BOA 1

Court of Appeal File No. COA-24-CV-13328
Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/Respondent in Appeal

-and-

CONACHER KINGSTON HOLDINGS INC. and **5004591 ONTARIO INC.**

Respondents/Respondents in Appeal

BOOK OF AUTHORITIES OF THE RECEIVER

April 29, 2025

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TO: **Service List**

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INDEX

TAB 1

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources) | 1999 CarswellOnt 1444, [1999] O.J. No. 1690, 13 Admin. L.R. (3d) 208, 62 C.R.R. (2d) 303, 98 O.T.C. 341, 43 O.R. (3d) 760 | (Ont. S.C.J., Apr 28, 1999)

1986 CarswellOnt 235
Ontario Supreme Court, High Court of Justice

Crown Trust Co. v. Rosenberg

1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note)

CROWN TRUST COMPANY, SEAWAY TRUST COMPANY and GREYMAC TRUST COMPANY v. ROSENBERG et al.

Anderson J.

Judgment: November 6, 1986
Docket: No. 1380/83

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.a Actions by receiver
Headnote
Receivers — Sale of debtor's assets — Approval by court — Court discussing obligations in determining whether to approve sale.
On a motion by a court appointed receiver and manager to approve the sale of certain properties, the duties of the court are to consider: whether the receiver has made a sufficient effort to get the best price and ensure he has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process.
The court has the power and responsibility to disregard the recommendation of the receiver and to approve another offer or offers. On the other hand, the court ought not to enter into the market place or sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which his decision has been reached. Furthermore, the court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific

performance or proceed against the recommendations of its receiver except in special circumstances or where the necessity and propriety of doing so are plain. It is only in exceptional circumstances that a court will intervene and proceed contrary to the receiver's recommendations if satisfied that the receiver has acted reasonably, prudently and fairly, and not arbitrarily.

It is necessary to keep in mind not only the function of the court but the function of the receiver. The receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets. However, the court is not to apply an automatic stamp of approval to the decision of the receiver. The court has power to come to a different decision and a discretion to exercise which must be exercised judicially.

The courts have recognized that they are not making a decision in a vacuum; that they are concerned with the process not only as it affects the case at bar, but as it stands to affect situations of a similar nature in the future. The delicate balance of competing interests is relevant and material.

***Anderson J.*, (orally):**

1 This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

2 A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

3 In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

4 In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them during the course of my reasons, although they will form part of the reasons should they be transcribed.

5 On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

6 On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

7 On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

8 This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

9 Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest

63 Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

64 Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

65 The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. 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. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. 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.

66 In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

67 To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

68 The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

69 It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

70 Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

71 I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

72 Reference was made in argument to *The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd.* (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

TAB 2

1994 CarswellOnt 3852
Ontario Court of Justice (General Division) [Commercial List]

Gentra Canada Investments Inc. v. 724270 Ontario Ltd.

1994 CarswellOnt 3852, 50 A.C.W.S. (3d) 310

Gentra Canada Investments Inc., Plaintiff and 724270 Ontario Limited, 986978 Ontario Limited, Goldwin Properties Limited, ZVI Tress, London Life Insurance Insurance Company, Canadian Imperial Bank of Commerce, Daniel Markham Farms Limited and Republic National Bank of New York (Suisse) S.A., Defendants

D. Lane J.

Heard: April 20, 1994
Heard: April 21, 1994
Heard: April 22, 1994
Heard: June 27, 1994
Heard: June 28, 1994
Heard: June 30, 1994
Heard: July 4, 1994
Judgment: September 16, 1994
Docket: B215/93

Proceedings: Additional reasons (October 19, 1994), Doc. B215/93 (Ont. Gen. Div.); Affirmed (March 23, 1995), Doc. CA C19726 (Ont. C.A.)

Counsel: *Ronald G. Slaght, Q.C.* and *Robin L. Martin*, for Plaintiff.
Gary C. Grierson and *Adrienne V. Campbell*, for Price Waterhouse Limited, Receiver of the number company defendants.
R. Paul Steep and *Andrew Shaughnessy*, for Daniel Markham Farms Limited.
Richard A. Conway and *Nicholas A. Richter*, for London Life Insurance Company.

Subject: Insolvency; Property
Related Abridgment Classifications
Real property
V Landlord and tenant
V.14 Forfeiture and re-entry
V.14.e Bankruptcy or insolvency
Headnote
Bankruptcy --- Receiving order — Effect of receiving order
Bankruptcy --- Receiving order — Rescission or stay of receiving order
Landlord and tenant --- Assignment of lease — Covenant restricting assignment — Breach of covenant
Landlord and tenant --- Forfeiture and re-entry — Bankruptcy or insolvency
Landlord and tenant --- Forfeiture and re-entry — Relief against forfeiture — Grounds for relief

***Dennis Lane, J*:**

1 These motions relate to two apartment buildings at 400 Walmer Road in Metropolitan Toronto known as Park Towers containing some 547 residential suites, 27 professional suites and other facilities on 3.27 acres of land. The land is presently owned by the defendant Daniel Markham Farms Limited, ("DMF") subject to a mortgage of the fee and a ground lease. The former does not figure in the matter and the mortgagee, Republic National Bank, was not represented on the hearing. The ground

PWL endeavoured to interpret and apply the repair covenants having regard to what a reasonably minded person would expect the covenants to mean, trying not to ask too much or to accept too little, and endeavouring to guard the interests of both the lessor and the lessee under the Ground Lease.

