File No. CV-12-9667-00CL

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 SINO-FOREST CORPORATION

BOOK OF AUTHORITIES OF THE BOARD OF DIRECTORS OF SINO-FOREST CORPORATION (Motion returnable October 9-10, 2012)

October 3, 2012

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Canwest Global Communications Corp., Re

IN THE MATTER OF SECTION 11 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 OTHER APPLICANTS

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST CANADA INC.

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: July 19, 2010
Docket: CV-09-8396-00CL, CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, T. Klinck for Applicant, CMI Entities and LP Entities

D.V. MacDonald for Administrative Agent of Senior Secured Lenders Syndicate

L. Willis for Ad Hoc Committee of CMI Entities Senior Subordinated Noteholders

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

J. Moher for CIBC Asset-Based Lending Inc.

H. Daley for Gluskin Sheff & Associates

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

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Media and publishing companies ("companies") established trust funds for pension plans — Companies appointed plan custodian but remained responsible for funding, overseeing, administering, and investing plans as plans' sponsors and administrators — GS Inc. was companies' investment counsel and portfolio manager on behalf of pension funds and entitled to certain fees under agreement ("IMA") — On October 6, 2009, companies obtained Companies' Creditors Arrangement Act ("CCAA") Claims Procedure Order — In December 2009, companies terminated GS Inc.,

alleging it was violating IMA by, among other things, mixing securities — Companies refused to pay fees and sought return of other fees — On January 8, 2010, companies obtained CCAA stay order — On January 20, 2010, GS Inc. brought action ("action") for payment for services rendered pursuant to IMA or for damages on quantum meruit basis against companies in their capacities as administrators of pension plans — In June 2010, GS Inc. brought motion for declaration that stays of proceedings in orders did not apply to action or for leave to lift stays — Motion dismissed — Stays applied to action — Stay provisions were extremely broad and were to be interpreted broadly to give debtors best possible chance of successfully restructuring while ensuring fair treatment of creditors — While capacity might be factor to consider when faced with request to lift stay, it would undermine objective of stay if one could dissect various capacities in which debtor company served — Even if one dissected companies' capacities, companies were not pension fund trustees but administrators responsible for investing and overseeing fund investments, including ability to engage investment advisors in discharge of responsibilities — Circumstances were similar to those in Federal Court of Appeal tax case where company was entitled to claim tax credits in respect of GST relating to fees paid to investment managers of assets of pension plans, in spite of fact that company entered into agreement in capacity as administrator of pension plans — Here, custodian was trustee who held legal title to fund assets — Companies were liable for payment, not plan trusts — Companies approved payments and authorized custodian to pay, and custodian had no responsibility under IMA — Action was against or in respect of companies and affected their business, important aspect of which was administering plans — IMA did not provide for GS Inc.'s payment from fund or trustee, GS Inc. had no security interest over fund, and account had been collapsed — Even if GS Inc. could execute against defined benefit plans, companies remained responsible for deficiencies, so action might affect property.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Media and publishing companies ("companies") established trust funds for pension plans — Companies appointed plan custodian but remained responsible for funding, overseeing, administering, and investing plans as plans' sponsors and administrators — GS Inc. was companies' investment counsel and portfolio manager on behalf of pension funds and entitled to certain fees under agreement ("IMA") — On October 6, 2009, companies obtained Companies' Creditors Arrangement Act ("CCAA") Claims Procedure Order — In December 2009, companies terminated GS Inc., alleging it was violating IMA by, among other things, mixing securities — Companies refused to pay fees and sought return of other fees — On January 8, 2010, companies obtained CCAA stay order — On January 20, 2010, GS Inc. brought action ("action") for payment for services rendered pursuant to IMA or for damages on quantum meruit basis against companies in their capacities as administrators of pension plans — In June 2010, GS Inc. brought motion for declaration that stays of proceedings in orders did not apply to its action — It was determined that stays applied to action — Issue arose as to whether stay should be lifted — Stay was not to be lifted other than in relation to pre-filing performance and management fees which were debt claim for less than $30,000 — There was no statutory test governing lifting of stay — Stay provisions were discretionary and were to be applied so as to support CCAA's legislative purpose — None of situations enumerated in prevailing authorities or legal texts was present here, and balance of convenience, relative prejudice to parties, and merits of action did not favour GS Inc.'s position — Not only would objectives of CCAA not be met by lifting stay, converse was true — Allowing action to proceed would be prejudicial to restructuring and unfair to others — GS Inc. elected to commence action in face of stays and opted not to file proof of claim in either CCAA proceeding — GS Inc.'s actions were type of manoeuvring CCAA was designed to avoid — Purpose of claims procedures was to elicit and deal with claims against companies so businesses could emerge unencumbered by prior claims — It was unfair to other creditors who submitted claims which were now subject to compromise, to permit action to proceed — Claim did not specify from whom damages were sought — Action would be time consuming and distracting — It had not been established that companies did not act in good faith or with due diligence — Finally, Monitor was opposed to lifting of stay.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Fiduciary duties — Liabilities for breach

