Court File No. CV-09-8396-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Applicants

BOOK OF AUTHORITES
OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

(Motion Returnable February 11, 2011)

February 8, 2011

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TAB

Tab 1

Case Name:

Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
Between
Skeena Cellulose Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corp., respondents (petitioners), and
Clear Creek Contracting Ltd. and Jasak Logging Ltd., appellants (applicants), and
The Truck Loggers' Association, intervenor

[2003] B.C.J. No. 1335

2003 BCCA 344

184 B.C.A.C. 54

13 B.C.L.R. (4th) 236

43 C.B.R. (4th) 187

123 A.C.W.S. (3d) 73

2003 CarswellBC 1399

Vancouver Registry No. CA030149

British Columbia Court of Appeal
Vancouver, British Columbia

Newbury, Hall and Levine JJ.A.

Heard: April 28 - 29, 2003.
Judgment: June 9, 2003.

(67 paras.)

Counsel:

J.S. Forstrom, for the appellants.
M.I. Buttery and S.A. Dubo, for the respondents.
M. MacLean and J.I. McLean, for the intervenor, Truck Loggers' Association.

The judgment of the Court was delivered by

1 **NEWBURY J.A.**:-- This appeal turns on the interaction of two statutory regimes - the scheme of "replaceable" or "evergreen" logging contracts established by the Province under the Forest Act, R.S.B.C. 1996, c. 157, and the scheme of judicial stays and creditors' compromises available under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended (the "CCAA"), to insolvent corporations whose indebtedness exceeds $5,000,000.

2 Both schemes are said to involve considerations of fairness and equity. In the case of the Forest Act, a detailed series of "contractual" terms is required to be incorporated in agreements between the holders of harvesting licences granted by the Crown, and the contractors they in turn retain to carry out the logging. Most aspects of the relationship are either provided for in the mandatory terms or must be resolved by arbitration, the principles and procedures of which are also regulated by the Act. Most importantly, a licence holder must agree that when such an agreement expires, it will be renewed (or in the statutory terminology, "replaced") on terms substantially the same as those of the expired contract, assuming the contractor has performed its obligations thereunder. In this way, the legislation seeks to provide contractors with a degree of "security" analogous to the security of tenure implicit in a Crown harvesting licence, and to achieve greater fairness between the licence holder and its contractors.

3 In the case of the CCAA, the fairness analysis required to be carried out by the court generally refers to fairness as between classes of creditors. That analysis is tempered by the starker realities of whether the proposal before the court offers a chance of survival to the debtor corporation and whether it will be acceptable to the requisite majority of creditors. Unlike the detailed provisions of the Forest Act and regulations thereto, the CCAA is a brief set of "broad-brush" provisions that leave wide avenues of discretion to be exercised by courts in circumstances that may not permit the fine weighing of individual interests. As observed in Re Keddy Motor Inns Ltd. (1992) 13 C.B.R. (3d) 245 (N.S.S.C., App. Div.) at 258, the legislation contemplates "rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat but on the best terms they can get."

4 The substantive question raised by this appeal is to what extent considerations of fairness between individual logging contractors who have replaceable contracts with a corporation in CCAA proceedings, should figure in the "rough-and-tumble" considerations applicable to a large corporate insolvency. Looked at another way, does the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?

FACTUAL BACKGROUND

5 The insolvent corporation in this case is Skeena Cellulose Inc. ("Skeena"). At all material times, it owned and operated a pulp mill and three sawmills, and held related forest tenures, mainly in north-western British Columbia. It was a large employer in that region and was one of the major manufacturers of bleached softwood kraft pulp in North America.

6 Skeena has experienced financial difficulties for many years. It underwent a financial restructuring under the CCAA in 1997. Although many of the positive results hoped for from that arrangement improved Skeena's long-term prospects, it appears that various other factors prevented full recovery. In August 2001, the Toronto-Dominion Bank demanded payment of more than $350,000,000 from Skeena and its subsidiaries, froze their operating lines and began to refuse to honour their cheques, including payroll cheques. Other creditors followed suit, and on September 5, 2001, Skeena and its subsidiaries petitioned the Supreme Court of British Columbia for a stay of proceedings under the CCAA.

7 The petition alleged, and it is not disputed, that Skeena owed over $409,000,000 (exclusive of interest) mainly to the Toronto-Dominion Bank and to corporations owned by the Province, which also held over 70 percent of its common shares. This debt was represented by bonds issued under a trust deed secured by charges on all of Skeena's assets, present and future. The petition stated that Skeena and its subsidiaries were insolvent and described the impact their bankruptcy could have on the provincial economy:

> 50. If the Petitioners were to totally cease operations or go into liquidation, the direct loss of jobs in British Columbia would be enormous, including the approximately 1,050 existing Skeena employees and, at least 1,000 employees of logging contractors, road building and silviculture contractors. It would also directly and indirectly impact service industries and business which rely on Skeena for a source of revenue. By the Petitioners' estimate, as many as 7,000 additional jobs in British Columbia would be affected.
> 51. A liquidation of the Petitioners would be particularly devastating to the communities of Terrace, South Hazelton, and Prince Rupert. Skeena is the largest employer in those communities, and many hundreds of families depend on Skeena for their livelihoods in those communities.
> 52. The loss of this number of jobs would also, of course, have a generally damaging effect on the British Columbia economy, given the spillover effect of lost wages and lost purchases.
> 53. Skeena is currently in good standing under its collective agreements and other employment relationships. However, if some or all of the employees would be terminated, severance claims, including payments for group termination under the Employment Standards Act, could be significant.

8 Chief Justice Brenner, who I understand heard most if not all the applications in this matter in Supreme Court, granted an initial order ex parte on September 5, 2001, staying proceedings against Skeena and its subsidiaries for 30 days and appointing Arthur Andersen Inc. as Monitor. On October 5, he granted a "Come-back Order" which extended the stay and contemplated that the petitioners would file a formal plan of compromise or arrangement (entitled the "Reorganization Plan") with their creditors on or before November 5; that they would file a formal plan of arrangement (entitled the "Plan of Arrangement") with their shareholders under the Canada Business Corporations Act, R.S.C. 1985, c. C-44; and that meetings of their creditors would be called to vote on the Reorganization Plan. Under the heading "Post-Filing Operations", the Order stated:

> 11. The Petitioners shall remain in possession of the Assets and shall continue to carry on business in the ordinary course provided that they shall have the right with the approval of the Monitor, or this Court, to proceed with an orderly disposition of such of the Assets as they deem appropriate, either with the consent of any creditor holding security against such Assets or pursuant to an Order of this Court, in order to facilitate the downsizing and consolidation of their business and operations (the "Downsizing").
> 12. To facilitate the Downsizing, the Petitioners may:
>
> (a) terminate the employment of such of the Petitioners' employees or temporarily lay off such of the Petitioners' employees as they deem appropriate;
> (b) terminate such of the Petitioners' supplier or service arrangements or agreements as they deem appropriate;

(c) abandon such leases, tenures, contracts, rights, authorizations, franchises, dealerships, permits, approvals, uses or consents as are deemed to be unnecessary for the Petitioners' business; . . .

all without interference of any kind from third parties, including landlords and notwithstanding the provisions of any lease, other instrument or law affecting or limiting the rights of the Petitioners to remove or divest Assets from leased premises, and that any liabilities of the Petitioners arising as a result thereof shall be claims provable in these proceedings in the same manner as all creditor claims existing as at the Filing Date and provided that:

(f) the Monitor shall have submitted to the Court a report of any proposed termination of any Forest Act Replacement Contract under the foregoing sub-paragraph (b) at least 21 days before such plan is implemented;

(g) the implementation of any of the plans and procedures contemplated by the foregoing sub-paragraphs (a)-(d) including any termination or partial termination of any contract, shall be without prejudice to the claims of any counter party to such contract to file a proof of claim in such manner as may be provided for in the Reorganization Plan;

(h) the Petitioners shall provide 3 days' written notice of any termination of any executory agreements under the foregoing sub-paragraphs (b) or (c); and

(i) the counter party or parties to any agreements proposed by the Petitioners to be terminated in accordance with the foregoing, including the counter party or parties to any Forest Act Replacement Contracts, may during the applicable 3 day notice period, in the case of executory contracts, or within 21 days of the filing of the Monitor's report, in the case of the Forest Act Replacement Contracts, apply to the Court in this proceeding to show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate. [Emphasis added.]

9 The deadline for the filing of the Reorganization Plan was extended by the Court on several occasions while solutions to Skeena's difficulties were sought and potential purchasers were pursued. Finally, on February 28, 2002, a Plan was filed which proposed that an outside buyer, NWBC Timber & Pulp Ltd. ("NWBC"), would acquire the interests of the secured lenders for $8,000,000. Of this, $2,000,000 would be paid to the Monitor for distribution to the unsecured creditors, so that the secured creditors would receive $6,000,000 on debt in excess of $400,000,000. The claims of governmental bodies for property taxes would be compromised, and the holders of existing common shares would surrender them for no consideration. Skeena would then issue new common shares to NWBC. The Plan was of course subject to many conditions, including approval by the specified classes of creditors and shareholders and the passing of applicable appeal periods in respect of the Court's order. After some amendments, the Plan was approved by the Court on April 4, 2002. Once the conditions contained in the Order were met, NWBC completed its purchase of the shares and secured debt of Skeena in early May.

The Appellants' Logging Contracts

10 The appellants or their predecessors had been performing logging services under contract with Skeena or its predecessors since the 1960s. In 1991, their contracts became "replaceable logging contracts" under new provisions of the Forest Act. At the time Skeena's financial difficulties became manifest in 2001, the corporation had five such contracts. All five were due to expire on December 31,

2001, and Skeena was required to offer replacement contracts to the contractors thereunder no later than September 30 of that year.

