File No. CI 20-01-26627

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

MOTION BRIEF OF THE RESPONDENTS (NOTRE DAME APPROVAL AND VESTING ORDER)

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Part I - List of Documents

1. The First Report of the Receiver, dated April 20, 2020;
2. The supplementary First Report of the Receiver, dated April 27, 2020;
3. The Second Report of the Receiver, dated May 27, 2020;
4. The Third Report of the Receiver, dated June 22, 2020; and
5. Affidavit of Greg Fenske affirmed June 24, 2020.

Part II List of Authorities

1. *Royal Bank v. Soundair* 1991 CarswellOnt 205;
2. Bill 58, The Residential Tenancies Amendment Act; and
3. COVID-19 Novel Coronavirus – Residential Tenancies Information Pamphlet.

Part III - Points to be Argued

1. The Respondents respectfully submit the following arguments as to why this Honorable Court should not approve the Receiver's Notre Dame Approval and Vesting Order. In particular, the Respondents object to the Receivers Motion for an Order approving the terms of the Mist purchase (Notre Dame property) and for a Vesting Order on the following grounds:

Open Ended Closing

2. Specifically, the Respondents are concerned about the Court be asking to approve an open ended possession/closing date which will be to the determent of the Creditors, resulting in a lower realized final price and prejudicing the Respondents who will be held responsible for the resulting financial shortfall from the proposed sale.

Marketing

3. The Receivers Third Report of June 22 states as follows (emphasis added):

> *(d) "the Notre Dame Property was listed based on its "highest and best use", which is a single tenant industrial user. Unfortunately, the industrial users contacted by Colliers were not interested in the Notre Dame Property due, in part, to the age of the buildings. The majority of interest was received from redevelopment and/or demolition buyers, such as the Purchaser, which buyers require a lower price to justify redevelopment costs".*

4. The Respondents maintain that the Receiver and its agents did not properly market the property to obtain the highest price and best sale terms, as evidenced by the Receiver's admissions that the responses were mainly from those interested in simply demolishing the premises

and obtaining the property at a price substantially below the appraised value. This is further evidenced in the Mist purchase proposal, where the Receiver reported substantial discounts were made to the purchase price and left openings for an even lower final price to be automatically approved at a later date.

The Respondents strenuously object to the terms and conditions contained in Receiver's sale proposal, as falling well short of the standards set out in the attached *Royal Bank v. Soundair*.

Market Conditions – Global Pandemic

5. The Respondents submit that the market circumstances are extremely poor due to the COVID-19 pandemic.

6. The Receiver's Third Report confirms that the offer for which it seeks approval is significantly lower than the value of the Property. At Page 13, Paragraph (d), the Receiver states: "On May 16, 2020, Mist submitted a conditional offer to purchase the Notre Dame Property, which offer was at a significant discount to the listing price of $5,245.000".

7. The Respondents therefore submit that the Receiver should be required to wait until the market conditions improve prior to finalizing a sale of the Notre Dame Property.

Receiver should pursue Second Offer

8. The Receiver confirms in its Third Report at page 14, paragraph 49 that

on June 9, 2020 it received a Second Offer that was “higher in value than what was offered by Mist”.

9. The Respondents submit that the Second Offer should be pursued by the Receiver to determine whether the conditions can be met and therefore, bring in more money for the creditors.

10. The Respondents submit that that the Receiver did not expose the Property to the market for a long enough period of time and the market conditions are poor. Therefore, the Receiver should be required to hold onto the First Offer, while pursuing the Second Offer to determine if the conditions can be met.

11. The Respondents refer this Honorable to the factors set out in *Royal Bank v. Soundair* 1991 CarswellOnt 205:

> ¶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.

12. The Respondents submit that the duty of the Receiver to make a sufficient effort to get the best price, as set out above, has not been met and can be met if the Receiver is required to pursue the Second Offer.

13. The assertion that no one would be interested in the office sections of the building is not born out by the facts as Mr. Nygard was prepared to buy this part of the building.

14. The assertion that no one would be interested in the accommodation sections of the building is not born out by the facts as Mr. Nygard was prepared to buy those parts of the building. He was also prepared to rent this part of the building. And prepared to do it now.

