Court File No. S1 GS 28446

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

DME LIMITED PARTNERSHIP, DME GENERAL PARTNER INC., ATLANTIC SYSTEMS MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC. and DME US HOLDCO INC. as represented by Alvarez & Marsal Canada Inc. as Court-appointed Receiver

Respondents

FACTUM

PART I – FACTS

1. The facts are generally set out in the First Report of the Receiver dated January 18, 2019, (the "**First Report**") as well as the Supplemental First Report of the Receiver dated January 25, 2019 of Alvarez & Marsal Canada Inc. (the "**Receiver**") as Court-appointed receiver of all of the assets, undertakings and properties (the "**Property**") of each of DME Limited Partnership, DME General Partner Inc., Atlantic Systems Manufacturing (2016) Ltd., DME Canada Acquisitions Inc., and DME US Holdco Inc. (collectively "**DME Group**" or the "**Company**").

2. The following is an overview of some of the key facts for the purpose of this brief. Capitalized terms not defined herein have the meanings attributed to them in the First Report.

3. Pursuant to the motion of the Royal Bank of Canada (the "**Bank**"), the Supreme Court of Prince Edward Island (the "**Court**") granted the Receivership Order that, among other things, authorized and empowered the Receiver to:

   a. take possession and control of the Property;

   b. receive, preserve and protect the Property, or any parts thereof;

   c. apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; and

d. take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

4. After its appointment, the Receiver immediately began investigating the DME Group's estate and the options available to maximize the value of the estate for the benefit of all of the DME Group's stakeholders.

Overview of DME Group

5. The DME Group operates through three independent manufacturing facilities in Canada, being:

   a. the Charlottetown, Prince Edward Island operations ("**DME Charlottetown**");
   b. the Abbotsford, British Columbia operations (the "**Abbotsford Plant**"); and
   c. Atlantic Systems Manufacturing ("**ASM**"), a small subsidiary of the DME Group operating in Charlottetown, Prince Edward Island.

6. Both the ASM and the Abbotsford Plant are currently not operating.

Sales Process and Resulting Transactions

7. The Receiver identified a target list of credible prospective purchasers. The Receiver contacted each prospective purchaser and invited them to participate in the sale process. Additional inquiries were also received from interested parties as the receivership details became public.

8. The interested parties who had executed a confidentiality agreement were provided with access to a virtual data room containing relevant information including a Confidential Information Memorandum ("**CIM**") relating to the DME Group. The interested parties were then to submit a bid to the Receiver for the Property. Bids were to be received by the Receiver no later than 5:00 pm on January 7, 2019 or such other later date or time as may be agreed by the Receiver (the "**Bid Deadline**").

9. Prior to the Bid Deadline, the Receiver responded to inquiries in connection with the sales process from 111 parties.

10. On or before the Bid Deadline, the Receiver received 16 bids, comprised of the following

    a. 3 bids for the assets of the DME Charlottetown operations;
    b. 4 bids for the assets of ASM ("**Initial ASM Bids**"); and

c. 9 bids which included liquidation or similar proposals for the assets of either (i) the Abbotsford Plant on a stand-alone basis or (ii) all of the assets of the DME Group (collectively the "**Abbotsford and Other Liquidations Bids**"). Summaries of the Abbotsford and Other Liquidation Bids are found in the Confidential Appendices.

11. The Receiver, in consultation with the Royal Bank of Canada (the "**Bank**"), conducted a review process to determine which offers would maximize the net recovery of the estate of DME Group.

DME Charlottetown

12. The Receiver continued discussions with certain bidders and potential bidders during the period of January 8 to 10, 2019, and determined that one of the bids was superior to that of the other offers for the DME Charlottetown operations. That bidder is currently in the process of completing its final due diligence prior to negotiating the terms of an asset purchase agreement. The Receiver will update this Court on the progress of these negotiations as information becomes available.

ASM

13. In the First Report, the Receiver determined that a continuation of the sales process in relation to the Initial ASM Bids would be beneficial.

14. The Receiver resumed communications with each of those who entered an Initial ASM Bid and requested that each submitted their best and final bid in the form of an executed Asset Purchase Agreement no later than 1:00 p.m. (AST) on January 24, 2019 ("**ASM Bid Deadline**").

15. On or before the ASM Bid Deadline, the Receiver received final ASM bids from three of the four initial bidders. A summary of the bids are attached to the Supplemental First Report as Confidential Appendix "A".

16. The Receiver has determined that it has received an acceptable from Eastern Fabricators Inc. which is comprised of all of the assets of ASM with an expected closing date of February 1, 2019 ("**ASM Sale Agreement**"). Particulars of the ASM Sale Agreement are set out in the Confidential Supplemental First Report, and the ASM Sale Agreement is appended to the Supplemental First Report as Confidential Appendix B.

17. The only secured creditor with an economic interest in the Property included in the ASM Sale Agreement is the Bank. The Bank has accepted the Receiver's recommendation with respect to

the ASM Sale Agreement. The ASM Sale Agreement has been accepted, subject to obtaining the approval of this Honourable Court.

18. The Receiver believes it has conducted an appropriate market test for the Property and the ASM Sale Agreement represents an acceptable recovery of the ASM assets to the Respondents' receivership Estate. Further, the sale of the ASM assets will not impact the ongoing sales process as it relates to DME Charlottetown.

Abbotsford Plant

19. A summary of the Abbotsford and Other Liquidation Bids is found in the Confidential Appendices. The Receiver determined that it received an acceptable bid from Infinity Asset Solutions Inc. and Joiner Sales Corp. in the form of an Auction and Liquidation Services Agreement (the "**Abbotsford Sale Agreement**"). Particulars of the Abbotsford Sale Agreement are set out in the Confidential Appendices.

20. The only secured creditor with an economic interest in the Property included in the Abbotsford Sale Agreement is the Bank. The Bank has accepted the Receiver's recommendation with respect to the Abbotsford Sale Agreement. The Abbotsford Sale Agreement has been accepted, subject to obtaining the approval of this Honourable Court.

21. The Abbotsford Sale Agreement was superior to the other offers submitted for various reasons including but not limited to the ultimate sale proceeds being paid to the Receiver.

22. The Receiver believes it has conducted an appropriate market test for the Property and the Abbotsford Sale Agreement represents an acceptable recovery of the Abbotsford Plant to the Respondents' receivership Estate. Further, the sale of the Abbotsford Plant assets will not impact the ongoing sales process as it relates to DME Charlottetown.

PART II – ISSUES

23. It is respectfully submitted that the following issues must be determined:

(a) Abridgement - Should this Honourable Court grant an Order for the abridgement of time for service of this motion, excusing the lack of service of this motion or excusing the lack of service of the Moving Party's motion record as part of the relief in each of the Orders requested herein?

(b) Approval - Should this Honourable Court approve the Receiver's First Report and Supplemental First Report and approve the transactions contemplated by the ASM Sale Agreement and the Abbotsford Sale Agreement?

(c) Sealing - Should this Honourable Court grant an order sealing certain confidential information appended to the Receiver's First Report and Supplemental First Report?

PART III – LAW

Issue #1 -- Should this Honourable Court grant an Order for the abridgement of time for service of this motion, excusing the lack of service of this motion or excusing the lack of service of the Moving Party's motion record as part of the relief in each of the Orders requested herein?