11 Skeena did not offer replacement contracts to the appellants, but did renew those of its three other logging contractors. Mr. Veniez, the president and chief executive officer of NWBC and Skeena following the Reorganization, explained this decision by reference, at least in part, to the fact that whereas the Forest Act scheme requires a licence holder to cut at least 50 percent of its allowable annual cut ("AAC") through replaceable contracts, Skeena had entered into such contracts for approximately 65 percent of its AAC. Moreover, the change in control of Skeena contemplated by the Reorganization would result in a five percent reduction of its AAC, absent a ruling to the contrary by the Ministry of Forests. Mr. Veniez deposed in these proceedings that:

> 17. As part of its efforts to ensure the economic viability of Skeena, NWBC determined, in consultation with Skeena management at the time, that it would be desirable to reduce the amount of timber required to be harvested under replaceable contracts to the current statutory minimum of 50% of Skeena's AAC.
> 18. Because NWBC's acquisition of Skeena represents a change of control, I knew that Skeena's Terrace Woodlands' AAC would be reduced by 5% to approximately 878,000 m3. Therefore, in consultation with Skeena management, I determined that it would be appropriate to reduce the volume of timber allocated to evergreen contractors to 439,000 m3, representing a reduction of approximately 160,000 m3.
> 19. I was advised by Skeena management that, until the terminations of Clear Creek and Jasak, Skeena's five evergreen contractors held the following volumes:

Contractors	Volume
Don Hull & Sons	166,239 m3
K'Shian Logging	166,239 m3
Main Logging	99,828 m3
Clear Creek	83,331 m3
Jasak	83,331 m3

> 20. In consultation with Skeena management and the Province, NWBC determined that it would be appropriate to terminate the Clear Creek and Jasak contracts, representing a reduction of "evergreen" volume of approximately 166,662 m3.
> 21. I recognize that by terminating these two contracts, Skeena will be slightly below the 50% allowable minimum under the Contract Regulation, but it is Skeena's intention to re-tender the approximately 6,000 m[3] difference in the form of new evergreen contract. The approximately 160,000 m3 balance will be tendered on the open market (as opposed to have to negotiate rates with its existing evergreen contractors). I expect that this tendering process will result in substantial savings to Skeena and significantly reduce its delivered wood costs for this 160,000 m3. (If the cost differential is $3.90/m3, the savings could be as much as $624,000 per year).

22. Moreover, a tendering process for this volume of wood will help to establish more accurate fair market values for both evergreen and non-evergreen contracts (in this regard, I am advised by Mr. Curtis that historically it has been difficult to establish these values in light of the predominance of evergreen contracts).
23. In deciding to terminate certain of Skeena's evergreen contracts, I reasoned that this would better allow Skeena to reorganise the size (volume) and equipment configurations for its different contracts. (Skeena does have the right to insist that its current evergreen contractors log by whatever methods Skeena stipulates, but historically it has been more cost-efficient for Skeena to introduce new logging methods via an open tendering process than by introducing changes to existing replaceable contracts).
24. Finally, I was advised by Skeena management that Clear Creek and Jasak had, historically, been more expensive than the three other evergreen contractors listed above. That is, through a combination of the rates charged by those two contractors, and their relative efficiency, the cost to Skeena of logs produced by Clear Creek and Jasak was greater than for the other three evergreen contractors above.
25. With the foregoing considerations in mind, I, on behalf of NWBC, advised Skeena's management at the time that NWBC would require, as a condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts.
26. By asking Skeena to terminate those contracts, NWBC was in no way motivated to frustrate the objectives of the Forest Act. On the contrary, for the reasons set out above, NWBC perceives these terminations to be an important aspect of what I hope and fully expect will be a successful reorganization of Skeena. [Emphasis added.]

12 On or about March 1, 2002, each of the appellants received a letter from Skeena purporting to terminate its replaceable contract, effective immediately. Neither the Court nor the appellants had received prior notification from Skeena or the Monitor - even though under the terms of the Come-back Order, the Monitor was required to submit to the Court "a report of any proposed termination of any Forest Act Replacement Contract . . . at least 21 days before such plan is implemented" and even though within 21 days of the filing of the Monitor's report, the parties to such contracts were to be entitled to apply to the Court to "show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate." Two weeks later, in its Eleventh Report to the Court, the Monitor referred to the terminations as faits accomplis:

> We have been advised that the petitioner has terminated replaceable logging contracts with Jasak Logging Ltd. and Clear Creek Contracting Ltd. in accordance with the Order. Copies of the letters of termination to each of the contractors dated March 4, 2002 and March 1, 2002, respectively are attached.
>
> These replaceable logging contracts have been terminated in accordance with the terms of the Purchase Agreement between NWBC Timber & Pulp Ltd., 552513 British Columbia Ltd. and Skeena Cellulose Inc. dated February 20, 2002.

13 It is not clear to me what "plan" was being referred to in subpara. 12(f) of the Come-back Order quoted above, nor whether it was necessary to "terminate" contracts that had not been renewed. On appeal, however, Skeena acknowledged that the Monitor's report had been filed two weeks after the

termination letters were issued and that the "creditors' meeting to vote on the Plan took place before the 21-day time period referred to in the Come-back Order had expired." Thus counsel did not take issue with the Chief Justice's conclusion that Skeena had not complied strictly with the Come-back Order.

14 Upon receiving the letters of termination, the appellants' solicitors wrote to the Monitor's solicitors objecting that that the Come-back Order had not been complied with. They explained:

> Our clients are in a position where they cannot file proofs of claim on March 25 as their contracts are not terminated yet and they do not know if the contracts will be terminated and, if there is a termination, what class of creditor they will be. Due to the failure to deal with this matter in a timely fashion, it appears that the parties have no choice but to postpone the deadline for filing claims to the middle of April with a vote of creditors to take place in early May.

The appellants asked the Monitor for information as to how the termination would result in lower costs to Skeena and requested a copy of the contract of purchase between Skeena and NWBC. The Monitor declined to provide a copy of this agreement on the basis that it was confidential. The agreement was never adduced into evidence.

15 In further correspondence, Skeena characterized its earlier letters to the appellants as having "served to clarify that the previously expired contract with Jasak and Clear Creek would not be reinstated." (My emphasis.) Again, however, since that characterization of the letters was not pursued by counsel in this court or the court below, I will proceed on the footing that the contracts were terminated, as opposed to not having been renewed. (In law, the distinction in this case may be insignificant.) The appellants were told that if they wished to vote on Skeena's Reorganization Plan, they would have to file proofs of claim by March 22. At the same time, Skeena told the appellants it was prepared to discuss future arrangements with them "for the continuation of their services to Skeena."

16 By March 22, the appellants did file conditional proofs of claim in the CCAA proceeding, claiming indebtedness in the amount of $2,925,315.14 in the case of Jasak Logging Ltd., and $2,896,680 in the case of Clear Creek Contracting Ltd. (Mr. Forstrom advised us that these amounts represented the present value of the income stream which the appellants stood to earn under their contracts over the next 50 years or so. I understand that apart from these 'future' losses, nothing was owing by Skeena to the appellants under their expired contracts.) The Monitor disallowed a portion of each claim and instead allowed a claim of $172,430.47 to Jasak and $166,670 to Clear Creek. The appellants notified the Monitor that they disagreed with its position.

17 On March 28, Jasak and Clear Creek filed a motion in Supreme Court seeking an order restraining Skeena from terminating their contracts and declaring them "in full force and effect and are binding upon the parties thereto". Alternatively, they sought the summary determination of the value of their respective claims as creditors in Skeena's plan of arrangement. However, before the motion could be heard, the meeting of Skeena's creditors took place and the Reorganization Plan was approved by the requisite numbers of each class. The appellants did not attend or vote at the meeting. On April 4, 2002 Skeena applied for and obtained court approval of the Plan. As earlier mentioned, NWBC closed its purchase of the shares of Skeena in accordance with the Reorganization Plan in early May. We are told that it has not yet resumed its logging operations.

18 The appellants' motion to have the termination of their contracts declared invalid was heard in Chambers on June 17 and was dismissed by the Chief Justice on September 4, 2002. His reasons are now reported at (2002) 5 B.C.L.R. (4th) 193.

19 After reciting the facts before him, the Chief Justice briefly summarized the purpose of the

replaceable contract scheme and the nature of replaceable contracts. He noted that in Skeena's CCAA proceeding in 1997, Thackray J. (as he then was) had determined that the Court had the authority under the CCAA to allow Skeena to terminate replaceable logging contracts notwithstanding their unusual 'statutory' aspects. (See In the Matter of the Companies' Creditors Arrangement Act and In the Matter of Repap British Columbia Inc. et al., B.C.S.C., Vancouver Registry A970588, dated June 11, 1997.) Thackray J. had observed:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of the Provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the Forest Act. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts. There is no doubt that the parties are governed by the regulation and that the regulations forming part of the contract will govern many events by parties to the contracts. However the issue here is whether or not the contract is subject to the particular order that I gave under the Companies' Creditors Arrangement Act. I am of the opinion that it is subject to the order which I gave and that this Court had the jurisdiction to give that order. [para. 7]

20 The Chief Justice then turned to the questions of whether on this occasion, Skeena had complied with the "procedures and conditions" stipulated in the Come-back Order and whether the termination conformed to the "broader principles of economic necessity and fairness" underlying the Court's discretionary authority under the CCAA. In connection with the first question, he noted that the Come-back Order had authorized the termination of arrangements and agreements by Skeena only for the purpose of facilitating the "downsizing and consolidation of their business and operations (the 'Downsizing')". He noted the appellants' submission that although Skeena claimed to be "downsizing" its operations, it had maintained its timber harvesting rights and was planning to continue to harvest timber from them, presumably to the extent it always had in the past. On the other hand, there was the fact that the change in control of Skeena would result in a five percent reduction of Skeena's AAC, which Skeena proposed to reflect in a reduction in volume of timber allocated to "evergreen" contractors by approximately 160,000 cubic metres. The Chief Justice concluded that this reduction qualified as "Downsizing" for purposes of the Come-back Order. This conclusion was not specifically challenged on appeal.

21 In response to the appellants' objection that Skeena had terminated their contracts without first filing a report of the Monitor, the Chief Justice agreed that the letters of termination had been "issued untimely". He concluded, however, that since the appellants had had "clear and unequivocal notice", prior to the creditors' meeting, of Skeena's intention to terminate their contracts and to treat their claims as compromised under the Plan, they had not been prejudiced by the lack of strict compliance. (para. 41.)

22 The remaining question framed by the Chief Justice was whether Skeena's termination of two of its five replaceable logging contracts constituted an "inappropriate differentiation of treatment between the applicants and other [Skeena] creditors." (para. 42.) He noted that one of the unfortunate results of insolvency restructurings is that some persons suffer hardship. In this case, Skeena had had to terminate the employment of many individuals, its unsecured and secured creditors stood to recoup only a small fraction of their claims, and the Court had already dismissed an application brought by the Pulp, Paper and Research Institute of Canada similar to that brought by the appellants. The Court noted the comments of LoVecchio J. in Re Blue Range Resource Corp. [1999] A.J. No. 788 (Alta Q.B.), to the effect that an order authorizing the termination of a contract is appropriate in a restructuring since, like

others dealing with the insolvent corporation, the contracting party will have its claim for damages. But that claim should not be elevated above those of other contracting parties; as LoVecchio J. had stated:

> A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route. [paras. 37-8]

23 Similarly in this case, the Chief Justice concluded that the applicants before him were "seeking to be put in a position superior to [Skeena's] other creditors." (para. 50.) In the result, since Thackray J. had already ruled that replaceable contracts could be terminated as part of a CCAA reorganization, and the appellants had had "full knowledge prior to the creditors' meetings that they would have claims under the Plan if their contracts were to be terminated", the Chief Justice saw no reason why the appellants should "in effect, be placed in a better position than other creditors." (para. 53.)