Tenancy at the Notre Dame Property

15. In the alternative, the Respondents submit that if this Honorable Court approves the order sought by the Receiver, Mr. Peter Nygard should be permitted to return to the property and continue his tenancy pursuant to a lease.

16. As set out in the Affidavit of Greg Fenske, affirmed June 24, 2020:

a. 1340 Notre Dame, Winnipeg, Manitoba has been a residence of Peter Nygard for in excess of forty years;

b. Peter Nygard has been residing at the Property, and has been a permanent resident of Canada for in excess of one and one-half years;

c. Peter Nygard has been continuously in this residence over the course of the past year and a half;

d. Subsequent to the Receivership Order on March 18th, 2020, Peter Nygard advised the Receiver that 1340 Notre Dame was his residence and he wanted to have the Receiver confirm this tenancy. The Receiver did not confirm the tenancy;

e. While Peter Nygard was out of his residence, at his summer lake residence, the Receiver changed the locks at 1340 Notre Dame Avenue and Peter Nygard could not gain re-entry;

f. It was always Peter Nygard's intention to continue his residence at 1340 Notre Dame during the summer while he spent most of his time at his summer lake residence;

g. It was Peter Nygard's intention to return to 1340 Notre Dame, his residence in the fall;

h. Peter Nygard was advised in writing by the Receiver that he had to be out of 1340 Notre Dame on or before June 5th, 2020. Peter Nygard advised the Receiver that he did not accept the Receiver's position; and

i. Peter Nygard agreed to have someone attend on his behalf to pick up some of his belongings. It is Peter Nygard's position some of his

belongings are still at 1340 Notre Dame.

14. Based on the evidence as set out above, it is Mr. Nygard's position that he was not legally evicted from the Property and should be allowed to return in September, as he planned.

15. The illegality of the eviction is also based on change to the *Residential Tenancies Act*, as set out in Bill 58, which prohibits evictions due to COVID-19 until at least September 30, 2020. As set out in the additional information prepared by the Province, a landlord cannot currently serve a Notice of Termination. If a Notice of Termination is served at this time, it will be considered void under the Act.

Change of Closing Date or Purchase Price

16. In the event this Honorable Court grants the Receiver's request the Approval Order should contain the following terms:

a) If the closing date is delayed more than 30 days the parties have to return to court to approve the extension.
b) If the parties ask to reduce the approved price (from that set out in the Offer dated May 22, 2020) for any reason, the parties have to return to the Court to get approval of the Court and if the price is to be reduced then Mr. Nygard will have an opportunity to have an offer approved by the Court in the amount of then new reduced price plus $50,000.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF JUNE, 2020.

No. 318/91

COURT OF APPEAL FOR ONTARIO

Goodman, McKinlay and Galligan JJ.A.

91186 003

B E T W E E N :

THE ROYAL BANK OF CANADA Plaintiff/Respondent	J.B. Berkow and S.H. Goldman for the appellants
- and -	J.T. Morin, Q.C. for Air Canada
SOUNDAIR CORPORATION, CANADIAN PENSION CAPITAL LIMITED and CANADIAN INSURERS' CAPITAL CORPORATION Defendants (Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively "CCFL") - Appellants) (Soundair Corporation - Respondent)	L.A.J. Barnes and L.E. Ritchie for the Royal Bank of Canada S.F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., Receiver of Soundair Corporation (Respondent) W.G. Horton for Ontario Express Limited N.J. Spies for Frontier Air Limited Heard: June 11, 12, 13 and 14, 1991

GALLIGAN J.A. :

This is an appeal from the order of Rosenberg J. made on May 1st, 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.

