Court File No. CV-16-11359-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

BRIO FINANCE HOLDINGS B.V.

Applicant

and

CARPATHIAN GOLD INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

BOOK OF AUTHORITIES THE RECEIVER
(Re Approval and Vesting Order and Discharge Order)
(Returnable April 29, 2016)

Dated: April 26, 2016

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon LSUC#: 35638M
Tel: (416) 869-5623
Email: lpillon@stikeman.com

C. Haddon Murray LSUC#: 61640P
Tel: (416) 869-5239
Email: hmurray@stikeman.com
Fax: (416) 947-0866

Lawyers for the Receiver

6553508 v1

INDEX

INDEX

TAB

TAB 1

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

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

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

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

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

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

Held, the appeal should be dismissed.

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

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

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

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

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

Statutes referred to

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

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

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

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

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

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

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

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

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

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

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

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

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

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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

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

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

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

2. It should consider the interests of all parties.

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

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

I intend to discuss the performance of those duties separately.

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

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

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

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

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

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

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

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

(Emphasis added)

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

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

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

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

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

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

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

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

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

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

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

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

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

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

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

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

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

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

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

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

(Emphasis added)

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

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

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

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

4. Was there unfairness in the process?

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

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

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

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

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

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

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

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

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

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

The second is at p. 111 O.R., p. 550 D.L.R.:

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

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

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

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

I agree.

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

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

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

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

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

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

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

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

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

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

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

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

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

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

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

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

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

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

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

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

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

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

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

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

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

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

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

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

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

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

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

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

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

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

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

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

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

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

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

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

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

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

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

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

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

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

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

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

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

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

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

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

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

TAB 2

Court File No. CV-09-8240-00CL
Date: 20090730

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

Applicants

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

Jay Swartz for RSM Richter

Linda Galessiere for the Landlords

Maria Konyukhova for Everest Holdings

Alexander Cobb for Bank of America

Heard: July 22, 2009

C. CAMPBELL J.:

REASONS FOR DECISION

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

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

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

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

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

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

[7] The joint hearing conducted on June 29, 2009 before the U.S. Court and this Court approved a Stalking Horse process and certain prescribed bidding procedures. Rainer Holdings LLC, an affiliate of CCMP Capital Advisors and indirectly of the buyer, became the Stalking Horse bidder.

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

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

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

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

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

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

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

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

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

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

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

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

1. It should consider the interests of all parties.

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

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

[20] Galligan J.A. for the majority in the Court of Appeal in Ontario in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at p. 8 further accepted and adopted the further statement of Anderson J. in *Crown Trust* at p. 551 that "its decision was made as a matter of business judgement on the elements then available to it. It is the very essence of a receiver's function to make such judgments and in the making of them, to act seriously and responsibly, so as to be prepared to stand behind them."

[21] What have come to be known as the *Soundair* principles have been accepted in a number of Ontario cases, including *Bakemates International Inc. v. Mormac Holdings* 2004 CanLII 59994 (ON. C.A.) The same principles have been accepted to approval of Asset Purchase Agreements and Vesting Orders. See *Ivaco Inc. (Re)* 2004 CanLII 21547 (ON. S.C.) In *Tiger Brand Knitting Co. (Re)* 2005 CanLII 9680 (ON. SC), I declined to extend the time for a bid and directed the Monitor not to accept a bid it had received and to negotiate with another party.

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

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

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

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

C. CAMPBELL J.

Released:

Court File No. CV-09-8240-00CL
Date: 20090730

SUPERIOR COURT OF JUSTICE

ONTARIO

(Commercial List)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: July 30, 2009

TAB 3

CITATION: Nelson Education Limited (Re), 2015 ONSC 5557
COURT FILE NO.: CV15-10961-00CL
DATE: 20150908

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' LENDERS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett, Jessica Kimmel and Caroline Descours*, for the Applicants

Robert W. Staley, Kevin J. Zych and Sean Zweig, for the First Lien Agent and the First Lien Steering Committee

John L. Finnigan, D.J. Miller and Kyla E.M. Mahar, for Royal Bank of Canada

Orestes Pasparaskis, for the Monitor

HEARD: August 13 and 27, 2015

ENDORSEMENT

[1] The applicants Nelson Education Ltd. ("Nelson") and Nelson Education Holdings Ltd. sought and obtained protection under the CCAA on May 12, 2015. They now apply for approval of the sale of substantially all of the assets and business of Nelson to a newly incorporated entity to be owned indirectly by Nelson's first ranked secured lenders (the "first lien lenders") pursuant to a credit bid made by the first lien agent. Nelson also seeks ancillary orders relating to the sale.

The effect of the credit bid, if approved, is that the second lien lenders will receive nothing for their outstanding loans.

