Court File No. 31-2215824
Estate File No. 31-2215824

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TECHNI-LITE SYSTEMS INC.

BRIEF OF AUTHORITIES
(Motion for Approval and Sale Transaction)
(Returnable April 7, 2017)

March 31, 2017

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TAB	AUTHORITIES
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2.	*Re Hypnotic Clubs Inc,* 2010 ONSC 2987 [Comm List]
3.	*Re Komtech Inc,* 2011 ONSC 3230 [Comm List]
4.	*Royal Bank v. Soundair Corp.*, (1991), 83 DLR (4th) 76 (ONCA)

TAB 1

2010 ONSC 5647
Ontario Superior Court of Justice

Outdoor Broadcast Networks Inc., Re

2010 CarswellOnt 7710, 2010 ONSC 5647, 196 A.C.W.S. (3d) 319, 71 C.B.R. (5th) 311

In Bankruptcy and Insolvency

In the Matter of the Proposal of Outdoor Broadcast Networks Inc. of the City of Toronto, in the Province of Ontario

Reg. Scott W. Nettie

Heard: September 27, 2010
Judgment: October 13, 2010
Docket: Estate No. 31-1385780

Counsel: Jonathan H. Wigley for Proponent
Sanjeev Mitra for Trustee
John C.M. Sayers for ATEC
Lisa Brost for Maple Leaf Sports & Entertainment Ltd.

Subject: Insolvency; Civil Practice and Procedure

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

Bankruptcy and insolvency

VI Proposal
VI.1 General principles

Bankruptcy and insolvency

VI Proposal
VI.10 Practice and procedure

Headnote

Bankruptcy and insolvency --- Proposal — General principles

O Inc. filed Notice of Intention (NOI) to make proposal under Bankruptcy and Insolvency Act — Amendments were made to Act such that s. 65.13(1) provides that where insolvent person has filed NOI under s. 50.4 of Act, that person may not dispose of assets outside ordinary course of business, unless authorized by Bankruptcy Court — O Inc. brought application seeking Court's approval to sell six billboards as liquidation of its assets, to raise cash to fund intended proposal — Application granted — Grant of order was appropriate exercise of Registrar's jurisdiction — Factors set out in s. 65.13(4) of Act were considered in determining whether to exercise discretion to authorize sale — Process leading to sale was reasonable, trustee

was in support and had filed requisite report, creditors had been consulted, and consideration proposed was reasonable — O Inc.'s major secured creditor supported sale — Any deemed bankruptcy flowing from failure of proposal process would result in no funds for ordinary unsecured creditors; thus, proceeding without broader notice to ordinary unsecured creditors was appropriate.

Bankruptcy and insolvency --- Proposal — Practice and procedure

O Inc. filed Notice of Intention (NOI) to make proposal under Bankruptcy and Insolvency Act (BIA) — Amendments were made to BIA such that s. 65.13(1) provides that where insolvent person has filed NOI under s. 50.4 of BIA, that person may not dispose of assets outside ordinary course of business, unless authorized by Bankruptcy Court — O Inc. brought application seeking Court's approval to sell six of its billboards as liquidation of assets to raise cash to fund intended proposal — Application granted on other grounds — All appropriate parties were involved in application, and it proceeded as unopposed — Registrar in Bankruptcy has jurisdiction under s. 192(1)(f) of BIA to hear and determine any unopposed matter — Prima facie conclusion that Bulk Sales Act (BSA) ought to apply to proposed sale of signs was ousted by s. 65.13(7) of BIA — Section 65.13(7) of BIA authorizes Court making order under s. 65.13(1) to authorize sale free and clear of "other restriction" implicit in application of BSA to sale — So long as Court makes proceeds of s. 65.13(1) BIA sale transaction subject to restrictions of BSA, compliance with s. 65.13(7) is had, and application of BSA is not only ousted, but may be so ousted not by judge of Superior Court of Justice, but by duly authorized judicial officer of Bankruptcy Court, be that judge or registrar.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

s. 65.13(7) [en. 2007, c. 36, s. 27] — considered

s. 192(1)(f) — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

s. 2 — considered

s. 3 — considered

APPLICATION for order approving sale of assets.

***Reg. Scott W. Nettie*:**

1 On September 27, 2010, I granted the requested approval of a certain sale, and vesting Order, for Reasons to follow. These are those Reasons.

2 Outdoor Broadcast Networks Inc. ("OBN") has filed a Notice of Intention to make a proposal, in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). Schonfeld Inc. (the "Trustee") is the trustee in the proposal estate.

3 OBN is in the business of providing marketing solutions to advertisers. In particular, it owns a number of large, full motion LED digital billboards. These billboards are located in the Provinces of Ontario and British Columbia.

4 OBN would like to sell six such signs, located in five locations. Four of those locations are in the City of Toronto, comprising five signs. The fifth location is in the City of Pitt Meadow, British Columbia.