65 This is no doubt founded on the language of the Exchequer Court in *Royal Trust Company -v- The King*, [1924] Ex.C.R. 123 and certainly represents the practical approach when confronted with parties having sharply differing views on the standard of repair. While it is not clear from this passage alone what the interpretation selected actually was, the receiver's instructions to Revay are reflected in the first Revay report at sections 1.1 and 1.2 and are substantially in accord with the analysis I have made of the covenants. An examination of the recommendations, compared to the positions of the two experts, indicates that the receiver has considered both repair and replacement; has not recommended up-grading except where necessarily incidental to proper repair; has had in mind the requirement of "first-class" substantially as I have since defined it; and has had regard to balancing cost, functionality and aesthetics. The receiver's advisor, Revay & Associates, outlined the different classes of work to be done in their report. They proposed that all Building Code violations and Retrofit Code requirements be met; that all immediate maintenance work to correct for wear and tear be done; that preventive maintenance be done to avoid certain damage in the future; that some work be done which they recommended as part of a long-term program; but that as a rule work not be done for the purpose of upgrading the quality of the building except where work necessary for maintenance had this effect.

66 This program was severely criticized by counsel for DMF in his factum declaring that it represented a bare minimum, did not take into account that first-class meant a luxury standard and tolerated some deterioration from aging. That part of the argument must fail as I have interpreted these covenants. In oral argument he said that he accepted the principle that the tenant did not have to do work only to enhance the building, but said that the receiver was not complying with that part of the principle that contemplated enhancement where it was necessary as a part of maintenance. His major example was the windows, which are conceded to be in bad shape. He submitted that the windows must be replaced with those windows which would be suitable for a first-class apartment building being built to-day. It would be incongruous, he said, to put new 1964 windows in these buildings in 1994. With great respect, the argument is unsound. These are not windows built in 1964, like an automobile model year; new windows might be built in 1994 to the design of the existing windows. There is nothing incongruous in that; indeed, it might be a very acceptable preservation of the look of the building, as well as having the practical advantage that not every window would necessarily have to be replaced. Considering the example further, it may be the business decision of the receiver to try the scheme to repair the windows, rather than replace them altogether. In my view, that course is open to the receiver under the terms of this lease. While the landlord has the right to approve some classes of work, such approval may not unreasonably be with-held and it would not be reasonable to insist on replacement when the receiver has expert advice that repair is feasible and there is no covenant to enhance, as opposed to repair and renew, the building. It is for the tenant, or in this case the receiver, and not the landlord, to manage the maintenance of the building.

67 Submissions were also made as to the decisions of the receiver relating to the quality of carpet, the suite interiors, the parking garage roof, the penthouse cladding and the external cable TV housing.

68 Some submissions about specific repairs seemed premised on the view that the court's role was to choose between the two expert reports as to what repairs are necessary and what parts of the premises ought to be replaced altogether. That, however, is the receiver's role. The court's role in supervising its receiver is quite different. In *Crown Trust -v- Rosenberg* (1986) 60 O.R. (2d) 87, Anderson J. dealt with the duties of the court on a motion to approve a sale. In principle, these duties are the same on a motion such as this. He said, at page 92, that the court must consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently. As framed the question is here premature, for the receiver is not yet asking for approval of the cost of the repairs. But there is no question that to date the effort involved in defining the repairs that are necessary has been very great indeed. Two expert reports, its own and the landlord's, have been studied and cross-examined upon and its recommendations revised accordingly. They have not been revised enough to suit the landlord, but this arises from the vastly different interpretations of the covenant upon which the respective reports are based.

TAB 3

Court of Appeal for Ontario
Ravelston Corp. (Re)
Date: 2005-11-10

Docket: CA M33075, CA M33076, CA M33049, CA C44249

Alan H. Mark, Edward Greenspan for Conrad Black

Robert Staley for Hollinger International Inc.

Derek Bell for Hollinger Inc.

Alex MacFarlane for R.S.M. Richter Inc.

Doherty J.A.:

I

[1] The receiver, R.S.M. Richter Inc. ("Richter") seeks an order quashing an appeal brought by Lord Conrad Black ("Black") as of right from the order of Farley J. Black resists the motion to quash and, by way of alternative, seeks leave to appeal the order of Farley J. Black's application for leave to appeal need be considered only if Richter successfully quashes Black's appeal.

[2] I would hold that Black does not have a right of appeal and would quash his appeal. I would refuse leave to appeal.