[2] RBC is one of 22 first lien lenders, a second lien lender and agent for the second lien lenders. At the time of its motion to replace the Monitor, RBC did not accept that the proposed sale should be approved. RBC now takes no position on the sale approval motion other than to oppose certain ancillary relief sought by the applicants. RBC also has moved for an order that certain amounts said to be owing to it and their portion of a consent fee should be paid by Nelson prior to the completion of the sale. The applicants and the first lien lenders oppose the relief sought by RBC.

Nelson business

[3] Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

[4] The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

[5] The maturity date under the first lien credit agreement was July 3, 2014 and the maturity date under the second lien credit agreement was July 3, 2015. Nelson has not paid the principal balances owing under either loan. It paid interest on the first lien credit up to the filing of this CCAA application. It has paid no interest on the second lien credit since April 2014. As of the filing date, Nelson was indebted in the aggregate principal amounts of approximately US$269 million, plus accrued interest, costs and fees, under the first lien credit agreement and

approximately US$153 million, plus accrued interest, costs and fees, under the second lien credit agreement.

[6] Because these loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans. Nelson generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances of the first and second lien loans are $352,873,910 and $201,176,237.

[7] According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. Notwithstanding the industry decline over the past few years, Nelson has maintained strong EBITDA over each of the last several years.

Discussions leading to the sale to the first lien lenders

[8] In March 2013, Nelson engaged Alvarez & Marsal Canada Securities ULC ("A&M"), the Canadian corporate finance arm of Alvarez & Marsal to assist it in reviewing and considering potential strategic alternatives. RBC, the second lien agent also engaged a financial advisor in March 2013 and the first lien steering committee engaged a financial advisor in June 2013. RBC held approximately 85% of the second lien debt.

[9] Commencing in April 2013, Nelson and its advisors entered into discussions with stakeholders including the RBC as second lien agent, the first lien steering committee and their advisors. Nelson sought to achieve as its primary objective a consensual transaction that would be supported by all of the first lien lenders and second lien lenders. These discussions took place until September 2014. No agreement with the first lien lenders and second lien lenders was reached.

[10] In April 2014, Nelson and the second lien lenders agreed to two extensions of the cure period under the second lien credit agreement in respect of the second lien interest payment due on March 31, 2014, to May 30, 2014. In connection with these extensions, Nelson made a partial payment of US$350,000 in respect of the March interest payment and paid certain professional fees of the second lien lenders. Nelson requested a further extension of the second lien cure period beyond May 30, 2014, but the second lien lenders did not agree. Thereafter, Nelson defaulted under the second lien credit agreement and failed to make further interest payments to the second lien lenders.

[11] The first lien credit agreement matured on July 3, 2014. On July 7, 2014, Nelson proposed an amendment and extension of that agreement and solicited consent from its first lien lenders. RBC, as one of the first lien lenders was prepared to consent to the Nelson proposal, being a consent and support agreement, but no agreement was reached with the other first lien lenders and it did not proceed.

[12] In September, 2014, Nelson proposed in a term sheet to the first lien lenders a transaction framework for a sale or restructuring of the business on the terms set out in a term sheet dated September 10, 2014 and sought their support. In connection with the first lien term sheet, Nelson entered into a first lien support agreement with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprised 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

[13] The first lien term sheet provided that Nelson would conduct a comprehensive and open sale or investment sales process (SISP) to attempt to identify one or more potential purchasers of, or investors in, the Nelson business on terms that would provide for net sale or investment proceeds sufficient to pay in full all obligations under the first lien credit agreement or that was otherwise acceptable to first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. If such a superior offer was not identified pursuant to the

SISP, the first lien lenders would become the purchaser and purchase substantially all of the assets of Nelson in exchange for the conversion by all of the first lien lenders of all of the debt owing to them under the first lien credit agreement into a new first lien term facility and for common shares of the purchaser.

[14] In September 2014, the company engaged A&M to assist with the SISP. By that time, A&M had been advising the Company for over 17 months and had gained an understanding of the Nelson Business and the educational publishing industry. The SISP was structured as a two-phase process.

[15] Phase 1 involved (i) contacting 168 potential purchasers, including both financial and strategic parties located in Canada, the United States and Europe, and 11 potential lenders to ascertain their potential interest in a transaction, (ii) initial due diligence and (iii) receipt by Nelson of non-binding letters of interest ("LOIs"). The SISP provided that interested parties could propose a purchase of the whole or parts of the business or an investment in Nelson.

[16] Seven potential purchasers submitted LOIs under phase 1, six of which were offers to purchase substantially all of the Nelson business and one of which was an offer to acquire only the K-12 business. Nelson reviewed the LOIs with the assistance of its advisors, and following consultation with the first lien steering committee and its advisors, invited five of the parties that submitted LOIs to phase 2 of the SISP. Phase 2 of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

[17] Three participants submitted non-binding offers by the deadline of December 19, 2014, two of which were for the purchase of substantially all of the Nelson business and one of which was for the acquisition of the K-12 business. All three offers remained subject to further due diligence and reflected values that were significantly below the value of the obligations under the first lien credit agreement.