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 dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 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 Company v. Rosenberg (1986), 60 O.R. (2d) 87 at pp.92-94 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 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the Receiver had not received one offer which it thought was acceptable. After

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

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:

> 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 N.S. (1981), 38 C.B.R. (N.S.) 1 at 11 (N.S.S.C.A.D.):

> 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 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

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 hypothesis 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, 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 at 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 at 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 at 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 v. Rosenberg, supra, and Re Selkirk, supra, (Saunders J.). However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p.244 "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 v. Rosenberg, supra, Re Selkirk (1986), supra, Re Beauty Counsellors, supra, Re Selkirk (1987), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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, supra, where Saunders J. said at p.246:

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 binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

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

In Salima Investments Ltd. v. Bank of Montreal (1985), 21 D.L.R. (4th) 473 at 476, 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 refere to the reasoning of Anderson J. in Crown Trust v. Rosenberg, supra, at p.124:

> 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 v. Rosenberg, supra, at p.109:

> ...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 to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would

have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the Receiver. The Receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the Receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the Receiver knew nothing about.

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, that 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 v. Rosenberg, supra, which I adopt as my own. The first is at p.109:

> ...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 the approval.

The second is at p.111:

> 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:

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

I agree.

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 and the Environmental Protection Act, 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-client scale. I would make no order as to the costs of any of the other parties or intervenors.

J.A.

McKinlay J.A.:

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 v. Rosenberg. 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 thereform) 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.

Dunfield 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 OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors viz. CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Developments Corporation v. Spun Cast Industries Ltd. et al. (1978), 26 C.B.R. (N.S.) 28, Berger J. said at p.30:

> 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. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

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

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 downpayment 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 N.S. (1981), 38 C.B.R. (N.S.) 1 (N.S.S.C.A.D.) Hart J.A., speaking for the majority of the court, said at p.10:

> 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.S.C.) Saunders J. said at p.243:

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

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

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

> 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:

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

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 in so far 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 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 that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

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 inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is

common ground that it was a condition over which the Receiver had no control and accordingly would not have been acceptable on that ground alone. The Receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

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 downpayment 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:

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

If he meant by "acceptable in form" that it was acceptable to the Receiver then obviously OEL had the unfair advantage of its lengthy negotiations with the Receiver to ascertain what kind of an offer would be acceptable to the Receiver. If on the other hand he meant

that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

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

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 downpayment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash downpayment in the OEL transaction constitutes approximately 20-25% of the contemplated sale price. In terms of absolute dollars, the downpayment 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:

> 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 downpayment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the downpayment 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 as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a Receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the Receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the Receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

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 downpayment. It did not, however, tell the Receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became

aware of the letter of intent that it knew that CCFL was interested in purchasing Air Toronto.

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-client basis. I would make no order as to costs of any of the other parties or intervenors.

J.A.

No. 318/91

COURT OF APPEAL FOR ONTARIO

Goodman, McKinlay and Galligan JJ.A.

B E T W E E N :

THE ROYAL BANK OF CANADA

Plaintiff/Respondent

- and -

SOUNDAIR CORPORATION, CANADIAN PENSION CAPITAL LIMITED AND CANADIAN INSURERS' CAPITAL CORPORATION

Defendants
(Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively "CCFL") - Appellants)

(Soundair Corporation - Respondent)

J U D G M E N T

Released: July 3, 1991

***acm**

D.D.

57

2nd Session, 42nd Legislature,
Manitoba,
69 Elizabeth II, 2020

2e session, 42e législature,
Manitoba,
69 Elizabeth II, 2020

BILL 58

THE RESIDENTIAL TENANCIES AMENDMENT ACT

Honourable Mr. Fielding

PROJET DE LOI 58

LOI MODIFIANT LA LOI SUR LA LOCATION À USAGE D'HABITATION

M. le ministre Fielding

First Reading / Première lecture : _____

Second Reading / Deuxième lecture : _____

Committee / Comité : _____

Concurrence and Third Reading / Approbation et troisième lecture : _____

Royal Assent / Date de sanction : _____

EXPLANATORY NOTE

This Bill amends *The Residential Tenancies Act*.

- Rent is frozen at the amount payable immediately before April 1, 2020.
- Evictions are limited to specific circumstances that infringe, interfere with or adversely affect the security, safety, health or well-being of other tenants, such as engaging in unlawful activity. This amendment is effective as of March 24, 2020.
- Late fees for failure to pay rent are prohibited.

The amendments remain in effect until they are repealed by proclamation.