24. This Court has the discretion to abridge the time for service of this motion, to excuse the lack of service of the motion, or to excuse the lack of service of the Receiver motion record:

> EFFECT OF NON-COMPLIANCE
>
> 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> COURT MAY DISPENSE WITH COMPLIANCE
>
> 2.03 The Court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time
>
> EXTENSION OR ABRIDGMENT
>
> General Powers of Court
>
> 3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
>
> (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.
>
> Rules 2 and 3 of the *Rules of Civil Procedure* [Tab 1]

25. The Court's discretion under Rules 2 and 3 to abridge the time for service, if necessary, is wide and permits the Court to dispense with strict adherence to any rule in appropriate circumstances.

> *Re Entegrity Wind Systems Inc.*, 2009 PEISC 25 (CANLII) [Tab 2]

26. It is submitted that no party has been prejudiced as a result of the notice period provided. Royal Bank of Canada supports the Receiver's request and it is in the interest of all parties to move expeditiously in this matter to preserve and maximize value.

Issue #2 – Should this Honourable Court approve the Receiver's First Report and Supplemental First Report and approve the transactions contemplated by the ASM Sale Agreement and the Abbotsford Sale Agreement?

27. The Receiver has acted honestly and in good faith in recommending the completion of the transaction contemplated by the ASM Sale Agreement and Abbotsford Sale Agreement (the **"Accepted Offers"**). The Receiver conducted various investigations and consultations and is of the opinion that the transactions are commercially reasonable and in the best interests of the DME Group's estate.

28. In *Re Soundair* (1991), 4 OR (3d) 1 (CA), [Tab 3] Galligan J.A. considered the duties of a receiver when selling property. Galligan J.A. stated at paragraphs 14 to 16:

> 14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.
>
> 15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.
>
> 16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.),

at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.
>
> [emphasis added]

29. *In Re Soundair, supra*, when considering the fourth duty, the fairness of the process, Galligan J.A. stated at paragraph 58:

> 58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg*, supra, which I adopt as my own. The first is at p. 109 [O.R.]:
>
> > The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
>
> The second is at p. 111 [O.R.]:
>
> > It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.
>
> In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.
>
> [emphasis added]

30. It is respectfully submitted that the sale of both the Abbotsford Plant and ASM as contemplated by the Accepted Offers should be approved for the following reasons:

a. The Receiver believes, and the parties with an economic interest agree, that the market has been sufficiently canvassed and all reasonable steps have been taken to obtain the best price possible, in the circumstances, for the assets located at the Abbotsford Plant and the assets of ASM;
b. The Accepted Offers are the highest and best offer received by the Receiver that complied with the terms of the Sales Process;
c. The Receiver was authorized by this Honourable Court to carry out a sales process in the manner that it believed would maximize value for the DME Group's estate;
d. The process leading to the Accepted Offers was conducted fairly. The interests of the economic stakeholders and the terms of the Sales Process were properly considered by the Receiver in determining to accept and seek approval of the Accepted Offers; and
e. The Bank, the Company's sole secured creditor with an economic interest in ASM and the Abbotsford Plant supports the approval of the Accepted Offers.

31. The Receiver is satisfied that the Accepted Offers are commercially reasonable because of the reasons set out in its First Report and the Supplemental First Report.

Issue #3 - Should this Honourable Court grant an order sealing certain confidential information contained in the Receiver's First Report and Supplemental First Report?

32. The First Report of the Receiver and Supplemental First Report contains commercially sensitive information including the Abbotsford and Other Liquidation Bids, the ASM Bids and the Accepted Offers. The disclosure of this commercially sensitive information or the identities of the other bidders and the terms of their bids could negatively affect any future sales process transactions if the Accepted Offers do not close for any reason. It is respectfully submitted that this information be treated on a sealed and confidential basis until the completion of the Receivership.

33. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, the Supreme Court of Canada articulated a two-part test that should be applied when considering whether to grant a confidentiality order. The Supreme Court stated at paragraph 53 that a confidentiality order should only be granted when:

a. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[See also *Dr. Ian Reid v Health P.E.I.* 2017 PECA 22 (Tab 4) and *Judicature Act* S. 62(2) (Tab 5)]

34. In the present case, a sealing of the information is appropriate for the following reasons:

a. it would be prejudicial to the interests of the DME Group's stakeholders if the information were available to future prospective purchasers of the DME Group's remaining Property;
b. there is no other reasonable alternative to preventing this information from becoming available upon review of this Honourable Court; and
c. The Receiver is not aware of any party that would be prejudiced if this information is sealed.

35. The salutary effects of maintaining the confidential nature of the information until the completion of the Receivership greatly outweighs the deleterious effects. It is respectfully requested that this Honourable Court grant the Sealing Order.

PART IV – RELIEF SOUGHT

32. The Moving Party seeks this Honourable Court to:

a. abridge the time for service and filing as applicable to the Motion Record herein;

b. approve the activities of the Receiver as per the First Report and Supplemental First Report;

c. authorize and approve the completion of the transactions contemplated by the Abbotsford Sale Agreement and the ASM Sale Agreement by the Receiver of the assets in accordance with the form of draft Order;

d. Order that the Confidential Appendices to the First Report and Supplemental First Report of the Receiver shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope until further order of this Court; and

e. such further and other relief as counsel may request and this Honourable Court may allow.

All of which is respectfully submitted this 25th day of January, 2019.

Pamela J. Williams, Q.C.
George Cooper, Q.C.
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Charlottetown, PE C1A 4A9
(902) 628-1033
Lawyers for Alvarez & Marsal Canada Inc., as Court Appointed Receiver and Receiver Manager of the Respondents

ROYAL BANK OF CANADA V. DME LIMITED PARTNERSHIP, DME GENERAL PARTNER INC., ATLANTIC SYSTEMS MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC. and DME US HOLDCO INC.

Court File No. S1 GS 28446

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)

Proceedings Commenced in
Charlottetown

AMENDED
MOTION RECORD

Pamela J. Williams, Q.C.
George Cooper, Q.C.
COX & PALMER
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Memorandum of Authorities

1. Rule 2 and Rule 3, Prince Edward Island Rules of Civil Procedure
2. *Re Entegrity Wind Systems Inc.*, 2009 PEISC 25 (CANLII)
3. *Re Soundair (1991), 4 OR (3d) 1 (CA)*
4. *Dr. Ian Reid v. Health PEI*, 2017 PECA 22
5. S. 62(2), *Judicature Act*

RULE 2

NON-COMPLIANCE WITH THE RULES

EFFECT OF NON-COMPLIANCE

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the grounds the proceeding should have been commenced by an originating process other than the one employed.

ATTACKING IRREGULARITY

2.02 A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made,

(a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,

except with leave of the court.

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Chaisson (c.o.b. Safe Haven Guest House) v. McKeil (1996), 147 Nfld & P.E.I.R. 153 (P.E.I.S.C.-T.D.)

Applies *Read v. Read* infra.

Read v. Read et al. (No. 1) (1995), 131 Nfld. & P.E.I.R. 91 (P.E.I.S.C.-T.D.)

When documentation filed to initiate prejudgment garnishment proceedings does not comply with the Rules of Court the irregularities cannot be cured and it is necessary, in the interests of justice to set aside the proceedings.