[18] On December 19, 2014, one of the participants advised A&M that it required additional time to complete and submit its offer, which additional time was granted. An offer was subsequently submitted but not ultimately advanced by the bidder.

[19] Nelson, with the assistance of its advisors, maintained communications throughout its restructuring efforts with Cengage Learnings, the company that has the U.S. business that was sold by Thomson and which is a key business partner of Nelson. Cengage submitted an expression of interest for the higher education business that, even in combination with the offer received for the K-12 business, was substantially lower than the amount of the first lien debt. In February 2015, Cengage and Nelson terminated discussions about a potential sale transaction.

[20] Ultimately, phase 2 of the SISP did not result in a transaction that would generate proceeds sufficient to repay the obligations under the first lien credit agreement in full or would otherwise be supported by the first lien lenders. Accordingly, with the assistance of A&M and its legal advisors, and in consultation with the first lien steering committee, Nelson determined that it should proceed with the sale transaction pursuant to the first lien support agreement.

Sale transaction

[21] The sale transaction is an asset purchase. It will enable the Nelson business to continue as a going concern. It includes:

(a) the transfer of substantially all of Nelson's assets to a newly incorporated entity to be owned indirectly by the first lien lenders;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet, excluding some obligations including the obligations under the second lien credit agreement and an intercompany promissory note of approximately $102.3 million owing by Nelson to Nelson Education Holdings Ltd.;

(c) an offer of employment by the purchaser to all of Nelson's employees; and

(d) a release by the first lien lenders of all of the indebtedness owing under the first lien credit agreement in exchange for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

[22] The relief sought by the applicants apart from the approval of the sale transaction involves ancillary relief, including authorizing the distribution from Nelson's cash on hand to the first lien lenders of outstanding fees and interest, effecting mutual releases of parties associated with the sale transaction, and deeming a shareholders' rights agreement to bind all shareholders of the purchaser. This ancillary relief is opposed by RBC.

Analysis

(i) Sale approval

[23] RBC says it takes no position on the sale, although it opposes some of the terms and seeks an order paying the second lien lenders their pre-filing interest and expense claims. Whether RBC is entitled to raise the issues that it has requires a consideration of the intercreditor agreement of July 5, 2007 made between the agents for the first lien lenders and the second lien lenders.

[24] Section 6.1(a) of the intercreditor agreement provides that the second lien lenders shall not object to or oppose a sale and of the collateral and shall be deemed to have consented to it if the first lien claimholders have consented to it. It provides:

> The Second Lien Collateral Agent on behalf of the Second Lien Claimholders agrees that <u>it will raise no objection or oppose a sale</u> or other disposition of any Collateral <u>free and clear of its Liens</u> and other claims under Section 363 of the

> Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) if the First Lien Claimholders have consented to such sale or disposition of such assets and the Second Lien Collateral Agent and each other Second Lien Claimholder will be deemed to have consented under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) to any sale supported by the First Lien Claimholders and to have released their Liens in such assets. (underlining added)

[25] Section 6.11 of the intercreditor agreement contained a similar provision. RBC raises the point that for these two sections to be applicable, the first lien claimholders must have consented to the sale, and that the definition of first lien claimholders means that all of the first lien lenders must have consented to the sale. In this case, only 88% of the first lien lenders consented to the sale, the lone holdout being RBC. The definition in the intercreditor agreement of first lien claimholder is as follows:

> "**First Lien Claimholders**" means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Collateral Agent, the First Lien Lenders, any other "Secured Party" (as defined in the First Lien Credit Agreement) and the agents under the First Lien Loan Documents.

[26] The intercreditor agreement is governed by the New York law and is to be construed and enforced in accordance with that law. The first lien agent filed an opinion of Allan L. Gropper, a former bankruptcy judge in the Southern District of New York and undoubtedly highly qualified to express proper expert opinions regarding the matters in issue. Mr. Gropper did not, however, discuss the principles of interpretation of a commercial contract under New York law, and in the absence of such evidence, I am to take the law of New York so far as contract interpretation is concerned as the same as our law. In any event, New York law regarding the interpretation of a contract would appear to be the same as our law. See *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir. 1992) and *Rainbow v. Swisher*, 72 N.Y. 2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (1988).

Mr. Gropper did opine that the sections in question are valid and enforceable in accordance with their terms.[1]

[27] The intercreditor agreement, like a lot of complex commercial contracts, appears to have a hodgepodge of terms piled on, or added to, one another, with many definitions and exceptions to exceptions. That is what too often appears to happen when too many lawyers are involved in stirring the broth. It is clear that there are many definitions, including a reference to First Lien Lenders, which is defined to be the Lenders as defined in the First Lien Loan Documents, which is itself a defined term, meaning the First Lien Credit Agreement and the Loan Documents. The provisions of the first lien credit agreement make clear that the Lenders include all those who have lent under that agreement, including obviously RBC.

