment of money borrowed by it or the payment or performance of obligations….

Reading the *Act* as a whole, I am of the view that the property referred to in section 18(3) of the *Act* is property that relates to the management functions of the condominium corporation. It does not refer to "the property" in the sense that that term is defined in section 2(1)(v). Property purchased pursuant to section 18(3), for example, a snow blower, becomes an asset of the condominium corporation; ownership of such assets is dealt with by section 24 of the *Act*:

> 24 The members of the corporation share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

[51] As to section 61(1)(a) of the *Act*, the receiver says that based upon the property interests of Sports Villas, it represents ownership of more than 80% of the common elements of TNCC. Consequently, it submits, it can force the sale of the TNCC Property pursuant to Section 61 notwithstanding the objections of the unit owners who appeared at the application.

[52] The dissenting unit owners argue that although Sports Villas owns more than 80% of the common elements, it is only one of the six owners of those units. Therefore, they say, it represents just 17% of the owners of the common elements and so cannot force a sale under section 61(1)(a) without the consent of a substantial number of the other unit owners. They submit that where consent of the owners is required, the *Act* distinguishes between the consents of a "percentage of the owners of the common elements" and the consents of the "owners of a percentage of the common elements". I agree that the use of different language in different sections of the *Act* gives rise to different interpretations.

[53] Examples of circumstances calling for the consent of owners of a percentage of the common elements include the following:

> 52(1) The corporation, by a **vote of members who own 80%, or a greater percentage that is specified in the declaration, of the common elements**, may make a substantial addition, alteration or improvement to or renovation of the common elements or may make a substantial change in the assets of the corporation.
>
> …
>
> 62(2) Where there has been a determination that there has been substantial damage as provided in subsection (1) and **owners who own 80% of the common elements, or the greater percentage as specified in the declaration,** vote for repair within 60 days of the determination, the corporation shall repair.
>
> …
>
> 66(1) Two or more corporations may amalgamate by registering a declaration and description where
>
> > (b) **the owners of at least 80% of the units** of each corporation vote in favour of approving the declaration and description.

[Emphases added.]

[54] In the circumstances referred to above, Sports Villas represents ownership of more than 80% of the common elements and so could, therefore, unilaterally effect a change contemplated by sections 52(1), 62(2) and 66(1).

[55] In contrast, the circumstances calling for a percentage of owners are more limited:

> 61 (1) Sale of the property or a part of the common elements may be authorized by the consent of
>
> (a) **80% of the owners of the common element**
>
> **…**
>
> 63 (1) Withdrawal of the government of the property by this Act may be authorized by the consent of
>
> (a) **all the owners of the common elements**;
>
> [Emphasis added.]

[56] These latter provisions go to the very foundation of a unit holder's property interest in the condominium. I find that although the receiver's interest represents ownership of more than 80% of the common elements, it does not represent 80% of the owners of those common elements.

[57] The receiver argues that it does not matter how one interprets the phrase "80% of the owners of the common elements" in section 61(1)(a). It suggests that the same result is reached if the language used had been "the owners of 80% of the common elements" because Sports Villas could have avoided any confusion by holding each of its units in a separate corporation. This would have had the effect of making each individual corporation an owner with an interest in its unit and the appurtenant common elements, and at the same time giving each individual corporate owner one vote as a unit holder. Although Sports Villas could have

arranged its ownership in such a way, it did not. The flaw in this argument, therefore, is that it does not reflect the facts before me. Furthermore, the legislature could have employed language in section 61 that would coincide with the receiver's position. It did not.

[58] It was also suggested by counsel for the receiver that it would be irrational to interpret section 61(1)(a) as requiring consent of 80% of the owners rather than the owners of 80% of the common elements. To understand the receiver's position, consider, for example, a declarant who has developed a fifty-unit condominium but has only sold one unit to a third party. That declarant may decide that the development would be better put to another use and seek to sell it. In such a case, each party, the declarant with 49 units, and the third party, with one unit, would each represent 50% of the owners. Consequently, the single third-party purchaser would have a veto over the sale, which the receiver suggests would be unfair to the declarant who owns 98% of the units.