24 On appeal, the appellants challenged both the Court's ruling on the question of notice and its substantive ruling that the Come-back Order validly permitted Skeena to terminate the appellants' "evergreen" contracts. Since Mr. Forstrom, counsel for the appellants, focussed on the second argument in his oral submissions in this court - and rightly so in my view - I will deal with it first. It is linked to the argument made by the intervenor, the Truck Loggers' Association, which challenges the court's constitutional and statutory jurisdiction to "permit" Skeena to terminate any replaceable logging contracts, contrary to what Mr. Maclean says is the intention of the Forest Act. Mr. Maclean submits that this legislation must prevail over what he characterized as the exercise of the court's "inherent jurisdiction" under the CCAA when the court approves an arrangement which includes the termination of a lease or other contract.

25 It may be useful at this point to review in greater depth the unusual scheme of replaceable contracts imposed by the Forest Act, and then to review the CCAA and the "inherent" or 'supervisory' jurisdiction exercised by the courts thereunder.

The Forest Act Scheme

26 The Province first introduced a regime of statutorily-mandated logging contracts in 1991. The initial legislation was revised somewhat in 1996 when the present Regulation 22/96 to the Forest Act was enacted. Speaking in the Legislative Assembly in June 1991, the then Minister of Forests stated that the purposes of the legislation were to "address logging-contractor security in British Columbia", to "improve the balance in . . . contractual relationships" between holders of timber rights and logging contractors, and to provide a quick and inexpensive system for resolving disputes between them. The

Minister drew an analogy between the desire of long-term licence holders for security of tenure from the Crown, and the needs of logging contractors and subcontractors, who also make large capital investments in logging equipment, for similar security vis-à-vis the licence holders. Accordingly, the Forest Amendment Act, 1991, c. 11, permitted the imposition of a series of requirements on the holders of certain classes of timber licences with respect to logging contracts already in existence, and logging contracts entered into thereafter.

27 Most of the provisions relevant to this appeal are contained in Regulation 22/96. Part 2, headed "Written Contracts and Subcontracts Required", states that persons entering into a timber harvesting contract or subcontract must do so in writing. If the terms of a contract do not comply with the Regulation, the parties are required to make reasonable efforts to cause the contract to do so. Every "replaceable contract" (defined in s. 152 of the Act) must provide that the contractor's interest thereunder is assignable, subject to the consent of the licence holder, which consent may not be unreasonably withheld. As well, every contract must provide that all disputes between the parties in connection with the contract "will be referred to mediation and, if not resolved by the parties through mediation, will be referred to arbitration." (The Regulation leaves unsaid the apparent intention that neither party will have recourse to courts of law to resolve such disputes.) The Commercial Arbitration Act, R.S.B.C. 1996, c. 55, applies to such arbitrations, but there are also detailed rules in Regulation 22/96 for the mediation and arbitration proceedings and for the keeping of a publicly available "Register of Timber Harvesting Contract and Subcontract Arbitration Awards" by the Ministry of Forests.

28 Part 5 of the Regulation is headed "Replaceability of Contracts and Subcontracts". It requires that the holders of Crown licences carry out specified proportions of their timber harvesting operations by means of replaceable contracts. Different requirements apply to different classes of licence and to operations in the Coastal and Interior regions respectively. As I noted earlier, since Skeena operates in the Coastal region, it is required to harvest at least 50 percent of its timber by means of replaceable contracts.

29 Sections 13-15 of the Regulation deal with the commencement and expiration of replaceable contracts in the following terms:

13 (1) A replaceable contract must provide that

(a) if the contractor has satisfactorily performed its obligations under the contract, and conditional on the contractor continuing to satisfactorily perform the existing contract, the licence holder must offer a replacement contract to the contractor, and

(b) the replacement contract must

(i) be offered 3 months or more before the expiry of the contract being replaced,

(ii) provide that it commences on or before the expiry of the contract being replaced,

(iii) provide for payment to the contractor of amounts in respect of timber harvesting services as agreed to by the parties or, failing agreement, as determined under section 25, and

(iv) otherwise be on substantially the same terms and conditions as the contract it replaces.

(2) If a replaceable contract does not provide for an expiry date, the contract expires on the second anniversary of the date on which the contract commenced.

14 (1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may require, for bona fide business and operational reasons, that the contractor

(a) use different timber harvesting methods, technology or silvicultural systems,
(b) move into a new operating area, or
(c) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government.

(2) A replaceable contract must provide that if a requirement made pursuant to subsection (1) results in a substantial change in the timber harvesting services provided by the contractor, the contractor may, within 60 days of receiving notice under subsection (1), elect by notice in writing to the licence holder to terminate the replaceable contract without incurring any liability to the licence holder.

(3) A replaceable contract must provide that, if a requirement is made pursuant to subsection (1) and the contractor does not elect to terminate the replaceable contract as provided for in subsection (2), either party may, within 90 days of the contractor receiving notice under subsection (1), request a review of the rate then in effect.

(4) If, after any changes in timber harvesting services required by the licence holder under subsection (1), the parties are unable to agree upon the rate to be paid for timber harvesting services, a rate dispute is deemed to exist.

15 A replaceable contract must provide that the contract terminates, to the extent that it relates to the licence, upon the cancellation, expiry or surrender of a licence under which the timber harvesting services provided by the contractor are carried out. [Emphasis added.]

30 The Regulation stipulates that if a dispute arises regarding the amount of work to be specified in a replaceable contract, the matter may be referred to arbitration under s. 24. The same is true of any dispute regarding the rates chargeable by the contractor for its work. The arbitrator must determine a rate that is reasonable and competitive by industry standards and which "would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit."

31 Division 5 of the Regulation deals with reductions in work under a replaceable contract due to a reduction in AAC. If the Crown reduces the AAC under a harvesting licence, the holder "must apportion the effect of the reduction in AAC . . . proportionately among (i) all contractors holding replaceable contracts, and (ii) any company operations in respect of the licence." (s. 28(2)(d).) Alternatively, the

holder may make a proposal either to reduce the AAC covered by one or more of its replaceable contracts or to terminate one or more such contracts. If the proposal is objected to by one or more of the affected contractors, a "dispute is deemed to exist" between the licence holder and the contractor(s). If not settled by mediation, this dispute must also be arbitrated in accordance with s. 32, which states in part:

> (g) an arbitrator must resolve the dispute in the manner that the arbitrator believes most fairly takes into account each of the AAC reduction criteria; [and]
> (h) for greater certainty, in making a decision with respect to the dispute
>
> (i) an arbitrator is not restricted to choosing between any of the various AAC reduction proposals made by the parties to the arbitration, and
> (ii) an arbitrator may make an award that includes the termination of one or more of the replaceable contracts, or reduces the amount of work available to any contractor or company operation in a manner that is not proportionate to the reduction in AAC. [Emphasis added.]

The Regulation defines the term "AAC reduction criteria" to mean each of the following factors:

> (a) the amount of work specified in each replaceable contract to which the proposal relates;
> (b) the relative seniority of each contractor with a replaceable contract;
> (c) the economic impact of the proposal on the timber harvesting operations carried out under that licence by each contractor with a replaceable contract;
> (d) the impact of the proposal on employment;
> (e) the economic impact of the proposal on the licence holder; [and]
> (f) the impact of the proposal on community stability; . . .

32 As Mr. Forstrom points out, then, the statutorily-mandated terms of replaceable logging contracts "tie" them in a sense to Crown licences themselves. A licence holder must carry out a specified percentage of its logging through contractors under replaceable contracts. If the AAC under the licence is reduced, the work committed to by the licence holder in its replaceable contracts may also be reduced. If the licence is cancelled or surrendered, any replaceable contract referable thereto also terminates. Mr. Forstrom and Mr. Maclean go further, however, and argue that the "tie" confers a "special status" on the contractor and that the status must be recognized in the event of a breach of the obligation to renew or continue the contract, and must be reflected in any CCAA arrangement. I will return below to these arguments.

The CCAA

33 Unlike the Forest Act and Regulation, the CCAA is very brief. It operates substantially through judge-made law interpreting and applying its 22 sections. For purposes of this appeal, the key ones are the following:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

* * *

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

* * *

11. (1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the

company.

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

34 There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 Can. Bar Rev. 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

> Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
>
> Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent

> company in exchange for new securities of lower nominal amount and later maturity date.
>
> Public Interest
>
> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A. [at 592-3]

(See also Duff, C.J.C. in Reference re Companies' Creditors Arrangement Act (Canada) [1934] S.C.R. 659.)

35 In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See Re Smoky River Coal Ltd. (1999) 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) In Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990) 51 B.C.L.R. (2d) 84 (B.C.C.A.), for example, this court held that security granted under s. 178 of the Bank Act was not exempt from the CCAA provisions applicable to "security" and secured creditors, since otherwise a single creditor (in that case, a bank) could frustrate the objectives of the statute. Gibbs J.A. observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. [at 88-9]

36 In connection with other "priority" issues - the power to grant priority to persons advancing debtor-in-possession ("DIP") financing and to the Monitor for the payment of its fees and disbursements before the payment of secured creditors - this court has called in aid Equity's ability to adapt to changing circumstances in order to achieve the objectives of the statute. In Re United Used Auto & Truck Parts Ltd. (2000) 16 C.B.R. (4th) 141 (B.C.C.A.), this court declined to follow an earlier case in which the Ontario Court of Appeal had ruled that the receiver of a partnership had no authority to subordinate the

interests of secured creditors to liability for the receiver's disbursements, unless one of three exceptions applied. (See Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975) 21 C.B.R. (N.S.) 201.) Mackenzie J.A. commented:

> Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the Kowal statement of exceptions has been influential in subsequent cases and they were applied by this Court in Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54 (C.A.). But as Macdonald J. observed in Westar Mining, supra at 93-94, different considerations apply under the CCAA. The court is concerned with the survival of the debtor company long enough to present a plan of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the Kowal exceptions to serve that broader interest.
>
> Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the CCAA. In my opinion the jurisdiction under the CCAA cannot be restricted to the Kowal exceptions. [paras. 21-22; emphasis added.]

In conclusion, he stated:

> In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the CCAA. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and CCAA orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgement for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.
>
> In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge. [paras. 30-31; emphasis added.]

(I understand that leave to appeal United Used Auto was granted by the Supreme Court of Canada, but that the case settled before the appeal was heard, [2000] S.C.C.A. No. 142.)