[28] Under section 8.02(d) of the first lien credit agreement, more than 50% of the first lien lenders (the "Required Lenders") may direct the first lien agent to exercise on behalf of the first lien lenders all rights and remedies available to. In this case 88% of the first lien lenders, being all except RBC, directed the first lien agent to credit bid all of the first lien debt. This credit bid was thus made on behalf of all of the first lien lenders, including RBC.

[29] While the definition of First Lien Claimholders is expansive and refers to both the First Lien Collateral Agent (the first lien agent) and the First Lien Lenders, suggesting a distinction between the two, once the Required Lenders have caused a credit bid to be made by the First Lien Collateral Agent, RBC in my view is taken to have supported the sale that is contemplated by the credit bid.

[1] I do not think that Mr. Gropper's views on what particular sections of the agreement meant is the proper subject of expert opinion on foreign law. Such an expert should confine his evidence to a statement of what the law is and how it applies generally and not express his opinion on the very facts in issue before the court. See my comments in *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171 para. 103.

[30] It follows that RBC is deemed under section 6.11 of the intercreditor agreement to have consented to the sale supported by the first lien claimholders. It is nevertheless required that I determine whether the sale and its terms should be approved. It is also important to note that no sale agreement has been signed and it awaits an order approving the form of Asset Purchase Agreement submitted by Nelson in its motion materials.

[31] This is an unusual CCAA case. It involves the acquisition of the Nelson business by its senior secured creditors under a credit bid made after a SISP conducted before any CCAA process and without any prior court approval of the SISP terms. The result of the credit bid in this case will be the continuation of the Nelson business in the hands of the first lien lenders, a business that is generating a substantial EBITDA each year and which has been paying its unsecured creditors in the normal course, but with the extinguishment of the US $153 million plus interest owed to the second lien lenders.

[32] Liquidating CCAA proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court with its views on the process that was carried out[2]. None of this has occurred in this case. One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair*[3] principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.

[33] I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements, for the reasons that follow.

---

[2] See *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 at paras. 35-40 and *Re Brainhunter Inc.* [2009] O.J. No. 5207 at paras. 12-13.

[3] *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

[34] Alvarez & Marsal Canada Inc. was named the Monitor in the Initial Order over the objections of RBC, but shortly afterwards on the come-back motion by RBC, was replaced as Monitor by FTI Consulting Inc. The reasons for this change are contained in my endorsement of June 2, 2015. There was no suggestion of a lack of integrity or competence on the part of A&M or Alvarez & Marsal Canada Inc. In brief, the reason was that A&M had been retained by Nelson in 2013 as a financial advisor in connection with its debt situation, and in September 2014 had been retained to undertake the SISP process that has led to the sale transaction to the first lien lenders. I did not consider it right to put Alvarez & Marsal Canada Inc. in the position of providing independent advice to the Court on the SISP process that its affiliate had conducted, and that it would be fairer to all concerned that a different Monitor be appointed in light of the fact that the validity of the SISP process was going to be front and centre in the application of Nelson to have the sale agreement to the first lien lenders approved. Accordingly FTI was appointed to be the Monitor.

[35] FTI did a thorough review of all relevant facts, including interviewing a large number of people involved. In its report to the Court the Monitor expressed the following views:

(a) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;

(b) The SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;

(c) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;

(d) The selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;

(e) Both key senior management and A&M were incentivised to achieve the best value available and there was no impediment to doing so;

(f) The SISP was undertaken in a thorough and professional manner;

(g) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement

(h) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the first lien debt.

[36] The Monitor expressed the further view that:

(a) There is no realistic prospect that Nelson could obtain a new source of financing sufficient to repay the first lien debt;

(b) An alternative debt restructuring that might create value for the second lien lenders is not a viable alternative at this time;

(c) There is no reasonable prospect of a new sale process generating a transaction at a value in excess of the first lien debt;

(d) It does not appear that there are significant operational improvements reasonably available that would materially improve profitability in the short-term such that the value of the Nelson business would increase to the extent necessary to repay the first lien debt and, accordingly, there is no apparent benefit from delaying the sale of the business.

[37] *Soundair* established factors to be considered in an application to approve a sale in a receivership. These factors have widely been considered in such applications in a CCAA proceeding. They are:

> (a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;
>
> (b) whether the interests of all parties have been considered;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[38] These factors are now largely mirrored in section 36(3) of the CCAA that requires a court to consider a number of factors, among other things, in deciding to authorize a sale of a debtor's assets. It is necessary to deal briefly with them.

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances. In this case, despite the fact that there was no prior court approval to the SISP, I accept the Monitor's view that the process was reasonable.

(b) Whether the monitor approved the process leading to the proposed sale or disposition. In this case there was no monitor at the time of the SISP. This factor is thus not strictly applicable as it assumes a sale process undertaken in a CCAA proceeding. However, the report of FTI blessing the SISP that took place is an important factor to consider.

(c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. The Monitor did not make such a statement in its report. However, there is no reason to think that a sale or disposition under a bankruptcy would be more beneficial to the creditors. The creditors negatively affected could not expect to fare better in a bankruptcy.

