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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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" (collectively the "APPLICANTS" or "Canwest")

BRIEF OF AUTHORITIES OF GS CAPITAL PARTNERS VI FUND L.P., GSCP VI AA ONE HOLDING S.ar.l AND GS VI AA ONE PARALLEL HOLDING S.ar.l (the "GS Parties")

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4. R.H. McLaren, Canadian Commercial Reorganization: Preventing Bankrtuptcy (Aurora: Canada Law Book, looseleaf)

TAB 1

1992 CarswellOnt 185, 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339

1992 CarswellOnt 185

Campeau v. Olympia & York Developments Ltd.

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

Ontario Court of Justice (General Division)

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle*, for the plaintiffs.

Peter F. C. Howard, for National Bank of Canada.

Yoine Goldstein, for Olympia & York Development Limited and 857408 Ontario Inc.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Practice — Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General.

Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Cases considered:

Arab Monetary Fund v. Hashim (June 25, 1992), Doc.34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 — *referred to*

Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 244 (C.A.) — *referred to*

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) — *applied*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. (H.C.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *applied*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*.

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 —

s. 17(1)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

R.A. Blair J:

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,

b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of*

Civil Procedure . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by

Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.) , appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) , where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

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 C.C.A.A. 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.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, 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.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

END OF DOCUMENT

TAB 2

2007 CarswellSask 324, 2007 SKCA 72, 33 C.B.R. (5th) 50, [2007] 9 W.W.R. 79, 299 Sask. R. 194, 408 W.A.C. 194

2007 CarswellSask 324

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

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

Saskatchewan Court of Appeal

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

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

Counsel: Fred C. Zinkhan for Appellant

Jeffrey M. Lee for Respondents

Kim Anderson for Monitor, Ernst & Young

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial

Bankruptcy and insolvency — Practice and procedure in courts — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was

allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Debtors and creditors — Receivers — Actions by and against receiver — Actions against receiver

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina

("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

Debtors and creditors — Receivers — Actions by and against receiver — Practice and procedure — Costs

On application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Civil practice and procedure — Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Against chief restructuring officer — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Super-

vising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Cases considered by *Jackson J.A.*:

Air Canada, Re (2004), 47 C.B.R. (4th) 182, 2004 CarswellOnt 643 (Ont. S.C.J. [Commercial List]) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Caterpillar Financial Services Ltd. v. 360networks corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95 (B.C. C.A.) — referred to

Hadmor Productions Ltd. v. Hamilton (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (U.K. H.L.) — referred to

Hashemian v. Wilde (2006), [2007] 2 W.W.R. 52, 40 C.P.C. (6th) 10, 2006 SKCA 126, 2006 CarswellSask 740, 382 W.A.C. 105, 289 Sask. R. 105 (Sask. C.A.) — followed

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2003), 2003 CarswellOnt 6097, 1 C.B.R. (5th) 204, 6 P.P.S.A.C. (3d) 261 (Ont. S.C.J. [Commercial List]) — considered

Ivaco Inc., Re (2006), 2006 CarswellOnt 8025 (Ont. S.C.J.) — considered

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — followed

Martin v. Deutch (1943), [1943] O.R. 683, 1943 CarswellOnt 36, [1943] 4 D.L.R. 600 (Ont. C.A.) — referred to

Mosaic Group Inc., Re (2004), 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R.

(5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Ptarmigan Airways Ltd. v. Federated Mining Corp. (1973), 1973 CarswellNWT 10, [1973] 3 W.W.R. 723 (N.W.T. S.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 1990 CarswellBC 384, 2 C.B.R. (3d) 303 (B.C. C.A.) — referred to

Ramsay Plate Glass Co. v. Modern Wood Products Ltd. (1954), 1954 CarswellQue 24, 34 C.B.R. 82 (Que. S.C.) — considered

Siemens v. Bawolin (2002), 2002 SKCA 84, 2002 CarswellSask 448, 46 E.T.R. (2d) 254, [2002] 11 W.W.R. 246, 219 Sask. R. 282, 272 W.A.C. 282 (Sask. C.A.) — followed

Smart v. South Saskatchewan Hospital Centre (1989), 75 Sask. R. 34, 60 D.L.R. (4th) 8, [1989] 5 W.W.R. 289, 1989 CarswellSask 266 (Sask. C.A.) — considered

Smith Brothers Contracting Ltd., Re (1998), 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264, 13 P.P.S.A.C. (2d) 316 (B.C. S.C.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 5024, 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]) — considered

360networks Inc., Re (2003), 45 C.B.R. (4th) 151, 2003 BCSC 1030, 2003 CarswellBC 1636 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 [rep. & sub. 2005, c. 47, s. 128] — referred to

s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(c) — considered

s. 11(6) — considered

s. 11(6) [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.11 [en. 2001, c. 9, s. 577] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 12(1) "claim" — considered

s. 13 — referred to

Real Estate Act, S.S. 1995, c. R-1.3

Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules

R. 173 — referred to

Words and phrases considered:

Substantial indemnity costs

[Jackson J.A. (Klebuc C.J.S. and Smith J.A. concurring):] . . . while [the judge, in awarding substantial indemnity costs,] indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs.

APPEAL by creditor from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) dismissing application to lift stay against debtor under Companies Creditors' Arrangement Act, and from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264, 33 C.B.R. (5th) 46 (Sask. Q.B.) ordering costs against creditor.

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*[FN1] (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,[FN2] 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.[FN3] 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 ...

(c) 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;

. . . . .

(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. ...[FN4] [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;[FN5]

(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;[FN6]

(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;[FN7]

(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.[FN8]

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.[FN9] [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.[FN10]

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.
>
> .....
>
> 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.[FN11]

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 Septem-

ber 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.[FN12]

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.[FN13]

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.[FN14]

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.

.....

[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 per-

mit 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. [FN15]

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.

.....

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.

.....

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,

(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.[FN16] [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*[FN17] In my respectful view, the facts in *Ramsay Plate Glass* narrow its application.

27 In *Ramsay Plate Glass Co.*, 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;[FN18]

I do not interpret *Ramsay Plate 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 Plate 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*;[FN19] *Stelco Inc., Re*;[FN20] and *Campeau v. Olympia & York Developments Ltd.*[FN21]

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 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.[FN22]

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."[FN23]

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, 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.[FN24] [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*[FN25], *Stelco*[FN26] and *Campeau*[FN27] 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 Plate Glass* points out that under the *Bankruptcy and Insolvency Act*[FN28] (*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.*[FN29]) 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 credit-

ors. 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[FN30] 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:[FN31]

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 ob-

ligated 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. [FN32]

[Footnotes omitted.]