NOTE EXPLICATIVE

Le présent projet de loi modifie la *Loi sur la location à usage d'habitation*.

- Les loyers sont gelés au montant payable immédiatement avant le 1er avril 2020.
- Les évictions sont permises uniquement dans des circonstances précises où la santé, la sécurité ou le bien-être des autres locataires sont menacés, notamment en cas d'activités illégales. Cette modification s'applique à compter du 24 mars 2020.
- Les frais pour retard de paiement du loyer sont interdits.

Les modifications restent en vigueur jusqu'à ce qu'elles soient abrogées par proclamation.

BILL 58

THE RESIDENTIAL TENANCIES AMENDMENT ACT

(Assented to)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

C.C.S.M. c. R119 amended

1 ***The Residential Tenancies Act*** *is amended by this Act.*

2 The following is added after Part 9.1:

PART 9.2

TEMPORARY CHANGES CONCERNING THE 2020 PUBLIC HEALTH EMERGENCY

Purpose

140.9 The purpose of this Part is to make temporary changes to address the social and economic impacts on landlords and tenants that are related to the pandemic in Manitoba caused by the communicable disease known as COVID-19.

PROJET DE LOI 58

LOI MODIFIANT LA LOI SUR LA LOCATION À USAGE D'HABITATION

(Date de sanction :)

SA MAJESTÉ, sur l'avis et avec le consentement de l'Assemblée législative du Manitoba, édicte :

Modification du c. R119 de la ***C.P.L.M.***

1 La présente loi modifie la ***Loi sur la location à usage d'habitation****.*

2 Il est ajouté, après la partie 9.1, ce qui suit :

PARTIE 9.2

MODIFICATIONS TEMPORAIRES CONCERNANT L'ÉTAT D'URGENCE SANITAIRE DE 2020

Objet

140.9 La présente partie a pour objet d'apporter des modifications temporaires afin de faire face aux répercussions sociales et économiques sur les locateurs et les locataires qui sont liées à la pandémie au Manitoba causée par la maladie contagieuse connue sous le nom de COVID-19.

Freeze in Rent Increases

Rent freeze
140.10(1) Any notice of a rent increase given by a landlord in accordance with section 25

(a) on or after April 1, 2020; or

(b) before April 1, 2020, with an effective date for the rent increase being on or after April 1, 2020;

is void and the rent increase does not take effect.

Reimbursement required
140.10(2) A landlord who collects a rent increase for which no effective notice is given as a result of subsection (1)

(a) is deemed to charge rent in excess of the rent permitted by this Act; and

(b) must reimburse the amount of the excess to the person who paid it, regardless of whether it was paid before or after the coming into force of this section.

Conflict
140.10(3) This section prevails to the extent that it conflicts with

(a) any other provision of this Act; or

(b) any provision in a tenancy agreement, regardless of whether the tenancy agreement was entered into before or after the coming into force of this section.

Gel des augmentations de loyer

Gel des loyers
140.10(1) L'avis d'augmentation de loyer donné par un locateur en conformité avec l'article 25 est nul et l'augmentation de loyer n'entre pas en vigueur s'il est donné :

a) soit après le 31 mars 2020;

b) soit avant le 1er avril 2020, si l'entrée en vigueur de l'augmentation est postérieure au 31 mars 2020.

Remboursement obligatoire
140.10(2) Le locateur qui perçoit une augmentation de loyer à l'égard de laquelle aucun avis valide n'est donné par suite de l'application du paragraphe (1) :

a) est réputé exiger un loyer supérieur au montant autorisé en vertu de la présente loi;

b) rembourse le montant de l'excédent à la personne qui l'a payé, que ce montant ait été payé avant ou après l'entrée en vigueur du présent article.

Incompatibilité
140.10(3) En cas d'incompatibilité, le présent article l'emporte sur :

a) toute autre disposition de la présente loi;

b) toute disposition d'une convention de location, que cette convention ait été conclue avant ou après l'entrée en vigueur du présent article.

Forgoing Late Payment Fees

No late payment fees during emergency
140.11(1) A landlord must not require a tenant to pay a late payment fee if the tenant fails to pay the rent on the date specified in the applicable tenancy agreement.