(d) The extent to which the creditors were consulted. The first lien steering committee was obviously consulted. Before the SISP, RBC, the second lien lenders' agent, was consulted and actively participated in the reconstruction discussions. I take it from the evidence that RBC did not actively participate in the SISP, a decision of its choosing, but was provided some updates.

(e) The effects of the proposed sale or disposition on the creditors and other interested parties. The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear that the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time line as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders.

There are some excluded liabilities and a small amount owing to former terminated employees that will not be paid. As to these the Monitor points out that there is no reasonable prospect of any alternative solution that would provide a recovery for those creditors, all of whom rank subordinate to the first lien lenders.

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The Monitor is of the view that the results of the SISP indicate that the consideration is fair and reasonable in the circumstances and that the SISP can, and should, be relied on for the purposes of such a determination. There is no evidence to the contrary and I accept the view of the Monitor.

[39] In the circumstances, taking into account the *Soundair* factors and the matters to be considered in section 36(3) of the CCAA, I am satisfied that the sale transaction should be approved. Whether the ancillary relief should be granted is a separate issue, to which I now turn.

(ii) Ancillary claimed relief

(a) Vesting order

[40] The applicants seek a vesting order vesting all of Nelson's right, title and interest in and to the purchased assets in the purchaser, free and clear of all interests, liens, charges and encumbrances, other than the permitted encumbrances and assumed liabilities contemplated in the Asset Purchase Agreement. It is normal relief given in an asset sale under the CCAA and it is appropriate in this case.

(b) Payment of amounts to first lien lenders

[41] As a condition to the completion of the transaction, Nelson is to pay all accrued and unpaid interest owing to the first lien lenders and all unpaid professional fees of the first lien agent and the first lien lenders outstanding under the first lien credit agreement. RBC does not oppose this relief.

[42] If the cash is not paid out before the closing, it will be an asset of the purchaser as all cash on hand is being acquired by the purchaser. Thus the first lien lenders will have the cash. However, because the applicant is requesting a court ordered release by the first lien lenders of all obligations under the first lien credit agreement, the unpaid professional fees of the first lien

agent and the first lien lenders that are outstanding under the first lien credit agreement would no longer be payable after the closing of the transaction. Presumably this is the reason for the payment of these prior to the closing.

[43] These amounts are owed under the provisions of the first lien credit agreement and have priority over the interests of the second lien lenders under the intercreditor agreement. However, on June 2, 2015 it was ordered that pending further order, Nelson was prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders. Nelson then chose not to make any payments to the first lien lenders. It is in effect now asking for an order nunc pro tunc permitting the payments to be made. I have some reluctance to make such an order, but in light of no opposition to it and that fact that it is clear from the report of the Monitor that there is no value in the collateral for the second lien lenders, the payment is approved.

(c) Releases

[44] The applicants request an order that would include a broad release of the parties to the Asset Purchase Agreement as well as well as other persons including the first lien lenders.

[45] The Asset Purchase Agreement has not been executed. In accordance with the draft approval and vesting order sought by the applicants, it is to be entered into upon the entry of the approval and vesting order. The release contained in the draft Asset Purchase Agreement in section 5.12 provides that the parties release each other from claims in connection with Nelson, the Nelson business, the Asset Purchase Agreement, the transaction, these proceedings, the first lien support agreement, the supplemental support agreement, the payment and settlement agreement, the first lien credit agreement and the other loan documents or the transactions contemplated by them. Released parties are not released from their other obligations or from claims of fraud. The release also does not deal with the second lien credit agreement or the second lien lenders.

[46] The first lien term sheet made a part of the support agreement contained terms and conditions, but it stated that they would not be effective until definitive agreements were made by the applicable parties and until they became effective. One of the terms was that there would be a release "usual and customary for transactions of this nature", including a release by the first lien lenders in connection with "all matters related to the Existing First Lien Credit Agreement, the other Loan Documents and the transactions contemplated herein". RBC was not a party to the support agreement or the first lien term sheet.

[47] The release in the Asset Purchase Agreement at section 5.12 provides that "each of the Parties on behalf of itself and its Affiliates does hereby forever release…". "Affiliates" is defined to include "any other Person that directly or indirectly…controls…such Person". The party that is the purchaser is a New Brunswick numbered company that will be owned indirectly by the first lien lenders. What instructions will or have been given by the first lien lenders to the numbered company to sign the Asset Purchase Agreement are not in the record, but I will assume that the First Lien Agent has or will authorize it and that RBC as a first lien lenders has not and will not authorize it.

[48] Releases are a feature of approved plans of compromise and arrangement under the CCAA. The conditions for such a release have been laid down in *ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 43 and 70. Third party releases are authorized under the CCAA if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. In *Metcalfe*, Blair J.A. found compelling that the claims to be released were rationally related to the purpose of the plan and necessary for it and that the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan[4].