5 Ordinarily, OBN would be at liberty to sell its signs, without application to this Court. Having filed an NOI, the assets of OBN remain vested in it, and it retains capacity to deal with its own assets. It would have been, of course, subject to the provisions, in Ontario, of the *Bulk Sales Act*, R.S.O. 1990, c. B-14 ("BSA"), if any proposed sale constituted a sale in bulk, out of the ordinary course of business.

6 That changed September 18, 2009, with the most recent amendments to the BIA. Section 65.13(1) BIA now provides that where an insolvent person has filed an NOI under s. 50.4 BIA, as OBN has, then that person may not sell or dispose of assets outside of the ordinary course of business, unless authorized to do so by the Bankruptcy Court.

7 According to the Affidavit of Kevin Clay, filed on the application, the sales by OBN of these billboards are intended to be a liquidation of its assets, so as to raise cash to fund the proposal which it intends to make. No one disputes that such a liquidation constitutes a sale outside of the ordinary course of business for OBN. Hence this application.

8 Section 65.13(4) BIA sets out the factors which the Court is to consider in exercising its discretion to authorize such a sale, or not. All six of those factors were addressed by counsel or in the materials, or both, and I duly considered them in granting the requested Order. The process leading to the sale was reasonable; the Trustee was in support, and had filed the requisite report; creditors had been consulted; and the consideration proposed is reasonable.

9 On the point of creditor consultation, I note that Fraser Kearney Capital Corporation ("FKCC") is the major secured creditor of OBN. Kevin Clay, the affiant in support of the application, is an officer of FKCC and a director of OBN. FKCC supports the sale transactions, and intends to permit the proposal to proceed despite its apparent prior security position over the assets of OBN (including the sale proceeds of the signs) in order to benefit from certain tax losses of OBN. The evidence before me was that the security of FKCC is in a shortfall position, such that any deemed bankruptcy flowing from a failure of the proposal process would result in no funds for ordinary unsecured creditors. Thus, I was satisfied that proceeding without broader notice to the ordinary unsecured creditors was appropriate. Further, a number of the larger unsecured creditors, being landlords where the signs are located, were waiving their lease claims as part of the sale terms of the signs to them. In short, I was satisfied that the grant of the Order was an appropriate exercise of my jurisdiction.

10 Ordinarily, the record could have simply reflected my satisfaction, and that an Order was to go as signed. These Reasons were required in respect of two points, both of which relate to my jurisdiction, as Registrar in Bankruptcy, to hear and determine this application.

11 The first, and least contentious, is my jurisdiction to hear an application under s. 65.13(1) BIA. In the case at bar, all appropriate parties were involved in the application, and it proceeded as unopposed, subject only, of course, to my being persuaded to exercise my discretion in favour of OBN, which I was. A Registrar in Bankruptcy has the jurisdiction, under s. 192(1)(f) BIA to hear and determine any unopposed matter. Thus, I had jurisdiction to hear the application.

12 The second point is whether or not I have the ability, as Registrar, to not only approve the sale, under s. 65.13(1) BIA, but to make that sale not subject to the provisions of the BSA which might otherwise apply, absent the Order of a Judge of the Superior Court of Justice exempting the sale from the BSA under s. 3 BSA. As all who regularly practise in this area know, a s. 3 BSA exemption is routinely added into the majority of vesting orders, even where the sales are by a trustee, and thus expressly already exempt from the BSA under s. 2 BSA.

13 *Prima facie*, it would seem that the BSA ought to apply to the proposed sale of the signs by OBN. While the sale in bulk is broken up amongst a number of purchasers, it is admittedly a sale out of the ordinary course of business, and, in effect, a liquidation. It is not being conducted by a trustee or FKCC as a creditor realizing under its security, but directly by OBN itself, as OBN still owns and controls the assets.

14 This *prima facie* conclusion is ousted, in my view, by the provisions of s. 65.13(7) BIA. That section provides that in making the within Order, the Court may authorize the sale to be "free and clear of any security, charge or *other restriction* (emphasis added), and, if it does, it shall also order that...the proceeds of the sale...be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order."

15 I find that s. 65.13(7) BIA authorizes the Court making the Order under s. 65.13(1) BIA to authorize the sale free and clear of the "other restriction" implicit in application of the BSA to the sale. After all, what is the BSA but a series of restrictions on alienability by a property owner of its assets, in order to protect ordinary creditors, who may be unaware of the alienation, occurring as it must, out of the ordinary course of the seller's business. So long as the Court makes the proceeds of the s. 65.13(1) BIA sale transaction themselves subject to the restrictions of the BSA, compliance with s. 65.13(7) BIA is had, and the application of the BSA is not only ousted, but may be so ousted not by a Judge of the Superior Court of Justice, but by the duly authorized judicial officer of the Bankruptcy Court, be that a Judge or a Registrar.