37 In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in Re Dylex Ltd. (1995) 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in Dylex, at para. 8; Re T. Eaton Co. (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; Smoky River Coal; supra, and Re Armbro Enterprises Inc. (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Ltd [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial

to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

38 But in approving and implementing compromises and arrangements under the statute, courts are concerned with more than the efficacy of the plans before them and their acceptability to creditors. Courts also strive to ensure fairness as between the unsecured, secured and preferred creditors of the corporation and as between the debtor and its creditors generally. In the article from which I have already quoted, Stanley Edwards also wrote:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest. If small groups are placed in too strong a position they become capable of acquiring a nuisance value which will make it necessary for the reorganizers to buy them off at a high price in order to effectuate the plan successfully. However, care should be taken that this statutory power of binding minorities should not be utilized to confiscate the legitimate claims of those minorities or of any class of creditors or shareholders. [at 595; emphasis added.]

39 This theme has been repeated and refined in various cases over the years as CCAA courts have struggled with increasingly complex forms of debt and security and with increasingly complicated plans of arrangement. In current terms, the principle of equity is expressed as a concern to see that a plan of arrangement is fair and reasonable and represents an attempt to "balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights". (Per Farley J. in Re Sammi Atlas Inc. (1998) 3 C.B.R. (4th) 171 (Ont. Ct. (Gen. Div.)), at 173.) Elsewhere, it has been said that one measure of what is "fair and reasonable" is the "extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in a non-intrusive and as non-prejudicial a manner as possible." (Per Blair J. in Olympia & York Developments Ltd. (1993) 12 O.R. (3d) 500, at 513.) At the same time, fairness and reasonableness are not "abstract notions, but must be measured against the available commercial alternative." Thus in Re Canadian Airlines Corp. [2000] A.J. No. 771, [2000] 10 W.W.R. 269 (Alta. Q.B.), the Court summarized the interaction between the objectives of a CCAA arrangement and the principles of fairness and reasonableness as follows:

> In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in Olympia and York Dev. Ltd. v. Royal Trust Co., supra, at page 9:
>
> > "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

> The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1989] 2 W.W.R. 566 at 574 (Alta. Q.B.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).
>
> The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:
>
> a. The composition of the unsecured vote;
> b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
> c. Alternatives available to the Plan and bankruptcy;
> d. Oppression;
> e. Unfairness to Shareholders of [the debtor]; and
> f. The public interest. [paras. 94-96]

40 Of course, there are also statutory and constitutional limitations on the court's exercise of its authority under the CCAA. The Supreme Court of Canada's decision in Baxter Student Housing Ltd. v. College Housing Cooperative Ltd. [1976] 2 S.C.R. 475 confirmed that it is beyond the authority of a CCAA court to provide for a priority that runs contrary to the express terms of a statute (in that case, the Mechanics Lien Act of Manitoba.) Thus in Baxter, the fact that the provincial legislation created a lien having priority over "all judgments, executions, assignments, attachments, garnishments and receiving orders", precluded an order granting CMHC priority for new advances over and above all prior registered liens. Dickson J. (as he then was) stated for the Court:

> . . . the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a Court simply cannot do. [at 480; emphasis added.]

41 Baxter continues to be applied today: see Re Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Ct. (Gen. Div.)) and Re Westar Mining Ltd. (1992) 70 B.C.L.R. (2d) 6 (B.C.S.C.). However, the Court in United Used Auto distinguished Baxter on the basis that the former did not involve an express statutory priority that could not be overcome by the Court's equitable jurisdiction. Mackenzie J.A. noted that the receiver's jurisdiction originates in the "equitable jurisdiction of the Court of Chancery and [that] while that jurisdiction cannot be exercised contrary to a statute, nothing precludes its exercise to supplement a statute and effect a statutory object." (para. 18.)

42 It may be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail. The only case brought to our attention which, on its face at least, applied the doctrine of paramountcy in the CCAA context was Re Sulphur Corp. of Canada Ltd. [2002] A.J. No. 918 (Alta. Q.B.). In addressing

the question of whether the Court had the authority to permit DIP financing ranking in priority to liens registered under the Builders' Lien Act of British Columbia, LoVecchio J. distinguished Baxter and Royal Oak, supra, on the basis that the discretion to grant priority for DIP financing was grounded in s. 11 of the CCAA rather than purely in the court's inherent jurisdiction. (This, at least, is what I draw from the Court's comments at paras. 35-37.) Seeing the case before him as involving a conflict between a federal statute and a provincial statute, LoVecchio J. ruled that the former prevailed and that in exercising its jurisdiction under the CCAA, the Court could grant priority for DIP financing. (See also Pacific National Lease Holding Corp. v. Sun Life Trust Co. (1995) 10 B.C.L.R. (3d) 62 (B.C.C.A.).)

The Issues in this Case

43 Against this background, I turn at last to the substantive questions raised by the intervenor and the appellants respectively - did the Chambers judge have the jurisdiction to include in the Come-back Order provisions which contemplated the termination of any replaceable logging contracts; and if so, did he err by failing to consider whether the appellants would be treated fairly in relation to Skeena's other replaceable contractors or by failing to consider whether the termination of the appellants' contracts was, in their words, "a necessary or justifiable part of [Skeena's] reorganization plan at all"?

Jurisdiction

44 On behalf of the Truck Loggers' Association, Mr. Maclean contended that the Chambers judge had strayed outside his jurisdiction because nothing in s. 11 of the CCAA (which permits the granting of a stay) extends to the termination of a contract. On this view, any authority to sanction a termination must originate not in the statute, but in the Court's inherent jurisdiction. Based on the authority of Baxter, Royal Oak and Westar, the intervenor submits that the court's inherent jurisdiction cannot be used to override legislation such as the Forest Act and Regulation 22/96.

45 It is true that in "filling in the gaps" or "putting flesh on the bones" of the CCAA - for example, by approving arrangements which contemplate the termination of binding contracts or leases - courts have often purported to rely on their "inherent jurisdiction". Farley J. did so in Dylex, for example, at para. 8, and in Royal Oak, supra, at para. 4, the latter in connection with the granting of a "superpriority"; and Macdonald J. did so in Westar, supra, at 8 and 13. The court's use of the term "inherent jurisdiction" is certainly understandable in connection with a statute that confers broad jurisdiction with few specific limitations. But if one examines the strict meaning of "inherent jurisdiction", it appears that in many of the cases discussed above, the courts have been exercising a discretion given by the CCAA rather than their inherent jurisdiction. In his seminal article, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems, Sir J.H. Jacob, Q.C., writes that the inherent jurisdiction of a superior court of law is "that which enables it to fulfill itself as a court of law." The author explains:

> On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by the ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticized as being "metaphysical," but I think nevertheless it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. . . . The juridical basis of this jurisdiction is therefore

> the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. [at 27-28; emphasis added]

The author also notes that unlike inherent jurisdiction, the source of statutory jurisdiction "is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition." (at 24.)

46 Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. (As to the meaning of "discretion" in this context, see S. Waddams, "Judicial Discretion", (2001) 1 Cmnwth. L.J. 59.) This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

47 In saying this, I leave to one side the jurisdiction of the court to make special provision for the payment of the fees and expenses of a monitor appointed under the CCAA. The monitor's functions are of course analogous to those of a receiver - traditionally a creature of Equity. I suspect that this particular power may be properly described as both an equitable jurisdiction and a statutory discretion. As this court said in United Used Auto, nothing precludes the exercise of the equitable jurisdiction of the Court of Chancery to "supplement a statute and effect a statutory object." (para. 18.) In any event, the distinction between these two sources of authority is one that, in my mind at least, 'eludes definition'.

48 Returning, then, to the intervenor's argument, the first question posed by it must in my view be revised to whether the Chief Justice erred in purporting to exercise the statutory discretion given by the CCAA in a manner that conflicts with the Forest Act. But the second branch of the question also incorporates an assumption that is problematic. Can it be said that the Come-back Order conflicts with the Forest Act or the scheme created thereby? It is true that the Act and Regulation contemplate a perpetual series of contracts (provided the contractor fulfils its obligations thereunder) and contemplate the termination of a replaceable contract only in the event of a reduction in AAC or the expiration or surrender of the licence. But nothing in the legislation to which we were referred purports to invalidate a termination of a replaceable logging contract by the licence holder or to require that a court make an order for specific performance in the event of such a termination. (In a CCAA context, such an order would be very unlikely, as well as futile.) The licence holder will of course be liable in damages for breach of contract, giving rise to a "claim" against the debtor corporation under the CCAA. The licence holder may also be in breach of one or more of its obligations under the Act; but ultimately, a logging contract is still a "contract" at law, notwithstanding that many of its terms are dictated by the legislation for the protection and security of the contractor.

49 Thus I disagree with the intervenor's assertion that the effect of the Come-back Order was to "eliminate" the licence holder's "statutory obligation under the Forest Act to replace the contract and to eliminate the other conditions that are required by the Regulation to be included in the contract." In fact, the renewal of the appellants' contracts was not required by the Act per se; what the Act required was that each of their contracts contain a clause requiring renewal. It was those contractual terms which were breached. The licence holder's obligations, mandated by the scheme, were not "eliminated" by the Come-back Order or even by Skeena: having been breached, the obligations are recognized as giving

rise to claims against the corporation either for specific performance or for damages.

50 It follows in my view that in approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. The breach of contract is recognized as a matter of fact by the court, but is not "permitted" in the sense that the licence holder is somehow immunized from the usual consequences of its breach at law or in Equity. Finally, even if the Forest Act or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.

The Exercise of the Court's Discretion

51 The appellants and the intervenor argued that even if the Court did have the authority to grant the Come-back Order on the terms it did, the Chief Justice erred in failing to exercise his discretion so as to achieve "fairness" between the appellants and Skeena's three other logging contractors, whose contracts were, in theory at least, unaffected by the Reorganization Plan. As I mentioned earlier, both the appellants and the intervenor contend that contractors under replaceable contracts have "special status" as persons entitled to share in the benefits of a Crown resource (timber) and that the Forest Act scheme is predicated on fairness between them, and between them and the holders of Crown licences. They note that the Chief Justice referred in his "fairness" analysis only to the question of whether the Order differentiated inappropriately "between the applicants and other [Skeena] creditors" and made no reference to fairness as between the appellants and the other three contractors or as between the appellants and Skeena itself. In Mr. Forstrom's submission, it is unfair that his clients should suffer the loss of their very significant income streams under the replaceable contracts when the other three contractors will suffer no such loss, and when the licence holder itself suffers only the loss of five percent of its AAC under the Forest Act. (In fact, it is possible the Minister may revoke that reduction upon application by Skeena under s. 56.1 of the Act.) In essence, the argument of the appellants is "Why us?"