[4] This case does not involve a plan under the CCAA. One of the reasons for this may be that pursuant to section 6.9(b) of the intercreditor agreement, in the event the applicants commence any restructuring proceeding in Canada and put forward a plan, the applicants, the first lien lenders and the second lien lenders agreed that the first lien

[49] While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered.

[50] The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release. RBC as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release.

In the circumstances, I decline to approve the release by the first lien lenders requested by the applicants to be included in the approval and vesting order.

(d) Stockholders and Registration Rights Agreement

---

lenders and the second lien lenders should be classified together in one class. The second lien lenders agreed that they would only vote in favour of a plan if it satisfied one of two conditions, there was no contractual restriction on their ability to vote against a plan.

[51] The applicants seek to have a Stockholders and Registration Rights Agreement declared effective and binding on all persons entitled to receive common shares of Purchaser Holdco in connection with the transaction as though such persons were signatories to the Stockholders and Registration Rights Agreement.

[52] The Stockholders and Registration Rights Agreement is a contract among the purchaser's parent company, Purchaser Holdco, and the holders of Purchaser Holdco's common shares. After implementation of the transaction, the first lien lenders will be the holders of 100% of the shares of Purchaser Holdco. The Stockholders and Registration Rights Agreement was negotiated and agreed to by Purchaser Holdco and the First Lien Steering Committee (all first lien lenders except RBC). The First Lien Steering Committee would like RBC to be bound by the agreement. The evidence of this is in the affidavit of Mr. Nordal, the President and CEO of Nelson, who says that based on discussions with Mr. Chadwick, the First Lien Steering Committee requires that all of the first lien lenders to be bound to the terms of the Stockholders and Registration Rights Agreement. This is of course double hearsay as Mr. Chadwick acts for Nelson and not the First Lien Steering Committee.

The effect of what is being requested is that RBC as a shareholder of Purchaser Holdco would be bound to some shareholder agreement amongst the shareholders of Purchaser Holdco. While the remaining 88% of the shareholders of Purchaser Holdco might want to bind RBC, I see nothing in the record that would justify such a confiscation of such shareholder rights. I agree with RBC that extending the Court's jurisdiction in these CCAA proceedings and exercising it to assist the purchaser's parent company with its corporate governance is not appropriate. The purchaser and its parent company either have the contractual right to bind all first lien lenders to terms as future shareholders, or they do not.

RBC Motion

(a) Second lenders' pre-filing interest and second lien agent's fees

[53] RBC seeks an order that directing Nelson to pay to RBC in its capacity as the second lien agent the second lien interest outstanding at the filing date of CDN$1,316,181.73 and the second lien fees incurred prior to the filing date of US$15,365,998.83.

[54] Mr. Zarnett in argument conceded that these amounts are owed under the second lien credit agreement. There are further issues, however, being (i) whether they continue to be owed due to the intercreditor agreement (ii) whether RBC is entitled under the intercreditor agreement to request the payment and (iii) whether RBC is entitled to be paid these under the intercreditor agreement before the first lien lenders are paid in full.

[55] There is a distinction between a lien subordination agreement and a payment subordination agreement. Lien subordination is limited to dealings with the collateral over which both groups of lenders hold security. It gives the senior lender a head start with respect to any enforcement actions in respect of the collateral and ensures a priority waterfall from the proceeds of enforcement over collateral. It entitles second lien lenders to receive and retain payments of interest, principal and other amounts in respect of a second lien obligation unless the receipt results from an enforcement step in respect of the collateral. By contrast, payment subordination means that subordinate lenders have also subordinated in favour of the senior lender their right to payment and have agreed to turn over all money received, whether or not derived from the proceeds of the common collateral[5]. The intercreditor agreement is a lien subordination agreement, as stated in section 8.2.

[56] Nelson and the first lien agent say that RBC has no right to ask the Court to order any payments to it from the cash on hand prior to the closing of the transaction. They rely on the language of section 3.1(a)(1) that provides that until the discharge of the first lien obligations, the second lien collateral agent will not exercise any rights or remedies with respect to any collateral,

[5] See 65 A.B.A. Bus Law. 809-883 (May 2010).

institute any action or proceeding with respect to such remedies including any enforcement step under the second lien documents. RBC says it is not asking to enforce its security rights but merely asking that it be paid what it is owed and is permitted to receive under the intercreditor agreement, which does not subordinate payments but only liens. It points to section 3.1(c) that provides that:

> (c) Notwithstanding the foregoing (i.e. section 3.1(a)(1)) the Second Lien Collateral Agent and any Second Lien Claimholder may (1)... and may take such other action as it deems in good faith to be necessary to protect its rights in an insolvency proceeding" and (4) may file any... motions... which assert rights... available to unsecured creditors...arising under any insolvency... proceeding.

[57] My view of the intercreditor agreement language and what has occurred is that RBC has not taken enforcement steps with respect to collateral. It has asked that payments owing to it under the second lien credit agreement up to the date of filing be paid.