16 I am equally confident in this conclusion when I consider further the issue of paramountcy between a validly enacted Dominion statute, made in pursuit of the Dominion's clear jurisdiction over bankruptcy and insolvency and that of a validly enacted Provincial statute going to issues of property and civil rights in the Province. Where they conflict, precedence must be given to the Dominion legislation, especially when it serves to continue to protect the interests of the very creditors which the BSA seeks to safeguard.

17 By way of illustration of this latter point, let us consider to what use OBN might put the sale proceeds. If OBN dispenses them in the ordinary course of business, both the BIA and the BSA will be content. If, however, OBN were to dispose of them outside of the ordinary course of business, both s. 65.13(1) BIA and s. 2 BSA would be invoked, and the creditors would have all of the same protections which they had before this Court authorised the sale of the signs.

18 Moreover, this analysis permits the proper pursuit by an insolvent, OBN, of its rights to compromise its debts under the BIA. A finding which serves both the intent of the Dominion and Provincial acts, while protecting creditors and allowing an insolvent debtor proper access to the Dominion statute is in my view the proper conclusion.

19 Any remaining doubt that this conclusion is correct is dispelled, I find, by a consideration of the November, 2003, *Report of the Standing Senate Committee on Banking, Trade and Commerce*[1], a report by a Committee of the Upper House of the Dominion Parliament. That Report, at page 148 recommended to Parliament that:

> The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangements Act* be amended to permit the debtor, subject to prior approval of the Court, to sell part or all of its assets out of the ordinary course of business, during reorganization and *without complying with bulk sales legislation* (emphasis added). Similarly, the debtor should be permitted to sell all or substantially all of its assets on a going concern basis. On an application for permission to sell, the Court should take into consideration whether the sales process was conducted in a fair and reasonable manner, and whether major creditors were given reasonable notice, in the circumstances, of the proposed sale and had input into the decision to sell. No such sale to controlling shareholders, directors, officers or senior management of the debtor having a significant financial interest in the purchaser or in the sales transaction should be permitted, other than in exceptional circumstances.

20 A review of s. 65.13 indicates that essentially every other of the recommendations, above, were adopted by Parliament. One can but conclude from that that the intent of s. 65.13(7) BIA, in respect of the "other restrictions" language was also an adoption by Parliament of the recommendation that the BIA provide for sale by insolvent debtors of assets out of the ordinary course - free from compliance with the BSA, including s.3 thereof.

21 Having concluded that I had jurisdiction to hear the application under s. 192(1)(f) BIA, and having concluded that sitting in such a capacity constituted my actions as those of the Court under s. 2 BIA, and having concluded that the Court has the ability to authorize the proposed sale by OBN free and clear of the other restriction of the BSA, I granted my Order herein on September 27, 2010.

Application granted.

Footnotes

1 *http://www.cfs-fcee.ca/html/english/campaigns/Senate_Cmte_Report_2003_11-a.pdf*

TAB 2

2010 ONSC 2987, 2010 CarswellOnt 3463, 189 A.C.W.S. (3d) 29, 68 C.B.R. (5th) 267

2010 ONSC 2987
Ontario Superior Court of Justice [Commercial List]

Hypnotic Clubs Inc., Re

2010 CarswellOnt 3463, 2010 ONSC 2987, 189 A.C.W.S. (3d) 29, 68 C.B.R. (5th) 267

IN THE MATTER OF THE PROPOSAL OF HYPNOTIC CLUBS INC., A COMPANY DULY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO WITH A HEAD OFFICE IN THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO (Applicant)

Cumming J.

Heard: May 18, 21, 2010
Judgment: May 21, 2010
Docket: 31-1323465

Counsel: Domenico Magisano, Catherine DiMarco for Hypnotic Clubs Inc.
Kenneth H. Page for Jenny Telios
John Salmas for Muzik Clubs Inc.
M. Solomon for Generation of Dance, Inc.
John Hendriks for Trustee, A. Farber & Partners Inc.