RULE 3
TIME

COMPUTATION

3.01 (1) In the computation of time under these rules or an order, except where a contrary intention appears,

(a) where there is a reference to time expressed as clear days, weeks, months, or years, or as "at least" or "not less than" a number of days, weeks, months, or years, the first and last day, week, month or year shall be excluded.

(b) in the calculation of time not expressed as clear days, or other period of time not referred to in clause (a), the first day shall be excluded and the last day included.

(c) where a period of less than seven days is prescribed, holidays shall not be counted;

(d) where the time for doing an act under these rules expires on a holiday, the act may be done on the next day that is not a holiday; and

(e) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday.

(2) When a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally.

EXTENSION OR ABRIDGMENT

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to the Court of Appeal may be made by a panel or by one judge of the Court of Appeal.

Consent

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by consent.

WHEN PROCEEDING MAY BE HEARD

Hearings Throughout the Year

3.03 Proceedings may be heard throughout the year, except that during July and August and from December 24th to the following January 6th, both dates

inclusive, no trial of an action shall be held unless all parties consent or the court orders otherwise.

Court Office Hours

3.04 (1) Court offices shall be open for business between 9:00 A.M. and 4:00 P.M. every day except a holiday, and except during the summer months when the Prince Edward Island Government offices open at 8:00 A.M. and close at 4:00 P.M., at which time the court offices shall be open for business at 8:30 A.M. and close at 3:30 P.M.

(2) With the consent of the prothonotary an office may be open at any time where the relief sought requires urgency.

Ayangma v. City of Charlottetown, 2016 PECA 14

Rule 3.02
The court granted an application for an extension of time to file a Notice of Appeal. The court found that while the applicant did not meet the factors to be considered when granting an extension, it was in the interests of justice to do so.

Thomas v. Thomas Estates, 2016 PECA 13

Rules 3.02, 61.03, 61.03(1)
The court denied an application for an extension of time to commence two appeals. The court again cited the applicable factors:

1. Does the appeal have merit?
2. Was there a *bona fide* intention to appeal?
3 Is there a reasonable excuse for a delay in not filing within the prescribed time?
4 Are there exceptional or special circumstances justifying the extension of time?

Additionally, the court treats the question of whether the "*justice of the case*" requires that an extension be given as the governing principle and employs all of the mentioned factors, as well as prejudice to the other party, as factors. This approach facilitates a full assessment of the competing interests.

Ellis v. Callahan & Camp Abegweit 2006 PESCTD 52

The court granted an order extending the time for service of the statement of claim on a defendant. If the defendant is alleging prejudice to him as the basis to oppose the extension of time, he must show it is prejudice which has been caused by the delay.

Bentham v. Bentham (1999), 170 Nfld. & P.E.I. R. 273 (P.E.I.S.C.-A.D.)

Application for an extension of time to file a Notice of Appeal. The decision of Mitchell J.A. in *Bryant v. Fenton* (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.) was applied. Despite the fact the time for filing an appeal had elapsed twelve months prior to the application, an extension was granted on certain conditions.

Bryant v. Fenton (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.)

The appellant sought an order, pursuant to Rule 3.02, to extend the time prescribed by Rule 61.07(1) for perfecting an appeal. Although a motion had been made to the Prothonotary pursuant to Rule 61.11(1) to dismiss the appeal, the Court extended the time for perfecting the appeal because it is desirable to have appeals decided on their merits and because the respondent would not suffer any prejudice by the granting of the extension. The appellant

was, however, ordered to pay the costs of the respondent in making the motion for dismissal to the Prothonotary.

In the Matter of the Estate of Duncan MacCannell, [1995] 2 P.E.I.R. 87 (P.E.I.S.C.A.D.)

The court denied an application for an extension of time to file a notice of appeal because the applicant did not demonstrate he had an arguable case on appeal.

Ellis and Birt Ltd. v. Island Regulatory and Appeals Commission (P.E.I.) (1993), 105 Nfld. & P.E.I.R. 65 (P.E.I.S.C.-A.D.)

The Rule is applicable to an application to extend or abridge the time for filing a notice of appeal pursuant to s.13 of the **Island Regulatory and Appeals Commission Act** R.S.P.E.I. 1988 Cap. I-11.

D.B. and L.B. v. Director of Child Welfare (1992), 100 Nfld. & P.E.I R. 333 (P.E I.S.C.-A.D.)

On an application to extend or abridge the time for filing a notice of appeal the Court must address the following questions: (1) does the appeal have merit; (2) was there a bona fide intention to appeal; (3) is there a reasonable excuse for the delay in not filing within the prescribed time and; (4) are there exceptional or special circumstances justifying the extension of time?

SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: In Re Entegrity Wind Systems Inc. 2009 PESC 25 Date: 20090819
Docket: S1-BK-2429
Registry: Charlottetown

In the Matter of the Notice of Intention to make a Proposal of:

ENTEGRITY WIND SYSTEMS INC.

INSOLVENT PERSON

PRICEWATERHOUSECOOPERS INC.

TRUSTEE

In the matter of an Application by Entegrity Wind Systems Inc. having a place of business in Charlottetown, Prince Edward Island, to grant an extension for filing a Proposal pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*.

BEFORE: The Honourable Justice Wayne D. Cheverie

Appearances:
Krista MacKay & John Keith (via telephone) solicitors for the applicant
Michael Drake & Jeffery Cormier, solicitors for respondent, Mercantile Finance Services Ltd.

Place and date of hearing

August 14, 2009

Place and date of judgment

August 19, 2009

In the Matter of the Notice of Intention to make a Proposal of:

ENTEGRITY WIND SYSTEMS INC.

INSOLVENT PERSON

PRICEWATERHOUSECOOPERS INC.

TRUSTEE

In the matter of an Application by Entegrity Wind Systems Inc. having a place of business in Charlottetown, Prince Edward Island, to grant an extension for filing a Proposal pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*.

Supreme Court of Prince Edward Island
Before: Cheverie J.
Heard: August 14, 2009
Judgment: August 19, 2009
[9 pages]

Bankruptcy and insolvency - proposal - time period to file - extension of time.

Insolvent person filed notice of intention to make proposal - Section 50.4(8) of the *Bankruptcy and Insolvency Act* required insolvent person either to file proposal or obtain extension of time to file proposal within 30 days - insolvent person brought motion for extension of time before end of 30 day period - motion granted - insolvent person met the three part test for extending time as set out in s. 50.4(9) of the *Act* - action taken against the insolvent person by a secured creditor immediately following the filing of the notice of intention to make a proposal, and subsequent application to the court in that matter was relevant to the determination of an extension of time.

STATUTE CONSIDERED: ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, s-ss. 50.4(9), 50.4(1), 50.4(8).

RULE CONSIDERED: ***Prince Edward Island Rules of Civil Procedure***, Rule 2.03.

CASES CONSIDERED: ***Re Baldwin Valley Investors Inc.***, 1994 CarswellOnt. 253; ***H & H Fisheries Ltd. (Re)***, 2005 CarswellNS 541; ***Re Cantrail Coach Lines Ltd.***, 2005 BCSC 351.

Krista MacKay & John Keith (via telephone) solicitors for the applicant
Michael Drake & Jeffery Cormier, solicitors for respondent, Mercantile Finance Services Ltd.