41 Professor McLaren similarly comments in his text "Canadian Commercial Reorganization":[FN33]

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*[FN34] 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.[FN35] [Footnotes omitted.]

43 *Smith Brothers Contracting Ltd., Re*[FN36] also supports a narrow reading of s. 11.3. After citing *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[FN37] and *Quintette Coal Ltd. v. Nippon Steel Corp.* [FN38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Brothers* 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.[FN39]

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the *CCAA* 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.[FN40]

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. [FN41]

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*[FN42]

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.[FN43] 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*,[FN44] 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.[FN45] 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).[FN46]

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. [FN47] 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.[FN48] Neither the amending legislation[FN49] nor the proposed Bill presently before the Senate[FN50] 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 man-

ner, 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*[FN51] 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*,[FN52] 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*[FN53] 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 Com-*

mercial Reorganization: Preventing Bankruptcy (Toronto: Canada Law Book, 1995) at 3-18.1. ...[FN54]

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*[FN55] and *Stelco*[FN56]). 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 meaning of a Queen's Bench Rule 173 striking motion, but it was nonetheless an untenable claim. The question becomes whether a supervising *CCAA* judge can weigh a post-filing claim in this manner.

60 Professor Sarra comments on the anomalous position of liquidating *CCAA* proceedings:

> One policy issue that has not to date been fully explored is whether the *CCAA* should be used to effect an organized liquidation that should properly occur under the *BIA* or receivership proceedings. Increasingly, there are liquidating *CCAA* proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the *BIA*. While creditors still must vote in support of such plans in the requisite amounts, there may be some public policy concerns regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation. ...[FN57]

The issue of whether the *CCAA* should be used for a liquidating, as opposed to a restructuring purpose, is not before us. In the case at bar, when the Initial Order was granted, it was thought possible that Bricore could be restructured. It was only some months after the Initial Order that it became clear that all of the assets would have to be sold. Our task at this point is to address the position of an undetermined claim arising post-filing in such a context.

61 If a claim had some reasonable prospect of success and were otherwise meritorious in the *CCAA* context, it seems inappropriate to refuse simply to lift the stay on the basis that the claim is outside the *CCAA* process knowing that, by the time the matter is heard in the ordinary course, there will be no assets remaining. On the other hand, it also seems inappropriate to delay distribution of the assets under a plan of arrangement, or make some other accommodation, for an action that is likely to fail. I should make it clear that I am not addressing the issue of whether a meritorious claimant can share in a proposed plan of distribution as a result of the liquidation of the assets. The issue before this Court is whether a post-filing creditor should be permitted to commence action, in the context of what is now a liquidating *CCAA*, and avail itself of whatever pre-judgment remedies might be available to it as a result of its claim.

62 In the face of a liquidating plan of arrangement, given the broad jurisdiction conferred by the *CCAA* on the Court, it seems appropriate that the supervising judge establish some mechanism to weigh the post-filing claim to determine the next step. The next step might entail permitting the claimant to commence action and attempt to convince a chambers judge to grant it a pre-judgment remedy in relation to the funds. It is also possible that the

supervising judge may delay distribution of the funds, or some portion thereof, with or without full security for costs, or on such other terms as seems fit. Mechanisms to test the claim could include referral to a special claims officer, examination of the pertinent principal parties, or a settlement conference, or, as in this case, a preliminary examination by the supervising *CCAA* judge in chambers based on affidavit evidence.

63 In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

64 Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco Inc., Re*,[FN58] but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.[FN59]

65 Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.

66 Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

67 Nonetheless, a broad test articulated along the lines of that in *Ma, Re*[FN60] may be of assistance. The test from *Ma, Re* is:

> 3 ... As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the *CCAA*, to relieve against the stay imposed by ss. 11(3) and (4) of the *CCAA*, may be a better way to express the task of the chambers judge faced with a liquidating *CCAA* than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the *CCAA* proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in 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.

69 While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the *CCAA* proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price,[FN61] which is significantly less than that being claimed by ICR at a 5% commission;

2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;

3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;[FN62]

4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"[FN63]

5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,

6. there was no sale from Bricore to the City of Regina.

70 While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

> We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.[FN64] [Emphasis added]

The addition by the CRO of these words, "Date of closing of *a sale* or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had

a contractual relationship.

71 Finally, in assessing Koch J.'s decision, and in determining the deference that is owed to it, I am not unmindful that he issued some 20 orders in 2006, pertaining to the Bricore restructuring, at least five of which dealt substantively with the Building and its prospective sale to the Proposed Purchaser.

72 Thus, applying the standard of review previously articulated, I cannot say that Koch J. acted arbitrarily, on a wrong principle, or on an erroneous view of the facts, or that a failure of justice is likely to result from the exercise of his discretion in the manner he did.

VII. Issue #4. Did the Supervising CCAA Judge Make a Reviewable Error in Refusing Leave to Commence an Action Against the CRO?

73 In addition to the indemnification provided by para. 18 of the CRO Order quoted above, the Order goes on to indicate the only circumstances in which the CRO can be sued personally:

20. For greater clarity, the CRO [*sic*]:

. . . . .

(c) the CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and

(d) no Proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO, without prior leave of the Court on at least seven days' notice to Bricore Group, the CRO and legal counsel to Bricore Group.

21. Subject to paragraph 20 hereof, nothing in this Order shall restrict an action against the CRO for acts of gross negligence, bad faith or wilful misconduct committed by him.

Setting aside the obvious ambiguity in this Order, it can be taken that to assert a claim against the CRO personally, ICR had to claim "fraud, gross negligence, wilful misconduct or bad faith." ICR claimed "bad faith."

74 Based on para. 20(d) of the Initial Order, there is no question that ICR was required to obtain prior leave of the court. The issue thus becomes whether the supervising *CCAA* judge erred in exercising his discretion in refusing to lift the stay.

75 Koch J.'s reasons for refusing to lift the stay are these:

[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 ex-

ceptions 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. [FN65]

76 Again, Koch J. employed the same mechanism that he used to assess the claim against Bricore. He considered the status of the CRO as an officer of the court, noted the ambiguity in the Order and weighed the evidence to a certain extent. The question he was answering was the sufficiency of the claim to permit an action to be commenced against the Court's officer.

77 Again, applying the standard of review with respect to discretionary orders, there is no basis upon which the Court can intervene with Koch J.'s refusal to lift the stay so as to permit an action against the CRO in his personal capacity.