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

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

Bankruptcy and insolvency

VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.9 Miscellaneous

2010 ONSC 2987, 2010 CarswellOnt 3463, 189 A.C.W.S. (3d) 29, 68 C.B.R. (5th) 267

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Debtor operated nightclub — Debtor was tenant under sublease from M Inc. — M Inc. was related person to debtor — M Inc. was tenant under head lease from Canadian National Exhibition (CNE) — Debtor filed notice of intention to make proposal — M Inc. had purported claim against debtor for unpaid rent — GD Inc. was secured creditor — T was unsecured creditor — Debtor entered into revised asset purchase agreement (APA) to sell its assets to corporation that was related person to M Inc. — Debtor brought motion for sale of its assets pursuant to revised APA — T brought cross-motion for production of head lease — Motions dismissed — Factors to be considered under Bankruptcy and Insolvency Act (Act) were met because revised APA provided for better recovery to creditors than bankruptcy — If revised APA were approved, creditors would not be able to vote upon proposal in their self-interest — Good faith efforts were not made to sell debtor's assets to unrelated parties within intent of s. 65.13(5)(a) of Act — M Inc. could sublet to non-related party, subject to consent by CNE — M Inc. wanted to keep economic benefit of nightclub business for itself — M Inc. would only rent to related party so there was no market for third party to purchase assets and operate business.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Jurisdiction of court to order production of document — Debtor operated nightclub at Exhibition Place — Debtor was tenant under sublease from M Inc. — M Inc. was related person to debtor — M Inc. was tenant under head lease from Canadian National Exhibition (CNE) — Debtor filed notice of intention to make proposal — T was unsecured creditor — Debtor entered into revised asset purchase agreement (APA) to sell its assets to corporation that was related person to M Inc. — Debtor brought motion for sale of its assets pursuant to revised APA — T brought cross-motion for production of head lease between CNE and M Inc. — Motions dismissed — Court had no jurisdiction to compel production of head lease — Debtor was not party to head lease — Head lease was agreement between M Inc. and CNE.

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Debtor operated nightclub at Exhibition Place — Debtor was tenant under sublease from M Inc. — M Inc. was related person to debtor — M Inc. was tenant under head lease from Canadian National Exhibition (CNE) — Debtor filed notice of intention to make proposal — M Inc. had purported claim against debtor for unpaid rent — GD Inc. was secured creditor — T was unsecured creditor — Debtor entered into revised asset purchase agreement (APA) to sell its assets to corporation that was related person to M Inc. — Debtor brought motion for sale of its assets pursuant to revised APA — T brought cross-motion for production of head lease — Motions dismissed — Debtor's request under s. 50.4(9) of Bankruptcy and Insolvency Act brief extension for filing of proposal was reasonable — All parties consented to brief extension of time.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — pursuant to

s. 65.13 [en. 2005, c. 47, s. 44] — pursuant to

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

s. 65.13(5) [en. 2005, c. 47, s. 44] — considered

s. 65.13(5)(a) [en. 2005, c. 47, s. 44] — considered

s. 65.13(5)(b) [en. 2005, c. 47, s. 44] — considered

s. 136 — referred to

MOTION by debtor corporation for sale of its assets; CROSS-MOTION by unsecured creditor for order for production of head lease between two third parties.

***Cumming J.*:**

The Motion

1 A motion is made by the debtor corporation, Hypnotic Club Inc. ("Hypnotic" or the "debtor"), for a sale of its assets pursuant to s. 65.13 of the *Bankruptcy and Insolvency Act* ('*BIA*") R.S.C. 1985, c.B-3, as am.

Background

2 The debtor is a private company, operating a nightclub management company at Exhibition Place in Toronto.

3 The debtor filed a Notice of Intention to Make a Proposal (the "NOI") on February 17, 2010 under s. 50.4 of the *BIA*. A. Farber & Partners Inc. ("Farber" or "Proposal Trustee") was named Proposal Trustee. Court Orders have twice been made extending the time for the debtor to file its proposal. The last extension expires today, May 21, 2010.

4 Hypnotic is a tenant under a sublease from Muzik Club's Inc. ("Muzik"). Muzik is a related person to Hypnotic.

5 On May 5, 2010, the debtor entered into an Asset Purchase Agreement (the "APA") to sell its assets to Muzik (in trust for its nominee) subject to Court approval. On May 13, 2010, the APA was revised ("Revised APA") on the recommendation of the Proposal Trustee.

6 Hence, the intended sale of assets is to a new corporation which will be a related person to Muzik.

7 (If the Revised APA is approved, Hypnotic also requests a 32-day extension to June 22, 2010 pursuant to s. 50.4 (9) of the *BIA* to allow the Purchaser time to deal with various liquor licensing issues and to make a viable proposal upon the closing of the Revised APA.)

8 Muzik is the tenant under an existing head lease from the Canadian National Exhibition ("CNE"). Muzik has some 12 years remaining on the 20-year term of the head lease. Muzik has a purported claim against Hypnotic of $1.5 million for unpaid rent. No proof of claim has been filed in respect of this alleged unpaid rent. Muzik also states that $210,000. in rent arrears is a preferred claim pursuant to s. 136 of the *BIA*.

9 The Proposal Trustee is of the opinion that the process leading to the proposed sale and disposition to Muzik (in trust for its nominee) is reasonable in the circumstances because the sublease has expired and Hypnotic is now on a month-to-month tenancy. Muzik has the unfettered discretion as to who is acceptable as a new tenant. The clear intent of Muzik is to give a lease to the property to a related person tenant.