Cheverie J.:

Introduction

[1] This motion is brought by Entegrity Wind Systems Inc. ("Entegrity") for an order abridging the time for the service of the motion and, if granted, an order pursuant to s-s. 50.4(9) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 as amended R.S.C. 1985, c. 27 first supplement ("BIA") for an extension of 45 days within which to file a proposal as per its notice of intention under s-s. 50.4(1) of the BIA. Entegrity is insolvent and has engaged the services of Pricewaterhousecoopers Inc. as Trustee.

[2] The single largest creditor of Entegrity is Mercantile Finance Services Ltd. ("Mercantile"). It alone opposes Entegrity's motion for an extension of time. As will be seen from a discussion of the applicable law, Entegrity suggests it has discharged the burden of proof on it to satisfy the three part test set out by Parliament in s-s. 50.4(9) of the BIA, while Mercantile argues Entegrity has not met any of the branches of the test and, therefore, the extension ought not be granted and the motion should be dismissed, with costs.

[3] Allow me first to dispose of the motion for an order abridging the time for service of this motion. This was not seriously contested by Mercantile and I am satisfied the interests of justice require abridgement of time as per Rule 2.03 of the ***Rules of Civil Procedure***. Given the rapid pace of events involving Entegrity and Mercantile over the past six weeks or so, I am of the view the motion ought to be heard notwithstanding the strict time frames of the ***Rules*** have not been met.

The law

[4] Entegrity filed its Notice of Intention to Make a Proposal pursuant to s-s. 50.4(1) of the BIA on July 15, 2009. By operation of s-s. 50.4(8) of the BIA, Entegrity is required to file a proposal within 30 days of that date unless it otherwise obtains an extension of time from the court within that 30 day period.

[5] Parliament has set the rules for obtaining an extension of time for filing a proposal. Those rules are contained in s-s. 50.4(9) of the BIA which reads as follows:

> (9) Extension of time for filing proposal - The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five

> months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

The parties agree Entegrity's motion has been brought and heard within 30 days of filing. The parties also agree that the three part test is conjunctive and the onus on Entegrity is to establish all three prongs of the test. If Entegrity fails on any one branch, its motion must be dismissed. (See ***Re Baldwin Valley Investors Inc.***, 1994 CarswellOnt. 253 at para. 7.) As in so many cases, the applicable law is clear, it is the application of that law to the particular facts of each case which is more challenging. The case at bar is an example of that challenge.

Positions of the parties and discussion

[6] At this juncture I shall identify each of the three parts of the applicable test, summarize the position of each party on that element, and arrive at a conclusion with respect to whether the particular test has been met

(a) Has Entegrity acted in good faith and with due diligence?

[7] Mercantile argues Entegrity has not acted in good faith nor has it proceeded with due diligence. Central to this argument is the affidavit of John F. Gundy, Vice President, Commercial Lending and Portfolio Management, for Mercantile, where in his affidavit of July 14, 2009 at para. 27 he deposes that James Heath, who is the President and Chief Executive Officer of Entegrity, disclosed to him at a June 8, 2009 meeting that he had arranged to have equipment transferred from existing contracts over which Mercantile held security to other buyers over which Mercantile did not have security. Gundy further deposes Heath indicated in no uncertain terms he had diverted Entegrity funds from Mercantile to Entegrity's accounts to pay bills and make payroll payments. Gundy alleges these funds were properly payable to Mercantile pursuant to the credit agreement between the parties and Mercantile's security. Therefore, says Mercantile, Entegrity was not acting in good faith.

[8] Entegrity's response to this allegation is contained in the affidavits of Heath of August 10, 2009 and August 13, 2009. The detail of Entegrity's response is contained in paras. 10 through 17 of Heath's latter affidavit. He denies any

misappropriation or misdirection of company funds and refers to monies received from various projects and how they were dispersed. In one case funds were used for payment of employee health insurance and to complete two additional projects. In another case some funds were used to repay out of pocket expenses to US employees volunteering during this period of time. Further, Heath deposes that during this relevant period of time Entegrity generated a total of $271,000 CAN and that the cash received in July 2009 was approximately 90% of the July plan submitted to its trustee, a plan wherein Entegrity proposed to pay off Mercantile. I infer from these actions the direction of funds as detailed in Heath's affidavit were in the interests of keeping the company afloat, which objective, if achieved, would ultimately benefit its primary secured creditor, Mercantile.

[9] In addition to the use of funds from various projects, Heath deposes at para. 17 of his August 13 affidavit that he provided an additional $600,000 of capital to Entegrity and began to use all funds for maintaining operations. His version of meetings with Gundy and others in Toronto differs in some respects from the version of events advanced by Mercantile. However, Heath says as a result of those meetings he called an emergency meeting of his board, hired an individual to assist the board in its fiduciary responsibility to creditors and then Heath made the requested interest and fee payment out of his own funds.

[10] As I assess the allegations and responses from the parties with respect to good faith, I am not of the view Entegrity failed to act in good faith during this tumultuous period. Rather, it appears Entegrity was attempting to address Mercantile's demands and in the course of doing so, used funds from projects as well as its own funds to maintain the company while it moved on an overall plan to extricate itself from its difficulties. In this context, the allegation that Heath arranged to have equipment transferred from existing contracts to other buyers over which Mercantile did not have security is not quite as damaging. The allegation is not that Entegrity converted machinery over which Mercantile held security so much as it was a redeployment of equipment to other contracts in which Mercantile was not a financier.

[11] Mercantile also argues Entegrity has not acted with due diligence. It argues that neither Heath nor Walter MacKinnon, the Trustee for Entegrity, has offered any particulars of the due diligence. Entegrity argues there are no details of the proposal being developed by it, to say nothing of the fact whether the proposal is viable or not. Mercantile's argument here spills over into its argument on the second branch of the test that Entegrity is not likely to be able to make a viable proposal even if the extension applied for were granted. It points to para. 12 of Heath's affidavit of August 10, 2009 as a bare assertion that Entegrity has had meetings with "an interested investor, Valmont Industries Inc." and that Valmont is "interested to go forward subject to the court's decision."

[12] As argued by Mercantile, it is true Heath provides no details of the nature of his discussions with Valmont; the substance of those discussions; the nature and extent of any involvement proposed by Valmont; whether Valmont's interest includes a provision for paying out Mercantile; or any terms and conditions of Valmont's interest. Mercantile alleges this is nothing more than a bare assertion. This argument is equally applicable and intertwined with the allegation by Mercantile that there is no hope for a viable plan forthcoming from Entegrity if it is granted the extension of time sought.

[13] Entegrity's response to the allegation of lack of due diligence is really contained in the chronology of events which have unfolded since the Spring of this year and particularly since it filed its Notice of Intention to Make a Proposal on July 15, 2009. Essentially, as I understand it, having filed the Notice of Intention, Entegrity then engaged the services of Pricewaterhousecoopers Inc. as Trustee as required by s. 50.4 of the BIA. It then complied with the filings required by s-s. 50.4(2) of the BIA including the development of a cash flow statement. It notified its creditors as required and provided the cash flow statement to its Trustee.