VIII. Issue #5. Did the Supervising CCAA Judge Err in Awarding Costs on a Substantial Indemnity Basis?

78 Koch J. awarded substantial indemnity costs for this reason:

[6] In my view, allegations of misconduct against a court officer are rare and exceptional. Therefore costs on this motion should be imposed on a substantial indemnity scale, although not on the full solicitor and client basis sought. Bricore is entitled to costs on the motion of $2,000.00, and Maurice Duval is entitled to costs of $1,000.00, payable in each instance by the applicant, ICR Commercial Real Estate (Regina) Ltd. [FN66]

79 I note that Newbury J.A. in *New Skeena Forest Products Inc., Re*[FN67] dismissed a challenge to a costs award, holding that "these are the kinds of considerations which the [*CCAA*] Chambers judge ... was especially qualified to make." And, of course, all costs orders are discretionary orders.

80 Nonetheless in this case, it would appear that the supervising *CCAA* judge erred. There is no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore. 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 cannot 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.

81 In addition, while Koch J. indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs. As such, the award does not seem to

meet the test established in *Siemens v. Bawolin*[FN68] and *Hashemian v. Wilde*[FN69] wherein it is stated that solicitor-and-client costs are generally awarded where there has been reprehensible, scandalous or egregious conduct on the part of one of the parties in the context of the litigation.

82 If the parties are unable to agree with respect to costs in the Court of Queen's Bench and in this Court, they may speak to the Registrar to fix a time for a conference call hearing regarding costs.

Appeal allowed in part.

FN1 R.S.C. 1985, c. C-36.

FN2 Appeal Book, pp. 17a and 22a [Affidavit of Paul Mehlsen].

FN3 *Ibid.* at pp. 27a and 32a.

FN4 Order (Appointment of Chief Restructuring Officer, Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.

FN5 Order (Extension of Stay of Proceedings) made August 1, 2006.

FN6 Order (Extension of Stay of Proceedings) made August 18, 2006.

FN7 Order (Extension of Stay of Proceedings, Extension of Appointment of CRO and Increase in Maximum CRO Remuneration; Increase to Administrative Charge) made September 25, 2006.

FN8 Order (Approving Sale; Extending Stay of Proceedings; Extending Appointment of CRO) made October 10, 2006.

FN9 Appeal Book, p. 7a-8a.

FN10 *Ibid.* at p. 12a.

FN11 *Ibid.* at pp. 14a-15a.

FN12 *Ibid.* at p. 46a.

FN13 *Ibid.* at pp. 38a-39a.

FN14 *Ibid.* at p. 51a-52a.

FN15 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 (Sask. Q.B.).

FN16 John D. Honsberger, *Debt Restructuring: Principles and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 9.61.

FN17 (1954), 34 C.B.R. 82 (Que. S.C.). There are no cases referring to *Ramsay Plate Glass* on the point that Prof. Honsberger raises in his text. (*Ptarmigan Airways Ltd. v. Federated Mining Corp.*, [1973] 3 W.W.R. 723 (N.W.T. S.C.) mentions *Ramsay Plate Glass* but not in reference to the point made here.)

FN18 *Ibid.* at p. 83.

FN19 (2003), 45 C.B.R. (4th) 151 (B.C. S.C.), appeal dismissed [*Caterpillar Financial Services Ltd. v. 360networks corp.*] (2007), 27 C.B.R. (5th) 115 (B.C. C.A.).

FN20 (2005), 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).

FN21 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

FN22 *360networks, supra* note 19.

FN23 *Stelco, supra* note 20 at para. 11.

FN24 *Campeau, supra* note 21.

FN25 *360networks, supra* note 19.

FN26 *Stelco, supra* note 20.

FN27 *Campeau, supra* note 21.

FN28 R.S.C. 1985, c. B-3.

FN29 Lloyd W. Houlden & Geoffrey B. Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at pp. 562 and 789.

FN30 *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 124.

FN31 *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, s. 577.

FN32 *Debt Restructuring Principles and Practice, supra* note 16 at p. 9-88.1.

FN33 Richard H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 3-17.

FN34 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007).

FN35 *Ibid.* at pp. 110-11.

FN36 (1998), 53 B.C.L.R. (3d) 264 (B.C. S.C.). See also *Air Canada, Re* (2004), 47 C.B.R. (4th) 182 (Ont. S.C.J. [Commercial List]), and *Mosaic Group Inc., Re* (2004), 3 C.B.R. (5th) 40 (Ont. S.C.J.).

FN37 (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).

FN38 (1990), 51 B.C.L.R. (2d) 105 (B.C. C.A.).

FN39 *Smith Brothers Contracting Ltd., supra* note 36.

FN40 Order (Appointment of Chief Restructuring Officer; Extension of Stay of Proceedings; Additional DIP

Financing) made May 23, 2006.

FN41 Bayda C.J.S., for the majority, in *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask. R. 34 (Sask. C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.) at 1046.

FN42 [1943] O.R. 683 (Ont. C.A.) at 698.

FN43 *Rescue! The Companies' Creditors Arrangement Act*, *supra* note 34 at pp. 88-92.

FN44 *Supra* note 28.

FN45 Twelfth Report of the Standing Senate Committee on Banking, Trade and Commerce, February 1997, unnumbered p. 3 of the Chairman's Report, and p. 18.

FN46 *Ibid.* at pp. 17-18.

FN47 Canada Legislative Index, 2nd Session, 35th Parliament, Bill C-5, S.C. 1997, c. 12, pp. 1 & 2.

FN48 *Ibid.*

FN49 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47, s. 128.

FN50 Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, 1st Sess., 39th Parl., 2006-2007.

FN51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.

FN52 (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial List]) at para 3.

FN53 [2006] O.J. No. 5029 (Ont. S.C.J.).

FN54 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *supra* note 15.

FN55 *360networks*, *supra* note 19.

FN56 *Stelco*, *supra* note 20.

FN57 *Rescue! The Companies' Creditors Arrangements Act*, *supra* note 34 at p. 82.

FN58 *Ivaco Inc., Re*, *supra* note 53.

FN59 *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*, supra note 29 at p. 403.

FN60 *Ibid.*

FN61 Order (Extension of Stay, DIP Financing, Sale Process & Shareholder Proceedings) of Koch J. in Chambers dated February 13, 2006.

FN62 Order made September 25, 2006, *supra* note 7.

FN63 Appeal Book, p. 37a, para. 3.

FN64 *Supra* note 11.

FN65 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *supra* note 15.

FN66 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 144 (Sask. Q.B.).

FN67 [2005] 8 W.W.R. 224 (B.C. C.A.) at para. 23.

FN68 2002 SKCA 84, [2002] 11 W.W.R. 246 (Sask. C.A.).

FN69 2006 SKCA 126, [2007] 2 W.W.R. 52 (Sask. C.A.).