Media and publishing companies ("companies") established trust funds for pension plans — Companies appointed plan custodian but remained responsible for funding, overseeing, administering, and investing plans as plans' sponsors

and administrators — GS Inc. was companies' investment counsel and portfolio manager on behalf of pension funds and entitled to certain fees under agreement ("IMA") — On October 6, 2009, companies obtained Companies' Creditors Arrangement Act ("CCAA") Claims Procedure Order — In December 2009, companies terminated GS Inc., alleging it was violating IMA by, among other things, mixing securities — Companies refused to pay fees and sought return of other fees — On January 8, 2010, companies obtained CCAA stay order — On January 20, 2010, GS Inc. brought action ("action") for payment for services rendered pursuant to IMA or for damages on quantum meruit basis against companies in their capacities as administrators of pension plans — In June 2010, GS Inc. brought motion for declaration that stays of proceedings in orders did not apply to action or for leave to lift stays — Motion dismissed — Stays applied to action — Stay provisions were extremely broad and were to be interpreted broadly to give debtors best possible chance of successfully restructuring while ensuring fair treatment of creditors — While capacity might be factor to consider when faced with request to lift stay, it would undermine objective of stay if one could dissect various capacities in which debtor company served — Even if one dissected companies' capacities, companies were not pension fund trustees but administrators responsible for investing and overseeing fund investments, including ability to engage investment advisors in discharge of responsibilities — Circumstances were similar to those in Federal Court of Appeal tax case where company was entitled to claim tax credits in respect of GST relating to fees paid to investment managers of assets of pension plans, in spite of fact that company entered into agreement in capacity as administrator of pension plans — Here, custodian was trustee who held legal title to fund assets — Companies were liable for payment, not plan trusts — Companies approved payments and authorized custodian to pay, and custodian had no responsibility under IMA — Action was against or in respect of companies and affected their business, important aspect of which was administering plans — IMA did not provide for GS Inc.'s payment from fund or trustee, GS Inc. had no security interest over fund, and account had been collapsed — Even if GS Inc. could execute against defined benefit plans, companies remained responsible for deficiencies, so action might affect property.

Cases considered by *Pepall J.*:

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

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7882 (Ont. S.C.J. [Commercial List]) — followed

General Motors of Canada Ltd. v. R. (2008), 2008 TCC 117, 67 C.C.P.B. 290, [2008] G.S.T.C. 41, 2008 G.T.C. 256 (Eng.), 2008 CarswellNat 3153, 2008 CCI 117, 2008 CarswellNat 454 (T.C.C. [General Procedure]) — referred to

General Motors of Canada Ltd. v. R. (2009), 2009 CarswellNat 880, 2009 FCA 114, (sub nom. *R. v. General Motors of Canada Limited)* 2009 G.T.C. 2071 (Eng.), 74 C.C.P.B. 1, 2009 CarswellNat 3282, (sub nom. *Minister of National Revenue v. General Motors of Canada Ltd.)* 391 N.R. 184, 2009 CAF 114, [2009] G.S.T.C. 64 (F.C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, (sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, (sub nom. *Slater Steel Inc. (Re))* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

2010 CarswellOnt 5225, 2010 ONSC 3530, 85 C.C.P.B. 127

Statutes considered:

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

Generally — referred to

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

Pension Benefits Act, R.S.O. 1990, c. P.8

s. 22(2) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 9.01(1) — considered

MOTION by creditor for declaration that stays of proceedings in Companies' Creditors Arrangement Act orders did not apply to its action or for leave to lift stays.

***Pepall J.*:**

Introduction

1 On October 6, 2009 and January 8, 2010, initial Companies' Creditors Arrangement Act[FN1] orders were granted to the CMI Entities including Canwest Media Inc. ("CMI") and the LP Entities including Canwest Publishing Inc. ("CPI") (the "Applicants") respectively. The CMI Entities, which hold interests in television stations and channels, and the LP Entities, which hold interests in newspaper publishing and digital and online media operations, are being restructured separately. As a result of the initial CCAA orders, the Applicants are protected by broad stays of proceedings which preclude the taking or maintaining of proceedings against or in respect of them or affecting their business or property. Notice of the orders was widely disseminated. In spite of the stays, on January 20, 2010, Gluskin Sheff and Associates Inc. ("GSA"), an investment management firm, issued a statement of claim for payment for services rendered pursuant to an Investment Management Agreement ("IMA") or for damages on a quantum meruit basis against CMI and CPI in their capacities as administrators of certain registered pension plans.

2 By notice of motion dated April 20, 2010 and made returnable June 16, 2010, GSA seeks a declaration that the stays of proceedings in my October 6, 2009 and January 8, 2010 initial orders do not apply to its action. Alternatively, it asks for leave to lift the stays.

Facts

(a) The Pension Plans

3 Canwest Media Works Inc., now known as CMI, and Canwest Media Works Publications Inc., now known as CPI, (the "Canwest Parties") are the sponsors and administrators of numerous defined benefit and defined contribution pension plans. In accordance with applicable pension benefit standards legislation, a pension trust fund was estab-

lished for each pension plan.

4 As administrator, the relevant CMI or CPI Entity is required to oversee all pension plan and fund administration matters. The administrator is responsible for investing the assets of the pension fund in a reasonable and prudent manner and in the manner prescribed by the applicable statute and regulations.

5 The Canwest Parties appointed RBC Dexia Investor Services Trust (the "Custodian") as the custodian of each pension fund. The Canwest Parties and the Custodian entered into a Master Trust Agreement dated August 10, 2007 to establish a trust for the purposes of co-mingling a portion of the assets of all of the plans under a consolidated investment structure. That Agreement provides that the Custodian holds title to all assets comprising the Master Trust fund but does so only in accordance with the instructions of CMI or CPI or investment managers appointed by them. Compensation of the Custodian constituted a charge upon the Master Trust Fund and was to be paid out of the Fund unless paid by the Canwest Parties.

6 As sponsor, the Applicants are responsible for funding the various plans in accordance with their terms and the relevant legislation. Fifteen of the seventeen plans in issue are defined benefit plans. The sponsor is ultimately responsible for ensuring that the defined benefit plans are fully funded.