[14] Walter MacKinnon, in his affidavit of August 10, 2009 indicates he has reviewed that cash flow statement and then he filed a Trustee's report on that statement on July 24, 2009. He kept unsecured creditors apprised of Entegrity's activities, all the while noting Mercantile appointed a private receiver, A.C. Poirier & Associates on July 16, 2009 who took possession of the assets of the company and issued the required notice under s. 245 of the BIA to creditors. Of note is the step taken by Mercantile to appoint its own receiver the day after Entegrity filed its Notice of Intention to Make a Proposal. I am advised by counsel, and it appears from certain documents filed in this motion, that another dispute was being addressed by Taylor J. of this Court. (Taylor J. rendered his decision on August 14, 2009 - Mercantile v. Entegrity 2009 PESC 23.) Apparently that dispute focussed on the legality of the waiving of a ten day notice period required by the BIA so that Mercantile could move more quickly to realize on its security. I say that generally because I am not aware of the exact details, suffice to say the parties engaged counsel and the matter was vigorously litigated, taken under advisement by Taylor J. and subsequently determined by him.

[15] The purpose of referencing that action is to provide some context for the activities of Entegrity since filing its Notice of Intention to Make a Proposal. It appears to me Entegrity was trying to act with due diligence during this time, but at the same time was distracted by the actions advanced by Mercantile, resulting in another court action, the requirement to deploy resources to answer those allegations, with the resultant lessening of time needed to address its proposal. In all of these circumstances, I am satisfied Entegrity acted with due diligence and, therefore, it has met the burden required in part one of the test.

(b) Whether Entegrity would likely be able to make a viable proposal if the extension being applied for were granted?

[16] To a degree, the arguments of the parties under this part of the test have been at least partially addressed in the discussion of due diligence. It is clearly Mercantile's position that not only will Entegrity not be able to file a viable proposal, it is not likely to be able to file any proposal. In addition, Mercantile has made it quite clear that short of being paid out in full, it is not interested in any proposals forthcoming from Entegrity. It has simply lost faith in Heath who is the principal of Entegrity and no longer wishes to do business with him. It relies on ***Baldwin Valley Investors Inc.*** at para. 4 for the proposition that a viable proposal should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor." As Farley J. pointed out:

> ...there is no indication of the names and substance of all these fall back partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal... I do not see the conjecture of the debtor company's rough submission as being "likely".

In ***Baldwin Valley***, Farley J. was faced with the situation where a draft proposal had been advanced. Mercantile argues there is no such draft proposal in the present case but rather only what they characterize as the vague hearsay assertions of a potential interested investor and alleged discussions with a further unnamed investor. Mercantile further argues there is no evidence Entegrity is even working on a proposal of any kind, let alone a viable proposal

[17] Mercantile also referred the court to the Nova Scotia decision in ***H & H Fisheries Ltd. (Re)***, 2005 CarswellNS 541 where Goodfellow J. wrote at paras. 22 and 23 with respect to what is meant by "viable." He wrote:

> [22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (Re Baldwin Valley Investors Inc., [1994] 23 C.B.R. (3rd) 219). Again, the court must be satisfied on a balance of probabilities that HHFL would likely. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.
>
> [23] Lack of detail and assurance of this kind was considered in St. Isidore Meats Inc. v. Paquette Fine Foods Inc. [1997] O.J. No. 1863. In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):
>
> > ... [T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague

> reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future.

[18] At first glance it would appear the circumstances outlined by Goodfellow J. would sound a death knell to Entegrity in the case at bar. Certainly no detailed proposal has been advanced by Entegrity at this stage. However, their argument countering that of Mercantile must be considered carefully. Firstly, as already referred to in these reasons, Entegrity takes the position it has been preoccupied with the legal initiatives advanced by Mercantile requiring it to defend itself before another judge of this court and that action has not only drawn upon what meagre resources it has, but has also detracted from its ability to prepare its proposal within the strict 30 day legislative requirement.

[19] However, Entegrity does not rely entirely on the circumstances facing it since July 15, 2009 as meeting its obligation under part two of the test. It points to the affidavit of its Trustee, Walter MacKinnon, and the cash flow statement attached thereto which it was required to file under the BIA. Further to this cash flow statement is the evidence of Heath in his August 10 affidavit wherein he deposes in para. 3 that the company has completed two projects since July 15, 2009 and has received another four orders since that time (no details provided), but in doing so Entegrity has achieved 90% of the cash receipts as set out in the cash flow statement even though it has not been able to access inventory since the Receiver has been put in place. Heath also deposes Entegrity reduced its staff in order to further cut costs.

[20] In his August 13, 2009 affidavit, at para. 19, Heath outlines the actions taken by Entegrity to complete its proposal within the 30 day period. In para. 19 he advises the names of three individuals who have been working with him daily on a draft of the proposal. He advises the narrative or qualitative portion of the proposal is near completion and he anticipates the ability to complete the full proposal (including the quantitative or accounting aspects within 45 days). Furthermore, he says Entegrity's proposal contemplates Mercantile being repaid in full and to that extent Mercantile is protected. He again references the possible investment of Valmont Industries and others unnamed and he says they have done all this despite the fact they are contesting Mercantile's private receivership and alleged premature enforcement.

[21] In normal circumstances, I would expect to see more detail from Entegrity of its proposal, and to that extent I would be in agreement with Mercantile's argument that therefore it would be unlikely Entegrity would be able to make a viable proposal if time were extended. However the circumstances of this case do not appear to be normal. As soon as Entegrity filed its Notice of Intention to Make a Proposal, Mercantile moved on its security and appointed a receiver. Entegrity

then lost the ability to deal in an unfettered way with its operation, but did proceed to make efforts to attract other investors. All the while it was embroiled in legal proceedings with Mercantile.

[22] I accept the proposition advanced by Entegrity that the proposal contains two parts - a narrative or qualitative portion and a second quantitative or accounting portion. I also note Entegrity's proposal is not one which seeks to reduce its obligation to Mercantile, but rather it is proposed to pay Mercantile out. If that is the case then Mercantile is saved harmless.

[23] In its argument on this branch of the test, Entegrity relied on and referred the court to the case ***Re Cantrail Coach Lines Ltd.***, 2005 BCSC 351. The headnote indicates the British Columbia Master saying it was disingenuous for a secured creditor to oppose a proposal even before the proposal was made. That is relevant to the case at bar since that is the position taken by Mercantile. In paras. 14, 15 and 16 of the decision, the court articulates why taking such a position is inconsistent with the BIA. The legislation reflects Parliament's direction that in these circumstances the insolvent person has the right to set out a proposal to its creditors, and the BIA describes the process to be followed. And then the court goes on to say this at para. 17:

> Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buy-out of this operation, or a merger, and even the possibility of a refinancing. **There is a possibility, though as of yet uncertain, that Volvo could be paid out in full.** It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. **It may be a proposal which gets them out of the picture completely by some form of payout** -- a proposal which if they voted against they would probably be viewed as irrational businesspeople.
> (Emphasis added.)

In the ***Cantrail*** case, as in the case at bar, there was a possibility, though uncertain, that the creditor could be paid out in full. This was held not to be a bar to a viable proposal.

[24] After considering the peculiar circumstances of this case and the fact there is some case authority to support the proposition this branch of the test may be achieved without an actual formal proposal in existence, I am satisfied on the balance of probabilities that Entegrity again has discharged the burden on it and they would likely be able to make a viable proposal if the extension were granted.

(c) Will any creditor be materially prejudiced if the extension being applied for were granted?