END OF DOCUMENT

TAB 3

Case Name:

Humber Valley Resort Corp. (Re)

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 of Arrangement of Humber Valley Resort Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited and Humber Valley Interiors Limited AND IN THE MATTER OF an Application of Maxium Financial Services Inc. for an Order lifting the Stay of Proceedings provided in the Initial Order dated September 5, 2008, as amended by the Order dated October 14, 2008

[2008] N.J. No. 318

2008 NLTD 174

50 C.B.R. (5th) 137

280 Nfld. & P.E.I.R. 268

2008 CarswellNfld 291

Docket: 2008 01T 3743

Newfoundland and Labrador Supreme Court - Trial Division
St. John's, Newfoundland and Labrador

R.M. Hall J.

Heard: October 31, 2008.
Judgment: November 4, 2008.

(21 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application by

Maxium to have the Stay of Proceedings in bankruptcy proceeding lifted dismissed -- Maxium contended it was being severely prejudiced by the Stay of Proceedings on the basis that its security position was being eroded -- The prejudice to Maxium would not substantially outweigh the prejudice to the Resort.

Application by Maxium to have the Stay of Proceedings lifted. The applicant also sought an order requiring the Resort to deliver up possession to Maxium of various pieces of equipment leased under agreements made between the parties. The Resort was granted protection pursuant to the Companies' Creditors Arrangement Act. The Initial Order provided for a Stay of Proceedings. Maxium was entitled, save and except for the effect of the Stay of Proceedings granted to the Resort, to enforce its security for the leased equipment. Maxium contended it was being severely prejudiced by the Stay of Proceedings on the basis that its security position was being eroded. The Resort argued that a functioning golf course, and the use of the equipment, was key to a successful restructuring of its financial affairs.

HELD: Application dismissed. The prejudice to Maxium would not substantially outweigh the prejudice to the Resort. The court was not satisfied that Maxium had conducted sufficient investigations to market the equipment widely and therefore had not used best efforts in its own interest or in the interest of the Resort.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4), s. 11(6), s. 68

Cases cited:

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007) 33 C.B.R. (5th) 50 (Sask. C.A.).

Canadian Airlines Corp. (Re) (2000) 19 C.B.R. (4th) 1 at paragraph 20 (Q.B.).

Statutes cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

Geoffrey L. Spencer: Counsel for the Applicant.

John Stringer, Q.C., Stephen Kingston and Douglas B. Skinner: Counsel for the Respondents.

Dean A. Porter: Counsel for Home Construction Limited.

Neil L. Jacobs: Counsel for Her Majesty the Queen in right of Newfoundland and Labrador.

REASONS FOR JUDGMENT
ON APPLICATION OF MAXIUM FINANCIAL SERVICES INC.
FOR ORDER LIFTING STAY OF PROCEEDINGS

R.M. HALL J.:--

BACKGROUND

1 Humber Valley Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited, and Humber Valley Interiors (collectively referred to as the "Resort") were granted protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "*CCAA*") by an Initial Order issued by this Court on September 5, 2008.

2 The Initial Order provided for a Stay of Proceedings with respect to the Resort from the date of the Initial Order up to and including October 6, 2008, and this Stay of Proceedings was extended to December 5, 2008, by an Order of the Court dated October 14, 2008. The extension of the Stay of Proceedings was subject to the right of creditors of the Resort to request a review and reconsideration of the extension.

3 The Applicant, Maxium Financial Services Inc. ("Maxium") seeks to have the Stay of Proceedings lifted as it pertains to Maxium and in particular seeks an order requiring the Resort to deliver up possession to Maxium of various pieces of equipment leased under certain capital leases made between Maxium and the Resort (the "Equipment").

4 Maxium is in the business of providing lease financing and asset management services to, *inter alia*, customers in the golf course industry. It began its relationship with the Resort in 2003 when it leased various pieces of the Equipment to the Resort for the operation of a golf course on the Resort property at Humber Valley, Newfoundland. Security was given to Maxium by Humber Valley Resort Corporation by way of a Master Lease Agreement. The validity and enforceability of the Master Lease Agreement is not contested nor is it contested that payment thereunder is presently in arrears and Maxium is entitled, save and except for the effect of the Stay of Proceedings granted herein, to enforce its security.

5 The Equipment leased under the Master Lease Agreement is still in the possession of Humber Valley Resort Corporation. It is agreed that most of the Equipment has been winterized and stored and there are no concerns about its physical diminishment as a result thereof. Only a few pieces of the Equipment are currently being used to maintain the golf course and to prepare it for

winterization. With the advent of snow conditions, that work will cease also and is expected to cease in a few weeks.

THE PRESENT APPLICATION

6 Maxium contends it is being severely prejudiced by the Stay of Proceedings on the basis that its security position is being eroded. In Affidavits filed with the Court, Maxium contends that the buying season for golf course equipment of the nature leased to the Resort is presently ongoing. It contends that 50% of Canadian golf courses shut down from December 1st to February 1st of each year. Those courses which close on December 1st, Maxium contends, will make their equipment purchase decisions in October and November. Maxium contends that in order to have an opportunity to sell the Equipment to another golf course prior to the commencement of the 2009 golf season (which Maxium says would commence in or around April 1, 2009), Maxium would have to proceed to market the Equipment by November at the latest. If Maxium is unable to market the Equipment during this short window of opportunity, it contends that the value of the Equipment will deteriorate with the loss increasing as the next golf season approaches.

7 Maxium produced a table showing its anticipated realizations on the sale of the golf Equipment at various times. It contends that if the Equipment was sold in November 2008 the realization would be $808,286. However, if the sale was held off and made during the period of December 2008 to April 2009, that realization would be reduced by $135,556 to a total of $672,730. A further delay of the sale to take place during the summer of 2009 would see that reduction in value being to the level $585,100. Maxium points out that even if it were to proceed to sell the Equipment immediately it is anticipated that it will incur deficiency with respect to the indebtedness owed to it by the Resort.

8 Maxium has noted that the Resort had previously indicated that it hoped to attract an operator for the golf course for the 2009 golf season and that such operator would hopefully negotiate lease terms with Maxium in order to secure the continued use of the Equipment. However, Maxium points out that it may not approve financing for such a prospective operator and that Maxium should not be forced to let the Equipment sit idle while it depreciates in value in the interim. It points out that the golf course is no longer in operation and the Equipment is, for the most part, not in use. It contends that the Equipment can be removed without detrimentally affecting the Resort. In the event that the Resort is able to attract a new operator for the golf course, Maxium contends that the new operator can obtain golf course equipment from other sources in time for the 2009 golf season.