10 It is also noted that s. 15.2 of the sublease to Hypnotic provides the tenant shall not effect any assignment or major sublease and there shall be no change of control of the tenant without the prior written consent of Muzik, which consent may be arbitrarily and unreasonably withheld.

11 Mr. Starkovski, the principal of Muzik, also states that the head lease from the CNE only allows Muzik to sublet the premises to related parties without obtaining the prior written consent of the CNE; however, Muzik states that it will not entertain offers to lease from an unrelated party even if the CNE's consent were to be given.

12 The Proposal Trustee's third report notes that two independent appraisals estimate the assets (equipment and inventory) of Hypnotic have a gross liquidation value of less than $282,000.

13 The only secured creditor of Hypnotic, Generation of Dance Inc., is a related person to Muzik, owed some $325,000. A legal opinion has been provided that the security is valid and enforceable.

14 Ms. Penny Telios, by far the largest arms-length unsecured creditor of Hypnotic, has a judgment against Hypnotic for $740,879.78 for monies loaned on or about May 27, 2005. Ms. Telios, in effect, has a veto over any proposal that Hypnotic makes to its creditors.

15 In his affidavit, Mr. John Telios (the brother of Ms. Penny Telios) alleges, amongst other things, that Mr. Zlatko Starkovski (the principal behind Muzik) made misrepresentations at the time of the loan to Hypnotic and specifically, misrepresented that Hypnotic was the tenant of the long-term lease from the CNE. Such allegation has no relevancy to the proceeding at hand.

16 Ms. Telios has brought a cross motion seeking an order that Muzik produce the head lease from the CNE for the examination by Ms. Telios. Muzik refuses to produce the head lease. I have no jurisdiction (and the counsel for Ms. Telios does not suggest I have jurisdiction) to compel production of the head lease, being an agreement between two parties who are not the debtor. Accordingly, the cross motion is dismissed.

17 Mr. Telios questions the validity of the Muzik purported claim against Hypnotic for unpaid rent of $1.5 million. The materials throw up suspicions as to the merits of this asserted claim.

18 However, Muzik has agreed to waive the entirety of its purported claim of $1.5 million if the Revised APA is approved. Moreover, leaving aside the claim for $1.5 million by Muzik as landlord, it appears the appraised assets (inventory and equipment) of Hypnotic have a liquidation value that probably would not satisfy the secured creditor claim.

19 The purchase price under the Revised APA is $450,000. In addition, as stated above, the landlord, Muzik, has agreed to not submit a claim against Hypnotic for asserted rent arrears of some $1.5 million. As well, subject to Court approval of the Revised APA, Muzik has agreed to fund 100% of any source deduction deemed trust and the directors' liabilities, including GST (some $130,874.83), and unremitted corporate taxes (some $110,199.72) and not file subrogated claims in the debtor's proposal if the Revised APA is accepted. Assuming the Revised APA is approved, Hypnotic intends to file a viable proposal after the closing of the sale under the Revised APA, with the $450,000. purchase price having replaced the sold assets of Hypnotic.

20 Mr. Telios makes various allegations against Mr. Starkovski. I leave aside these various accusations. They are not relevant to this proceeding.

21 Mr. Starkovski in his affidavit states that Ms. Telios will not agree to a compromise of her judgment and recognizes that she holds a veto power over any proposal. Ms. Telios's position is that the Revised APA should not be given Court approval and a formal proposal should be made by Hypnotic. The record suggests that Ms. Telios will not vote in favour of any proposal that does not satisfy her judgment.

22 Mr. Starkovski is concerned that the Telioses have an ulterior motive of desiring to subvert the relationship of Muzik with the CNE for their own benefit.

23 It is apparent that Mr. Telios and Mr. Starkovski have other business dealings and an acrimonious relationship. Whatever the merit, or lack of merit of their respective allegations about the other, those allegations are not relevant to this motion.

24 Realistically, Muzik is the only potential purchaser of Hypnotic's assets given Muzik's position that it will not agree to any subtenant who is not a related party to Muzik. Accordingly, there has not been any sales process undertaken by Hypnotic to offer the assets for sale to the public.

The Factors for Consideration in Considering the Motion

25 The factors to be considered by the Court in respect of this Motion are set forth in s. 65.13 (4) and (5) of the *BIA*, which provide:

> **65.13 (4) Factors to be considered-**
>
> In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the trustee approved the process leading to the proposed sale or disposition;
>
> (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> **(5) Additional factors - related persons -**
>
> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

26 Muzik has stated that it will only rent to a related party and no one else can enter the premises to run the business in the current location. Thus, there is no market for any third party to purchase the assets and operate from the current location.