[25] The emphasis in this part of the analysis must be on the phrase "materially prejudiced." As I read the law, it is not a question of simply a creditor being prejudiced by an extension of time, but rather that creditor must be materially prejudiced. The only creditor opposing the application for extension is Mercantile. Therefore I must examine whether it will be materially prejudiced if the extension is granted.

[26] Mercantile argues Entegrity has been in default of its obligations to it since May, 2009 and that the total secured indebtedness to Mercantile as at July 9, 2009 was in excess of $3 million with a per diem since that time of over $1,880. This clearly amounts to some prejudice to Mercantile, but can it be said to materially prejudice Mercantile? It is clear from the evidence that Mercantile wishes to part company with Heath. They repeat on numerous occasions that they have lost all confidence in the ability of James Heath to manage Entegrity's affairs and business operations. However, at the time of this hearing, Mercantile, acting on its security, had taken control of Entegrity such that any prejudice to it would be minimized.

[27] Entegrity conceded that if the pending decision of Taylor J. allowed the BIA to prevail, there "may" be some prejudice to Mercantile, but it would be minimal. It argues Mercantile does not trump the other creditors and that by filing a Notice of Intention to Make a Proposal and now seeking an extension to make good on the details of that proposal, Entegrity has put itself under the pressure of a process which has dire consequences for it if it does not meet with the approval of all the creditors.

[28] It is true the per diem owing to Mercantile is clicking at the rate of $1,880 per day. I do not intend to trivialize this amount, but in the overall scheme of things, given its stated exposure in excess of $3 million, $1,880 per day over the extension period does not in and of itself amount to material prejudice to Mercantile. It still has its security. The BIA allows for proposals to be advanced by companies like Entegrity found in circumstances like the present. If Parliament did not wish to provide a window of hope for companies like Entegrity, it would not have enacted the provisions of the BIA which allow for the advancement of proposals to creditors short of immediately bankrupting the company. Likewise, Parliament chose the wording in subsection 50.4(9) carefully and in the third prong of the test was concerned about a creditor who would be materially prejudiced upon the granting of an extension, not a creditor who would be simply prejudiced. Again, on the balance of probabilities, I am satisfied Entegrity has met the burden placed on it and the third part of the test has been met.

Conclusion

[29] Based on the evidence before me, I have asked myself whether it is more likely than not that Entegrity has acted, and is acting, in good faith and with due diligence; whether Entegrity would likely be able to make a viable proposal if the extension being applied for were granted; and whether any creditor would be materially prejudiced if the extension being applied for were granted; and in each case I am satisfied Entegrity meets the test.

[30] For all of these reasons, I exercise the discretion reposed in me under s-s. 50.4(9) of the BIA and I extend the time allowed for Entegrity to file its proposal for 45 days from August 14, 2009 when its initial 30 day period was due to expire. My calculation of the 45 day extension allows Entegrity up to and including September 28, 2009 to complete its proposal.

[31] In its notice of motion, Entegrity has not sought its costs, nor were costs sought by counsel at the hearing. However, Entegrity shall have its costs of this motion in the cause.

_____ J.

August 19, 2009

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.

2017 PECA 22
Prince Edward Island Court of Appeal

Dr. Ian Reid v. Health PEI

2017 CarswellPEI 68, 2017 PECA 22, 286 A.C.W.S. (3d) 3

DR. IAN REID (APPLICANT) AND HEALTH PEI (RESPONDENT)

John K. Mitchell J.A.

Heard: November 22, 2017
Judgment: November 29, 2017
Docket: S1-CA-1357

Counsel: Thomas P. Laughlin, for Applicant
Geoff W.D. Gibson, for Respondent, Health PEI
Karen A. Campbell, Q.C., for Respondent, Provincial Medical Advisor Committee (PMAC)

Subject: Civil Practice and Procedure; Public

Headnote

Administrative law --- Practice and procedure - On application for certiorari Evidence in support General principles

Applicant doctor was reappointed to medical staff of respondent provincial health authority without full privileges Doctor applied for judicial review — Health authority brought motion for order sealing record and ordering that it not form part of public record; allowing health authority to file redacted record edited to remove information which could reveal identity of patients; and banning publication of information which could reveal identity of patients and witnesses Motion granted in part Order granted with respect to information tending to reveal identity of patients, but not with respect to names of other, non-patient witnesses -- Publication of patient names or any identifying information would pose very serious risk to very important interest Salutary effects of order sought far outweighed deleterious effects to public interest in open court proceedings -- Original record to be sealed and not form part of record; health authority to file redacted record Any information which could reveal identity of patients, including names, social insurance numbers, and health numbers, shall not be published.

MOTION by respondent provincial health authority for order sealing record filed on judicial review, publication ban, and other relief.

John K. Mitchell J.A.:

1 Dr. Ian Reid made application for reappointment to the medical staff of Health PEI in accordance with the requirements of the Medical Staff Bylaws. His application was heard over a period of 13 months. In the end, Health PEI decided that Dr. Reid should be granted what might be called a modified appointment. That is, his appointment to the medical staff does not come with full privileges.

2 As Dr. Reid has filed an application for judicial review of that decision, it is incumbent upon Health PEI to file a true copy of the Record pursuant to s.8 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-2-1. Health PEI makes this motion for an order: a) sealing the original record which was filed and an order that it not form part of the public record; b) allowing Health PEI to file a redacted record edited to remove or disguise information which could reveal the identity of patients referred to in the original record which redacted edited record is to be filed in addition to the original record and which redacted record will form part of the public record; c) a publication ban on any information which could reveal the identity of the aforesaid patients and witnesses.

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3 There were 15 hearing days spread out over a period of 13 months. There were 15 witnesses in addition to Dr. Reid. Nine of the witnesses were doctors, four were nurses or former nurses and two were patients. Health PEI also had before it considerable documentary evidence including at least two expert reports and documents containing patients' names, numbers and other personal information of people who are neither parties nor witnesses.

4 While Health PEI did not prohibit the public from attending the hearing, the public did not attend. That may well have been because the public was given no notice of the hearings. Witnesses were not given assurances that their evidence would not be made public. Counsel for Health PEI candidly admitted that they had no authority to make such a commitment.

5 Health PEI and the Provincial Medical Advisory Committee (PMAC) argue that confidentiality is a hallmark of the relationship between health care providers and patients. It is therefore an important public interest. They point to s.8(2) of the *Hospitals Act*, R.S.P.E.I. 1988, Cap. H-10.1, which provides that "*no person shall disclose information relating to health services provided to, or the medical condition of, any patient, without the consent of the patient.*" They argue that the orders they seek are necessary to prevent serious risk to the important interest of patient confidentiality and privacy. Dr. Reid agrees with Health PEI and PMAC on this point.

6 They argue as well that the names of the witnesses should be redacted or disguised in order to protect the integrity of the system. Health PEI has no powers of subpoena and is therefore reliant on the goodwill of those witnesses to come forward to provide evidence without compulsion. They feel that should these witnesses, mostly health professionals, find their names bandied about in court or used in a court decision or media coverage of the case, they will be reluctant to come forward in the future. That would have a detrimental impact on the health system as issues in the health system might never see the light of day. Dr. Reid takes no position on this issue.

7 Health PEI and PMAC argue that the salutary effects of the orders they seek outweigh the deleterious effects because all of the relevant information will be available to the public. They point to the court's common law power to issue publication bans as well as s.62 of the *Judicature Act* as authority for the court's jurisdiction to impose the requested orders. Section 62(2) of the *Judicature Act* states:

> For the purpose of confidentiality, a court may order that any document filed in a civil proceeding in the court be sealed and not form part of the public record.