THE RESPONSE OF THE RESORT

9 The Resort, on its part, contends that a functioning golf course is key to a successful restructuring of the Resort's financial affairs. Key to that operation of the golf course is the existence of the Equipment, leased by Maxium to the Resort, said Equipment being in place and ready for the use at the commencement of the golf season in the spring of 2009. Implicit in this argument is the suggestion that if the Equipment is not available, the purchase from new sources of new equipment will be more expensive, more time-consuming, and likely to delay the opening of

the golf course and that collectively these complications will make the restructuring of the financial affairs of the Resort more difficult. In addition, the Resort argues that if the Stay of Proceedings is lifted as against Maxium, such action by the Court is likely to encourage a veritable stampede of applications by other creditors seeking to have their equipment repossessed. The Resort has not received applications from any other creditors seeking a lifting of the Stay of Proceedings. However, a review of the registered PPSA security against the Resort, tendered as an exhibit to the Maxium affidavits, indicates security issued by the Resort to numerous creditors governing various motor vehicles, heavy construction equipment and computer equipment. No evidence was presented by the Resort to show that the loss of this Equipment would prejudice the restructuring, albeit where construction for the completion of approximately 130 chalets will need to re-commence after the restructuring, the presence of the heavy equipment would seem to be logically required. Similarly, the loss of computer equipment might impact the restructuring through loss of the financial records and other records of the Resort.

LAW AND ARGUMENT

10 The Court has authority to lift a Stay of Proceedings granted under the *CCAA* by virtue of section 11(4) of the *CCAA*. That section provides:

> 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,
>
> (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.

11 It is to be noted that this power is discretionary but the *CCAA* does not set out any specific tests with respect to the lifting of a Stay or Proceedings. Section 11(6) of the *CCAA* does however provide a minimal amount of guidance. It 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.

12 The Saskatchewan Court of Appeal in *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 held that the test for lifting the Stay of Proceedings under the *CCAA* should be based on sound reasons consistent with the scheme of the *CCAA*:

> 68. In determining what constitutes "sound reasons", much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:
>
> (a) the balance of convenience;
> (b) the relative prejudice to the parties;
> (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).
>
> The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in 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.

13 In *Canadian Airlines Corp. (Re)* (2000) 19 C.B.R. (4th) 1 at paragraph 20 (Q.B.) the Court outlined various situations in which courts have lifted a Stay or Proceedings. At paragraph 20 the Court stated:

> 20. At pages 342 and 343 of this text, Canadian Commercial Reorganization:
>
> Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or

the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period

14 In *Canadian Airlines (supra)* the Court dismissed the application to lift the Stay of Proceedings on the basis that the value of the applicant's security was well in excess of what they were owed and that the applicants had not established that they would suffer any material prejudice in having to wait three weeks for the creditors' meeting to vote on the plan or arrangement.

15 In dealing with the issue of the balance of convenience, Maxium contends that if it is permitted to repossess its Equipment the Resort will not be inconvenienced as much as Maxium would be by the refusal to allow repossession. It emphasizes that the Equipment is not in use and is in storage and that the golf course is no longer in operation and that, if the Resort is successful in finding a new operator, that new operator will be able to acquire equipment on its own for the commencement of the golf season in 2009. On the other hand, Maxium will be severely prejudiced by leaving the Equipment idle with the Resort while its security erodes with the passage of time decreasing as much as 28% in value by summer 2009.

16 Maxium contends there would be no prejudice to the other creditors of the Resort, as the Resort would still be in a position to seek an operator of the golf course and that courts generally recognize that a reduction in the value of inventory during a stay period is an important decision and a factor to be considered by a court to lift a Stay for an inventory financier.

17 The Resort, on the other hand, urges that the Court should consider that it continues to work diligently and in good faith to restructure its affairs and that that restructuring ought to be allowed to proceed without interruption by reason of the repossession of the Maxium Equipment.

CONCLUSION

18 In considering the six tests set out by the Alberta Queens Bench in *Canadian Airlines (supra)*, the single most important test is whether Maxium would be severely prejudiced by the refusal to lift the Stay of Proceedings and that there would be no resulting prejudice to the Resort or to its creditors. It is interesting to note the strong language of this particular condition. Maxium is required to be "severally" prejudiced by the refusal to lift the Stay of Proceedings. On the other hand, there must be "no resulting prejudice" to the Resort or to the position of its creditors if the Stay is lifted. It is difficult to reconcile this extremely strong statement with the requirement set out by the Saskatchewan Court of Appeal in *ICR Commercial Real Estate (supra)* that the Court has to consider a "balance of convenience". It is difficult to conceive how there can be any consideration of a balance of convenience where the *Canadian Airline (supra)* decision requires that there be no prejudice to the debtor company or to the position of its creditors. If there is no prejudice, what is there to be balanced against the impact upon Maxium if it is not to repossess? I am not satisfied that

the tests which I should apply should be as stringent as that set out in condition number six, paragraph 20 of the *Canadian Airlines (supra)* decision. Rather, I am satisfied that there merely should be a balancing of the levels of prejudice to the creditor, Maxium, or to the Resort, depending upon whether the application to lift the Stay or Proceedings is allowed or not. This consideration needs to be made in light of the stated purpose of the *CCAA*, which is to allow a corporation sufficient time to restructure itself and that the Stay of Proceedings is not intended to maintain an absolute Stay of Proceedings at the positions existing before the Initial Order, insofar as they relate to either the Corporation or to creditors.

19 With these principles in mind, I conclude that Maxium has not demonstrated that the level of prejudice, which it might suffer, outweighs the difficulties that the removal and sale of its leased Equipment will cause to the Resort and to its restructuring efforts. Firstly, the stated debt owing to Maxium is overstated by the amount of the goods and services tax of over $100,000. Obviously, if the Equipment is repossessed, that goods and services tax is not payable. Therefore, the initial loss at least of Maxium is overstated. Additionally, Maxium has confined its research and opinion as to its prospective losses solely to the situation that would pertain if the Equipment was to be sold in Canada. Maxium deposes that it does not carry on business in the United States and has no knowledge of the United States market. That ignorance on its part, however, should not be a factor in causing this Court to accept that the only market for the Equipment is a Canadian market. It is logical that brokers would be available in the United States who could provide Maxium with evidence as to the market value of this Equipment in a U.S. market. With U.S. golf courses generally being open for a longer season, it is probable that there would be many more purchasers of this Equipment looking year-round for equipment to purchase. Additionally, the recent decline in value of the Canadian dollar versus the U.S. dollar would give a selling advantage to Maxium, if it were selling in to the United States.

20 Therefore, I am not satisfied that the prejudice to Maxium would substantially outweigh the prejudice to the Resort. In addition, I am not satisfied that Maxium has conducted sufficient investigations to market this Equipment widely and therefore has not used best efforts in its own interest or in the interest of the Resort.