II

[3] In April 2005, Ravelston Corporation Limited ("RCL") was placed into receivership in proceedings taken under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*") and the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*"). Richter was appointed receiver/monitor with wide powers to manage the affairs of the company. In making the order, Farley J. indicated that Black and others had resigned as officers and directors of RCL and that the objective of the proceedings was to place RCL (and associated entities) under the control of a court appointed officer:

> The draft orders are to be adjusted to make it absolutely clear that the old guard (Black and Radier — and any other officer and director including Messrs. White and Boultbee) are "out" — out in the sense of not being able to, directly or indirectly, pull any of the strings and that Richters as an officer of the court, responsible to the court and the stakeholders of the applicants, is "in" — in in the sense of being able to pull all the strings and thereby direct the fortunes, business and affairs of the applicants.

[4] Richter has filed a series of reports with the Superior Court summarizing its activities since April 2005. Various stakeholders have raised issues before Farley J. and

[39] It was unnecessary for Farley J. to come to any conclusion as to the proper meaning of the American legislation. He based the exercise of his discretion on the absence of any reason to "quarrel with or second guess" Richter's analysis. That analysis included, but was not limited to, Richter's assessment of the U.S. Attorney's ability to effectively summons RCL in answer to the charges. Farley J. did not make the order he did because he was satisfied that RCL could be properly summonsed under the American legislation, but because he was satisfied that Richter had done its job as the court appointed receiver and there was no reason for the court to interfere with Richter's judgment as to RCL's best course of conduct.

[40] Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

[41] The second argument made by Black that Farley J. should have at least limited RCL's appearance to a challenge of the American federal court's jurisdiction fails for the same reason as his first argument. Richter was aware of this option. The determination that RCL should attorn and plead not guilty reflected its considered opinion that RCL had much to lose should it engage in and ultimately lose a jurisdictional fight with the U.S. Attorney. Richter also properly took into account its court appointed status in deciding against a jurisdictional battle with the U.S. Attorney. Finally, Richter weighed the views expressed by other stakeholders, particularly Hollinger Inc. and Hollinger International, the

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization, 2018 ONCA 713
DATE: 20180831
DOCKET: C65109

Hoy A.C.J.O., van Rensburg and Pardu JJ.A.

BETWEEN

Reciprocal Opportunities Incorporated

Plaintiff (Respondent)

and

Sikh Lehar International Organization, Narinderjit Singh Mattu, Rajwant Kaur Nijjar, Manjit Singh Mangat, Kamaljit Kaur Mangat, Suchet Singh Saini, Kamaljit Kaur Saini, Gurdev Singh Gill, Kanwaljit Kaur Gill, Inderjeet Singh Saini, Jatinder Kaur Saini, Harjeet Singh Thabal, Jaswinder Thabal, Hardeep Singh Dhoot, Raminder Dhoot, Daljit Singh Jammu, Parnpal Jammu, Harkanwal Singh, Kanwaljit Singh, Ramandeep Singh Athwal, Harnish Mangat, Sikanderjit Singh Dhaliwal, Sukhinder Dhaliwal, Gurdish Singh Mangat, Satinderjit Kaur Mangat and Guru Nanak Property Management Ltd.

Defendants (Respondent)

Paul J. Pape, for the appellant Sukhinder Sandhu

Dennis Touesnard, for the receiver JP Graci & Associates Ltd.

Ted R. Laan, for the respondent Sikh Lehar International Organization

Jonathan Piccin, for the respondent Community Trust Company and 2283435 Ontario Inc.

Heard: July 18, 2018

On appeal from the order of Justice R.J. Harper of the Superior Court of Justice, dated February 28, 2018.

Hoy A.C.J.O.:

[53] SLIO argues that it was treated unfairly because the Receiver breached its written consent to permit the redemption/assignment of the first mortgage and to obtain an order for discharge. In SLIO's submission, it is implicit in the motion judge's reasons that he found that the unfairness to SLIO was the most important factor in the circumstances and the motion judge's reasons were sufficient in this regard. SLIO notes that, in any event, insufficiency of reasons is not automatically fatal to a decision.

Analysis

(a) The motion judge erred in his performance of the second *Soundair* duty

[54] The motion judge's order was discretionary in nature. An appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations: see *HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of)* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.), at para 22.

[55] I agree with the appellant and the Receiver that the motion judge erred in performing the second *Soundair* duty: first, by failing to properly consider and give sufficient weight to the interests of the creditors; and second, by failing to consider the interests of the appellant, *qua* purchaser.

TAB 5

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

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

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

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

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

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

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

***Galligan J.A.* :**

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

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

an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to

import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Court of Appeal File No. COA-24-CV-13328
Court File No.: CV-23-00701672-00CL

CAMERON STEPHENS MORTGAGE CAPITAL LTD. Applicant	-and-	**CONACHER KINGSTON HOLDINGS INC. et al.** Respondents

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