Law

8 There is a long list of authorities over the past 30-40 years to the effect that the principle of open courts is of fundamental importance to a free and democratic society. It is not, however, a principle that trumps all other principles (*MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *R. v. Mentuck*, 2001 SCC 76 (S.C.C.)).

9 In *Mentuck* Iacobucci J. wrote at para.32:

> The *Dagenais* test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while *Dagenais* framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
>
> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

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(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

10 It should be further noted in that case that Iacobucci J. agreed with La Forest J. in the *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), wherein La Forest J. noted that the burden of displacing the presumption of openness rests on the person applying for the ban on publication. There must also be a sufficient evidentiary basis on the record so that the trial judge can properly access the application (see *Mentuck*, paras.26 and 38).

11 In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), the court dealt with Atomic Energy's application for a confidentiality order to protect commercial interests and information. There the court stated at paras.53-54:

[53] Applying the rights and interests engaged in this case to the analytical framework of ***Dagenais*** and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[54] As in ***Mentuck***, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Application to the case at Bar

a) Identity of patients

12 I agree with Oland J. who wrote in *Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113 (N.S. C.A.), at para.22:

Confidentiality is a hallmark of the relationship between health care professionals and their patients. There is no question that the public considers that their medical records are confidential and expects that, except in limited circumstances, they will remain confidential. The confidentiality of such records is an important public interest.

13 Publication of the names of the patient's or any identifying information such as hospital numbers or patient numbers would pose a very serious risk to a very important interest. There are no reasonable alternative measures available to prevent a risk.

14 In my view the salutary effects of the order sought far outweigh the deleterious effects, which is, in this case, to the public interest in an open and accessible court proceedings. The public will have access to the facts contained in the patients' records where they are referred to in the record but will not have any identifying information. I would grant the order sought with reference to information tending to reveal the identity of the patients.

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b) Other witnesses

15 I am not of the same view however when it comes to the names of the witnesses save for the two patients who testified. In my view the names of the two patients who testified should be protected for the reasons contained in the preceding three paragraphs. I note that the decision issued by the Health PEI makes reference to the patients only by their initials. If the patients are identified, then their very personal medical records are also made public. I would extend the order to include the names of the two patient witnesses who testified.

16 I would not, however, grant the order sought concerning the other witnesses. There is no evidentiary basis upon which I conclude there is a serious risk to the integrity of the system. While the applicants fear that health professionals will not be forthcoming in the future, that fear has no evidentiary basis. Medical professionals are indeed that: professionals. While the Health PEI may not have the ability to subpoena them, medical professionals have an ethical and professional responsibility to provide information and evidence when the integrity of the health system is at stake.

17 I would therefore grant the following order:

(a) the original record filed by Health PEI in this judicial review be sealed and not form part of the record;

(b) that Health PEI file a redacted record edited to remove or disguise information which could reveal identity of patients including the two patients who gave *vive voce* evidence, referenced in the original sealed record which shall be filed and shall form part of the public record;

(c) that any information which could reveal the identity of patients, including but not limited to their names, social insurance numbers, and health numbers, shall not be published or broadcast or transmitted in any way.

18 There are no costs awarded on the motion.

Motion granted in part

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PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

JUDICATURE ACT

PLEASE NOTE

This document, prepared by the ***Legislative Counsel Office***, is an office consolidation of this Act, current to May 12, 2017. It is intended for information and reference purposes only.

This document is *not* the official version of the Act. The Act and the amendments as printed under the authority of the Queen's Printer for the province should be consulted to determine the authoritative statement of the law.

For more information concerning the history of this Act, please see the ***Table of Public Acts*** on the Prince Edward Island Government web site (www.princeedwardisland.ca).

If you find any errors or omissions in this consolidation, please contact:

Legislative Counsel Office
Tel: (902) 368-4292
Email: legislation@gov.pe.ca

(g) any other relevant consideration. *2008,c 20,s.59.*

60. Costs

(1) Unless otherwise provided by any Act, the costs of and incidental to a proceeding authorized to be taken in a court are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Trustees, etc.

(2) Nothing herein deprives a trustee, mortgagee or other person of any right to costs out of a particular estate or fund.

Government costs

(3) In a proceeding to which the Government is a party, costs awarded to the Government shall not be disallowed or reduced on assessment merely because they relate to a barrister or solicitor who is a salaried agent or employee of the Government, and costs recovered on behalf of the Government shall be paid into the Operating Fund. *2008,c.20,s.60.*

PUBLIC ACCESS

61. Hearings open to public

(1) Unless otherwise provided by any other Act, the rules or a court order, all court hearings shall be open to the public

Exception

(2) A court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

Disclosure of information

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court has expressly prohibited the disclosure of the information. *2008,c.20,s.61.*

62. Documents are public

(1) Unless otherwise provided by any other Act, the rules or a court order, any person is entitled, on payment of the fee prescribed under the *Court Fees Act* R.S.P.E.I. 1988, Cap. C-27.001, to see any document filed in a civil proceeding in a court.

Sealing documents

(2) For purpose of confidentiality, a court may order that any document filed in a civil proceeding in the court be sealed and not form part of the public record. *2008,c 20, s.62; 2012,c 16, s.3*

Court File No. S1 GS 28446

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

DME LIMITED PARTNERSHIP, DME GENERAL PARTNER INC., ATLANTIC SYSTEMS MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC. and DME US HOLDCO INC.

Respondents

BEFORE THE HONOURABLE
JUSTICE N. KEY

DATED the 31st day
of January, 2019.

APPROVAL AND VESTING ORDER

WHEREAS the motion of Alvarez & Marsal Canada Inc., solely in its capacity as Court appointed receiver and not in its personal capacity (the "**Receiver**") without security, of the property, assets and undertakings (the "**Property**") of, DME Limited Partnership, DME General Partner Inc., Atlantic Systems Manufacturing (2016) Ltd., DME Canada Acquisitions Inc. and DME US Holdco Inc. (the "**Respondents**" or the "**Company**") seeking, *inter alia*, direction and authorization to complete the transaction as set out in the Auction and Liquidation Services Agreement dated January 17, 2019, (the "**Abbotsford Sale Agreement**") and the ASM Asset Purchase Agreement dated January 25, 2019 (the "**ASM Sale Agreement**"), relating to certain of the Respondents' personal property (the "**Sale Assets**") was heard this 31st day of January, 2019 at 42 Water Street, Charlottetown, Prince Edward Island;

ON READING the Motion Record including the First Report of the Receiver dated January 18, 2019 (the "**Receiver's First Report**") and the Supplemental First Report of the Receiver dated January 25, 2019 (the "**Supplemental First Report**");

THIS COURT ORDERS THAT:

SERVICE

1. The time for service of the Notice of Motion and the Supplemental & Amended Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

RECEIVER'S REPORT

2. The Receiver's First Report and Supplemental First Report filed in relation to this motion and all actions of the Receiver since the initial Receivership Order are hereby approved.