27 The Proposal Trustee approves the process leading to the proposed sale. Farber has also stated that in its opinion the Revised APA "provides for a superior realization to the secured and arms-length unsecured creditors .... [and] permits the business to continue...[with] ongoing employment for 157 [7 full time and 150 part time] employees". In the Proposal Trustee's view, the consideration to be received for the sale of the assets is fair and reasonable, taking into account their

market value as estimated by the two appraisals, attributing a value of about one-half the amount of the offer through the Revised APA.

28 Muzik has advised that if the Revised APA is not approved it will withdraw its offer. Given the inability to find another purchaser, the resulting bankruptcy would quite probably result in a shortfall for the (related person) secured creditor and no recovery for the unsecured creditors, in particular, Ms. Telios.

29 The opinion of the Proposal Trustee, reasonably founded upon the record as set forth above, is that the Revised APA provides for a better recovery to the secured creditor and the arms-length creditors than a bankruptcy.

30 Thus, the factors to be considered as required by s. 65.13(4) of the *BIA* have been taken into account.

31 The additional factor to be considered when the proposed sale is to a related person as required by s. 65.13 (5) (b) is also met. Given the impossibility of any real market for a sale of Hypnotic's assets to other than Muzik, a related person, and given the appraisals as to the liquidation value of those assets, the reasonable conclusion is that the consideration to be received by the Revised APA is superior to the consideration that would be received under any other conceivable offer.

32 This brings me to the factor required to be met by s. 65.13(5) (a). Giving consideration to the entirety of the evidentiary record and the intent and policy underlying the *BIA*, I am not satisfied that good faith efforts have been made to sell or otherwise dispose of Hypnotic's assets to unrelated parties of Hypnotic within the intent and meaning of this provision.

33 The intent and policy underlying the *BIA* is that creditors should consider and vote upon a proposal advanced pursuant to a NOI as they see fit in their own self interest. That objective is defeated in the instant situation if the Revised APA is approved.

34 Section 65.13 (4) and (5) allow for exceptional situations to be considered by the Court provided the factors discussed are met.

35 In the situation at hand, if the proposed sale is approved, Muzik ends up with the benefit of the nightclub establishment with a payment of approximately $150,000 to the unsecured creditors, their total claims being about $850,000. Muzik is in the position of effectively controlling who the subtenant replacing Hypnotic might be and insists that only a person related to Muzik can be the subtenant of Muzik. Thus, given the position of Muzik, there is no real market for the nightclub business. It is clear that the nightclub business of Hypnotic has considerable value to Muzik. In the course of submissions counsel for Muzik stated that Muzik had expended more than $1 million in improvements to the business property of Hypnotic. However, given its control of the granting of the sublease, Muzik in effect removes itself from having to bid a competitive price for the business of Hypnotic. Moreover, Muzik could agree to sublet to a non-related party, subject to the CNE consenting to the sublet, however, Muzik wants to capture the economic benefit of the ongoing nightclub business for itself.

36 Given these circumstances, and taking into account the underlying policy of the *BIA* of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.

37 It is obvious that a deemed assignment into bankruptcy by s. 50.1 (8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

Disposition

38 For the reasons given, the motion is dismissed.

39 I have advised all parties in court this morning as to my intended disposition of this motion, with these written reasons to follow. The debtor requested under s. 50.4 (9) of the *BIA* a further brief extension for the possible filing of a proposal. All

parties present consent to the request. In my view, the request is reasonable in the circumstances and accordingly, an extension is given to June 7, 2010, and an Order shall issue to that effect.

Motions dismissed.

TAB 3

2011 ONSC 3230
Ontario Superior Court of Justice

Komtech Inc., Re

2011 CarswellOnt 6577, 2011 ONSC 3230, 106 O.R. (3d) 654, 205 A.C.W.S. (3d) 24, 81 C.B.R. (5th) 256

In the Matter of the Proposal of Komtech Inc. pursuant to the Law of the Province of Ontario, with a Head Office in the City of Kanata, in the Province of Ontario

Paul Kane J.

Heard: April 27, 2011
Judgment: July 8, 2011
Docket: 33-1469781

Counsel: Keith A. MacLaren for Komtech Inc.
John O'Toole, André Ducasse for Business Development Bank of Canada
Karen Perron for Hubbell Canada LP

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

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

Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Where no proposal — Company became insolvent — Company issued notice of intent to make proposal under Bankruptcy and Insolvency Act — Company sought auction for sale of assets — Company brought motion for approval of sale — Motion granted — Trustee and primary lenders of company approved of sale process — Proposed process was likely to see higher price than forced sale of assets — Company made reasonable efforts in search of alternate financing, equity partnership or purchaser of business — Company cooperated with trustee to identify and engage prospective purchasers — Position of creditors would not improve if motion dismissed — Sale could still be authorized under s. 65.13 of Act despite fact that proposal had not been filed, as court had jurisdiction to do so.