21 **IT IS THEREFORE ORDERED** that the application of Maxium is dismissed. There shall be no order as to costs.

R.M. HALL J.

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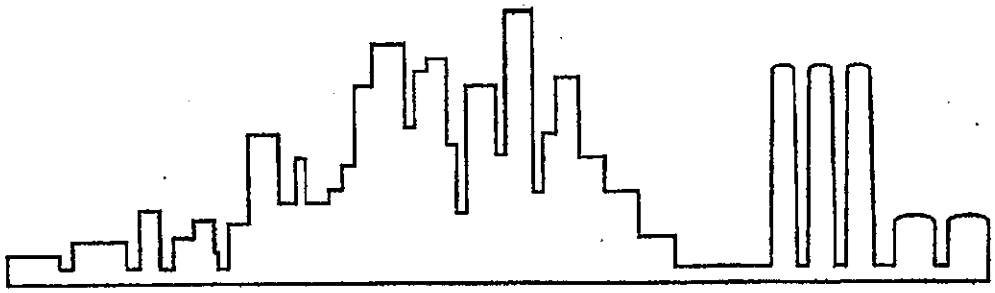
TAB 4



CANADIAN COMMERCIAL REORGANIZATION

PREVENTING BANKRUPTCY

VOLUME 1

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offer from C Inc. without providing the details of the offer to 209 Inc. prior to its acceptance. 209 Inc. could have freely made a superior offer to the offer made by C Inc. before the expiry of the MOA. 209 Inc. submitted that the MOA with MDS Inc. to purchase H Inc. still applied since MDS Inc. implicitly made a further extension to the MOA deadline or agreed to a further extension such that it was estopped from denying such an extension. Campbell J. held that 209 Inc. did not obtain an extension and there was no factual basis on which to apply the principles of promissory estoppel. The onus was on 209 Inc. to obtain an extension beyond the original closing date. 209 Inc. did not obtain that extension. 209 Inc. knew that MDS Inc. had not given its consent to an extension and did not contact counsel for MDS Inc. for an extension. 209 Inc. admitted on cross-examination that, as a sophisticated commercial party seeking to maximize its commercial interests, 209 Inc. purposely avoided having their counsel contact the counsel for MDS Inc. to request an extension.

(6) Lifting of the Stay

3.3400 The court has the discretion to terminate a stay or to lift it with respect to certain creditors. Unlike under the BIA, there is no statutory test under the CCAA to guide the court in terminating or lifting a stay against a certain creditor. An opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay.[134]

3.3450 Generally, the courts will lift a stay order where:

1. The plan is likely to fail.[135]

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134 In *Air Canada (Re)* (2004), 47 C.B.R. (4th) 177, [2004] O.J. No. 527 (QL) (S.C.J. (Comm. List)), the defendants Air Canada and United Airlines Inc. were trying to reorganize under the CCAA. The plaintiffs brought a second motion to lift the stay for the purpose of carrying on in the proposed class proceedings with the case in the Federal Court. The court found that the plaintiffs failed to focus on the test for lifting a stay in a CCAA context and were attempting to proceed with litigation unimpeded. The court found this to be contrary to the purpose of the CCAA as it was designed to facilitate the making of compromises between companies and their creditors. Holding creditors at bay is necessary for arrangements to have any prospect of success. Therefore, lifting the stay would have had extremely adverse effects on the defendants' restructuring efforts. The court found that the plaintiffs did not present any truly new evidence to support the motion and dismissed the motion to lift the stay with some costs awarded to the defendants. In *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (QL) (S.C.J.), the plaintiff brought a motion to interpret cost adjustments related to asset purchase agreements and to lift a stay in CCAA proceedings and commence an action against the defendant seeking separate damages. With respect to the interpretation of cost adjustments, the court allowed the stay to be lifted and a trial to proceed if issues were limited strictly to the interpretation. With respect to the request to lift the stay to sue for separate damages, the court determined that the applicant had failed to establish any damages and did not set forth a reasonable, or even tenable, cause of action. The stay was not lifted to allow the plaintiff to sue for damages.

Where an application is made to set aside or vary a stay order, the application should be made to the judge who made the original order: *Philip's Manufacturing Ltd. (Re)* (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84 (C.A.), leave to appeal to S.C.C. refused 15 C.B.R. (3d) 57*n*.

135 In *Inducon Development Corp. (Re)* (1991), 8 C.B.R. (3d) 306 (Ont. Ct. (Gen. Div.)), Farley J. stated that: "It is of course . . . fruitless to proceed with a plan that is doomed to failure at a further stage." In deciding whether the a plan is doomed to failure, the Court of Appeal in *Stelco Inc.*

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).[136]

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the

---

(Re), [2005] O.J. No. 4733 (QL) (C.A.), stated that it is a matter of judgment of the supervising judge to determine whether the plan is doomed to fail. A supervising judge may find merits in the plan even though the creditor with veto power did not want to accept the plan. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 at p. 315, [1991] 2 W.W.R. 136 (B.C.C.A.), Gibbs J.A. stated:

> . . . 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*. [Emphasis added.]

Thus, it is clear that an opposing party may attempt to have a stay lifted by presenting evidence that the plan or arrangement will fail. Such evidence may include proof that the requirements of s. 6 of the CCAA will not be met. This ground for denying an initial order, or subsequent extension of a stay, was also considered in *Rio Nevada Energy (Re)* (2000), 283 A.R. 146 (Q.B.). In this case, the major secured creditor opposed an extension of the initial stay on the grounds that any proposal or plan would be "doomed to failure". One issue was the manner in which the "doomed to failure" test was to be applied and who bore the burden of proof. The court held that the "doomed to failure" ground for preventing or terminating CCAA proceedings is not merely a factor to be considered in whether the court should grant an extension of the stay, but rather is a separate issue. The court found this preferable as it would ensure that the burden of proof is applied appropriately. In seeking an initial order, or an extension of a stay, the debtor has the burden of proving the requisites for a stay, but does not have the burden of proving that a plan would not be doomed to failure. Conversely, the applicant seeking termination of CCAA proceedings bears the burden of proving that any plan is "doomed to failure" (*Philips Manufacturing (Re)*, *Bargain Harold's*). The court also noted that two standards have been suggested for determining whether a plan is "doomed to failure". The first is that the applicant creditor must lead evidence showing that an attempt at a plan is indeed doomed to failure (*Philips Manufacturing*; *Sharp-Rite Technologies (Re)* (2000), 94 A.C.W.S. (3d) 421, [2000] B.C.J. No. 135 (QL) (S.C.), at para. 25, application for leave to appeal granted 19 C.B.R. (4th) 135, 2000 BCCA 402). The second is lower, the applicant only needing to show that there is no reasonable change that any plan would be accepted (citing *Bargain Harold's*). Noting that the first standard would be extremely difficult to demonstrate, especially in the earlier stages of a CCAA proceeding, the court adopted the second standard as the proper one to follow. In *Hickman Equipment (1985) Ltd. (Re)* (2003), 224 Nfld. & P.E.I.R. 62, 5 P.P.S.A.C. (3d) 124 (Nfld. & Lab. S.C.T.D.), the debtor applied for relief under the CCAA. The court granted the relief sought, including an order staying proceedings against the debtor. However, once it became apparent that the debtor would not be able to formulate a scheme of arrangement under the CCAA which would be acceptable to its creditors, the court granted an application by the debtor and a secured creditor which sought to discontinue the stay so that a petition in bankruptcy could be filed.