[58] Payment of what the second lien lenders are entitled to under the second lien credit agreement is protected under the intercreditor agreement unless it is as the result of action taken by the second lien lenders to enforce their security. Section 3.1(f) of the intercreditor agreement provides as follows:

> (f) Except as set forth is section 3.1(a) and section 4 to the extent applicable, <u>nothing in this Agreement shall prohibit the receipt by the Second Lien Collateral Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed</u> in respect of the Second Lien Obligations or receipt of payments permitted under the First Lien Loan Documents, including without limitation, under section 7.09(a) of the First Lien Credit Agreement, <u>so long as such receipt is not the direct or indirect result of the exercise by the Second Lien Collateral Agent or any Second Lien Claimholders of rights or remedies as a secured creditor (including set off) or enforcement in contravention of this Agreement.</u> ... (underlining added).

[59] Section 3.1(a) prohibits the second lien lenders from exercising any rights or remedies with respect to the collateral before the first liens have been discharged. Section 4 requires any collateral or proceeds thereof received by the first lien collateral agent from a sale of collateral to

be first applied to the first lien obligations and requires any payments received by the second lien lenders from collateral in connection with the exercise of any right or remedy in contravention of the agreement must be paid over to the first lien collateral agent.

[60] It do not agree with the first lien collateral agent that payment to RBC before the sale closes of amounts owing pre-filing under the second lien credit agreement would be in contravention of section 4.1. That section deals with cash from collateral being received by the first lien collateral agent in connection with a sale of collateral, and provides that it shall be applied to the first lien obligations until those obligations have been discharged. In this case, the cash on hand before any closing will not be received by the first lien collateral agent at all. It will be received after the closing by the purchaser.

[61] The first lien collateral agent has made a credit bid on behalf of the first lien lenders. Pursuant to section 3.1(b), that credit bid is deemed to be an exercise of remedies with respect to the collateral held by the first lien lenders. Under the last paragraph of section 3.1(c), until the discharge of the first lien obligations has occurred, the sole right of the second lien collateral agent and the second lien claimholders with respect to the collateral is to hold a lien on the collateral pursuant to the second lien collateral documents and to receive a share of the proceeds thereof, if any, after the discharge of the first lien obligations has occurred. That provision is as follows:

> Without limiting the generality of the foregoing, unless and until the discharge of the First Lien Obligations has occurred, except as expressly provided in Sections 3.1(a), 6.3(b) and this Section 3.1(c), the sole right of the Second Lien Collateral Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien of the Collateral pursuant to the Second Lien Collateral Documents for the period and to the extend granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred.

[62] RBC points out that its rights under section 3.1(f) to receive payment of amounts owing to the second lien lenders is not subject to section 3.1(c) at all. It is not suggested by the first lien collateral agent that this is a drafting error, but it strikes me that it may be. The provision at the

end of section 3.1(c) is inconsistent with section 3.1(f) as section 3.1(c) is not an exception to section 3.1(f).

[63] Both the liens of the first lien lenders and the second lien lenders are over all of the assets of Nelson. Cash is one of those assets. Therefore if payment were now made to RBC from that cash, the cash would be paid to RBC from the collateral for amounts owing under the second lien credit agreement before the obligations to the first lien lenders were discharged. The obligations to the first lien lenders will be discharged when the sale to the purchaser takes place and the first lien obligations are cancelled.

[64] There is yet another provision of the intercreditor agreement that must be considered. It appears to say that if a judgment is obtained in favour of a second lien lender after exercising rights as an unsecured creditor, the judgment is to be considered a judgment lien subject to the intercreditor agreement for all purposes. Section 3.1(e) provides:

> (e) Except as otherwise specifically set forth in Sections 3.1(a) and (d), the Second Lien Collateral Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Company or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, **such judgment Lien** shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement. (Emphasis added).

[65] What exactly is meant by a "judgment Lien" is not stated in the intercreditor agreement and is not a defined term. If an order is made in this CCAA proceeding that the pre-filing obligations to the second lien collateral agent are to be paid from the cash on hand that Nelson holds, is that a "judgment Lien" meaning that it cannot be exercised before the first lien obligations are discharged? In this case, as the first lien obligations will be discharged as part of the closing of the transaction, does that mean that once the order is made approving the sale and

the transaction closes, the cash on hand will go to the purchaser and the judgment Lien will not be paid? It is not entirely clear. But the section gives some indication that a judgment held as a result of the second lien agent exercising rights as an unsecured creditor cannot be used to attach collateral contrary to the agreement if the first lien obligations have not been discharged.

[66] I have been referred to a number of cases in which statements have been made as to the need for the priority of secured creditors to be recognized in CCAA proceedings, particularly when distributions have been ordered. While in this case we are not dealing with a distribution generally to creditors, the principles are well known and undisputed. However, in considering the priorities between the first and second lien holders in this case, the intercreditor agreement is what must govern, even with all of its warts.