52 It is trite law that the scope of review open to an appellate court in respect of the exercise of discretion of a CCAA court (or any other court) is narrow. In Re Pacific National Lease Holding Corp. (1992) 72 B.C.L.R. (2d) 368, Macfarlane J.A. (in Chambers) observed that this court should exercise its powers "sparingly" when asked to intervene in this context. In his words:

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. . . . In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. [para. 32]

Macfarlane J.A.'s comments were echoed by the Alberta Court of Appeal in Smoky River Coal, supra, where Hunt J.A. noted at para. 61 that ". . . Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases."

53 Another principle informing the court's task flows from the fact that a plan of arrangement approved by the court is not the plan of the court. It is a compromise arrived at by the debtor company and the requisite number of its creditors. The court should not readily interfere with their business decision, especially where the plan has been approved by a high percentage of creditors. As observed by Blair J. in Re Olympia & York, supra, "[I]t is not my function to second guess the business people with respect to the 'business' aspects of the Plan, descending into the negotiating arena and substituting my

own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas." (at 510.) (See also Re Sammi Atlas Inc., supra, at para. 5, and Re Northland Properties Ltd. (1989) 73 C.B.R. (N.S.) 195 (B.C.C.A.), at 205, per McEachern C.J.B.C.)

54 In this case, the chief executive officer of NWBC and Skeena provided the Chambers judge below with an explanation as to why they chose to reduce the volume of timber allocated to Skeena's evergreen contractors, and why they chose to terminate the contracts of the appellants rather than to terminate all five contracts or reduce the work allocated to all five. I have already mentioned Mr. Veniez's affidavit evidence (see para. 11 above) that the cost to Skeena of logs produced by each of the appellants was greater than those produced by the other three contractors and that NWBC made it a "condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts."

55 In this court, Mr. Forstrom asked us to discount Mr. Veniez's evidence, contending that since the appellants' objections to the Come-Back Order had been known to NWBC when it completed its purchase of the Skeena shares, NWBC must be taken to have effectively "waived" this condition. I am not persuaded that such an inference necessarily follows from NWBC's completion of the Plan. At that time, the Come-back Order clearly authorized the termination of replaceable logging contracts, and the validity of a similar order had been upheld by Thackray J. in 1997. It may be that in deciding to proceed, NWBC undertook a risk that the appellants would be successful either before the Chief Justice or on appeal, but we have no evidence as to what concessions NWBC may have obtained to protect against that risk.

56 As for the argument that the appellants' contracts were no less costly to Skeena than those of the other three contractors (since the rates chargeable under all five contracts were subject to arbitration), Mr. Veniez deposed:

> 13. I acknowledge that the Contract Regulation dictates that any rates determined according to this process must be determined according to what a licence-holder and a contractor acting reasonably in similar circumstances would agree is a rate that is competitive by industry standards. However, this provides little comfort to licence-holders such as Skeena, because ultimately rates under the Contract Regulation are determined on a cost-plus reasonable profit for replaceable contractors basis which, in my view, acts as a significant disincentive for replaceable contractors to be cost effective on an ongoing basis.
>
> 14. On the contrary, the Contract Regulation in my view creates a legislated disincentive for evergreen contractors to control their cost structures, because volumes under these contracts are guaranteed. This results in high costs being passed on to Skeena.
>
> 15. Prior to NWBC's acquisition of Skeena, and the termination of the replaceable contract that has given rise to this application, I was advised that Skeena, on average, paid approximately 10% more for work done under replaceable contracts than work done pursuant to contracts issued after a competitive bid process. Indeed, I am advised by Derrick Curtis, Skeena's Terrace Woodland's Manager, that in March 2001 Skeena put out to tender a harvesting contract (Setting S83303), consisting of roughly 20,000 m3, and received tenders from both evergreen and non-evergreen contractors. The latter offered significantly lower rates ($23.95/m3 vs. $27.85/m3, a difference of $3.90/m3), resulting in a 14% reduction in costs to Skeena. [Emphasis added.]

57 There was, then, a "business case" for the actions taken by Skeena and NWBC vis-à-vis the appellants. Clear Creek and Jasak did not apply to cross-examine Mr. Veniez on this evidence, and did not bring anything to our attention which would cast doubt on his statements. In these circumstances, the Chambers judge was entitled to take seriously the assertion that the termination of the appellants' contracts would save Skeena a considerable sum per year and that that fact was important to the only purchaser willing to make an offer acceptable to the requisite number of creditors. In the terminology used by Mr. Forstrom, there was a "causal link" between the terminations and the chances of success of the Reorganization Plan. For this reason, I do not agree with his submission that Dylex is different in principle from the case at bar: the appellants' contracts in particular were said to be too costly for Skeena to continue operating under them, in the same way the terminated leases were said to be too costly for Dylex to continue leasing under them. And, weighing Dylex's precarious financial position against that of the landlord (which was described as "less than robust"), the Court 'gave the nod' to the insolvent corporation, rejecting the proposition that Dylex should have to prove that without the three proposed closures (of leases), its proposal would not be viable. (supra, para. 10.)

58 In this case, the appellants deposed that the evergreen contracts were important to them, particularly for financing purposes. Mr. Rigsby, the controller of Clear Creek, for example, deposed:

> 26. Clear Creek requires its Replaceable Contract in order to obtain financing for capital costs. Lending institutions require that Clear Creek has a replaceable contract when considering lending money to, or financing equipment for, Clear Creek. Within the logging industry, it is very difficult to obtain financing without the security of a replaceable contract.
>
> * * *
>
> 30. Clear Creek remains capable of properly capitalising itself, and maintaining its own equipment and other capital investments in good working order, provided that it has a replaceable contract. If Clear Creek's replaceable contract remains in place, Clear Creek will be able to provide competitive, cost-effective, and efficient services and rates to [Skeena] . . . .

59 This evidence brings us squarely to the question of fairness. As already noted, for purposes of the CCAA, the court must be satisfied that the arrangement proposed is "fair, reasonable and equitable." Courts have made it clear that "equity" is not necessarily "equality"; in the words of Farley J. in Re Sammi Atlas Inc.:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights . . . . [para. 4]

60 I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis in this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in

my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the deferral and settlement of more than $400,000,000 in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period to save Skeena from bankruptcy was NWBC's acquisition of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims. As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

61 As has been seen, the purchaser required as a condition of proceeding with the Reorganization Plan that the appellants' contracts be terminated. In the absence of evidence that Skeena or the purchaser was motivated by anything other than a desire to improve the debtor corporation's financial prospects for survival post-arrangement, it cannot in my view be said that the Chambers judge erred in ruling that the termination of the appellants' replaceable contracts was a valid part of the Reorganization Plan in this case.

Procedural Question

62 The second ground of appeal advanced by the appellants was that since Skeena had failed to comply strictly with the requirements of the Come-back Order in relation to the termination of their contracts, the terminations were null and void. In response to the Chief Justice's conclusion that the appellants had not been prejudiced by the failure to give timely notice, the appellants submitted that the terminations could not have been effective until 21 days after they received the Monitor's Eleventh Report. In the meantime, the creditors' meeting took place. The appellants contend that since there was uncertainty as to whether their contracts had been validly terminated or would be terminated, it was unclear whether they were entitled to vote at the meeting. Accordingly, they submit that they:

> . . . were effectively disenfranchised in the CCAA proceeding. The Come-Back Order contemplates that the effectiveness of any proposed termination of a replaceable logging contract will be determined in a timely way, before the Plan of reorganisation is submitted to the creditors for approval. By failing to give proper notice, [Skeena] created uncertainty about both when and if the Appellants' contracts would be terminated. The Appellants were only entitled to vote in relation to the Plan if they acknowledged that the termination of their contracts was effective when the initial (and clearly invalid) notice was given on March 1, 2002.
>
> This placed the Appellants on the horns of a dilemma. Had the Appellants exercised the right to vote on April 2,2002, based on the premise that their contracts had been terminated, they would be guilty of approbation and reprobation in relation to their position that no valid notice of termination had yet been given and that their contracts remains in force. [Skeena] structured the approval process in such a way that the Appellants would effectively be required to waive their right to proper notice of termination under the Come-Back Order in order to vote on the Plan.

63 In response, Skeena emphasizes that the appellants did file proofs of claim with the Monitor prior

to the creditors' meeting. Skeena says the Chief Justice was correct in concluding that the appellants were not prejudiced in fact, since if it is ultimately determined that the replaceable logging contracts were not validly terminated, the appellants will be free to withdraw their proofs of claim; and if the contracts were validly terminated, the appellants will share pro rata under the Plan with Skeena's other unsecured creditors once the amounts of all claims have been finally determined.

64 As for the proposition that the appellants could not both reprobate and approbate, Skeena notes that "conditional voting" was permitted by the Monitor in light of the time pressures attendant upon the approval of the Plan. These led the Monitor to allow voting even by those claimants whose claims it had disallowed. The Monitor noted their particular ballots as "objected to" in case the votes cast by them ultimately had an impact on the outcome of the vote for the applicable class. Mr. Zuk, the chair and claims officer for the meeting, deposed that even if all of the disallowed claims were reversed and the appellants' votes were counted, the result would not have been affected. This statement was not challenged by the appellants.

65 In these circumstances, I cannot agree with the appellants that the delay in their receipt of notice of the terminations of their contracts and the delay in the processing of their proofs of claim were prejudicial to them. It is certainly unfortunate that these delays occurred, but there is no evidence (as opposed to speculation) that the delays were the result of bad faith or deliberate omission. On the other hand, the appellants could have had little doubt that they faced major difficulties once the initial CCAA order was granted (September 5, 2001) and once the "replacement" deadline of September 30 passed. Ultimately, the effect of the delay in their receipt of formal notice made no difference to the appellants' position and did not influence the approval of the Reorganization Plan one way or the other, especially given the small amount allowed by the Monitor in respect of the appellants' claims in relation to Skeena's indebtedness. The appellants chose not to attend the meeting and not to vote, even on a conditional basis. In these circumstances, the Chief Justice correctly recognized that, as stated by Rowles J.A. for the Court in Cam-Net Communications v. Vancouver Telephone Co. (1999) 71 B.C.L.R. (3d) 226, a supervising court under the CCAA must be alert to the incentive for creditors to "avoid the reorganization compromise" and must "scrutinize carefully any action by a creditor which would have the effect of giving it an advantage over the general body of creditors." (para. 20.)

66 Moreover, the arguments which the appellants would have made at the show cause hearing have now been made in the Supreme Court and in this court. If my analysis is correct, they would have failed even if the Court's approval of the Reorganization Plan had been delayed in accordance with the apparent intent of the Come-back Order.

67 I cannot say the Chief Justice was wrong in concluding that Skeena's failure to give timely notice was anything other than a procedural error without prejudicial consequences. I would dismiss this ground of appeal, as well as the substantive grounds, for the reasons I have given.