136 In *Alberta-Pacific Terminals Ltd. (Re)* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.), the harbour commission had an operating agreement with Fraser Surrey Docks Ltd. ("FSDL"). FSDL ran into financial difficulties and sought protection under the CCAA. The court ordered a stay of proceedings against the petitioners, prohibiting the commission from taking any steps to terminate the agreement and ordering that any contracts that might give a benefit to any petitioner be maintained. The stay left the management of FSDL a significant area of discretion in the application of its cash flow. The commission applied for an order directing the payment of the amounts that fell due monthly under the operating agreement. Huddart J. stated that it was not appropriate for the court to intervene with management's exercise of its discretion without some reason, such as evidence of hardship to the commission or erosion of its property. As there was no evidence of any hardship to the commission, the court held that FSDL should not be ordered to pay moneys pursuant to the operating agreement pending the termination of the stay.

creditor would cause it to close and thus jeopardize the debtor company's existence).[137]

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of the creditors.[138]
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.[138a]

137 In *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.), an *ex parte* order was made to give the debtor protection from its creditors so that it could prepare a plan. The order provided that the debtor pay off creditors owed less than $200,000 because these creditors might be faced with insolvency if not paid. Unsecured creditors owed more than $200,000 alleged that the order did not maintain the *status quo*. RT Inc. applied to vary the order to allow payment of creditors in financial hardship. The court stated that if RT Inc. would be forced to close without payment, thus jeopardizing the reorganization and existence of the debtor, the doctrine of necessity of payment could come into play. The court concluded, however, that there was no evidence to suggest that RT Inc. would be forced to close without payment.

138 In *Algoma Steel Corp. v. Royal Bank of Canada* (1992), 93 D.L.R. (4th) 98, 11 C.B.R. (3d) 11 (C.A.), leave to appeal to S.C.C. refused 59 O.A.C. 326*n*, 145 N.R. 395*n*, representatives of a child who had suffered serious injuries when a wheel manufactured by Kelsey-Hayes Canada Ltd. broke away from a truck brought an action against Kelsey-Hayes. In turn, Kelsey-Hayes sought contribution and indemnity from Algoma, the manufacturer of the steel used in the wheel. All proceedings against Algoma were stayed by an order under the CCAA as a plan of arrangement had been approved. Kelsey-Hayes argued that the existence of the plan did not prevent the court from permitting them to sue Algoma. The court stated [at p. 102] that:

> . . . generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable . . . it is not to be interfered with by the court unless: (a) the Act authorizes the court to affect the plan, and (b) there are compelling reasons justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the C.C.A.A., properly interpreted, authorizes intervention.

Subsequently, when determining whether any of the parties would be prejudiced, the court found that several interests would be prejudiced if the leave by the court had the effect of giving potential access to assets over and above the policy limits. The court concluded that only insurance proceeds that might become available to Algoma could be the subject of any recovery against Algoma.

In *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 75 A.C.W.S. (3d) 204 (Ont. Ct. (Gen. Div.)), the court applied the test set out in *Algoma* in considering a motion to have the stay under the Plan lifted with respect to claims by a landlord. The court denied the motion, stating that allowing the landlord to pursue its claims would prejudice the interests of other creditors and threaten the continued existence of the Plan itself. Furthermore, the court rejected the landlord's claim that a lifting of the stay was necessary to ensure that the "needs of justice" be met, holding that the landlord's contentions did not have the substance to constitute, and in the words of the Court of Appeal in *Algoma*, "compelling reasons" for the court to interfere in this case. See also *Ivaco Inc. (Re)* (2007), 29 C.B.R. (5th) 145 (Ont. S.C.J.), where the court ordered a lift on the stay of proceedings allowing the Ontario Pension Benefits Guarantee Fund ("PBGF") to make a payment to the fund of the salaried employees of Ivaco. Without the payment and upon the bankruptcy of Ivaco the non-unionized pensioners would have suffered harm because the assets of Ivaco were not sufficient to cover the large unfunded pension liability. The court allowed the lift reasoning that the payment by the PBGF to the fund of the salaried employees would never form any part of Ivaco's estate. The payment could not affect the validity or quantum of any claim by Ivaco's creditors.

138a In *Scaffold Connection Corp. (Re)* (2000), 15 C.B.R. (4th) 289, [2000] 7 W.W.R. 516 (Alta. Q.B.), a motion by two creditor companies was made to have a mechanics lien registered against the debtor company *nunc pro tunc*. The creditor companies argued that their claim would be prejudiced, as the limitation period in the *Mechanics' Liens Act*, R.S.N.B. 1973, c. M-6, would