Renonciation aux frais pour retard de paiement

Aucuns frais pour retard de paiement pendant les situations d'urgence
140.11(1) Le locateur ne peut exiger que le locataire qui ne paie pas le loyer à la date indiquée dans la convention de location applicable paie de frais pour retard de paiement.

Conflict
140.11(2) Subsection (1) prevails to the extent that it conflicts with

(a) subsection 69(4); and

(b) any provision in a tenancy agreement, regardless of whether the tenancy agreement was entered into before or after the coming into force of this section.

Incompatibilité
140.11(2) En cas d'incompatibilité, le paragraphe (1) l'emporte sur :

a) le paragraphe 69(4);

b) toute disposition d'une convention de location, que cette convention ait été conclue avant ou après l'entrée en vigueur du présent article.

Limiting Terminations

Limitation des résiliations

Landlord may terminate for limited reasons only
140.12(1) A landlord must not give a tenant a notice of termination unless

(a) the tenancy is terminated for

(i) a contravention of clause 74(a) (duty not to impair safety), or

(ii) a contravention of section 74.1 (unlawful activity by tenant); and

(b) the termination addresses an immediate risk to the health or safety of the landlord, a tenant or occupant of the residential complex, or a person permitted in the residential complex by any of those persons.

Résiliation permise pour des raisons limitées
140.12(1) Le locateur peut donner au locataire un avis de résiliation uniquement si, à la fois :

a) la location est résiliée en raison d'une violation de l'alinéa 74a) ou de l'article 74.1;

b) la résiliation a pour conséquence d'éliminer un risque immédiat pour la santé ou la sécurité du locateur, des locataires ou des occupants de l'ensemble résidentiel ou des personnes autorisées par eux à pénétrer dans l'ensemble résidentiel.

Earlier notices of termination void
140.12(2) Any notice of termination given by a landlord to a tenant with an effective date that is on or after March 24, 2020, is void unless it was given for the reasons set out in clauses (1)(a) and (b).

Nullité des avis de résiliation antérieurs
140.12(2) L'avis de résiliation donné par un locateur à un locataire qui prend effet le 24 mars 2020 ou à une date postérieure est nul sauf s'il a été donné pour les raisons prévues aux alinéas (1)a) et b).

Conflict
140.12(3) This section prevails to the extent that it conflicts with any other provision of this Act, except subsection 104(1) (termination by government authority).

Incompatibilité
140.12(3) Le présent article l'emporte sur les dispositions incompatibles de la présente loi, à l'exception du paragraphe 104(1).

No retroactive offence
*3 No person shall be charged with an offence under section 195 of **The Residential Tenancies Act** for contravening or failing to comply with a provision of Part 9.2, as enacted by section 2 of this Act, that comes into force retroactively, if the contravention or failure to comply is in respect of conduct that occurred before the coming into force of this section.*

Aucune infraction rétroactive
*3 Nul ne peut être accusé d'une infraction prévue à l'article 195 de la **Loi sur la location à usage d'habitation** en raison de la violation ou de l'inobservation d'une disposition de la partie 9.2, édictée par l'article 2 de la présente loi, qui entre en vigueur rétroactivement, si la violation ou l'inobservation se rapporte à des agissements commis avant l'entrée en vigueur du présent article.*

Repeal of Part 9.2
*4(1) The following provisions of **The Residential Tenancies Act**, as enacted by section 2 of this Act, are repealed:*

(a) section 140.9 and the Part heading before it;

(b) section 140.10;

(c) section 140.11;

(d) section 140.12.

Abrogation de la partie 9.2
*4(1) Les dispositions qui suivent de la **Loi sur la location à usage d'habitation**, édictées par l'article 2 de la présente loi, sont abrogées :*

a) l'article 140.9, et le titre de partie qui le précède est supprimé;

b) l'article 140.10;

c) l'article 140.11;

d) l'article 140.12.

Impact of repeal — notice of a rent increase
4(2) On the repeal of section 140.10, as enacted by section 2 of this Act, a written notice of a rent increase given by a landlord under section 25 takes effect on the later of

(a) the day section 140.10 is repealed; or

(b) the effective date of the rent increase, as specified in the notice.