Table of Authorities

Cases considered by *Paul Kane J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — considered

Hypnotic Clubs Inc., Re (2010), 68 C.B.R. (5th) 267, 2010 CarswellOnt 3463, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — pursuant to

s. 64.1 [en. 2005, c. 47, s. 42] — referred to

s. 64.2 [en. 2005, c. 47, s. 42] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(3) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — referred to

s. 65.13 [en. 2005, c. 47, s. 44] — considered

s. 81.4(4) [en. 2005, c. 47, s. 67] — referred to

s. 81.6(2) [en. 2005, c. 47, s. 67] — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, Act to establish the, S.C. 2005, c. 47
Generally — referred to

MOTION by company for approval of sale of assets.

***Paul Kane J.*:**

1 The applicant, Komtech Inc., ("Komtech") designs and manufactures plastic injection products at two facilities in Ontario and employs approximately 150 employees. Faced with serious financial difficulties, Komtech filed a Notice of Intention ("NOI") to make a proposal ("Proposal") under s. 50.4 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*BIA*") on March 2, 2011. A. Farber & Partners Inc. was appointed Proposal Trustee ("Trustee").

2 This Court on March 31, 2011, granted an extension to file the Proposal until May 16, 2011.

3 On April 20, 2011, Komtech by motion sought approval of a bidding process ("Bid Process") for the auction of its assets and the preliminary approval of the Stalking Horse Asset Purchase Agreement, the ("APA") between itself as vendor and 2279591 Ontario Inc. as purchaser. Pursuant to the APA, most of the assets of the vendor including, accounts receivable, inventory equipment, assigned contracts, intellectual property, products and prepaid expenses, are to be sold subject to the Bid Process, for a purchase price of $2,800,000 ("the Purchase Price", or the "MBA").

4 All secured creditors of Komtech were served with this motion pursuant to s. 65.13(3) of the *BIA*. Section 65.13(3) of the Act does not require service on unsecured creditors.

5 The two primary secured lenders support this motion namely: the Business Development Bank of Canada ("BDB") and HSBC Canada ("HSBC"). Demand for payment by each of these secured lenders has been made of Komtech. Komtech has been unsuccessful in obtaining alternative credit facilities. Combined, these two secured lenders are presently owed approximately $6,000,000. The NOI dated February 26, 2011, lists approximately $3,600,000 additional debt owing to other creditors of Komtech in addition to BDB and HSBC.

6 The Purchase Price may be increased in an auction under the Bid Process. The Trustee recommends that the motion be granted and in support thereof, filed a Second Report dated April 19, 2011, and a supplement to the Second Report dated April 27, 2011. The Trustee expresses the opinion that the greatest chance of return to creditors of Komtech is proceeding with the APA coupled with an auction using the APA and the Purchase Price as the floor.

7 The Trustee in the Second Report confirms that the purchaser under the APA will carry on the business now being operated by Komtech and continue the employment of most of the 150 unionized and non-unionized employees of Komtech.

Evaluation of the APA and Bid Process

8 I have reviewed the asset realization value estimate of Komtech's assets, the analysis prepared by the Trustee as well as an independent manufacturing equipment evaluation dated April 8, 2011. This estimate of liquidation value strongly supports the recommendation of the Trustee that Komtech be authorized to execute the APA as it represents consideration materially in excess of the liquidation value likely obtainable on a forced sale of assets.

9 I am satisfied on the material filed that Komtech has made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business. I am further satisfied that Komtech has cooperated with the Trustee to identify and engage prospective purchasers of the company and its assets.

10 In the event this motion is granted, the Trustee has undertaken to conduct further marketing in the hope of obtaining higher bids from prospective purchasers above that contained in the APA. That potential may increase consideration and payment to secured and unsecured creditors.

11 It is my understanding that 2279591, as purchaser in the APA, is not a related party to Komtech.

12 The position of Komtech's secured and unsecured creditors will not improve if this motion is dismissed given the past

unsuccessful attempts to sell the business and the estimate of the realizable value of the company's assets. The use of the Stalking Horse APA in the marketing and Bid Process represents the only remaining potential recovery for creditors beyond BDB and HSBC.

13 The Trustee in his reports has satisfied the requirements under s. 65.13(4). Alternative sources of financing were sought and are unavailable. A process was undertaken to identify and seek interest from potential purchasers under the direction of the Proposal Trustee. Negotiations took place with the knowledge of BDB and HSBC which led to the presentation for approval of the APA.

14 Involvement by the BDB since April 20, 2011 has increased the level of consideration payable under the APA by $100,000.

15 The APA represents continued employment to a large majority of the existing employees of Komtech. The APA represents a lower level of financial disruption to the existing customer base and suppliers of Komtech.

16 Given the realization value estimate, it appears that the consideration to be paid under the APA is reasonable and fair considering the book value, the market value and the estimate of liquidation value of such assets.