[59] The flaw in this argument is that the property rights of owners representing a minority of the ownership overall is recognized elsewhere in the *Act*. See section 63, for example, which applies to the removal of the property from operation of the *Act*. In such a case, *every* unit holder is given an express veto insofar as section 63(1) requires the consent of *all* of the owners of the common elements:

> 63 (1) Withdrawal of the government of the property by this Act may be authorized by the consent of
>
> (a) **all the owners of the common elements**; …
>
> [Emphasis added.]

[60] Consequently, giving the owners of a minority of the common elements a veto over the fundamental ownership aspect of a condominium property is a value recognized in the *Act*.

The Giving of Consent versus the Exercise of a Right to Vote

[61] I wish to address one other position put forward on behalf of the receiver in respect of section 61 of the *Act*. It was submitted that on the principle of one vote per unit (section 21(1)), Sports Villas would have more than 80% of the votes.

[62] Section 61(1) refers to matters being determined by the consent of a percentage of the owners of the common elements. The requirement of consent where significant issues affecting property rights or fundamental expenditures affecting the property itself are contemplated can be contrasted with other circumstances where condominium business is conducted by a vote of the membership. For example, we saw above that the board of directors is elected by vote of the members pursuant to section 27 of the *Act*. Other examples include:

> 35 (1) The corporation may, **on a resolution of not less than 66% of its members**, make by-laws not inconsistent with this Act, the regulations or the declaration
>
> …
>
> (4) By-laws made under this section may be amended or revoked by the corporation **on a resolution of not less than 66% of its members** and subsection (3) shall apply to the amendment or revocation of the by-laws as it applies to the by-laws.
>
> …
>
> 36 (2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws and **shall be approved by 66% of the members** of the corporation.
>
> ...
>
> (4) The rules made under this section may be amended or revoked by the corporation on a resolution of **not less that 66% of its members.**
>
> [Emphasis added.]

[63] The issues that are determined by a vote of the membership go to the governance of the condominium corporation and not to the property interests of owners.

[64] The receiver relies on *Ali* and submits that on a consent sought under section 61(1)(a) it should receive a number of "votes" equivalent to the number of units held by Sports Villas. The flaw in this reasoning is that the corresponding language of the Nova Scotia Act differs from section 61(1) of our *Act*. In Nova Scotia, to sell the condominium property a vote of the unit owners is contemplated as is consent by the encumbrancers. Section 40 of the Nova Scotia Act provides:

> 40 (1) Sale of the property or any part of the common elements may be authorized by
>
> (a) a **vote** of owners who own eighty per cent of the common elements; and
>
> (b) the **consent** of the persons having registered claims against the property or the part of the common elements, as the case may be, created after the acceptance for registration of the declaration and description.
>
> (Emphasis added)

[65] Our *Act* contemplates *consent*s from a threshold percentage of the unit owners and consents from all of the encumbrancers. Voting is distinct from the giving of consent, as we saw above in reference to sections 21(4) and (5). The Nova Scotia Act contemplates *votes* by unit owners, and consents by encumbrancers. Furthermore, the Nova Scotia Act contemplates owners who own eighty per cent of the common elements; not eighty percent of the owners as is required by section 61(1)(a) of our *Act*. Consequently, the reasoning in *Ali* on this issue is of no assistance to the receiver.

Conclusion on the Application of Section 61(1)(a) of the Act

[66] Because the receivership order over the assets of Sports Villas does not capture the TNCC Property other than those units owned by Sports Villas itself, the receiver could not effect the sale of the entire TNCC Property without complying with section 61(1)(a) of the *Act*. The receiver has not obtained the necessary consents from 80% of the owners of condominium units. I find that the property of Project Management, Dobbin, and NWS should not have been bundled

with the property of Sports Villas for the purposes of the sale. The receiver could have included its right, title and interest in the Sports Villas units in the tender package, but nothing more.

[67] The application for approval of the sale to the Purchaser is denied on this basis.

The Encumbrancer – Section 61(1)(b)

[68] The foregoing deals with the matter before me. Nevertheless, I wish to comment on another aspect of the receiver's application.