Effet de l'abrogation — avis d'augmentation de loyer
4(2) Dès l'abrogation de l'article 140.10, édicté par l'article 2 de la présente loi, un avis écrit d'augmentation de loyer donné par un locateur en conformité avec l'article 25 prend effet à la dernière des dates suivantes :

a) le jour de l'abrogation de l'article 140.10;

b) la date d'entrée en vigueur de l'augmentation de loyer précisée dans l'avis.

Coming into force — royal assent
5(1) Subject to subsections (2) to (4), this Act comes into force on the day it receives royal assent.

Entrée en vigueur — sanction
5(1) Sous réserve des paragraphes (2) à (4), la présente loi entre en vigueur le jour de sa sanction.

Coming into force — April 1, 2020
5(2) Section 140.10, as enacted by section 2 of this Act, is deemed to have come into force on April 1, 2020.

Entrée en vigueur — 1er avril 2020
5(2) L'article 140.10, édicté par l'article 2 de la présente loi, est réputé être entré en vigueur le 1er avril 2020.

Coming into force — March 24, 2020
5(3) Subsection 140.12, as enacted by section 2 of this Act, is deemed to have come into force on March 24, 2020.

Entrée en vigueur — 24 mars 2020
5(3) L'article 140.12, édicté par l'article 2 de la présente loi, est réputé être entré en vigueur le 24 mars 2020.

Coming into force — proclamation
5(4) Section 4 comes into force on a day to be fixed by proclamation.

Entrée en vigueur — proclamation
5(4) L'article 4 entre en vigueur à la date fixée par proclamation.

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COVID-19
NOVEL CORONAVIRUS

Information for Landlords

The Manitoba government has made temporary amendments to *The Residential Tenancies Act* to address the social and economic impacts on landlords and tenants due to COVID-19. Rent increases are temporarily frozen from April 1 until September 30. Late fees are prohibited for failure to pay rent from April 1 and later. Landlords are prohibited from issuing a notice of termination other than for impairment of safety or unlawful activities that pose an immediate health and safety risk. These temporary changes will remain in effect until they are repealed by proclamation.

All non-urgent eviction hearings (such as non-payment of rent, disturbances, renovations and breach of tenancy agreements etc.) are temporarily suspended effective March 24 until September 30. All non-urgent eviction hearings for Notices of Termination given before March 24 will be scheduled after the temporary suspension is lifted

If I can't evict a tenant right now, does a tenant have to continue to pay rent?

A tenant is still obligated to pay their rent in full and on time. If a tenant fails to pay rent on the date specified on their tenancy agreement, a landlord cannot charge late fees regardless of whether the ability to charge late fees is included in the tenancy agreement. Landlords are also prohibited from issuing a notice of termination other than for impairment of safety or unlawful activities that pose an immediate health and safety risk. If a tenant has not paid their rent, a landlord may still initiate an application for an Order of Possession for non-payment of rent once the suspension is lifted. Hearings for Orders of Possession for non-payment of rent will be scheduled once the suspension is lifted.

What should I do if my tenant does not pay their rent due to COVID-19?

A tenant is required to pay their rent in full and on time. If a tenant affected by COVID-19 cannot pay their rent, the landlord may try to work with the tenant to see if payment arrangements can be made. A landlord should keep a record of the payment arrangement and track of payment received in the form of a rent ledger. If a tenant fails to pay rent on the date specified on their tenancy agreement, a landlord cannot charge late fees during this time regardless of whether the ability to charge late fees is included in the tenancy agreement.

COVID-19
NOVEL CORONAVIRUS

If I have given a notice of termination to a tenant to vacate the rental property on or after March 24, can they stay past that date?

Notices of termination issued to tenants on or after March 24 that are for any reason other than an immediate risk to health and safety (including engaging in illegal activity) are void. Landlords may wish to contact the Residential Tenancies Branch for further information.

If the rent increase is frozen does that mean I won't be able to issue a rent increase for the entire year?