17 It is contemplated that a motion seeking a vesting order will be brought in the next several weeks. The Trustee has undertaken to provide all secured creditors and a representative group of the largest unsecured creditors with notice of that motion. That motion will provide creditors with an opportunity to express concerns regarding this initial approval of the APA, the auction bid process and amounts.

18 There is also value to suppliers and the greater community if this business is continued by a purchaser under the APA or the Bid Process.

19 Subject to the issue stated below, the moving party has satisfied me as to the requisite elements under s. 65.13 of the *BIA*.

Remaining Issue

20 On the facts in this case, it is unlikely that Komtech will be able to present a Proposal for approval by its creditors. The issue is whether court approval of the sale of assets is available under s. 65.13 of the *BIA* when the debtor is unable to present a Proposal to its creditors.

21 Parliament enacted s. 65.13 of the *BIA* at the same time as enacting s. 36 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Both amendments were enacted in 2005.

22 The wording of s. 65.13 under the *BIA* and s. 36 under the *CCAA*, are remarkably similar.

23 Section 65.13(1) of the *BIA* prohibits the sale and disposition of assets outside the ordinary course of business in respect of an insolvent person which has filed an NOI under s. 50.4, unless authorized by the court to do so.

24 *Hypnotic Clubs Inc., Re* (2010), 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) involved an NOI by the debtor under the *BIA* and a motion for approval of a sale of assets to a related third party under s. 65.13. The trustee was this Proposal Trustee. The Court refused to approve that asset purchase agreement as it was not satisfied that good faith efforts had been made to sell the debtor's assets to unrelated parties. In coming to that conclusion, the court at paras. 36 and 37 states:

> **36** Given these circumstances, and taking into account the underlying policy of the *BIA* of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.

37 It is obvious that a deemed assignment into bankruptcy by s. 50.1(8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

25 Under s. 65.13, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not expressed as limited to cases where the debtor is capable of presenting a Proposal to its creditors. The ability to present a Proposal is not one of the listed factors to be considered on a motion under s. 65.13(4). Parliament could have, but did not include language in s. 65.13 requiring the presentation of or the ability to present a Proposal and the vote thereon by creditors, as a condition to the exercise of the court's jurisdiction to authorize a sale of assets.

26 A comparable issue under the *CCAA* with wording remarkably similar to s. 65.13 of the *BIA* has concluded that the court has jurisdiction to authorize the sale of business assets absent a formal plan of compromising arrangement under s. 36 of the *CCAA*.

27 Section 36 of the *CCAA* reads as follows:

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

28 In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), the court found jurisdiction under the *CCAA* absent a plan of an arrangement which was described as "skeletal in nature". That court held that an important consideration, in addition to whether the business continues under the debtor stewardship or under a new equity structure, is whether the business can be continued as a going concern in the form of a sale by the debtor.

29 Following the amendments creating s. 36 of the *CCAA*, the Court in *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), determined that s. 36 of the *CCAA* expressly permits the sale of substantially all of the debtor's assets even in the absence of the presentation and vote upon a plan of arrangement.

30 Section 65.13 of the *BIA* and s. 36 of the *CCAA* were introduced in 2005 in "An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts" (Bill C-55).

31 There were two Senate Committee meetings. At one of those, the Honourable Jerry Pickard, Parliamentary Secretary to the Minister of Industry, stated:

It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as the Minister of Labour has pointed out. ...

Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to

> create greater fairness and efficiency.
>
> To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.
>
> (Emphasis added)

32 The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees.

33 Although different legislation, the similarity of language of s. 65.13 of the *BIA* and s. 36 of the *CCAA*, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding: (a) the filing of an NOI, or (b) an order under the *CCAA*, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors, is not a condition to this Court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the *BIA*.

Interim Charges

34 The Stalking Horse Bidders Charge as security for the breakup fee and expense reimbursement under the APA, the Director's and Officer's charge to indemnify against statutory liability and the administration charge related to the fees of the Proposal Trustee and the debtor as presented, are authorized under s. 64.1 and s. 64.2 of the *BIA*. They are appropriate priorities and charges in this case subject to ss. 14.06(7); 81.4(4); and 81.6(2) of the *BIA*.

35 For the above reasons, the relief sought in this motion is granted.

Motion granted.

TAB 4

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

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

Debtors and creditors

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

Headnote

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

Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

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

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

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

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

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

Table of Authorities

Cases considered:

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

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable.

After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In

my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the

922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

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

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

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

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

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

McKinlay J.A. **:**

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

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

Galligan J.A.

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

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

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

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

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

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

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

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

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

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

> evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

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

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the

letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

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

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

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

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

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

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

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

the offeror.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TECHNI-LITE SYSTEMS INC.

Court File No. 31-2215824

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at **TORONTO**

BRIEF OF AUTHORITIES
(RETURNABLE APRIL 7, 2017)

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