NEWBURY J.A.
HALL J.A.:-- I agree.
LEVINE J.A.:-- I agree.

cp/i/qw/qlrds/qlsng/qlbrl/qlesm

Tab 2

Indexed as:

Pacific National Lease Holding Corp. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act R.S.C. 1985, C. C-36, and IN THE MATTER OF the Company Act, R.S.B.C. 1979, C. 59, and IN THE MATTER OF the Pacific National Lease Holding Corporation, Pacific National Financial Corporation, Pacific National Leasing Corp., Pacific National Vehicle Leasing Corp., Southborough Holdings Inc. and Pac Nat Equities Corp.

[1992] B.C.J. No. 2309

19 B.C.A.C. 134

72 B.C.L.R. (2d) 368

15 C.B.R. (3d) 265

36 A.C.W.S. (3d) 389

Vancouver Registry: CA016047

British Columbia Court of Appeal
(In Chambers)

MacFarlane J.A.

Heard: October 22, 1992
Judgment: October 28, 1992

(13 pp.)

Debtor and creditor -- Insolvency -- Creditors arrangements -- Stay of all proceedings against insolvent debtor -- Statutory severance payments -- Creation of trust fund to secure making of severance payments.

Application for leave to appeal an order made under the Companies' Creditors Arrangement Act. The petitioner applied to establish a trust fund to indemnify its directors and officers with respect to statutory severance payments. In the alternative, it wished to use available funds to meet those payments. There was no evidence that the operations of the petitioner would be impaired if the payments were not made. Its applications were refused. It argued that the trial judge erred in ordering the debtor not to abide by relevant mandatory statutory provisions.

HELD: Application dismissed. The Act preserved the status quo and protected all creditors while a re-organization was being attempted. The steps sought to be taken by the petitioner in this case would

amount to an unacceptable alteration of that status quo. In exercising its powers under this statute, the court sought to serve creditors which included shareholders and employees. If in doing so, a decision of the court conflicted with provincial legislation, the pursuit of the purposes of the Act must prevail.

STATUTES, REGULATIONS AND RULES CITED:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. Employment Standards Act, S.B.C. 1979, c. 10.

Counsel for the Petitioners (Appellants): H.C. Ritchie Clark and D.D. Nugent.
Counsel for Sun Life Trust Co.: W.E.J. Skelly.
Counsel for the Mutual Life Assurance Co. of Canada: M.P. Carroll.
Counsel for the Commcorp Financial Services Inc. and National Trust: W.C. Kaplan.
National Bank of Canada: H.W. Veenstra.

MACFARLANE J.A. (refusing leave to appeal):-- This is an application for leave to appeal an order of Mr. Justice Brenner pronounced the 17th day of August, 1992, pursuant to the Companies Creditors Arrangement Act R.S.C. 1985, c. C-36 (the "C.C.A.A.").

1 The petitioners had become insolvent prior to July 22, 1992, when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the C.C.A.A..

2 Mr. Justice Brenner made an ex parte order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

3 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000.00, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the Employment Standards Act S.B.C. 1979, c. 10 for failing to make the payments mandated by that statute.

4 On July 31, 1992, Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the ex parte stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the Court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

5 The merits were argued in August and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

6 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make

> statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners to compel payment of statutory severance payments are stayed.

7 The appeal concerns the order made under the first paragraph of the order, not against the stay granted in the second paragraph.

8 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in Westar Mining Ltd., unreported reasons for judgment, August 11, 1992 (which dealt with a similar issue), and the application of that principle to the facts of this case.

9 The essential facts are that the petitioners are a group of inter-related companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000.00 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his reasons on August 17, 1992, had been reduced to 60. The provisions of the Employment Standards Act had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

10 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000.00 and for vacation pay in an amount of approximately $150,000.00 for a total potential liability of $1,000,000.00. I understand from counsel that once the Funders are repaid there may be as much as $61,000,000.00 available to meet other liabilities.

11 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000.00 is required.

12 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other respondents, who are 27 other financial institutions, referred to in the material as the "Funders". The Funders advanced monies and took security, in part by way of assignment of the lease revenue stream. The monies advanced by the Funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

13 The arrangements with the Funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the Funders.

14 The petitioners got into financial difficulties, which they revealed to the Funders. The Funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought

protection under the C.C.A.A..

15 The appellants seek an order of this Court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the Employment Standards Act) and permitting them to continue to maintain the Trust Funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

[para16] The petitioners assert that Mr. Justice Brenner erred:-

1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the Employment Standards Act, requiring the appellants to pay all the statutory payments in full, and thereby order the appellants to breach a mandatory statute regarding statutory payments.

2. In ruling that he had the inherent jurisdiction under the Companies Creditors Arrangement Act or otherwise to order the appellants to breach the Employment Standards Act regarding statutory payments and thereby order the petitioners to commit offences under such statute.
3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.
4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.
5. In suspending the provisions of the July 23, 1992 order authorizing the Trust Fund.
6. In failing to provide any protection to the directors and officers of the appellants by way of the Trust Fund when ordering the petitioners to breach the Employment Standards Act, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

17 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted reorganization of the affairs of a company, and which is intended to prevent a creditor obtaining a preference which it would not have if the attempted re-organization fails, and bankruptcy occurs.

18 I think that the answer is given in Chef Ready Foods Ltd. v. Hong Kong Bank of Canada (1990), B.C.L.R. (2d) 84. In that case Mr. Justice Gibbs, at pp. 88-89, said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust

> company, or a loan company. When a company has recourse to the C.C.A.A. the Court is called upon to play a kind of supervisory role to preserve the status quo to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the Court under Section 11.

19 In the same case, at p. 92, Mr. Justice Gibbs considered whether security given under the Bank Act gave preference to the Bank over other creditors, despite the provisions of the C.C.A.A.. He said:

> It is apparent from these excerpts and from the wording of the statute, that in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's right in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

20 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court. (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees. (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company. (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions. (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

Counsel do not suggest that statement of principles is incorrect.

21 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in Westar, and concluded:

> In my view, to allow the Petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

22 He said earlier that he did not understand Mr. Justice Macdonald to be saying in Westar that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

23 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a reorganization was being attempted under the C.C.A.A.

24 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a re-organization is being attempted.

25 So far as the directors and officers are concerned, they were personally liable for potential claims under the Employment Standards Act before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

26 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

27 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

28 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

29 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.

30 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

31 In all the circumstances I would refuse leave to appeal.

MACFARLANE J.A.

Tab 3

Case Name:

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

Between
ICR Commercial Real Estate (Regina) Ltd., Appellant,
and
Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd., 603767 Saskatchewan Ltd., 583261 Saskatchewan Ltd. and Horizon West Management Ltd., Respondents

[2007] S.J. No. 313

2007 SKCA 72

[2007] 9 W.W.R. 79

299 Sask.R. 194

33 C.B.R. (5th) 50

159 A.C.W.S. (3d) 671

2007 CarswellSask 324

Dockets: 1443 and 1452

Saskatchewan Court of Appeal

Klebuc C.J.S., Jackson and Smith JJ.A.

Heard: June 7, 2007.
Judgment: June 25, 2007.

(82 paras.)

Civil procedure -- Costs -- Solicitor and client or substantial indemnity -- As damages or punishment for improper conduct -- Appeal from Supreme Court decision that awarded substantial indemnity costs to respondent -- Appeal allowed -- There was no basis upon which to order substantial indemnity costs.

Insolvency law -- Administration of estate -- Actions by or against estate -- Appeal from a Supreme Court decision that denied the appellant leave to commence an action against the bankrupt -- The claim arose on a "post-filing" basis after a restructuring order had been made under the Companies' Creditors Arrangement Act -- Appeal dismissed -- The order applied to post-filing creditors -- The appellant did not reach the necessary threshold required to allow the action to proceed.

Appeal from a Supreme Court decision that denied ICR leave to commence an action against Bricore. The claim by ICR arose on a "post-filing" basis after a restructuring order had been made under the Companies' Creditors Arrangement Act. The restructuring failed. The principal assets of the companies were sold and the net proceeds were being held for distribution. The post-filing claim was asserted against (i) the companies, which were subject to the CCAA order, and (ii) against the companies' Chief Restructuring Officer. ICR claimed a real estate commission with respect to the sale of a building belonging to Bricore. Bricore and four related companies (collectively "Bricore") were all subject to an initial order granted by a Supreme Court judge in January, 2006, pursuant to s. 11(3) of the CCAA. The Chief Restructuring Officer (CRO) was appointed by the chambers judge in May, 2006 (the "CRO Order"). The Supreme Court judge remained the supervising CCAA judge from the time of the Initial Order. The Initial Order and the CRO Order imposed a stay of proceedings against Bricore and prohibited the commencement of new actions against Bricore and the CRO without leave of the Court. ICR applied to the supervising judge for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. The supervising judge found that the Initial Order and the CRO Order applied to ICR and that leave of the Court was required. He refused leave and also awarded substantial indemnity costs against ICR. On appeal, ICR raised four issues. First, it alleged that the stay of proceedings imposed did not mean leave to commence an action against Bricore was required. Second, it contended that s. 11.3 of the CCAA did not require that a post-filing claimant was subject to the stay of proceedings imposed by the Initial Order. Third, it claimed that if leave was required, the supervising judge erred when he refused ICR leave to commence an action against Bricore and against the CRO. Finally, ICR contended that the supervising judge erred when he awarded costs on a substantial indemnity basis.

HELD: Appeal allowed in part. The supervising judge erred when he awarded costs on a substantial indemnity basis. All other aspects of the appeal were dismissed. The Initial Order applied to post-filing creditors. Leave was required. Ultimately, it was within the discretion of the supervising CCAA judge as to whether the proposed action ought to be allowed to proceed in the face of the stay. ICR did not reach the necessary threshold required to allow the action to proceed. It did not structure its affairs or establish a claim with the specificity that justified the development of a remedy to allow it to participate in the liquidation of the Bricore assets. With respect to costs, there was no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore, as bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR could not be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 13

On appeal from Q.B.G. No. 8 of 2006, J.C. Saskatoon

Counsel:

Fred C. Zinkhan for the Appellant.

Jeffrey M. Lee for the Respondents.

Kim Anderson for the Monitor, Ernst & Young.

The judgment of the Court was delivered by

JACKSON J.A.:--

I. Introduction

1 This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[1] (the "*CCAA*"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the *CCAA* order; and (ii) against the companies' Chief Restructuring Officer.

2 The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the *CCAA*. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising *CCAA* judge since the Initial Order.

3 The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

4 ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

5 On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the *CCAA,* and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

6 The issues are:

1. Does the stay of proceedings imposed by the supervising *CCAA* judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?
2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?
3. If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?
4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?
5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

III. Background

7 ICR's claim to a real estate commission arises as a result of these brief facts. Bricore owned four commercial real estate properties in Saskatoon and three such properties in Regina (the "Bricore Properties"). ICR argued that it had marketed one of the Regina properties, known as the Department of Education Building (the "Building"), to the City of Regina.