[69] Aside from the unit owners who do not consent to the sale, the receiver is also faced with the Encumbrancer refusing to consent. Section 61(1)(b) of the *Act* requires the consent of any encumbrancers to a sale of the TNCC Property. The Encumbrancer is a registered encumbrancer, holding mortgages over five of the units. Its position is, therefore, different from that of the dissenting unit owners.

[70] The receiver proposes to invoke section 21(5) of the *Act* to circumvent the refusal of consent by the Encumbrancer. In certain circumstances, section 21(5) provides that application can be made to the Court to have another person consent in respect of a unit:

> (5) Where the court, upon application of the corporation or of an owner, is satisfied that there is no person capable or willing or reasonably available to

> exercise the power of voting, giving consent or executing a document, in respect of a unit, the court,
>
> > (a) in cases where unanimous vote or unanimous consent is required by this Act, the declaration or the by-laws, shall; and
> >
> > (b) in another case, may
>
> authorize another proper person to exercise the power of voting, to give the consent or to execute the document, in respect of the unit.

[71] The receiver acknowledges that it cannot comply with section 61(1)(b) of the *Act* unless the Court grants it the requested authority pursuant to section 21(5) to execute a deed of conveyance in respect of the units subject to the security interest of the Encumbrancer. The receiver submits that because the Encumbrancer will obtain no proceeds from the proposed sale as is set out in Schedule JJ to the Receiver's First Report, the Court should impose the sale upon it by invoking section 21(5). In essence, the receiver suggests that I should infer bad faith on the part of the Encumbrancer from its refusal to consent in such circumstances. Because of that bad faith, says the receiver, it would be appropriate for the Court to order that the receiver be authorized to consent to the sale and to execute any instruments otherwise required to be executed by the Encumbrancer.

[72] The Encumbrancer takes the position that it is entitled to the protection of section 61(1)(b) of the *Act* and that there is no provision for obtaining a waiver of its requisite consent. It argues that if the sale is approved and it receives no payment in respect of its security, the receiver will have succeeded in disposing of its security interest without compensation.

[73] It is not clear to me that section 21(5) of the *Act* would apply to an encumbrancer refusing to consent to a sale of a condominium property pursuant to section 61(1)(b). This is because, subject to limited and express exceptions, encumbrancers do not fall within the governance scheme of the *Act*. Section 21(5) is found under the heading "voting" with section 20 that addresses the quorum requirements for the transaction of the business of the corporation. Section 21, among other things, allocates one vote to each unit holder and prohibits voting by an encumbrancer unless it is a mortgagee in possession. The Encumbrancer is not a

mortgagee in possession. Therefore section 21(5) would not apply to any consent required of the Encumbrancer as a stranger to the ownership of the units and the governance of the corporation.

[74] Even if section 21(5) of the *Act* does apply to the Encumbrancer, however, the receiver has not met the onus of establishing that the Encumbrancer is acting in bad faith by not consenting to the sale of the Subject Property. No authority was provided to me upon which I could come to such a conclusion. That the Encumbrancer has refused to consent to a transaction that will see it realize no return on its security interest is not sufficient, on its own, to establish unreasonableness.

Conclusion on the Application of Section 61(1)(b) of the Act

[75] The receiver has not obtained consent from the Encumbrancer as required by section 61(1)(b) of the *Act*. I am not prepared to invoke section 21(5) to obviate the need for such consent.

[76] The application for approval of the sale to the Purchaser would also be denied on this basis.

DISPOSITION

[77] The application by the receiver is granted in respect of sealing the First Receiver's Report and in approving the Receiver's First Report and activities as qualified above.

[78] Although Project Management and Dobbin raised other objections to the proposed sale, the failure by the receiver to obtain the requisite consents under section 61 of the *Act* is sufficient to dispose of the application. The application by the receiver for approval of the sale of the Subject Property to the Purchaser is dismissed.

[79] Because the request for approval of the sale was the main substantive matter considered on the application, the intervenors, other than the Purchaser, shall have their costs against the receiver in accordance with Column 3 of the Scale of Costs. The Purchaser shall bear its own costs.

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ROBERT P. STACK
Justice