A landlord is required to give a tenant three full months' notice of a rent increase in writing. In most cases a landlord is allowed to increase the rent once every 12 months. Although a landlord will not be able to collect the increase during the temporary freeze, the increase would still be considered valid and a notice of rent increase could still be provided to the tenant to ensure that the anniversary date of the rent increase on the rental unit is consistent. If a tenant receives a notice of rent increase effective between April 1, 2020 and September 30, 2020 the tenant is not required to pay the increased amount during the freeze. Effective October 1, the tenant will be required to pay the increased amount for monthly rental payments going forward.

I sent a notice of rent increase that took effect on February 1, 2020. Do tenants still need to pay the increase now that rent increases have been frozen?

Only rent increases scheduled to take effect between April 1, 2020 and September 30, 2020 are frozen. If the rent increase took effect before April 1, tenants are required to pay the amount that they were given three months written notice.

Do I have to reimburse the excess amount of rent to the tenant who paid it as a result of a notice of rent increase with an effective date for rent increase being on or after April 1, 2020?

Yes, landlords are required to reimburse the excess amount of rent to the tenant who paid it based on the notice of rent increase given by their landlord with an effective date for rent increase being between April 1, 2020 and September 30, 2020.

COVID-19
NOVEL CORONAVIRUS

Are there any financial relief measures available for landlords to deal with cash flow?

The federal government has announced a comprehensive COVID-19 economic response plan for businesses. For more information, visit: www.canada.ca/en/department-finance/economic-response-plan.html.

The Manitoba government has also announced new measures in the Manitoba Protection Plan to provide extra support and relief to businesses. For more information, visit: www.manitoba.ca/covid19.

Landlords are also encouraged to regularly visit engagemb.ca for further developments.

Can I evict tenants for other reasons during the public emergency?

Yes, landlords can evict tenants for unlawful activities and for impairment of safety that poses an immediate risk to the health and safety of others in the residential tenancy complex.

Does this policy apply to commercial leases?

No. This policy applies to residential tenancies only.

When will non-urgent eviction hearings take place?

All non-urgent eviction hearings (such as non-payment of rent, disturbances, renovations and breach of tenancy agreements etc.) are temporarily suspended effective March 24 until September 30. All non-urgent eviction hearings for Notices of Termination given before March 24 will be scheduled after the temporary suspension is lifted.

Who can I call on for assistance?

The Residential Tenancies Branch remains available over the phone, by email and by appointment.

COVID-19
NOVEL CORONAVIRUS

Can I still appeal an order issued by the Residential Tenancies Branch?

The Residential Tenancies Commission office continues to receive appeals and leave to appeal applications. If you have any questions regarding filing an appeal or leave to appeal application you can contact the Commission at 204-945-2028 or rtc@gov.mb.ca.

When will my appeal hearing be scheduled?

Appeal hearings will only proceed for security deposits and orders of possession dealing with urgent eviction orders involving immediate health and safety matters. Urgent issues could include a landlord illegally shutting off utilities or locking tenants out of their rental unit, or a tenant conducting illegal activities from their rental unit.

All other appeal hearings, including orders of possession for non-payment of rent, remain adjourned until further notice.

Hearings will adhere to social distancing measures and will be held by conference call whenever possible.

Contact us:
Residential Tenancies Branch: https://www.gov.mb.ca/cca/rtb/index.html
Residential Tenancies Commission: https://www.gov.mb.ca/cp/residtc/index.html

Residential Tenancies Branch - Winnipeg
1700 - 155 Carlton Street
Winnipeg, MB R3C 3H8
Phone: 204-945-2476
Toll Free: 1-800- 782-8403
(in Winnipeg)
Fax: 204-945-6273
Email: rtb@gov.mb.ca

Residential Tenancies Branch - Brandon
143 - 340 9th Street
Brandon, MB R7A 6C2
Phone: 204-726-6230
Toll Free 1-800-656- 8481
(in Manitoba)
Fax: 204-726-6589
Email: rtbbrandon@gov.mb.ca

Residential Tenancies Branch – Thompson
113 – 59 Elizabeth Drive
Thompson, MB R8N 1X4
Phone: 204-677-6496
Toll Free: 1-800-229-0639
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Email: rtbthompson@gov.mb.ca

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