APPROVAL

3. The sale transaction contemplated by the Abbotsford Sale Agreement and the ASM Sale Agreement (the "**Sale Transactions**") are hereby approved and confirmed as commercially reasonable and in the best interests of the estate of the Company. The Receiver is hereby authorized and directed to take such additional steps and execute and deliver such additional documents, including entering into the Sale Agreements, as may be necessary or desirable for the completion of the Sale and the conveyance of the Sale Assets to the purchasers (the "**Purchasers**"). The Receiver may agree to such amendments related to the time of closing and costs as necessary, provided such changes do not materially impact the substantive terms of the Sale Transactions.

VESTING

4. Upon the delivery of the Receiver's certificate or certificates to a Purchaser substantially in the form attached as Schedule "A" or Schedule "B" hereto (the "**Receiver's Certificate**") all rights, title and interest of the Respondents in and to the Sale Assets identified in the applicable Receiver's Certificate shall vest absolutely and exclusively in and with the applicable Purchaser, free and clear of and from any and all interests of any person of any nature or kind, including, without limiting the foregoing, all claims, liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, conditional sales contracts or title retention agreements, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, encumbrances, judgments, orders, pledges, assignments, writs of seizure or execution, notices of sale, options, adverse claims, executions,

demands, duties, levies, charges, or other financial or monetary claims, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached, been perfected, registered or filed and whether secured, unsecured or otherwise and whether created by or pursuant to the orders made in these proceedings or any other proceedings before the Court (collectively, the "**Claims**") including, without limitation, all Claims evidenced by registrations pursuant to any provincial or other registry system (all of which are collectively referred to as the "**Encumbrances**"); and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Sale Assets be expunged and discharged as against the Sale Assets, in each case effective as of the applicable time and date of the Receiver's Certificate.

PROCEEDS OF SALE

5. For the purposes of determining the nature and priority of Claims and Encumbrances, the net proceeds from the sale of the Sale Assets (the "**Proceeds**") shall stand in the place and stead of the Sale Assets, and that from and after the delivery of a Receiver's Certificate, all Claims and Encumbrances shall attach to the Proceeds with the same priority as they had with respect to the applicable Sale Assets identified in the applicable Receiver's Certificate immediately prior to the sale, as if the Sale Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

SEALING

6. Subject to further Court Order, the Confidential Appendices to the Receiver's First Report and the Confidential Appendices to the Supplemental First Report shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope and shall only be opened after the completion of these receivership proceedings.

GENERAL

7. The Receiver is authorized and directed to issue a Receiver's Certificate upon being satisfied that the terms of the related transaction have been completed to its satisfaction.

8. The Receiver shall file with the Court a copy of all Receiver's Certificates, after delivery thereof. The Receiver shall not be required to file, register or record this Order, notice thereof or any financing statement with respect thereto but may take such steps as it deems necessary or

appropriate to register or record this Order, notice thereof or any financing statement with respect thereto, if it deems it advisable to do so. The Receiver is further authorized to execute and register discharges of any registered security or other interest extinguished by this Order after completion of any transaction authorized herein if necessary.

9. Notwithstanding

   (a) the pendency of these proceedings; and
   (b) the insolvency of the Company;

   the vesting of the Sale Assets in the Purchaser pursuant to this Order shall be binding on all persons and shall not be void or voidable by any person, including, without limitation, creditors of any of the Respondent, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

DATED at Charlottetown, Prince Edward Island this 31st day of January, 2019

_____

J.

Schedule "A"

Court File No. S1 GS 28446

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

DME LIMITED PARTNERSHIP, DME GENERAL PARTNER INC., ATLANTIC SYSTEMS MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC. and DME US HOLDCO INC.

Respondents

RECEIVER'S CERTIFICATE

A. Pursuant to an Order of the Honourable Justice Nancy Key (the "**Court**") dated November 26, 2018, the ("**Order**"), Alvarez & Marsal Canada Inc., as Court appointed receiver (the "**Receiver**") without security, of all of the assets, undertakings and properties (the "**Property**") of each of DME Limited Partnership, DME General Partner Inc., Atlantic Systems Manufacturing (2016) Ltd., DME Canada Acquisitions Inc., and DME US Holdco Inc. (collectively and individually, the "**Company**"), was granted those powers and authorizations as set out therein including to dispose of certain of the Property.

B. Pursuant to an Order of the Court granted on January 31, 2019 (the "**Approval and Vesting Order**"), the Court approved the Auction and Liquidation Services Agreement dated January 17, 2019, between Infinity Asset Solutions Inc. and Joiner Sale Corp. (the "**Purchaser**") and the Receiver, (the "**Sale Agreement**") and ordered that all of the Debtor's right title and interest in and to the Purchased Assets, as described and defined in the Amended Approval and Vesting Order, shall vest in purchaser(s) pursuant to the Purchaser's auction as contemplated by the Sale Agreement, effective upon the delivery by the Receiver of this certificate to the Purchaser.

THE RECEIVER CERTIFIES THE FOLLOWING:

1. The Receiver has received the net sale proceeds, as described in the Sale Agreement.

2. The Receiver confirms that all the conditions precedent under the Sale Agreement have been satisfied or waived in accordance with the Sale Agreement and that the Sale Agreement has not been terminated.

This Receiver's Certificate was delivered by the Receiver at _____[TIME] on _____ [DATE].

Alvarez & Marsal Canada Inc., in its capacity as the Court appointed Receiver of the Property of the Company and not in its personal capacity

Per:_____

Name:

Title:

Schedule "B"

Court File No. S1 GS 28446

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

DME LIMITED PARTNERSHIP, DME GENERAL PARTNER INC., ATLANTIC SYSTEMS MANUFACTURING (2016) LTD., DME CANADA ACQUISITIONS INC. and DME US HOLDCO INC.

Respondents

RECEIVER'S CERTIFICATE

A. Pursuant to an Order of the Honourable Justice Nancy Key (the "**Court**") dated November 26, 2018, the ("**Order**"), Alvarez & Marsal Canada Inc., as Court appointed receiver (the "**Receiver**") without security, of all of the assets, undertakings and properties (the "**Property**") of each of DME Limited Partnership, DME General Partner Inc., Atlantic Systems Manufacturing (2016) Ltd., DME Canada Acquisitions Inc., and DME US Holdco Inc. (collectively and individually, the "**Company**"), was granted those powers and authorizations as set out therein including to dispose of certain of the Property.

B. Pursuant to an Order of the Court granted on January __, 2019 (the "**Approval and Vesting Order**"), the Court approved sale of the property set out in the Asset Purchase Agreement attached hereto as Scheduled "A" (the "**Sale Property**"), to Eastern Fabricators Inc. (the "**Purchaser**") and provided for the vesting in the Purchaser all right, title and interest in and to the Sale Property, which vesting is to be effective with respect to the Sale Property upon delivery by the Receiver to the Purchase a certificate confirming: (i) the receipt by the Receiver of payment to the Purchaser of the purchase price for the Sale Property; and (ii) the sale has been completed to the satisfaction of the Receiver.

THE RECEIVER CERTIFIES THE FOLLOWING:

1. The Purchaser has paid and the Receiver has received the purchase price for the Sale Property payable on the applicable closing date; and

2. The Sale has been completed to the satisfaction of the Receiver.

This Receiver's Certificate was delivered by the Receiver at _____[TIME] on _____ [DATE].

Alvarez & Marsal Canada Inc., in its capacity as the Court appointed Receiver of the Property of the Company and not in its personal capacity

Per:_____

Name:

Title: