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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re: Elevation Gold Mining Corporation, *et al.* Debtor in a Foreign Proceeding.	Chapter 15 Case No. 2:24-bk-06359-EPB **Supplement to the Monitor's Motion for Recognition and Enforcement of Canadian Sale and Distribution Order** Date: December 23, 2024 Time: 11:00 a.m.

KSV Restructuring Inc. as Monitor (the "**Monitor**") appointed by the Supreme Court of British Columbia (the "**Canadian Court**") in proceedings for the above-captioned debtors (the "**Group**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**"), and the foreign representative of those proceedings, files this Supplement to the Monitor's Motion for Recognition and Enforcement of the Canadian Sale and Distribution Order, filed December 5, 2024 (ECF 110) (the "**Motion**").[1]

After a lengthy hearing on December 17, 2024, the Canadian Court issued the Sale Order[2] and approved releases for the benefit of the Group's officers and directors, the Monitor, and the investment bank that conducted the sale process (the "**Releases**"). Patriot Gold Corp. ("**Patriot**") and Nomad Royalty Company Limited ("**Nomad**") objected to issuance of the Sale Order,

[1] Capitalized terms used in this Supplement but not defined have the meanings ascribed to them in the Motion.
[2] *See* Notice of Filing Orders of the Canadian Court at Ex. C, 3 (ECF 132-3).

arguing that the Canadian Court did not have jurisdiction and should defer to this Court on all matters relating to the sale. They objected to the Releases for officers and directors to the extent the Releases impair any claim they might have against officers and directors for conversion of Patriot's and Nomad's property during the Canadian Proceeding and this case. No such claim has been asserted in the Canadian Proceeding or this case. The Canadian Court overruled both objections.

The Canadian Court also issued the Distribution Order[3] and the Expanded Powers Order,[4] which expanded the Monitor's powers upon resignation of the Group's officers and directors following the closing of the transaction.[5] Neither Patriot nor Nomad objected to the issuance of those Orders.

The Canadian Court has plenary jurisdiction over Elevation Gold and Golden Vertex Corporation ("GVC"). Patriot and Nomad did not object to the exercise of that jurisdiction when the Canadian Court issued the Initial Order on August 1, 2024,[6] the Amended and Restated Initial Order on August 12, 2024,[7] or at any other time during the Canadian Proceeding. Nor did they object to this Court's recognition of the Canadian Proceeding as a foreign main proceeding and the enforcement in the United States of the Initial Order and the Amended and Restated Initial Order. The determinations by the Canadian Court and this Court have consequences. The proceedings here are ancillary and meant to be in aid of the Canadian Proceeding and in furtherance of the overarching principles of comity and cooperation embedded in chapter 15. Absent a delineation between plenary and ancillary jurisdiction, cross border insolvency cases are chaotic, there are incompatible decisions, and value is destroyed. This Court can avoid that outcome by granting the Motion.

The Monitor has made it clear since the first day of the proceedings in Canada and this Court that the purpose of the proceedings is to solicit and close a transaction before the Group's

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[3] ECF 132-2.
[4] ECF 132-4.
[5] The Monitor is seeking recognition and enforcement of the Expanded Powers Order in a separate motion filed in this case on December 12, 2024 (ECF 121).
[6] Filed with this Court at ECF 2-1.
[7] Filed with this Court at ECF 34-1.

liquidity constraints could force a shutdown and loss of value. The steps to achieve that goal were set out in detail in the Sales and Investment Solicitation Process (the "SISP") and the order approving it, which was issued on August 12, 2024, with the Amended and Restated Initial Order. The SISP expressly contemplated approval of the winning bid by the Canadian Court followed by this Court's recognition and enforcement of that order. Patriot and Nomad did not object to the Canadian Court's jurisdiction over that process or its supervision of it throughout these proceedings. The outcome of the SISP is a transaction that is conditioned on closing no later than December 31, 2024. Patriot and Nomad should not be allowed to derail a successful result, which is structured to preserve their rights subject to post-closing proceedings in this Court.

The assets to be transferred to the Purchaser under the Sale Agreement are:

1. The stock in GVC, an Arizona corporation, owned by Elevation Gold, the Canadian parent company, and physically held in Canada by Maverix, a Canadian company, pursuant to a pledge agreement governed by Canadian law;

2. A month-to-month lease for a storage facility in British Columbia; and

3. Books and records.

GVC's Residual Assets, which include its cash, bank deposits, and accounts receivable are to be transferred to Elevation Gold subject to all existing liens and claims, including the senior liens of Maverix and whatever interests Patriot and Nomad might allege they have in those assets. Elevation Gold will also assume the Residual Liabilities which include liabilities owed to Maverix, obligations under a Finder's Fee Agreement described in schedule 1.1 of the Sale Agreement, and unsecured pre-filing creditor claims.

The completed transaction leaves GVC intact but for the Residual Assets transferred to Elevation Gold which will remain subject to all encumbrances, and the Residual Liabilities assumed by Elevation Gold. GVC retains the licenses and permits needed to operate the business, the Moss Mine, and assets used in the business. It also retains the agreements with Patriot and Nomad and the labilities under those agreements pending the outcome of the determination process in this Court. As of the closing date, Patriot and Nomad will have whatever rights and claims they have today under those agreements, but those claims will be against a financially

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sound GVC, which will be free of more than $32 million of secured debt owed to Maverix. Patriot and Nomad will also retain any interests they might allege they have in GVC's cash and receivables, and they can make those claims against Elevation Gold pursuant to the terms of the Distribution Order. The only impact on Patriot and Nomad will be the result of proceedings in this Court, which will determine the nature and extent of their interests.

The Canadian Court concluded that it has jurisdiction over the assets to be transferred. The GVC shares are owned by a Canadian company and physically held in Canada by another Canadian company pursuant to a Canadian law governed pledge agreement. Patriot and Nomad do not claim any interest in the shares.

Maverix's Statement in Support of the Motion dated December 19, 2024,[8] explains why the GVC shares are not U.S.-based assets. But even if the GVC shares are for any relevant reason "deemed" to be in the United States, §§ 1521(a)(5) and 1521(b) allow this Court to entrust to the foreign representative the administration or realization of all or part of a foreign debtor's assets within the territorial jurisdiction of the United States. This would include the GVC shares even if they were actually in the United States and would even include the Moss Mine itself if that were being sold by GVC.

In *In re ENNIA Caribe Holding N.V.*, 596 B.R. 316 (Bankr. S.D.N.Y. 2019) the foreign representative sought access to the debtor's account at Merrill Lynch in the United States with a value of $240 million. The bankruptcy court there granted that relief under §§ 1521(a)(5) and (b), noting that there was no dispute as to ownership of that account. 596 B.R. at 323. Here, there is no dispute that Elevation Gold owns the GVC shares. It is also clear there is no value in those shares (or any other assets of the Group) over the amount of the senior secured claim of Maverix.

If any of the relief afforded in Canada is required to be subjected to an analysis under § 363 of the Bankruptcy Code, the standard is clearly satisfied here. Given the close trading relationship between Canada and the United States, and the vast amount of law governing cross border commerce it is not surprising that the standards under § 363 are substantively identical to the standards in Canada governing transfers of assets in insolvency cases. *See* the Ontario Court

[8] Filed with this Court at ECF 128.

of Appeal decision in *Royal Bank v. Soundair Corp.,* 1991 CanL II 2727 (ON CA).[9] The standards in both jurisdictions essentially boil down to business judgement and fairness: whether there is a business justification for the transaction, the process was fair and reasonable under the circumstances, and the price is fair. In Canada, the courts also consider the views of the appointed Court-officer (in this case, the Monitor) as the court officer charged with supervising the case.

The business rationale for the transaction is compelling and amply demonstrated in the Affidavit of Tim Swendseid attached to the Motion as Exhibit D, and in the Monitor's Fourth Report attached as Exhibit C. *See Sixth Swendseid Affidavit* at ¶¶ 7-17 and 25-27, *Fourth Report* at § 3.5. This transaction preserves the business and mining operations of GVC as well as employment at the mine and GVC's relationships with its trade creditors. It avoids a liquidation which would shut the mine, terminate employment, terminate business for trade creditors, and result in no recovery on any claim. The sale process consumed more than two years and was professionally run, the price is the highest and best that could be achieved, and there is no suggestion, much less evidence, that any party acted in bad faith.

Based on the record in this case, the Canadian Court approved the sale and issued the Sale Order which has been filed in this case at ECF 132-3.

The asset transfers pursuant to the Sale Order could be accomplished in a chapter 11 case, albeit in a more time-consuming and expensive process, which neither GVC nor Elevation Gold could withstand. Section 363 is available for the sale of assets including equity interests. The transfer of the Residual Assets to, and the assumption of Residual Liabilities by Elevation Gold could be embodied in a plan that complies with § 1123 of the Bankruptcy Code. Even if these clear parallels between the two jurisdictions did not exist, this Court, in an ancillary case, could recognize and enforce the foreign result. There is no requirement that the laws of the foreign jurisdiction be the same as in the United States.

[9] A copy of that decision is annexed hereto as **Exhibit A**.

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Following *Harrington v. Purdue Pharma L.P.*, 603 U.S.___, 144 S.Ct. 2071 (2024), the Releases[10] no longer have a chapter 11 analogue. In *Purdue*, the Supreme Court held that the Bankruptcy Code "does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Purdue*, 144 S.Ct. at 2088. The focus of the opinion is limited to § 1123(b), which sets out what is permitted in a chapter 11 plan. The Court concluded that each of the subsections of 1123(b) is confined to the rights and obligations of the debtor. *Id.* at 2081-83. There is nothing in § 1123 that supports a release and discharge for a non-debtor.

The statutory authority to grant a release in a chapter 15 case does not depend on whether it could be granted in a chapter 11 case. Unlike § 1520 (a)(2), which requires application of § 363 to a transfer of assets in the United States to "the same extent it would apply" in a chapter 11 case, there is no provision in chapter 15 or elsewhere in the Bankruptcy Code or other federal statute that limits U.S. enforcement of a release in a foreign proceeding. Instead, the enforcement of releases in foreign court orders is governed by the principles of enforcement of foreign judgments and international comity. *See Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 694 (Bankr. S.D.N.Y. 2010). In that case, the bankruptcy court enforced a release in favor of virtually all participants in the Canadian asset-backed commercial paper market. The beneficiaries of the releases included a long list of U.S. and international banks, dealers, conduits, and investors. The court had serious doubt that it would have the jurisdiction to grant the release in a plenary case under the Bankruptcy Code. But it concluded that "[t]here is no basis for this Court to second-

[10] The Releases for officers and directors cover claims arising before the commencement of the Canadian Proceeding only to the extent they relate to the prepetition sale process and the decision to commence CCAA proceedings. Any claims Patriot and Nomad may have against individuals for prepetition conversion are not released. The Releases also protect officers and directors from claims arising during the Canadian Proceeding. Patriot and Nomad objected only to this aspect of the Release. The Canadian Court overruled that objection based in part on the fact that the Amended and Restated Initial Order prohibited payment of obligations owing by the Group to any of their creditors as of the date of the Initial Order, and permitted but did not require the Group to pay certain post-petition obligations. The Court also exempted from the Releases any claims against directors and officers that are covered by available insurance, to the extent of any such available insurance.

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guess the decisions of the Canadian courts. Principles of comity in chapter 15 cases support enforcement of the Canadian Orders whether or not the same relief could be ordered in a plenary case under chapter 11." *Id.* at 700. The same result was reached by the court in *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013). *See also* Gillian Ho, "*After Purdue Pharma: The Future of Nonconsensual Third-Party Releases in Chapter 15 Proceedings,"* COLUMBIA BUS. L. REV. (Feb. 16, 2024).

The public policy exception in § 1506 does not limit this Court's ability to recognize and enforce the Releases in the United States. Section 1506 "is restricted to exceptional circumstances concerning the most fundamental policies of the United States." *Id.*; *see also In re Ran*, 607 F.3d 1017 (5th Cir. 2010); *In re Iida*, 377 B.R. 243 (9th Cir. BAP 2007); *In re Atlas Shipping A/S,* 404 B.R. 726 (Bankr. S.D.N.Y. 2009); *In re Ernst & Young Inc.,* 383 B.R. 779 (Bankr. D. Colo. 2008).

The jurisdiction of the foreign court and procedural fairness are the principal factors in the analysis. Section 1506 is a barrier where the extension of comity would severely impinge the value and import of a U.S. statute or constitutional right. *See In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333 (S.D.N.Y. 2006). In that case the district court in a chapter 15 proceeding ancillary to a CCAA proceeding enforced a Canadian arbitration process that would deprive U.S. personal injury and wrongful death claimants of their rights to jury trials that would be statutorily protected in a plenary case under the Bankruptcy Code. 349 B.R at 337. The court overruled objections under § 1506 based on U.S. public policy concerns. *Id.* at 335-36.

In *Purdue*, the Supreme Court did not discuss any constitutional or policy grounds for its decision. It expressly declined to address public policy issues and said, "this Court is the wrong audience for such policy disputes." *Purdue*, 144 S.Ct. at 2076. The Court limited its decision to what is permissible in a chapter 11 plan. *See id.*

It is also notable that third-party releases are expressly authorized in chapter 11 plans dealing with asbestos liabilities. 11 U.S.C. § 524(g). Since third-party releases are permitted in some situations, it cannot be the case that a third-party release in a foreign proceeding is violative of a fundamental U.S. public policy. This is particularly the case where the release is approved in

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a main plenary proceeding in a sister common law jurisdiction whose procedures in insolvency cases have uniformly been found to be fair in decisions by U.S. courts since at least 1883. *See Can. S. Ry. Co. v. Gebhard*, 109 U.S. 527 (1883).

After the *Purdue* decision, at least two bankruptcy courts approved third-party releases in chapter 15 cases. *See In re Nexii Bldg. Sols. Inc.*, Case No. 24-10026 (JKS) (Bankr. D. Del. July 18, 2024), at ¶ 10, annexed hereto as **Exhibit B**; *In re Americanas S.A.*, No. 23-10092 (MEW), 2024 WL 3506637 (Bankr. S.D.N.Y. July 22, 2024).

Based on the foregoing, this Court should not allow Patriot and Nomad to collaterally attack any of the Canadian Court's Orders.

WHEREFORE, the Monitor respectfully requests that this Court grant the Motion and provide any other or further relief as may be appropriate.

DATED this 20th day of December 2024.

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CERTIFICATE OF SERVICE

I certify that on this 20th day of December, 2024, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and served through the Notice of Electronic Filing automatically generated by the Court's facilities.

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

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

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

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

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

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

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

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

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

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

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

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

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

Cases referred to

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

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

Statutes referred to

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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

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

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

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

2. It should consider the interests of all parties.

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

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

I intend to discuss the performance of those duties separately.

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

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

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

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

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

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

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

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

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

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

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

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

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

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

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

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

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

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

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

2. Consideration of the interests of all parties

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

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

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

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

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

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

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

While those remarks may have been made in the context of a

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

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

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

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

(Emphasis added)

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

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

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

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

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

4. Was there unfairness in the process?

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

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

purchaser would require in order to make a serious bid.

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

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

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

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

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

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

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

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

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

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

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

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

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

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

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

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

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

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

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

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

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

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

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

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

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

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

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

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

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

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

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

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

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

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

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

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

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

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

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

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

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

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

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

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

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

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

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

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

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

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

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

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

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

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

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

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

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

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

To the extent that approval of the OEL agreement by Rosenberg

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

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

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

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

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

29, 1990.

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

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

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

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

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

include the purchase of any tangible assets or leasehold interests.

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

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

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

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

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

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

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

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

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

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

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

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

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

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

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

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

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

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

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

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

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

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

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

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

I accept that statement as being an accurate statement of the

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

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

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

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

procedure adopted by the receiver.

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

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

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

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

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

Appeal dismissed.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
NEXII BUILDING SOLUTIONS INC., et al.,[1]	Case No. 24-10026 (JKS)
Debtors in a Foreign Proceeding.	(Jointly Administered)
	Ref. Docket No. 48

ORDER GRANTING MOTION OF FOREIGN REPRESENTATIVE, PURSUANT TO SECTIONS 105(A), 363, 365, 1501, 1507, 1520, AND 1521 OF THE BANKRUPTCY CODE, AND BANKRUPTCY RULES 2002, 6004, 6006, AND 9014, FOR ENTRY OF AN ORDER (I) RECOGNIZING AND ENFORCING THE APPROVAL AND VESTING ORDER, (II) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES, AND (III) GRANTING RELATED RELIEF

Upon the motion (the "Motion")[2] of Nexii Building Solutions Inc., in its capacity as the Foreign Representative of the Debtors in the CCAA Proceedings, requesting entry of an order (this "Order") pursuant to sections 105(a) 363, 365, 1501, 1507, 1520, and 1521 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), (a) recognizing and giving effect in the United States to the Approval and Vesting Order, attached hereto as **Exhibit 1**; (b) approving, under section 363 of the Bankruptcy Code, the sale of the Debtors' right, title, and interest in and to the Purchased Assets to the Buyer, free and clear of all liens, claims, encumbrances, and other interests (other than the

[1] The Debtors in these chapter 15 cases (the "Chapter 15 Cases"), along with the last four digits of each Debtor's unique identifier, are Nexii Building Solutions Inc. (0911), Nexii Construction Inc. (1333), NBS IP Inc. (9930), and Nexii Holdings Inc. (5873). The Debtors' service address for purposes of these Chapter 15 Cases is 1455 West Georgia Street, #200, Vancouver, British Columbia V6G 2T3.

[2] Capitalized terms used and not defined herein shall have the meaning ascribed to such terms in the Motion.

Permitted Encumbrances); and (c) granting related relief; and upon the Tucker Declaration [Dkt. No. 7], the Jackson Declaration [Dkt No. 8], and the Tucker Sale Declaration [Dkt. No. 49]; and the Court having jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested being a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that due and proper notice of the Motion has been provided and no other or further notice need be provided; and a hearing (the "Hearing") having been held to consider the relief requested in the Motion; and upon the record of the Hearing and all of the proceedings had before the Court; and the Court having found and determined that the relief sought in the Motion is consistent with the purpose of chapter 15 of the Bankruptcy Code and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, IT IS HEREBY FOUND AND DETERMINED THAT:[3]

A. On June 28, 2024, the Canadian Court entered the Approval and Vesting Order approving the transactions contemplated by the Asset Purchase Agreement and authorizing the Debtors to take all such actions necessary and proper to effectuate the Sale.

B. This Court has jurisdiction and authority to hear and determine the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b). Venue of these Chapter 15 Cases and the Motion in this Court and this District is proper under 28 U.S.C. § 1410.

C. Based on the affidavits of service filed with, and the representations made to, this Court: (i) notice of the Motion, the Hearing, and the Approval and Vesting Order was proper, timely, adequate, and sufficient under the circumstances of these Chapter 15 Cases and these

[3] The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

proceedings and complied with the various applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules; and (ii) no other or further notice of the Motion, the Hearing, the Approval and Vesting Order, or the entry of this Order is necessary or shall be required.

D. This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a).

E. The relief granted herein is necessary and appropriate, is in the interest of the public, promotes international comity, is consistent with the public policies of the United States, is warranted pursuant to sections 105(a), 363(b), (f), (m) and (n), 365, 1501, 1507, 1520, and 1521 of the Bankruptcy Code, and will not cause any hardship to any parties in interest that is not outweighed by the benefits of the relief granted.

F. Based on information contained in the Motion, the Tucker Declaration, the Jackson Declaration, the Tucker Sale Declaration, and the record made at the Hearing, the Debtors' and the Monitor's advisors conducted a marketing and sale process to solicit interest in the Purchased Assets and such process was non-collusive, duly noticed, and provided a reasonable opportunity to make an offer to purchase the Purchased Assets. The Foreign Representative and the Monitor have each recommended the sale of the Purchased Assets in accordance with the Asset Purchase Agreement, and it is appropriate that the Purchased Assets be sold, transferred, assigned, and vested in the Buyer on the terms and subject to the conditions set forth in the Asset Purchase Agreement.

G. Based on information contained in the Motion, the Tucker Declaration, the Jackson Declaration, and the Tucker Sale Declaration, and the record made at the Hearing, the relief granted herein relates to assets that, under the laws of the United States, should be administered in the

CCAA Proceedings.

H. The Debtors' entry into and performance under the Asset Purchase Agreement and related agreements (i) constitute a sound and reasonable exercise of the Debtors' business judgment, (ii) provide value and are beneficial to the Debtors, and are in the best interests of the Debtors and their stakeholders, and (iii) are reasonable and appropriate under the circumstances. Business justifications for the sale of the Purchased Assets include, but are not limited to, the following: (a) the Asset Purchase Agreement constitutes the highest and otherwise best offer received for the Purchased Assets; (b) the Asset Purchase Agreement presents the best opportunity to maximize the value of the Purchased Assets on a going concern basis and avoid devaluation of the Purchased Assets; (c) unless the sale of the Purchased Assets pursuant to the Asset Purchase Agreement and all of the other transactions contemplated by the Asset Purchase Agreement and related agreements are concluded expeditiously, as provided for in the Asset Purchase Agreement, recoveries to the Debtors' creditors may be diminished; and (d) the value received for the Purchased Assets will be maximized through the transactions under the Asset Purchase Agreement and related agreements. The consideration provided by the Buyer for the Purchased Assets under the Asset Purchase Agreement constitutes fair consideration and reasonably equivalent value for the Purchased Assets under the Bankruptcy Code, the Uniform Voidable Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, and other laws of the United States, any state, territory, possession thereof, or the District of Columbia.

I. The Buyer is not, and shall not be deemed to be, a mere continuation, and is not holding itself out as a mere continuation, of any of the Debtors and there is no continuity between the Buyer and the Debtors. The Sale does not amount to a consolidation, merger, or de facto merger of the Buyer and any of the Debtors.

J. Time is of the essence in consummating the Sale. To maximize the value of the Purchased Assets, it is essential that the Sale occur and be recognized and enforced in the United States promptly. The Foreign Representative on behalf of the Debtors has demonstrated compelling circumstances and a good, sufficient, and sound business purpose and justification for the immediate approval and consummation of the Sale as contemplated by the Asset Purchase Agreement. Accordingly, there is cause to waive the stay that would otherwise be applicable under Bankruptcy Rules 6004(h) and 6006(d), and accordingly the transactions contemplated by the Asset Purchase Agreement and related agreements can be closed as soon as reasonably practicable upon entry of the Approval and Vesting Order and this Order.

K. Based upon information contained in the Motion, the Tucker Declaration, the Jackson Declaration, the Tucker Sale Declaration, the other pleadings filed in these Chapter 15 Cases, and the record made at the Hearing, the Asset Purchase Agreement and each of the transactions contemplated therein were negotiated, proposed and entered into by the Debtors and the Buyer in good faith, without collusion and from arms'-length bargaining positions. The Buyer is a "good faith purchaser" within the meaning of section 363(m) of the Bankruptcy Code and, as such, is entitled to all the protections afforded thereby. None of the Debtors, the Foreign Representative, nor the Buyer has engaged in any conduct that would cause or permit the Asset Purchase Agreement or the consummation of the Sale to be avoided or costs and damages to be imposed under section 363(n) of the Bankruptcy Code. The Buyer is not an "insider" of any of the Debtors, as that term is defined in section 101 of the Bankruptcy Code, and no common identity of incorporators, directors, or controlling stockholders exists between the Buyer and the Debtors.

L. The Asset Purchase Agreement was not entered into for the purpose of hindering, delaying, or defrauding any present or future creditors of the Debtors.

M. The Asset Purchase Agreement requires the assignment of the Assigned Agreements to the Buyer, which assignment is expressly approved by the Approval and Vesting Order. Such assignments by order of the Canadian Court require that all monetary defaults by the applicable Debtors under such Assigned Agreements be remedied by payment of cure costs (if any). As such, enforcement in the United States of the assignment of the Assigned Agreements to the Buyer does not present any public policy conflict or any issue concerning protection of the interests of the non-Debtor parties to the Assigned Agreements that would prevent this Court from entering this Order.

N. Consistent with the Approval and Vesting Order, the Foreign Representative, on behalf of itself and the Debtors, may sell the Purchased Assets free and clear of all liens, claims (as defined in section 101(5) of the Bankruptcy Code), rights, liabilities, encumbrances and other interests of any kind or nature whatsoever against the Debtors or the Purchased Assets, including, without limitation, security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, pledges, options, warrants, trusts or deemed trusts (whether contractual, statutory, or otherwise), obligations, liabilities, demands, guarantees, restrictions, contractual commitments, rights, including without limitation, rights of first refusal and rights of set-off, liens, executions, levies, penalties, charges, financial or monetary claims, adverse claims, or rights of use, puts or forced sale provisions exercisable as a consequence of or arising from the closing of the sale of the Purchased Assets, whether arising prior to or subsequent to the commencement of the CCAA Proceedings and these Chapter 15 Cases, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, equitable, possessory or otherwise, actual or threatened civil, criminal, administrative, regulatory, arbitral or investigative inquiry, action, complaint, suit, investigation, dispute, petition or proceeding by or before any governmental

authority or Person at law or in equity, whether imposed by agreement, understanding, law, equity or otherwise, and any claim or demand resulting therefrom (collectively, the "Encumbrances"), other than the Permitted Encumbrances, because with respect to each creditor asserting any Encumbrance, one or more of the standards set forth in section 363(f)(l)–(5) of the Bankruptcy Code has been satisfied. Each creditor that did not object to the Motion is deemed to have consented to the sale of the Purchased Assets free and clear of all Encumbrances pursuant to section 363(f)(2) of the Bankruptcy Code.

O. The total consideration to be provided under the Asset Purchase Agreement reflects the Buyer's reliance on this Order to provide it, pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, with title to and possession of the Purchased Assets free and clear of all Encumbrances, other than the Permitted Encumbrances.

P. The transfer of the Debtors' rights under the Assigned Agreements as and to the extent provided in the Approval and Vesting Order is integral to the Asset Purchase Agreement, is in the best interests of the Debtors and their estates, and represents the reasonable exercise of the Debtors' business judgment.

Q. As of the filing of the Monitor's Certificate in the CCAA Proceedings and the delivery thereof to the Buyer, the transfer of the Purchased Assets to the Buyer will be a legal, valid and effective transfer of the Purchased Assets, and will vest the Buyer with all right, title and interest of the Debtors in and to the Purchased Assets, free and clear of all Encumbrances, other than the Permitted Encumbrances.

R. Consistent with the Approval and Vesting Order, the Foreign Representative, the Debtors, and the Monitor, as appropriate, (i) have full power and authority to execute the Asset Purchase Agreement and all other documents contemplated thereby, (ii) have all the power and

authority necessary to consummate the transactions contemplated by the Asset Purchase Agreement, and (iii) upon entry of this Order, other than any consents identified in the Asset Purchase Agreement (including with respect to antitrust matters, if any), need no consent or approval from any other Person or governmental unit to consummate the Sale. The Debtors are the sole and rightful owners of the Purchased Assets, no other Person has any ownership right, title, or interest therein, and the Sale has been duly and validly authorized by all necessary corporate action of the Debtors.

S. The Asset Purchase Agreement is a valid and binding contract between the Debtors and the Buyer and shall be enforceable pursuant to its terms. The Asset Purchase Agreement, the Sale, and the consummation thereof shall be specifically enforceable against and binding upon (without posting any bond) the Debtors and the Foreign Representative in these Chapter 15 Cases and shall not be subject to rejection or avoidance by the foregoing parties or any other Person.

T. The Buyer would not have entered into the Asset Purchase Agreement and would not consummate the purchase of the Purchased Assets and the related transactions, thus adversely affecting the Debtors, their creditors, and other parties in interest, if the sale of the Purchased Assets to the Buyer was not free and clear of all Encumbrances (other than Permitted Encumbrances), or if the Buyer would, or in the future could, be liable on account of any such Encumbrances, including, as applicable, certain liabilities related to the Purchased Assets that will not be assumed by the Buyer, as described in the Asset Purchase Agreement.

U. A sale of the Purchased Assets other than free and clear of all Encumbrances (other than Permitted Encumbrances) would yield substantially less value than the sale of the Purchased Assets pursuant to the Asset Purchase Agreement; thus, the sale of the Purchased Assets free and clear of all Encumbrances, in addition to all of the relief provided herein, is in the best interests of

the Debtors, their creditors, and other parties in interest.

V. The interests of the Debtors' creditors in the United States are sufficiently protected. The relief granted herein is necessary and appropriate, in the interests of the public and international comity, consistent with the public policies of the United States, and warranted pursuant to section 1521(b) of the Bankruptcy Code.

W. The legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein.

X. Any and all findings of fact and conclusions of law announced by this Court at the Hearing are incorporated herein.

IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. The Court recognizes the Approval and Vesting Order, attached hereto as **Exhibit 1**, which is hereby given full force and effect in the United States in its entirety.

3. The Asset Purchase Agreement and the Sale contemplated thereunder, including, for the avoidance of doubt, the sale of the Purchased Assets and the transfers and assignments of the Purchased Assets located within the United States on the terms set forth in the Asset Purchase Agreement, the Approval and Vesting Order, including all transactions contemplated thereunder, this Order, including all transactions contemplated hereunder, and all of the terms and conditions of each of the foregoing are hereby authorized pursuant to sections 105, 363, 365, 1501, 1520 and 1521 of the Bankruptcy Code.

4. All objections to the entry of this Order that have not been withdrawn, waived, or settled, or otherwise resolved pursuant to the terms hereof, are denied and overruled on the merits, with prejudice.

5. Pursuant to sections 105, 363, 365, 1501, 1520, and 1521 of the Bankruptcy Code, the Approval and Vesting Order, and this Order, the Debtors, the Buyer, and the Foreign Representative (as well as their respective officers, employees and agents) are authorized to take any and all actions necessary or appropriate to: (a) consummate the Sale, including the sale of the Purchased Assets to the Buyer, in accordance with the Asset Purchase Agreement, the Approval and Vesting Order, and this Order; and (b) perform, consummate, implement and close fully the Asset Purchase Agreement, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Asset Purchase Agreement and the Sale and to take such additional steps and all further actions as may be necessary or appropriate to the performance of the obligations contemplated by the Asset Purchase Agreement, all without further order of the Court, and are hereby authorized and empowered to cause to be executed and filed such statements, instruments, releases and other documents on behalf of such Person or entity with respect to the Purchased Assets that are necessary or appropriate to effectuate the Sale, any related agreements, the Approval and Vesting Order and this Order, including amended and restated certificates or articles of incorporation and by-laws or certificates or articles of amendment, and all such other actions, filings, or recordings as may be required under appropriate provisions of the applicable laws of all applicable governmental units or as any of the officers of the Debtors or the Buyer may determine are necessary or appropriate, and are hereby authorized and empowered to cause to be filed, registered or otherwise recorded a certified copy of the Approval and Vesting Order, this Order, or the Asset Purchase Agreement, which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the release of all Encumbrances against the Purchased Assets. The Approval and Vesting Order and this Order are deemed to be in recordable form sufficient to be placed in the filing or recording system of every federal, state, or local

government agency, department or office.

6. All Persons that are currently in possession of some or all of the Purchased Assets located in the United States or that are otherwise subject to the jurisdiction of this Court are hereby directed to surrender possession of such Purchased Assets to the Buyer on the Closing Date.

Treatment of Executory Contracts and Unexpired Leases

7. Pursuant to, and to the extent allowed by, the Approval and Vesting Order, on the Effective Date, the rights and obligations of the Debtors under the Assigned Agreements shall be, notwithstanding any provision contained in any such Assigned Agreement that prohibits, restricts, or conditions assignment or transfer thereof or requires consent of any party to such assignment or transfer (each, an "Anti-Assignment Provision"), assigned to the Buyer or any Affiliate or designee thereof and shall remain in full force and effect for the benefit of the Buyer or such Affiliate or designee in accordance with their respective terms.

8. Each non-Debtor counterparty to the Assigned Agreements is prohibited from exercising any right or remedy under the Assigned Agreements by reason of (a) any non-monetary defaults or defaults or events of default arising as a result of the insolvency of any Debtor or the cessation of the Debtors' or their Affiliates' normal course business operations, (b) the insolvency of any Debtor or the fact that the Debtors sought or obtained relief under the CCAA or under the Bankruptcy Code, (c) any releases, discharges, cancellations, transactions or other steps taken or effected pursuant to the Asset Purchase Agreement, the Sale (including the pre-Closing reorganization of the Debtors), the provisions of this Order or any other Order of the Court in these Chapter 15 Cases, or (d) any change of control of the Debtors or their Affiliates arising from the implementation of the Sale, or any Anti-Assignment Provision in an Assigned Agreement.

9. This Court shall retain jurisdiction to enforce any and all terms and provisions of the Asset Purchase Agreement, the Approval and Vesting Order, and this Order with respect to the Assigned Agreements in the United States.

Releases

10. The releases set forth in paragraph 15 of the Approval and Vesting Order (the "Releases") are recognized by this Court and given full force and effect in the United States.

Transfer of the Purchased Assets Free and Clear

11. Pursuant to sections 105(a), 363, 365, 1501, 1520, and 1521 of the Bankruptcy Code, on the Closing Date, all rights, title, and interest of the Debtors in the Purchased Assets shall be transferred and absolutely vest in the Buyer, without further instrument of transfer or assignment, and such transfer shall: (a) be a legal, valid, binding and effective transfer of the Purchased Assets to the Buyer; (b) vest the Buyer with all right, title and interest of the Debtors in the Purchased Assets, and (c) be free and clear of all Encumbrances, other than the Permitted Encumbrances.

12. Pursuant to sections 105(a), 363(f), 365, 1501, 1520 and 1521 of the Bankruptcy Code, upon the closing of the Sale: (a) no holder of an Encumbrance shall interfere, and each and every holder of an Encumbrance is enjoined from interfering, with the Buyer's rights and title to or use and enjoyment of the Purchased Assets; and (b) the sale of the Purchased Assets, the Asset Purchase Agreement, and any instruments contemplated thereby shall be enforceable against and binding upon, and not subject to rejection or avoidance by, the Debtors or any successor thereof. All Persons holding an Encumbrance are forever barred and enjoined from asserting such Encumbrance against the Purchased Assets, the Buyer or its Affiliates and their respective officers, directors, employees, managers, partners, members, financial advisors, attorneys, agents, and

representatives and their respective Affiliates, successors and assigns from and after closing of the Sale.

13. Consistent with the Approval and Vesting Order, every federal, state, and local governmental agency or department is authorized to accept (and not impose any fee, charge, or tax in connection therewith) any and all documents and instruments necessary or appropriate to consummate the sale of the Purchased Assets to the Buyer and the Sale generally. Effective as of the closing date, the Approval and Vesting Order and this Order shall constitute for any and all purposes a full and complete general assignment, conveyance, and transfer of the Debtors' interests in the Purchased Assets to the Buyer free and clear of all Encumbrances, other than the Permitted Encumbrances.

14. This Order (a) shall be effective as a determination that, as of the Closing Date, all Encumbrances, other than the Permitted Encumbrances, have been unconditionally released, discharged and terminated as to the Buyer and the Purchased Assets, and that the conveyances and transfers described herein have been effected, and (b) is and shall be binding upon and govern the acts of all Persons, including all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal and local officials and all other Persons who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any lease; and each of the foregoing Persons is hereby authorized to accept for filing any and all of the documents and instruments necessary and appropriate to consummate the transactions contemplated by the Asset Purchase Agreement and effect the discharge of all Encumbrances other than the Permitted Encumbrances pursuant to this

Order and the Approval and Vesting Order and not impose any fee, charge, or tax in connection therewith.

15. Consistent with the Approval and Vesting Order and based on the testimony provided at the hearing, the Buyer is not and shall not be deemed to: (a) be a legal successor, or otherwise be deemed a successor to any of the Debtors; (b) have, de facto or otherwise, merged with or into any or all Debtors; or (c) be a mere continuation or substantial continuation of any or all Debtors or the enterprise or operations of any or all Debtors.