6. After the lapse of a significant time period, the insolvent is no closer to a

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expire before the stay was concluded. After reviewing the different ways in which limitation periods are dealt with in the context of an insolvency statute stay, the court held that the limitation period was "postponed" and only resumed once the stay was concluded. The court pointed to the wording of the actual stay order to find that the limitation period was extended by a period of time equal to the duration of the stay of proceedings and any further order of the court. In *PSInet Ltd. (Re)* (2002), 33 C.B.R. (4th) 284, [2002] O.J. No. 1156 (QL) (S.C.J. (Comm. List)), a parent company thought it was an unsecured creditor in the assets of its subsidiary. The parent company later realized it held a security interest in the assets but the period of perfection had lapsed. The parent company tried to reperfect it under s. 30(6) of the PPSA. The court lifted the stay granted under the CCAA and allowed the parent company to reperfect its interest. The parent company re-established priority over the unsecured creditors even though it was previously unaware that it held a security interest and had been negligent in letting the original registration expire. In *Ivaco (Re)* (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J.), an insurance financier sought an order lifting the stay of proceedings imposed under the CCAA. The insurance financier had provided insurance premium financing to Ivaco and wanted to realize on its security by cancelling the insurance policy and retaining the premiums refunded by the insurance company. The insurance financier argued that its security was being depleted with the passage of time. The court refused to lift the stay. It was held that the insurance premium financing contract was an unsecured pre-filing obligation which would be dealt with under the Plan. Granting permission to the insurance financier to recover the unearned premiums would have given the insurance financier priority over secured and unsecured creditors. See also *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 524 (Ont. C.A.), revg 49 C.B.R. (4th) 283 (S.C.J.), where the insurance financier moved for the same relief it had sought in *Ivaco*. Stelco had been given protection from creditors under the CCAA. Once again, the insurance financier sought an order lifting the stay of proceedings imposed under the CCAA because the insurance financier had provided insurance premium financing to Stelco and wanted to realize on its security — the unearned insurance premium. The court refused to lift the stay of proceedings. To lift the stay of proceedings and allow the insurance financier to cancel the insurance contract and collect the unearned premiums would be to give the insurance financier an inappropriate advantage over other unsecured and secured creditors. Cafo appealed this decision. On Appeal, the Court of Appeal did not revisit this issue. Rather, the court focused on whether in substance unearned premiums are exempted from the scope of the PPSA. In holding that unearned premiums are exempt, the court noted that values of certainty, uniformity, and ease of commerce are promoted if the unearned insurance premiums are outside the scope of the PPSA. The court refused to determine the effect if any on the priority between Cafo and other secured creditors and added that such matters awaited resolution another day using the general BIA or common law principles. Stelco had recently obtained protection from creditors under the CCAA. Once again, the insurance financier sought an order lifting the stay of proceedings imposed under the CCAA because the insurance financier had provided insurance premium financing to Stelco and wanted to realize on its security — the unearned insurance premiums. The court refused to lift the stay of proceedings. To lift the stay of proceedings and allow the insurance financier to cancel the insurance contract and collect the unearned premiums would be to give the insurance financier an inappropriate advantage over other unsecured and secured creditors. In *JTI-MacDonald Corp. (Re)* (2004), 5 C.B.R. (5th) 76 (Ont. S.C.J.), a stay was immediately lifted for the limited purpose of issuing a petition in bankruptcy within the five-year limitation period. Nearly identical facts are found in *Ascent Ltd. (Re)* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.), in which an order had been made while the bankrupt was in Notice of Intention proceedings, to hold for an insurance financier a reserve of cash as the equivalent of a wasting asset in the form of an insurance premium instalment contract, pending the outcome of the decision in *Stelco Inc. (Re)*. When the bankrupt failed to set aside the funds, the insurance premium continued to be paid and the secured interest wasted away, forcing the financier to bring an application appealing the denial of the proof of claim for a property interest in the funds that were to be set aside, on the basis of unjust enrichment of the bankrupt. The court held that the bankrupt was unjustly enriched, and imposed a remedial constructive trust over assets of the bankrupt in the amount of the prior court order not complied with, to prevent injustice to commercial morality.

proposal than at the commencement of the stay period.[139]

7. There is a real risk that a creditor's loan will become unsecured during the stay period.[139a]
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.[139b]
9. It is in the interests of justice to do so.[139c]

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139 In *Timber Lodge Ltd. v. Timber Lodge Ltd. (Creditors of)* (1992), 17 C.B.R. (3d) 126, 104 Nfld. & P.E.I.R. 104 (P.E.I.S.C.), the court lifted the stay to permit the creditors to take whatever action they deemed necessary, because the company was no closer to making a plausible proposal than it had been when it originally applied for the stay. In *Air Canada (Re)* (2003), 121 A.C.W.S. (3d) 994, [2003] O.J. No. 1158 (QL) (S.C.J. (Comm. List)), the applicant made an *ex parte* application for CCAA protection and ancillary relief. In granting the relief sought, the court noted that the application was a product of intense, virtually round-the-clock work over a period of a few days. As a result, the application would contain some glitches, which would have to be thought through. The court accepted the application nonetheless and encouraged the parties involved to make appropriate use of a comeback clause to demonstrate to the court that the relief sought was warranted, with or without amendment.

139a *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey* (C.A.); *Rio Nevada Energy Inc. (Re)* (2000), 102 A.C.W.S. (3d) 18, [2000] A.J. No. 1596 (QL) (Q.B.).

139b In *PSInet Ltd., supra*, footnote 138a, a motion was brought by a creditor company to have a stay lifted to allow a lapsed registration of the creditor company's GSA to be re-registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA"). The court held that despite the creditor company's lack of knowledge for a lengthy period of its perfected and subsequent lapsed registration it should not be prevented from re-registering and lifted the stay for that purpose. However, the court imposed certain conditions as a prerequisite to that permission pursuant to its discretionary CCAA jurisdiction. The creditor company was held responsible for all parties' costs related to their request to re-register. Finally, the court suggested that the creditor, as the owner of the debtor company, should compensate other creditors affected by the creditor company's unawareness of the lapse of registration of their interest. See also *TRG Services Inc. (Re)* (2006), 26 C.B.R. (5th) 203 (Ont. S.C.J.), in which C, a creditor with a security interest that had attached but was unperfected, sought the lifting of a stay of CCAA proceedings in order to register and perfect its security interest, to take priority over unsecured creditors. C filed for proof of claim nearly six months after the initial CCAA order which had included a come-back clause asking all creditors to apply for an amendment to the order within seven days of issuance of same. The court held that since C held a valid security interest, it had the discretion to lift the stay order to permit the creditor to register and perfect its security interest. The court held that through negative inference, the PPSA implies that a holder of a security interest has priority over an unsecured creditor of the debtor. Only if the security interest is unperfected and the competing creditor has seized the collateral is this priority lost. The court acknowledged that a ruling according secured creditor status to the holder of a deliberately unregistered and unperfected security interest would create enormous uncertainty in the CCAA process and would lead to many potential inequities. Where any prejudice was incurred by the other creditors who had made reorganization efforts, the court allowed the creditors to ask C to bear reasonable expenses associated to its delay in perfection.

139c In *360networks inc. (Re)* (2003), 45 C.B.R. (4th) 151, [2003] B.C.J. No. 1553 (QL) (S.C.), the court held that it was in the interests of justice to lift the stay of proceedings and allow a party to file a petition and abridge the notice requirements for the hearing of that petition. This allowed the party's petition to be heard at the same time as its appeal of a notice of disallowance regarding a claim for the purposes of the plan of arrangement. The court concluded that the extent of the party's unsecured claim for the purposes of the restructuring plan may depend on the outcome of the petition's claims. The court also concluded that there was a possibility of inconsistent findings if the claims were determined on separate occasions and, as a result, these inconsistent holdings could produce an injustice to one of the parties.

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

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

Court File No. CV – 09-8396-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

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