8 Bricore sold the Building, at a purchase price of $700,000,[2] to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of $1,075,000.[3] The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

9 As I have indicated, the Initial Order was made on January 4, 2006. On February 13, 2006 Koch J. appointed CMN Calgary Inc. as an Officer of the Court to pursue opportunities and to solicit offers for the sale or refinancing of the Bricore Properties. He also authorized Bricore to enter into an agreement with CMN Calgary dated as of January 30, 2006 entitled "Exclusive Authority To Solicit Offers To Purchase."

10 In May 2006, it was determined that Bricore could not be reorganized and, therefore, all the Bricore Properties should be sold. On May 23, 2006, Koch J. appointed Maurice Duval, C.A., of Saskatoon, Saskatchewan as an officer of the Court to act as CRO, and to assist with the sale of the assets.

11 The CRO Order confers these powers on the CRO pertaining to the proposed sale of the Bricore Properties:

> 7 ...
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> (e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;
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> ...
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> (g) subject to paragraphs 7C, 7D and 7E hereof, **the power to work with, consult with and assist the court-appointed selling officer (CMN Calgary Inc.) to negotiate with parties who make offers to purchase** the Bricore Properties in a manner substantially in accordance with the process and proposed timeline for solicitation of such offers to purchase the Bricore Properties recommended by the Monitor in the Monitor's Third Report. ...[4] [Emphasis added.]

12 On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore

Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

13 Negotiations were protracted resulting in a further series of orders:

(a) August 1, 2006: Koch J. extended the timeframe for due diligence and further negotiations to be completed by August 15, 2006;[5]
(b) August 18, 2006: Koch J. authorized the CRO to accept an Amended Offer to Purchase made the 15th day of August, 2006. The Amended Offer to Purchase contemplated the sale by Bricore to the Proposed Purchaser of six of the seven Bricore Properties including the Building;[6]
(c) September 25, 2006: The closing date for the proposed sale by Bricore to the Proposed Purchaser of the six properties was extended from October 15, 2006 to November 15, 2006;[7]
(d) October 10, 2006: Koch J. approved the sale of the six properties to their respective purchasers; in the case of the Building, it was sold to 101086849 Saskatchewan Ltd.[8]

Koch J. ultimately approved the sale of the Building to 101086849 Saskatchewan Ltd. as of November 30, 2006.

14 ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contending that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

15 This is the substance of ICR's draft statement of claim against Bricore and the CRO:

4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in his capacity as chief restructuring officer for the Bricore Group.

...

7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]
8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.
9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.
10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.
11. The Plaintiff says that at the time of execution of the said Agreement by Duval on

September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.

12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith,** proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan ltd., which became the owner of the [Building] on or about January 3, 2007.[9] [Emphasis added.]

16 While the words "bad faith" are not repeated in the affidavit evidence, Paul Mehlsen, the principal of ICR, swore an affidavit in support of the application for leave, stating that he had examined the statement of claim and that to the best of his knowledge the allegations contained therein are true. His affidavit also states:

13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.
14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.
15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

> I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.[10]

17 Exhibit "A" is a letter dated September 27, 2006 from Mr. Jim Thompson of ICR to Mr. Larry Ruf of Horizon West Management Inc. It reads, in material part, as follows:

> Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:
>
> 1. 1500 - 4th Avenue [Department of Education Building] - we have been in regular contact with the City of Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alfords Furniture and Flooring who have an ongoing interest.
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> . . .
>
> The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to

sell and request that ICR be protected in the specific situations as outlined.

In the event we are not able to carry on in a formal fashion we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.[11]

The words "December 31, 2006" are struck out and these words are added: "Date of closing of a sale or December 31, 2006 whichever is earlier." Mr. Ruf's name is crossed out and the signature of Maurice Duval, Chief Restructuring Officer is added in its place.

18 Mr. Ruf, on behalf of Bricore, refuted ICR's claim in a sworn affidavit stating:

3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.
4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:

(a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and

(b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.[12]

19 The CRO filed a report in response to ICR:

6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson's September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.
7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:

(a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and

(b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;

then Bricore Group would agree to pay a commission to ICR Regina. In regard to the

Department of Education Building located at 1500 - 4th Avenue in Regina (the "Department of Education Building"), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford's Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.

8. In January of 2007, after much effort and expenditure of resources, the sale of the Bricore Properties contemplated in the Accepted Offer to Purchase was unconditionally closed (effective November 30, 2006). The entity named as purchaser of the Department of Education Building in the final closing documents was a numbered Saskatchewan company controlled by Avenue Commercial Group of Calgary. Such entity was a nominee corporation operating entirely at arm's length from the City of Regina and Bricore Group. At all times after June 2006, the CRO had no authority to sell the property, as it was already sold.
9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly "flipped" such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.[13]

20 To rebut this, Mr. Mehlsen of ICR swore a further affidavit deposing:

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].
4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].
5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit "F" to this my affidavit.
6. In reply to paras. 2 and 12 of Mr. Duval's Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the "ugly duckling" of the Bricore Properties and therefore had been excluded from the reported sale. ICR's efforts were directed at the sale of [the Building] and leasing the other two Regina properties.
7. In response to para. 13 of Mr. Duval's Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.
8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an "information" or "fact" sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.

. . .

11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.
12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and

that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf 's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

. . .

14. In hindsight, it would appear that the confidential information concerning the intention of the City of Regina to purchase the [Building] that was provided by myself and representatives of ICR to Mr. Ruf and Mr. Duval was communicated to the [Proposed Purchaser], who then incorporated 101086849 Saskatchewan Ltd. to take advantage of this opportunity. Attached hereto and marked as exhibit "I" to this my Affidavit is a true copy of a Profile Report from the Corporate Registry indicating that 101086849 Saskatchewan Ltd. was incorporated by solicitors as a "shelf company" on May 31, 2006, with new Directors in the form of Garry Bobke and Steven Butt taking office on August 17, 2006.
15. My understanding is that the [Proposed Purchaser] initially excluded the [Building] from their offer to purchase the Bricore Group properties and made a separate offer through 101086849 Saskatchewan Ltd. when they were made aware of the confidential information about the City of Regina's plans to purchase the property.[14]

21 In refusing ICR leave to commence action, Koch J. wrote:

> [1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the *CCAA* that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.
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> ...
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> [16] Although the interpretation of s. 11.3 of the *CCAA* is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).
> (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a

prima facie case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the *CCAA* does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court- appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.[15]

IV. Issue #1: Does the stay of proceedings imposed by the supervising *CCAA* judge under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

22 ICR argues that, as a post-filing creditor, the Initial Order does not apply to it, either as a matter of law or on the basis of a proper interpretation of the Initial Order.

23 The authority to make an order staying and prohibiting proceedings against a debtor company is contained in s. 11(3) of the *CCAA*:

> 11.(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

24 Pursuant to s. 11(3) of the *CCAA*, Koch J. granted the Initial Order providing for a stay and prohibition of new proceedings in these terms:

> 5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.
> 6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:
>
> a) against Bricore Group or the Property;
> b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or
> c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.
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> . . .
>
> 11. Notwithstanding any of the provisions of this Order:
>
> a) no creditor of Bricore Group shall be under any obligation, by reason only of the issuance of this Order, to advance or re-advance any monies or otherwise extend any credit to Bricore Group, except as such creditor may agree; and
> b) Bricore Group may, by written consent of its counsel of record, agree to waive any of the protections that this Order provides to them, whether such waiver is given in respect of a single creditor or class of creditors or is given in respect of all creditors generally.
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> ...
>
> 13. Any act or action taken or notice given by creditors or other Persons or their agents,

> from and after 12:01 a.m. (local Saskatoon time) on the date of the filing of the application for this Order to the time of the granting of this Order, to commence or continue Enforcement or to take any Proceeding (including, without limitation, the application of funds in reduction of any debt, set-off or the consolidation of accounts) is, unless the Court orders otherwise, deemed not to have been taken or given.

"Proceeding" is defined in para. 22 of Schedule "A" to the Initial Order as "a lawsuit, legal action, court application, arbitration, hearing, mediation process, enforcement process, grievance, extrajudicial proceeding of any kind or other proceeding of any kind."

25 The authority to extend an initial order is contained in s. 11(4) of the *CCAA*:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
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> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Koch J., pursuant to this subsection, extended the stay many times and the stay continues in force.

26 As authority for the proposition that the Initial Order does not stay proceedings with respect to claims that arise after the Initial Order, ICR's counsel cites Professor Honsberger's *Debt Restructuring Principles & Practice*:

> The scope of an order staying proceedings extends only to claims that arose prior to the order. A proceeding based on a claim that arose after an order was made staying proceedings is not affected by the stay.[16] [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*[17] *In my respectful view, the facts in Ramsay Glass* narrow its application.

27 In *Ramsay Glass*, the initial *CCAA* order, dated April 12, 1951, suspended all proceedings against Modern Wood Products Ltd. Modern Wood Products made an offer of compromise that was accepted by its existing creditors and approved by the Court on May 21, 1951. Ramsay Glass sought to enforce a claim against Modern Wood Products that arose in 1953. Modern Wood Products sought to strike Ramsay Glass's claim on the basis that its proceedings were stayed by the April 1951 order.

28 In dismissing the application to strike, Prevost J. wrote:

> CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;
>
> CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;

> CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;
>
> CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year;[18]

I do not interpret *Ramsay Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the *CCAA* stay is in effect. In my opinion, *Ramsay Glass* can be read as authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re;*[19] *Stelco Inc., (Re);*[20] *and Campeau v. Olympia & York Developments Ltd.*[21]

29 In 360networks, a creditor (Caterpillar Financial Services Limited) had both pre-filing and post-filing claims. Caterpillar applied, *inter alia*, for an order lifting the stay of proceedings. Tysoe J. wrote:

> 8 On the hearing of the applications, Caterpillar continued to take the position that all of its claims could properly be determined within the *CCAA* proceedings on the first of its two applications. I agree that the Deficiency Claim and the Secured Creditor Claim are properly determinable within the *CCAA* proceedings, but it is my view that it would not be appropriate to make determinations in respect of the Trust Claim or the Post-Filing Claim in the *CCAA* proceedings. The only remaining thing to be done in the *CCAA* proceedings is the determination of the validity of claims for the purposes of the Restructuring Plan (with Caterpillar's claims being the only unresolved ones). **Neither the Trust Claim nor the Post-Filing Claim falls into this category of claim because each of these types of claim is not affected by the Restructuring Plan.** Indeed, the Post-Filing Claim was not asserted in Caterpillar's proof of claim and surely cannot be adjudicated upon within Caterpillar's appeal of the disallowance of its proof of claim. The B.C. Court of Appeal has recently affirmed, in *United Properties Ltd. v. 642433 B.C. Ltd.*, [2003] B.C.J. No. 852, 2003 BCCA 203 (B.C.C.A.), that it is appropriate for the court to decline jurisdiction to resolve a dispute in *CCAA* proceedings which, although it may relate to them, is not part and parcel of the proceedings. [Emphasis added.]
>
> . . .
>
> 11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the *CCAA* authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the CCAA and does not authorize the court to determine claims which fall outside of *CCAA* proceedings, such as the Trust Claim and the Post-Filing Claim.[22]

In the result, Tysoe J. lifted the stay so as to permit an action to be commenced to resolve all of Caterpillar's claims. The significance of the decision for our purposes is that the Court in *360networks* considered the stay as applying to claims that arose after the initial order.