[67] In this case, the cash on hand held by Nelson is collateral, and subject to the rights of the first lien lenders in that collateral. An order made in favour of RBC as second lien agent would reduce that collateral. The overall tenor of the intercreditor agreement, including section 3.1(e), leads me to the conclusion that such an order in favour of RBC should not be made. I do say, however, that the issue is not at all free from doubt and that no credit should be given to those who drafted and settled the intercreditor agreement as it is far from a model of clarity. I decline to make the order sought by RBC.

[68] I should note that RBC has made a claim that that Nelson and the first lien lenders who signed the First Lien Support Agreement acted in bad faith and disregarded the interests of the second lien lenders under the intercreditor agreement. RBC claims that the first lien lenders induced Nelson to breach the second lien credit agreement and that this breach resulted in damages to the second lien agent in the amounts of US$15,365,998.83 on account of interest and CDN$1,316,181.73 on account of fees. RBC says that these wrongs should be taken into account in considering whether the credit bid should be accepted and that the powers under section 11 of the CCAA should be exercised to order these amounts to be paid to RBC as second lien agent.

[69] I decline to do so. No decision on this record could be possibly be made as to whether these wrongs took place. The claim for inducing breach of contract surfaced in the RBC factum filed just two days before the hearing and it would be unfair to Nelson or the first lien lenders to have to respond without the chance to fully contest these issues. Moreover, even the release sought by the applicants would not prevent RBC or any second lien lender from bringing an action for wrongs committed. RBC is able to pursue relief for these alleged wrongs in a separate action.

(b) Consent fee

[70] The first lien lenders who signed the First Lien Support Agreement were paid a consent fee. That agreement, and particularly the term sheet made a part of it, provided that those first lien lenders who signed the agreement would be paid a consent fee.

[71] RBC contends that because the consent fee was calculated for each first lien lender that signed the First Lien Support Agreement on the amount of the loans that any consenting first lien lenders held under the first lien credit agreement, the consent fee was paid on account of the loans and thus because all first lien lenders were to be paid equally on their loans on a pro rata basis, RBC is entitled to be paid its share of the consent fees.

[72] Section 2.14 of the first lien credit agreement provides in part, as follows:

> If, other than as expressly provided elsewhere herein, **any Lender shall obtain on account of the Loans made by it**, or the participations in L/C Obligations and Swing Line Loans held by it, **any payment** (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) **in excess of its ratable share** (or other share contemplated hereunder) thereof, such Lender shall immediately (a) notify the Administrative Agent of such fact, and (b) purchase from the other Lenders such participations in the Loans made by them and/or such subparticipations in the participations in L/C Obligations or Swing Line

> Loans held by them, as the case may be, as shall be necessary to cause such purchasing Lender to share the excess payment in respect of such Loans or such participations, as the case may be, pro rata with each of them . . . [emphasis added].

[73] RBC says that while the section refers to a first lien lender obtaining a payment "on account" of its loan, U.S. authorities under the U.S. Bankruptcy Code have held that the words "on account of" do not mean "in exchange for" but rather mean "because of." As the consent payments are calculated on the amount of the loan of any first lien lender who signed the term sheet, RBC says that they were made because of their loan and thus RBC is entitled to its share of the consent fees that were paid by virtue of section 2.14 of the first lien credit agreement.

[74] I do not accept that argument. The consent fees were paid because the consenting first lien lenders signed the First Lien Support Agreement. The fact that their calculation depended on the amount of the loan made by each consenting first lien lender does not mean they were made because of the loan. RBC declined to sign the First Lien Support Agreement and is not entitled to a consent fee.

Conclusion

[75] An order is to go in accordance with these reasons. As there has been mixed success, there shall be no order as to costs.

Newbould J.

Date: September 8, 2015

TAB 4

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: MORAWETZ J.

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

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

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD & RELEASED: SEPTEMBER 29, 2008

ENDORSEMENT

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

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

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

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

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

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

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

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

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

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

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

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

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

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

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

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

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

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

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

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

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

MORAWETZ J.

DATE: October 24, 2008

TAB 5

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

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

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

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

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

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

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

Linda Galessiere, for Various Landlords

ENDORSEMENT

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

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. potential indemnity claims by the monitor.

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

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
>> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> ...
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
>> 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>>
>> ....
>>
>> 30. The submission that all claims that <u>could</u> have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> ...
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

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

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

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

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

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.,* 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

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

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

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

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

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

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

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

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

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

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

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

   (ii) potential indemnity claims by the Monitor.

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

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

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

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

Court File No. CV-16-11359-00CL

BRIO FINANCE HOLDINGS B.V. and **CARPATHIAN GOLD INC.**

Applicant | Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RECEIVER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon LSUC#: 35638M
Tel: (416) 869-5623
Email: lpillon@stikeman.com
C. Haddon Murray LSUC#: 61640P
Tel: (416) 869-5239
Email: hmurray@stikeman.com
Fax: (416) 947-0866

Lawyers for the Receiver