16. Consistent with the Approval and Vesting Order and based on the testimony provided at the hearing, the Sale, including the purchase of the Purchased Assets, is undertaken by the Buyer in good faith, as that term is used in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorizations provided herein shall neither affect the validity of the Sale nor the transfer of the Purchased Assets, including the Assigned Agreements, to the Buyer free and clear of all Encumbrances, unless such authorization is duly stayed before the closing of the Sale pending such appeal.

17. Consistent with the Approval and Vesting Order and based on the testimony provided at the hearing, neither the Debtors nor the Buyer has engaged in any conduct that would cause or permit the Asset Purchase Agreement to be avoided or costs and damages to be imposed under section 363(n) of the Bankruptcy Code.

18. Notwithstanding the provisions of Bankruptcy Rules 6004(h) and 6006(d) or any applicable provisions of the Bankruptcy Rules or Local Rules, this Order shall not be stayed after the entry hereof, but shall be effective and enforceable immediately upon entry, and the fourteen (14) day stay provided in Bankruptcy Rules 6004(h) and 6006(d) is hereby expressly waived and shall not apply. The Debtors, the Buyer, and the Foreign Representative are not subject to any stay

in the implementation, enforcement or realization of the relief granted in this Order. For the avoidance of doubt, the Debtors, the Buyer, and the Foreign Representative may, in their discretion and without further delay, take any action and perform any act authorized under the Approval and Vesting Order or this Order.

19. The terms and provisions of the Asset Purchase Agreement, the Approval and Vesting Order, and this Order shall be binding in all respects upon, and shall inure to the benefit of, the Debtors, the Buyer, the Foreign Representative, the Debtors' creditors, and all other parties in interest, and any successors of the Debtors, the Buyer, the Foreign Representative, and the Debtors' creditors, including any foreign representative(s) of the Debtors, trustee(s), examiner(s) or receiver(s) appointed in any proceeding, including without limitation any proceeding under any chapter of the Bankruptcy Code, the CCAA, or any other law, and all such terms and provisions shall likewise be binding on such foreign representative(s), trustee(s), examiner(s), or receiver(s) and shall not be subject to rejection or avoidance by the Debtors, their creditors, or any trustee(s), examiner(s) or receiver(s).

20. Subject to the terms and conditions of the Approval and Vesting Order, the Asset Purchase Agreement and any related agreements, documents or other instruments, may be modified, amended or supplemented by the parties thereto, in a writing signed by each party, and in accordance with the terms thereof, without further order of the Court; provided that any such modification, amendment, or supplement does not materially change the terms of the Sale, the Asset Purchase Agreement or any related agreements, documents or other instruments and is otherwise in accordance with the terms of the Approval and Vesting Order.

21. The provisions of this Order and the Asset Purchase Agreement are non-severable and mutually dependent. To the extent that there are any inconsistencies between the terms of this

Order and the Approval and Vesting Order, on the one hand, and the Asset Purchase Agreement, on the other, this Order and the Approval and Vesting Order shall govern.

22. Nothing in this Order shall be deemed to waive, release, extinguish or estop the Debtors or the Foreign Representative from asserting, or otherwise impair or diminish, any right (including, without limitation, any right of recoupment), claim, cause of action, defense, offset or counterclaim in respect of any asset that is not a Purchased Asset.

23. This Court shall retain jurisdiction with respect to any and all matters, claims, rights, or disputes arising from or related to the implementation or interpretation of this Order or the Approval and Vesting Order in the United States.

Dated: July 18th, 2024
Wilmington, Delaware

J. KATE STICKLES
UNITED STATES BANKRUPTCY JUDGE

No. S240195
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

and

IN THE MATTER OF NEXII BUILDING SOLUTIONS INC., NEXII CONSTRUCTION INC, NBS IP INC., NEXII HOLDINGS INC., 4540514 CANADA INC., 1061660 B.C. LTD., 0592286 B.C. LTD, 0713447 B.C. LTD, AND 0597783 B.C. LTD.

PETITIONERS

APPROVAL AND VESTING ORDER

BEFORE THE HONOURABLE	)	
	)	June 28, 2024
JUSTICE STEPHENS	)	

ON THE APPLICATION of KSV Restructuring Inc., in its capacity as the Court-appointed Monitor (in such capacity the "**Monitor**"), coming on for hearing at Vancouver, British Columbia, on the 28th day of June, 2024; AND ON HEARING from counsel of the Monitor, Michael Shakra and Andrew Froh, and those other counsel listed on **Schedule "A"** hereto, and no one else appearing although duly served; AND UPON READING, the material filed, including the Third Report of the Monitor dated June 24, 2024 (the "**Third Report**"); AND PURSUANT TO the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), the British Columbia *Supreme Court Civil Rules*, and the inherent jurisdiction of this Court;

THIS COURT ORDERS AND DECLARES THAT:

1. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to them in the Asset Purchase Agreement dated June 21, 2024 between Nexii Building Solutions Inc., Nexii Construction Inc., NBS IP Inc. and Nexii Holdings Inc. (In such capacity, the "**Vendors**") and Nexiican Holdings Inc. (the "**Purchaser**") and Nexii, Inc. (together with the Purchaser and both in such capacity, the "**Purchaser Parties**"), a copy of which is attached hereto as **Schedule "B"** (the "**Sale Agreement**") and the Third Report of the Monitor.

2. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today.

APPROVAL AND VESTING

3. The transactions (the "**Transaction**") contemplated by the Sale Agreement are commercially reasonable and are hereby approved, with such minor amendments as the Petitioners may deem necessary with the consent of the Purchaser Parties, the Monitor and the DIP Lenders. The execution of the Sale Agreement by the Vendors is hereby authorized, ratified, and approved and the Vendors are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance to the Purchaser and any permitted assignees under the Sale-Agreement of the Purchased Assets.

4. This Order shall constitute the only authorization required by the Vendors to proceed with the Transaction and no shareholder or other approvals shall be required in connection therewith.

5. The Monitor is hereby authorized to take such additional steps in furtherance of its responsibilities under the Sale Agreement and this Order and shall not incur any liability in taking such steps.

6. Upon the filing with this Court of the Monitor's Certificate substantially in the form attached hereto as **Schedule "C"** (the "**Monitor's Certificate**"), all of the Vendors' right, title and interest in and to the Purchased Assets described in the Sale Agreement shall vest absolutely in the Purchaser in fee simple in the manner set forth in the Sale Agreement, and except as otherwise specified herein, free and clear of and from any security interest, debenture, lien, Claim, charge, right of retention, trust, deemed trust, judgement, writ of seizure, writ of execution, notice of seizure, notice of execution, notice of sale, hypothec, reservation of ownership, pledge, encumbrance, assignment (as security), royalty interest, defect of title or adverse claim of any nature or kind, mortgage or right of a third party (including any contractual right, such as a purchase option, call or similar right of a third party in respect of securities, right of first refusal, right of first offer or any other pre-emptive contractual right) or encumbrance of any nature or kind whatsoever and any agreement, option or privilege (whether by law, contract or otherwise) capable of becoming any of the foregoing, (including any conditional sale or title retention agreement, or any capital or financing lease) (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by any Order of this Court in the Petitioners' CCAA proceeding commenced on January 11, 2024 (this "**CCAA Proceeding**");

   (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* of British Columbia, the *Personal Property Security Act* of Ontario or any other personal property registry system in any jurisdiction, including the United States;

(c) all claims in respect of, or relating to, any Taxes, apart from Transfer Taxes, owing by the Petitioners as at the Closing Date or any Taxes assessed or that could be assessed in respect of the Petitioners their business, property and assets; and

(d) any other restrictions which may be applicable to the Purchased Assets,

(all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed in **Schedule "D"** hereto (the "**Permitted Encumbrances**")), and, for greater certainty, all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

7. The Monitor may rely on written notice from the Vendors and the Purchaser Parties regarding the fulfilment of the conditions to Closing under the Sale Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

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

9. Pursuant to Section 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* or Section 18(10)(o) of the *Personal Information Protection Act* of British Columbia, or any other personal privacy legislation of another province where applicable to the Vendors, the Vendors and the Monitor are hereby authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the company's records pertaining to the Vendors' past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner, which is in all material respects identical to the prior use of such information, by the Vendors.

10. Subject to the terms of the Sale Agreement, vacant possession of the Purchased Assets, shall be delivered by the Vendors to the Purchaser and any permitted assignees under the Sale Agreement at the Closing Time, subject to the Permitted Encumbrances.

11. The Vendors, with the consent of the Purchaser Parties and the Monitor, shall be at liberty to extend the Closing Date to such later date according to the Sale Agreement without the necessity of a further Order of this Court.

12. Notwithstanding:

(a) this CCAA Proceeding or the termination thereof;

(b) any applications for a bankruptcy order in respect of any or all of the Petitioners or now or hereafter made pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made by or in respect of any or all of the Petitioners,

the vesting of the Purchased Assets in the Purchaser and/or any permitted assignees under the Sale Agreement pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Petitioners and shall not be void or voidable by creditors of the Petitioners, nor shall it constitute or be deemed to be a transfer at undervalue, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, or any similar legislation of a jurisdiction outside of Canada, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

ASSUMED CONTRACTS

13. Except as expressly contemplated in the Sale Agreement and subject to the payment of any amounts required to be paid pursuant to Section 11.3 of the CCAA (or such other amount as agreed upon between the Purchaser or any permitted assignees under the Sale Agreement and the counterparty to the Assumed Contract), all Assumed Contracts will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and completion of the Transaction, and no Person who is a party to an Assumed Contract may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement, and no automatic termination or termination upon notice will have any validity or effect by reason of:

(a) any event that occurred on or prior to the delivery of the Monitor's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Petitioners or any of their affiliates);

(b) the insolvency of the Petitioners or any of their affiliates, or the fact that the Petitioners or any affiliate of the Petitioners sought or obtained relief under the CCAA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations, or other steps taken or effected pursuant to the Sale Agreement or

to effect the Transaction, or the provisions of this Order, or of any other Order of this Court in this CCAA Proceeding; or

(d) any transfer or assignment, or any change of control arising from the Sale Agreement or the Transaction or the provisions of this Order.

14. As of the Closing Time and subject to the payment of any amounts required to be paid pursuant to Section 11.3 of the CCAA (or such other amount as agreed upon between the Purchaser and the counterparty to the applicable Assumed Contract) all Persons shall be deemed to have waived any and all defaults of the Vendors then existing or previously committed by the Vendors, or caused by the Vendors, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative covenant, provision, condition, or obligation, express or implied, in any Assumed Contract arising directly or indirectly from the insolvency of the Petitioners and the extension of certain protections under the CCAA to the Vendors, the Sale Agreement or the Transaction, including, without limitation, any of the matters or events listed in paragraph 13 hereof and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under an Assumed Contract shall be deemed to have been rescinded and of no further force or effect.

15. From and after the Closing Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for, or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including, without limitation, administrative hearings and orders, declarations and assessments, commenced, taken, or proceeded with or that may be commenced, taken, or proceeded with against the Purchaser Parties relating in any way to the Excluded Assets, Excluded Liabilities, Excluded Contracts, any Encumbrances (other than Permitted Encumbrances), and any other claims, obligations, and other matters that are waived, released, expunged or discharged pursuant to this Order.

GENERAL

16. This Court requests the aid and recognition of other Canadian and foreign Courts, tribunals, regulatory or administrative bodies, to act in aid of and to be complementary of this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners, the Vendors, the Purchasers, and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Vendors, the Purchaser Parties, and the Monitor and their respective agents in carrying out the terms of this Order.

17. The Petitioners, the Vendors, the Monitor, the Purchaser Parties and any permitted assignees under the Sale Agreement, or any other party, each have liberty to apply for such further and other directions or relief as may be necessary or desirable to give effect to this Order.

18. Endorsement of this Order by counsel appearing on this application, other than counsel for the Petitioners, is hereby dispensed with.

19. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver Time on the Order Date (the "**Order Effective Time**").

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of
☐ Party ☑ Lawyer for KSV Restructuring Inc.

Bennett Jones LLP
(Michael Shakra)

BY THE COURT

REGISTRAR

CHECKED