30 In *Stelco,* Farley J., relying on *360networks*, also held that the post-filing creditor's claim in that case "continues to be stayed and is to be dealt with in the ordinary course of litigation after Stelco's *CCAA* protection is terminated."[23]

31 *Campeau* does not deal with a post-filing creditor, but it does address the situation where a creditor, whose claim is not accepted as part of the plan of arrangement, wants to commence action. Blair J. (as he then was) refused an application brought by Robert Campeau and the Campeau Corporations to lift the stay of proceeding imposed by the initial order. In doing so, he wrote:

> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding - in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York - whose alleged misdeeds are the real focal point of the attack on both sets of defendants - is able to participate.
>
> 25. In addition to the foregoing, I have considered the following factors in the exercise of my discretion:
>
> 1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
> 2. In this sense, the Campeau claim - like other secured, undersecured, unsecured, and contingent claims - must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings - i.e. the action and the CCAA proceeding - the scales tip in favour of dealing with the Campeau claim in the context of the latter:
>
> see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim, [1992] O.J. No. 1330, supra.* **I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan".** This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will

> accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.[24] [Emphasis added.]

Campeau is further authority for the proposition that a supervising *CCAA* judge can refuse a prospective creditor, who is not part of the plan of arrangement, leave to commence proceedings and that the creditor may commence action after the stay is lifted.

32 Each of *360networks*[25], *Stelco*[26] *and Campeau*[27] *supports the proposition that while a stay of proceedings is extant, an application to lift the stay must be made to permit an action to be commenced against a debtor that is subject to a CCAA* order, regardless of whether the claim arises before or after the initial order, or whether the prospective creditor is able to take part in the plan of arrangement.

33 Prevost J. in *Ramsay Glass* points out that under the *Bankruptcy and Insolvency Act*[28] (*the "BIA"*) the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*.[29]) While s. 12 of the *CCAA* defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

34 On the face of ss. 11(3) and (4) of the *CCAA*, the authority to safeguard the company is not limited to staying existing actions, but extends to "prohibiting, until otherwise ordered by the court, the commencement of ... any other action, suit or proceeding against the company." Unlike the *BIA* there are no words limiting this phrase to debts or claims in existence at the time of the initial order.

35 With respect to the wording of the Initial Order, there can be no question that it applies to post-filing creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

36 ICR argued that by the addition of s. 11.3 in 1997[30] to the *CCAA*, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

37 In my respectful view, s. 11.3 cannot be interpreted in the way in which ICR contends. Indeed, a more logical and internally consistent reading of s. 11.3 and the other sections of the *CCAA* is to permit the supervising judge to determine, as a matter of discretion, whether an action commenced by a post-filing creditor should be permitted to proceed.

38 Section 11.3 forms part of a comprehensive series of sections addressing the question of stays added in 1997 and 2001:[31]

> No stay, etc., in certain cases
>
> 11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association

established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C. 1997, c. 12, s. 124)

No stay, etc., in certain cases

11.11 No order may be made under this Act **staying or restraining**

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act;*
(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)

No stay, etc. in certain cases

11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C. 1997, c. 12, s. 124)

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
(b) requiring the further advance of money or credit. (Added by S.C. 1997, c. 12, s. 124)

[Emphasis added.]

39 In ss. 11.1(2), 11.11 and 11.2, Parliament uses the words "staying or restraining" to describe those circumstances limiting the scope of the stay power, but these words are not repeated in s. 11.3. This application of the *expressio unius* principle supports the obvious implication that s. 11.3 does not limit the authority of the court to stay all proceedings.

40 While the debates of the House of Commons in Hansard do not comment on s. 11.3, several text book authors assist with the task of interpretation. Professor Honsberger states:

A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.

Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.

However, no order made under s. 11 of the Act has the effect of prohibiting a

> person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.
>
> . . .
>
> ... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for "goods, services, use of leased or licensed property or other valuable consideration after the order is made.[32]

[Footnotes omitted.]

41 Professor McLaren similarly comments in his text "Canadian Commercial Reorganization":[33]

> 3.800 ... Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(*a*), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(*a*) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.

42 Finally, Professor Sarra in *Rescue! The Companies' Creditors Arrangement Act*[34] provides this insight:

> While the court cannot compel a supplier to continue to extend credit to the debtor during a *CCAA* proceeding, the court can protect trade suppliers that choose to supply goods or credit during the stay period by granting them a charge on the assets of the debtor that will rank ahead of other claims. While section 11.3 of the *CCAA* states that no stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property, or requiring the further advance of money or credit, trade suppliers were often continuing credit only to find that they had lost further assets during the workout period because of their priority in the hierarchy of claims. Hence the practice of post-petition trade credit priority charges developed, first recognized in Alberta.[35] [Footnotes omitted.]

43 *Smith Bros. Contracting Ltd. (Re)*[36] also supports a narrow reading of s. 11.3. After citing *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[37] and *Quintette Coal Limited. v. Nippon Steel Corporation*[38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Bros.* wrote:

> 45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:
>
> > ... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...

> 46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.

47 To repeat the relevant portion of the section:

> 11.3 No order made under s. 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;
>
> It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.[39]

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the C*CAA* as creating a narrow right - the right to withhold services without immediate payment.

44 I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

> (a) to refuse to supply any such goods or services at all;
> (b) to supply such goods or services on a "cash on demand" basis only;
> (c) to negotiate with the insolvent corporation for the amendment of the *CCAA* Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
> (d) to take the risk of supplying goods or services on credit.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

> VI. Issue #3: If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

45 Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

46 The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more

of:

(a) the CRO's position or involvement with Bricore Group;
(b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
(c) any sale of all or part of the Property pursuant to these proceedings;
(d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
(e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.[40]

47 The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the *CCAA*:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> ...
>
> (c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

48 This is a discretionary power, which invokes the standard of appellate review stated as follows:

> [22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order.[41]

It is often expressed as permitting intervention where the judge acts arbitrarily, on a wrong principle, or on an erroneous view of the facts, or when the appeal court is satisfied that there is likely to be a failure of justice as a result of the refusal. See: *Martin v. Deutch.*[42]

49 With respect to discretionary decisions made under the CCAA, there is a particular reluctance to intervene. The reluctance is justified on the basis of the specialization of the judges who have carriage of complex proceedings that are often replete with compromised solutions.[43] This does not mean that the Court of Appeal can turn a blind eye or permit an injustice, but it does provide the backdrop against which *CCAA* discretionary decisions are reviewed.

50 Unlike the *BIA*,[44] the *CCAA* contains no specific statutory test to provide guidance on the circumstances in which a *CCAA* stay of proceedings is to be lifted. Some guidance, nonetheless, can be found in the statute and in the jurisprudence.

51 Subsection 11(6) of the *CCAA* states:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

While the reference to "order" in the opening clause "[t]he court shall not make an order under s. (3) or (4)" may very well be to the Initial Order and not to the order lifting the stay, s. 11(6) and, in particular, its legislative history, are also relevant to an application to lift the stay.

52 Subsection 11(6) was brought into effect in 1997 by Bill C-5, which enacted "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act." When Bill C-5 received third reading on October 23, 1996, s. 11(6) took this form:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that:
>
> (i) the applicant has acted, and is acting, in good faith and with due diligence,
> (ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and
> (iii) no creditor would be materially prejudiced if the order being applied for were made.

After Bill C-5 received third reading, it was referred to the Standing Senate Committee on Banking, Trade and Commerce.[45] The Committee reported:

> A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.
>
> Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.
>
> . . .
>
> Of the submissions received about proposed subsection 11(6), all but one condemned the provision.
>
> ...
>
> The CLHIA [Canadian Life and Health Insurance Association] argued that the

> amendment to the bill would be a significant improvement to the CCAA for four reasons:
>
> (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;
> (b) it would more closely align the CCAA with the BIA;
> (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
> (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]
>
> . . .
>
> The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.
>
> While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).[46]

Notwithstanding the submissions of the Canadian Life and Health Insurance Association, the Standing Committee recommended that Bill C-5 be amended by striking subparagraphs 11(6)(b)(ii) and (iii).

53 The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.[47] Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.[48] Neither the amending legislation[49] nor the proposed Bill presently before the Senate[50] make any change to s. 11 in this regard.

54 The Senate's and Parliament's specific rejection of a limitation on the court's discretion is a strong indication of Parliamentary intention. The fact that Parliament did not see fit to limit the discretion in any significant manner, despite having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising *CCAA* judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

55 In *Canadian Airlines Corp., Re*[51] *Paperny J. (as she then was) indicated that the obligation of the supervising CCAA* judge is to "always have regard to the particular facts" and "to balance" the interests. As Farley J. said in *Ivaco Inc., Re*,[52] the supervising *CCAA* judge must also be concerned not to permit one creditor to mount "an indirect but devastating attack on the CCAA stay" so as to give one creditor an inappropriate advantage over other unsecured creditors as well as over secured creditors with priority.

56 In *Ivaco Inc. (Re)*[53] Ground J. stated this to be the criteria to determine whether a stay should be lifted:

> 20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and

> whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

Ground J. went on to confirm that finding a tenable or reasonable cause of action is not the only factor to be considered:

> 30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

57 Turning back to the case before us, Koch J.'s reasons for refusing to lift the stay were:

> [16] . . .
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. ....
> (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).
> (c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. ...[54]

He went on to find that the proposed action against Bricore was not "tenable."

58 On an application made by a post-filing creditor, a supervising *CCAA* judge can refuse to lift the stay on the basis that the creditor's claim is outside the *CCAA* process and the action can be commenced after the *CCAA* order is lifted. (See *360networks*[55] and *Stelco*[56]). Koch J. did not exercise this option. He was no doubt motivated in part by the fact that by the time ICR's claim could be tried, after the stay is no longer in effect, there may be no funds for it to claim as Bricore has now liquidated all of its assets and there remains, for all intents and purposes, a pool of funds only. The funds are subject to a plan of distribution, approved by the creditors, and will be distributed over this year.

59 Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the