(b) The Investment Management Agreement

7 In March, 2006, GSA entered into the Investment Management Agreement ("IMA") with Canwest Media Works Inc. "on behalf of certain pension funds listed in schedule I" and Canwest Mediaworks Publications Inc. "on behalf of certain pension funds listed in schedule II." Both companies are referred to as the Corporations and are described in the IMA as administrators of the registered pension plans listed on the aforesaid schedules. The Investment Management Agreement states that:

- The Corporations are retaining GSA to serve as investment counsel and portfolio manager in respect of the management of a portion of the plans' assets.

- The Corporations appoint GSA as investment counsel and portfolio manager for the CanWest Income Trust Account. The Account consisted of the assets of the Plans which were credited to the Account from time to time, the securities in which such assets were invested and all dividends, interest and other income earned thereon and the proceeds of disposition thereof. The Account was registered in the name of CanWest Pension Pooled Fund.

- Certain individuals are authorized by the Corporations to provide GSA with instructions.

- On seven days' notice, the Corporations may withdraw cash or other assets from the Account, subject to any fees owing to GSA in respect of the Account.

- The Corporations have executed an Agreement with RBC Dexia Investor Service Trust ("the Custodian"). The assets of the Account are held by the Custodian. The Corporations shall instruct the Custodian to accept instructions from GSA in relation to the investment of the Account.

- GSA shall provide the Corporations with quarterly financial statements, written investment management reports and compliance reports for the Account.

- GSA shall manage and invest the assets of the Account in a diversified portfolio of *income trusts*. (Emphasis added.)

• Unless instructed otherwise by the Corporations, GSA has the right to vote in respect of any securities held in the Account.

• Management fees are calculated and paid monthly based upon the asset value of the Account net of fees. The management fee per annum is 0.5% of the assets held in the Account.

• All maintenance and operating fees charged by brokers, custodians, banks or trust companies shall be borne by the Account.

• GSA is also entitled to an annual performance fee. It is to be paid as soon as practicable following the end of the fiscal year of the Account which is June 30.[FN2] The fee is equal to 25% of the net appreciation of the assets in the Account in excess of a specified hurdle.

• The IMA may be terminated by either party on 30 days' written notice.

(c) Services Provided by GSA

8 Commencing in March, 2006, GSA provided investment services and continued to do so both before and after the October, 2009 CMI Entities initial order. Its last invoice was dated January 7, 2010. As such, no services were rendered after the LP Entities initial order. Although not specified in the IMA, GSA's fees were always paid from the Account.

9 From April 19, 2006 up to and including January 7, 2010, GSA invoiced "Canwest Media" on a quarterly basis for the monthly management fees. Invoices were not issued to the Custodian for payment directly from the Account. Similarly, invoices for the performance fee were not issued to the Custodian for payment directly from the Account. Rather, the relevant Canwest representative would direct the Custodian to pay the management fees and the performance fees out of the Account and also directed the proportionate share of the fee that was to be charged to each plan. In contrast, and as specifically authorized by the IMA, without any prior approval by the CMI or LP Entities, brokerage fees were paid directly from the Account as were maintenance and operating fees.

10 On October 31, 2006, the Federal Government announced its intention to introduce legislation that would make income trusts less attractive. The number of available income trust securities shrank and became highly concentrated in specific economic sectors. To manage risk, GSA began to include other income oriented securities in the Account. GSA maintains that the Canwest Parties were aware of the mix of securities and took no objection. The Canwest Parties disagree with the characterization of the communications that passed between the parties.

11 The IMA was with Canwest Mediaworks Inc., a predecessor company to CMI, and with Canwest Mediaworks Publications Inc., a predecessor company to CPI. GSA states that Canwest Mediaworks Inc. was not the entity named in the initial CCAA order (although not stated, presumably GSA is referring to the October, 2009 order) but does not identify when it learnt that the party named in the IMA had been succeeded by an Applicant in the CCAA proceeding. GSA states that it had not been advised of this corporate reorganization at the time.

(d) The Dispute Between the Parties

12 On July 7, 2009, GSA issued an invoice to "Canwest Media" for its performance fee of $740,247.41 and a quarterly management fee of $30,913.28 for the quarter ended June, 2009. GSA states that the Account's performance outperformed the benchmark and that the incremental benefit to the plans was $3.5 million. The Canwest Parties advised that a performance fee was not warranted as the performance assessment was based on a portfolio that did not correspond to the approved mandate found in the IMA and the IMA did not provide for non-income trust investments. The parties had further discussions.

13 On October 8, 2009, GSA issued an invoice for management fees of $33,276.15 for the quarter ended September 30, 2009.

14 The management fees portion of the July 7, 2009 invoice was paid on October 28, 2009. The Canwest Parties directed the Custodian to pay the fees out of the account and to charge a proportionate share of the fees to each plan. GSA was told that there were no issues with the management fees invoiced for the quarter ended September 30, 2009. GSA continued to render services.

15 In December, the Canwest Parties requested a withdrawal of certain of the funds in the Account. While GSA objected, the withdrawal occurred. On December 22, 2009, GSA received a cheque for the management fees invoiced for the period ended September 30, 2009, but it was countermanded and the Canwest Parties continued to complain of GSA's failure to comply with the terms of the IMA. Consistent with their advice of December 23, 2009, they also terminated GSA's appointment effective immediately. They refused to pay any additional performance or management fees and wanted reimbursement of the fees paid for the period the Account was not compliant with the IMA. The basis for their actions was that the IMA had been breached by purchasing securities that were not income trusts.

16 The Canwest Parties then instructed GSA to redeem all the assets in the Account which it did.

17 As mentioned, the initial order in the CMI Entities' CCAA proceedings was granted on October 6, 2009. On October 14, 2009, I granted a Claims Procedure Order. Pursuant to that order, the CMI Entities called for claims against the CMI Entities and proof of claim forms were given to CMI Entitities' known creditors. GSA was not given, nor did it request, a proof of claim package. The Canwest Parties did not consider GSA to be a known creditor because they did not consider that GSA had an outstanding claim against it. GSA did not submit a proof of claim before the claims bar date or at all. The same was true with respect to the LP Entities. There the Claims Procedure Order was granted on April 12, 2010, but no proof of claim was ever filed by GSA.

(e) The Action

18 After some further discussions, GSA issued a Statement of Claim for payment of $849,648.51 representing its performance and management fees or in the alternative, damages on a quantum meruit basis. Of this sum, $777,259.78 represents a performance fee for the performance year ended June 30, 2009; $34,939.97 is for management fees for the period July to September, 2009 and which were invoiced on October 8, 2009; and $37,448.76 is for management fees for the period October 1, 2009 to December 23, 2009.

19 In the Statement of Claim, GSA denies that adding non-income trust securities to the Account amounted to a breach of fiduciary duty or entitled the Canwest Parties to terminate the IMA other than on 30 days' notice. It states that the Canwest Parties were aware of the changes made to the Account and raised no objection. Furthermore, members of the pension plans benefited from the management of the Account. GSA states that the Canwest Parties have acted in bad faith trying to take advantage of an inconsequential discrepancy between the IMA and the intent of the parties.

20 GSA states that the action will not consume the Canwest Parties' attention and resources so as to hinder the restructuring. The events are mostly decided; the amount in issue is not material and would be paid by the plans; and the relationship was handled by one senior employee. Additionally, examinations for discovery are now time limited.

21 The Canwest Parties take a different view. They state that allowing the action to continue would be disruptive. The purpose of the claims procedure was to ensure to the fullest extent possible that all claims be established and resolved before CCAA emergence, not afterwards. Much progress has been made in this regard. It would be both time consuming and distracting to have to deal with the issues raised in the Statement of Claim post-emergence particularly

as the two enterprises being restructured will have gone their separate ways and will sponsor their own pension plans. Having the GSA dispute resolved outside the claims procedure would be contrary to the overall objectives of the restructurings and would mean that the GSA claim would be evaluated and possibly remedied on an entirely different basis than the claims of other creditors. Allowing the GSA action to proceed would be both prejudicial to the restructurings and unfair to other creditors.

Issues

22 The issues to consider are whether the stays are applicable and if so, whether they should be lifted.

Positions of the Parties

23 GSA takes the position that the stay is inapplicable because it is not within the stay language of the orders and its action is not against the Canwest Parties but rather against certain pension plans and their members and the assets of those plans. This is in accordance with the IMA and consistent with the Canwest Parties' acknowledgement that they were acting as plan administrators. The Canwest Parties are named solely in a representative capacity as administrator of those plans and no damages are being sought from them. Rather, fees are claimed from the assets of the plans. Naming the Canwest Parties and not the beneficiaries of the plans is authorized by Rule 9.01(1) of the Rules of Civil Procedure. Plan administrators hold the plans' assets in trust for the benefit of plan members and not for their own account or benefit and are authorized by the applicable legislation to engage agents to invest the plans' assets and to pay the agents from the plans' assets. GSA particularly relies on the Court of Appeal decision in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.*[FN3].

24 Alternatively, GSA asks that the stay be lifted. It submits that GSA is not a creditor within the CCAA proceedings and the action, if successful, will not impose any financial or other obligations on the Canwest Parties. By analogy, the circumstances are similar to insured claims where stays have been lifted as judgment would only be enforceable against insurance proceeds and not against the debtor's assets. There is no evidence or reasonable basis to suggest that permitting the action to proceed will impair the restructurings. Lastly, GSA notes that services were provided after the October, 2009 CMI Entities' initial order.

25 The Canwest Parties state that the IMA was a contract with the Canwest Parties who were the administrators of the plans and who were alone responsible for GSA's fees. GSA had no contractual right to require that its fees be paid out of the trust funds relating to the plans and it invoiced the Canwest Parties for them. The Canwest Parties particularly rely on *General Motors of Canada Ltd. v. R.*[FN4] in support of its position. As to GSA's alternative request, they state that GSA is a sophisticated investment manager that is now attempting to manoeuver a better outcome for itself than it would have had under the claims processes established in the CCAA proceedings. These restructurings are now at a very advanced stage and it would be unfair to creditors and prejudicial to the two restructurings to allow GSA to pursue the action in court when other similarly situated contractual counterparties have participated in the claims processes established by the court.

26 The Ad Hoc Committee and CIBC Asset-Based Lending Inc. support the position of the Canwest Parties. The Monitor takes no position on whether the stay applies but is opposed to any lifting of the stay.

Discussion

27 In my view, the stays apply to the action brought by GSA.

28 Firstly, the wording of the stay provisions in the two orders[FN5] is extremely broad and encompasses GSA's action. The CMI Entities' Initial Order states:

> [40] THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

The LP Entities' Initial Order states:

> [41] THIS COURT ORDERS that until and including February 5, 2010, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property, except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of proceedings affecting the LP Entities, the LP Property or the LP Business), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property are hereby stayed and suspended pending further Order of this Court. In the case of the LP CRA, no Proceeding shall be commenced against the LP CRA or its directors and officers without prior leave of this Court on seven (7) days notice to CRS Inc.

29 An action is therefore captured by the stays if it is against or in respect of an Applicant or affects the Business or Property of an Applicant. The two orders define CMI and LP Business and Property broadly. In my view, GSA's action would fall into each of these four categories.

30 Secondly, a stay imposed in a CCAA proceeding is to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that creditors are treated fairly. As noted by Farley J. in *Lehndorff General Partner Ltd., Re*[FN6], the power to grant a stay extends to affect not only creditors but to non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. As he also noted in that decision, a key purpose of the stay is to prevent manoeuvring for position among creditors. Furthermore, the possibility that a creditor or stakeholder might be prejudiced does not affect the court's exercise of authority to grant a stay as the prejudice is offset by the benefits of facilitating the reorganization.[FN7]

31 Thirdly, while capacity may be a factor to consider when faced with a request to lift a stay, it would undermine the objective of a stay if one could dissect the various capacities in which a debtor company serves. In this regard, Gillese J.A.'s comments in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* were obiter and the case dealt with a release and not a stay of proceedings. The Canwest Parties are the defendants in the action and the statement of claim is replete with allegations against them including that they acted in bad faith. Part of the purpose of a stay is to enable the debtor company to devote its time and attention to restructuring not to responding to allegations in pleadings.

32 Fourthly, even if one does dissect the capacities of the Canwest Parties, they were administrators who were responsible for investing and overseeing the investment of the pension funds. They were not the trustee[FN8]; RBC Dexia was. Furthermore, the Canwest Parties as administrators had the ability to engage investment advisors in the discharge of their responsibilities. Consistent with this fact, GSA was providing services to the Canwest Parties and invoices were sent to "Canwest Media".

33 I also accept the argument of the Canwest Parties that the *General Motors of Canada Ltd. v. R.* decision addressed this precise issue albeit in a different context. In that case, the issue was whether General Motors Canada Limited ("GMCL") was entitled to claim an input tax credit to offset goods and services tax payable on investment management fees relating to the administration and investment of its registered pension plans, or whether the input tax credit "belonged" to the pension funds from which GMCL recovered the fees. The Canada Revenue Agency asserted that the services were in essence provided to the pension funds. Both the Tax Court of Canada and the Federal Court of Appeal rejected this argument. The factual background in the GMCL case and the case before me are very similar. In the *GMCL* case, the Tax Court noted:

> The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers....
>
> No evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts. The Fee Agreements, pursuant to which consideration was calculated with respect to the Investment Management Agreements, were solely between GMCL and the respective Investment Managers. The Investment Managers issued invoices, pursuant to the Agreements, solely to GMCL. GMCL approved the amounts invoiced in accordance with the Fee Agreements and then instructed the Trust to pay the Investment Managers from the funds it had placed in the pension plans. This in no way converts or transfers the liability for payment of the invoices to the trustee.
>
> Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment."[FN9]
>
> [Emphasis added]

34 The Court accordingly held that GMCL itself was entitled to claim the input tax credits in respect of the GST relating to the investment management fees paid to the managers of the assets of GMCL's registered pension plans. This was in spite of the fact that GMCL entered into the investment management agreement in its capacity as administrator of its registered pension plans.

35 It seems to me that this decision is similar to the case before me. The Custodian, RBC Dexia, is the trustee who held legal title to the assets in the fund. The Canwest Parties contracted for and acquired the services of GSA. Although by statute, the fees could be paid from the Account, the plan trusts were not liable for payment; the Canwest Parties were. The Canwest Parties approved the payments to GSA and then authorized the Custodian to pay them out of the Account. The Custodian had no responsibility or requirement for investment management services; the Canwest Parties did. The Canwest Parties were described as contracting on behalf of the plans but this simply reflects their role as administrator. Again, as stated in the *General Motors of Canada Ltd. v. R.* decision,

> It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for the payment of the supply of these services by the Investment Managers, pursuant to the terms of

the Agreements between GMCL and the Managers. The origin of the payment is irrelevant.[FN10]

36 GSA's action is not only against or in respect of the Canwest Parties, it also affects their Business as that term is defined in the initial orders thereby attracting the application of the stays. The effective administration of the plans and the relationship between the Canwest Parties and their employees are important aspects of the Business of the Canwest Parties. It should also be observed that by statute, if there are unfunded liabilities in the defined benefit plans, the Canwest Parties are required to make special payments to ensure that the plans are funded.

37 Lastly, the action can also be said to affect the Property of the Canwest Parties as that term is defined in the initial orders. Nowhere does it say in the IMA that GSA is to be paid by the fund or by the Trustee. Unlike the Trustee in the Master Trust Agreement, GSA has no security interest over the fund. In addition, the Account has been collapsed. Recovery of any judgment against the Canwest Parties clearly affects their Property. Even if GSA could execute against the defined benefit plans, the Canwest Parties would still be responsible for any deficiency arising in the plans. As such the Canwest Parties' Property may also be affected by GSA's action.

38 For all of these reasons, it appears abundantly clear that the statement of claim of GSA is encompassed by the stays of proceedings.

39 The second issue to consider is whether the stay should be lifted to permit the action to proceed.

40 There is no statutory test under the CCAA that governs the lifting of a stay. The stay provisions in the CCAA orders are discretionary and should be applied so as to support the CCAA's legislative purpose: *Canwest Global Communications Corp., Re*.[FN11]

41 In that case, I described in some detail the legal issues applicable to the granting and lifting of a stay. I wrote:

> According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[FN12], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[FN13] That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[FN14]
>
> Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re*[FN15] and Professor McLaren has added three more since then. They are:
>
> 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 significantly 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 passing 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.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.[FN16]

42 None of those situations is present here and in my view, a consideration of the balance of convenience, the relative prejudice to the parties and the merits of the action do not favour GSA's position. The objectives of the CCAA would not be met by lifting the stay. Indeed the converse is true. I accept the Canwest Parties' position that allowing the action to proceed would be prejudicial to the restructuring and unfair to others. GSA elected to commence this action in the face of the court ordered stays and opted not to file a proof of claim in either CCAA proceeding. It seems to me that this is the exact type of maneuvering that the CCAA is designed to avoid. The whole purpose of the claims procedures is to elicit and deal with claims against the Canwest Parties so that their businesses may emerge unencumbered by prior claims. It is also unfair to other creditors to permit this action to proceed. Those creditors did submit claims and their claims were subject to compromise in the plans advanced in the two separate CCAA restructurings.

43 I do not accept that this case is analogous to an insured claim. As already outlined, it cannot be assumed that a judgment would or should be enforceable against the funds and in any event, the Canwest Parties would ultimately be responsible for addressing any shortfalls in the defined benefit plans.[FN17] The CMI Entities have not yet emerged from CCAA protection and this action would be time consuming and a distraction. The absence of good faith and due diligence on the part of the Canwest Parties has not been established. Lastly, I note that the Monitor is opposed to the lifting of the stay. In all of these circumstances, with one modest exception which I will address, the stay should not be lifted.

44 The performance fee and the management fees are pre-filing debt with respect to the LP Entities and subject to compromise. The same is true for the CMI Entities with the exception of that portion of the October 1, 2009, to December 23, 2009 management fee attributable to them which is arguably recoverable for post-filing services rendered pursuant to section 11.2 of the CCAA. I am lifting the stay for the limited purpose of permitting a claim by GSA for that amount which I estimate would be less than $30,000. This does not preclude a claim for set-off by the CMI Entities. With that limited exception, GSA's motion is dismissed.

Motion dismissed.

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

FN2 As noted in the affidavit of GSA's Deputy Chief Executive Officer, Jeremy Freedman, the performance of the Account over the year is determined at the end of the performance year which is June 30.

FN3 (2008), 65 C.C.P.B. 293 (Ont. C.A.).

FN4 [2009] F.C.J. No. 447 (F.C.A.), aff'g [2008] T.C.J. No. 80 (T.C.C. [General Procedure]).

FN5 The power for the court to stay proceedings is found in section 11.2 of the CCAA. The stays in both orders were extended from time to time by the court.

FN6 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p.33.

FN7 Ibid, at p.32.

FN8 Pursuant to section 22(b) of at least the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8, they would not qualify to be trustees.

FN9 *Ibid*, at paras. 53-54.

FN10 Ibid, at para. 57.

FN11 [2009] O.J. No. 5379 (Ont. S.C.J. [Commercial List]) at paras. 27 and 28.

FN12 Aurora: Canada Law Book, looseleaf, at para. 3.3400.

FN13 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

FN14 Ibid, at para. 68.

FN15 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

FN16 Ibid, at paras. 32 and 33.

FN17 In their factum, the Canwest Parties state: "the Statement of Claim in the Action does not say that relief is sought only against the Plans and in fact scrupulously avoids specifying from whom damages are sought." That said, in argument, counsel for GSA acknowledged that GSA would restrict its recovery to the funds.

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2011 CarswellOnt 2392, 2011 ONSC 2215, 75 C.B.R. (5th) 156

2011 CarswellOnt 2392, 2011 ONSC 2215, 75 C.B.R. (5th) 156

Canwest Global Communications Corp., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as Amended

And In the Matter of a Plan of Compromise or Arrangement of Canwest Global Communications Corp. and Other Applicants

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: April 7, 2011
Docket: CV-09-8396-00CL

Counsel: Douglas J. Wray, Jesse B. Kugler for Applicant, Communications, Energy and Paperworkers Union of Canada

David Byers, Maria Konyukhova for Monitor

Subject: Insolvency; Labour and Employment; Public

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

C Entities obtained initial order under Companies' Creditors Arrangement Act (CCAA) staying all proceedings against them — As part of CCAA proceedings, claims procedure order was granted which established procedure for identification and quantification of claims against C Entities — B was dismissed after having been employed by division of one of C Entities for 20 years — Union filed claims pursuant to claims procedure order in respect of certain outstanding grievances — Claim with respect to B's grievances was not resolved — Plan was implemented, at which time all operating assets of C Entities were transferred and C Entities ceased operations — Stay with respect to employer was terminated — Stay with respect to remaining C Entities was extended — Union brought motion for order lifting stay of proceedings in respect of B's grievances and directing that they be adjudicated in accordance with collective agreement — Motion granted — Generally speaking, grievances should be adjudicated along with other claims pursuant to provisions of claims procedure order within context of CCAA proceedings — Present case was unique — Employer emerged from CCAA protection and was currently operating under different name — B was 20 year employee — Given stage of CCAA proceedings, fact that stay relating to employer had been lifted, and B's employment tenure, B ought to be given opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by claims officer if so ordered — No meaningful prejudice would ensue to any stakeholder — Balance of convenience and interests of justice favoured lifting stay to permit grievances to proceed through arbitration rather than before claims procedure officer.

Cases considered by *Pepall J.*:

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

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7882, 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]) — followed

Canwest Global Communications Corp., Re (2010), 321 D.L.R. (4th) 561, 2010 ONSC 1746, 2010 CarswellOnt 3948, 82 C.C.E.L. (3d) 180 (Ont. S.C.J. [Commercial List]) — considered

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 C.L.L.C. 220-035, 363 N.R. 226, 400 W.A.C. 1, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 242 B.C.A.C. 1, 164 L.A.C. (4th) 1, 157 C.R.R. 21, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, [2007] 2 S.C.R. 391 (S.C.C.) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 14255, [2010] R.J.Q. 1518, [2010] R.J.D.T. 887, 2010 CarswellQue 6229, 2010 QCCS 2590, D.T.E. 2010T-443, 65 C.B.R. (5th) 186, 82 C.C.P.B. 192 (Que. S.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 33 [en. 2005, c. 47, s. 131] — referred to

s. 33(1) [en. 2005, c. 47, s. 131] — referred to

s. 33(8) [en. 2005, c. 47, s. 131] — referred to

MOTION by union for order lifting stay of proceedings in respect of certain grievances and ordering adjudication pursuant to collective agreement.

***Pepall J.*:**

Introduction

1 The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

2 On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**
>
> 15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

3 On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, "Claim" is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date[FN1] (a "Prefiling Claim") and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a "Restructuring Claim"). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the

claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

4 On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

5 On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

6 John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA][FN2] . The Union reserves its right to make further submissions in this regard.

7 In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

8 The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept, settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

9 The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr.

Bradley to his employment.

10 CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

11 For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

12 Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

13 Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

14 The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

15 Both parties agree that the following two issues are to be considered:

> (a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?
>
> (b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

16 In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

17 Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

18 The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

19 The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

20 As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*[FN3], the claims procedure order does not interfere with freedom of association.

21 Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

22 The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Ltd., Re*[FN4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

23 The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding Up and Restructuring Act;

(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 any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an *Act* referred to in paragraph (1)(a);

(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 any action, suit or proceeding against the company.

24 As the Court of Appeal noted in *Nortel Networks Corp., Re*[FN5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Ltd.*[FN6].

25 Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lehndorff General Partner Ltd.*[FN7]:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

26 In *Canwest Global Communications Corp., Re*[FN8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Canadian Airlines Corp., Re*.[FN9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*"[FN10]. They included where:

a) a plan is likely to fail;

b) 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);

c) the applicant shows necessity for payment;

d) 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 creditors;

e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;

g) there is a real risk that a creditor's loan will become unsecured during the stay period;

h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

i) it is in the interests of justice to do so.

27 The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp., Re*[FN11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

28 There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Smoky River Coal Ltd., Re*[FN12], the issue was whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[FN13]

29 I do recognize that the *Smoky River* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

30 In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

31 The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

32 Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

33 The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

34 That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

35 As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

36 In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

37 Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as

> provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

38 Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Co., Re*[FN14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*."[FN15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[FN16]

39 In *Canwest Global Communications Corp., Re*.[FN17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[FN18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[FN19]

40 I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

41 Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

42 CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*[FN20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects

> of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[FN21]

43 In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

44 Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

Motion granted.

FN1 The Filing Date was October 6, 2009, the date of the initial order.

FN2 The words in brackets were omitted but presumably this was the intention.

FN3 (S.C.C.).

FN4 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 6.

FN5 (Ont. C.A.) at para. 33.

FN6 *Supra*, note 4 at para. 10.

FN7 *Ibid*, at para. 6.

FN8 (Ont. S.C.J. [Commercial List]).

FN9 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)

FN10 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

FN11 *Supra*, note 8 at para. 32.

FN12 (Alta. C.A.)

FN13 *Ibid*, at para. 33.

FN14 2010 QCCS 2590 (Que. S.C.)

FN15 *Ibid*, at para. 31.

FN16 *Ibid*, at para. 35.

FN17 (Ont. S.C.J. [Commercial List])

FN18 *Ibid*, at para. 32.

FN19 *Ibid*, at para. 33.

FN20 *Supra*, note 3.

FN21 *Ibid*, at at paras. 19 and 29.

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2005 CarswellOnt 6648, 17 C.B.R. (5th) 275

Grace Canada Inc., Re

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF GRACE CANADA INC.

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: November 14, 2005
Judgment: November 14, 2005
Docket: 01-CL-4081

Counsel: D. Tay, O. Pasparakis, J. Stam for Plaintiffs, Grace Canada Inc.

E. Merchant for Merv Nordick, Ernest Spencer

K. Ferbers for Raven Thundersky

Ian Dick for Attorney General of Canada

Michel Bélanger, Jean-Philippe Lincourt, Matt Moloci for Association Des Consommatuers Pour La Qualité Dans La Construction, Jean-Charles Dextras, Viviane Brosseau, Léotine Roberge-Turgeon

Subject: Insolvency; Civil Practice and Procedure

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

Quebec plaintiffs in their putative class proceedings worked out arrangement with federal Crown — As result, Quebec plaintiffs were not proceeding with their request to lift stay and other ancillary relief — Saskatchewan plaintiffs were not opposed to Grace relief — Stay was extended to April 1, 2006, and included proceedings against federal Crown related to Grace proceedings in class actions — Modified preliminary injunction granted on January 22, 2002, by US Bankruptcy Court was recognized pending further order of Canadian court — There had been recognition in US Bankruptcy Court that Canadian proceedings would be governed by Canadian substantive law.

Cases considered by *Farley J.*:

Babcock & Wilcox Canada Ltd., Re (2000), 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — considered

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.) — referred to

Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287, 1982 CarswellOnt 461 (Ont. H.C.) — referred to

Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co. (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266, 1983 CarswellOnt 397 (Ont. Div. Ct.) — referred to

Eagle River International Ltd., Re (2001), (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*) 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.*) 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.*) 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*) [2001] 3 S.C.R. 978 (S.C.C.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Noma Co., Re (2004), 2004 CarswellOnt 5033 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered by *Farley J.*:

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

Generally — referred to

DETERMINATION of motions regarding stay of proceedings and related matters.

***Farley J.*:**

1 This endorsement applies to the 3 motions of Grace, the Quebec class proceeding and the Manitoba class proceeding.

2 The Quebec plaintiffs in their putative class proceedings have worked out an arrangement with the Federal Government. As a result they are not proceeding with their request to lift the stay and other ancillary relief, but without prejudice to it or similar relief being sought if the insolvency/CCAA recognition proceedings get bogged down. The Grace relief was then supported by the Quebec plaintiffs.

3 The "Sask" plaintiffs (represented by the Merchant firm were not opposed to the Grace relief.

4 The Manitoba plaintiffs represented by the Atkins firm took the position that the Grace relief was all right so long as it did not apply to their proceedings except that judgment would not be enforced without leave of this court.

5 It would seem to me that the various class proceedings would benefit from cooperation and coordination —

using the 3Cs of the Commercial List (communication, cooperation and common sense). Otherwise they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.

6 The stay is extended to April 1, 2006 and includes proceedings against the Federal Crown related to the Grace proceedings in these class actions. As well the Modified Preliminary Injunction granted on January 22, 2002 by the US Bankruptcy Court is recognized pending further order of this Court.

7 The foregoing does not prevent any of the parties entering into consensual resolutions with the Federal Crown.

8 I note that the Grace interests represented before me today indicated that it was their goal to emerge from their insolvency proceedings as soon as reasonably possible but under the guidelines that there be justice for all affected persons.

9 I also note that there has been recognition in the US Bankruptcy Court that Canadian proceedings will be governed by Canadian substantive law.

10 The foregoing relief granted is pursuant to the principles set out in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and is in furtherance of the long standing respect for comity extended by the courts of this country for the courts of the US and vice versa.

11 It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

12 I concur with the views of the US court in *Maryland Casualty* re respect to the necessity/desirability of a stay against the Federal Crown as a "3rd party" given the interrelated aspects of the claims against the Crown and Grace. There would in my mind be a considerable risk of record taint if the action against the Crown were allowed to proceed on its own without direct Grace evidence and counsel. See also *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.); *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 137 D.L.R. (3d) 287 (Ont. H.C.), aff'd (1983), 145 D.L.R. (3d) 266 (Ont. Div. Ct.); *Noma Co., Re*, [2004] O.J. No. 4914(Ont. S.C.J. [Commercial List]); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

13 The stay does not affect the ability of the plaintiffs from coming back to court if they feel that there is foot dragging or other elements of prejudice.

14 I note that the Federal Crown may accept service of the Sask claim without that being an infringement of the stay now imposed (and previously requested). This is without prejudice to the Crown moving for relief on, say, a limitations point.

15 What the Manitoba plaintiffs are in essence requesting is that they obtain a leg up on all other Canadian plaintiffs (and US plaintiffs) and that there be by this court somewhat of a quasi-certification, although indicating that the actual certification would be dealt with by the Manitoba court.

16 This would result in a lack of single control in insolvency proceedings which was cautioned against in *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.). It would also fragment and possibly destabilize the other proceedings by other affected persons (including those claiming for personal injury including serious personal injury). In saying that I in no way wish to or intend to be taken as minimizing the terrible tragedy which has befallen the Thundersky/Bruce family.

17 I look forward to seeing that continued timely progress is being made with respect to this insolvency proceeding including the effective efficient way of dealing with personal injury and property damage claims. The information officer should ensure that this court and affected parties including these class action plaintiffs are kept abreast of proposed material developments and their outcome. That is the report on the regular time period basis should be the minimum.

18 The motion of the Manitoba plaintiffs is dismissed, but without prejudice to similar or other relief being sought in the future based on a change in circumstances.

Order accordingly.

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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

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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

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 — 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.

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 ...
>
> (e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;
>
> . . . . .
>
> (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 September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:
>
> > (a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and
> >
> > (b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.[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 permit the proposed action against Bricore is dismissed.

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

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order. [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 creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the CCAA Mean That a Post-Filing Claimant Cannot Be Subject to the Stay of Proceedings Imposed by the Initial Order?

36 ICR argued that by the addition of s. 11.3 in 1997[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 obligated under a letter of credit or guarantee in relation to the company. (Added by S.C.1997, c. 12, s. 124)
>
> 11.3 No order made under section 11 shall have the effect of
>
> > (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
> >
> > (b) requiring the further advance of money or credit. (Added by S.C.1997, c. 12, s. 124)
>
> [Emphasis added.]

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

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

> A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.
>
> Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.
>
> However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.
>
> . . . . .
>
> ... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made. [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 manner, despite having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising *CCAA* judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

55 In *Canadian Airlines Corp., Re*[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 Commercial 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 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. [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, un-numbered 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.).

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1993 CarswellOnt 183, 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 37 A.C.W.S. (3d) 847

Lehndorff General Partner Ltd., Re

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Ontario Court of Justice (General Division — Commercial List)

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.

L. Crozier , for Royal Bank of Canada.

R.C. Heintzman , for Bank of Montreal.

J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.

Jay Schwartz , for Citibank Canada.

Stephen Golick , for Peat Marwick Thorne[FN*] Inc., proposed monitor.

John Teolis , for Fuji Bank Canada.

Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements

— Effect of arrangement — Stay of proceedings.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — *referred to*

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237 , Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.)* 46 D.L.R. (4th) 669 (Q.B.) , reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — *referred to*

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — *referred to*

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — *referred to*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 [H.C.] — *referred to*

Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — *referred to*

Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — *referred to*

Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — *referred to*

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

Inducon Development Corp. Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

International Donut Corp. v. 050863 N.B. Ltd. (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — *considered*

Keppoch Development Ltd., Re (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — *referred to*

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *referred to*

McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 (H.C.) — *referred to*

Meridian Developments Inc. v. Toronto Dominion Bank, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — *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. 1 (Q.B.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *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.) , affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — *referred to*

Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *referred to*

Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) — *referred to*

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — *referred to*

Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — *referred to*

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.) — *referred to*

United Maritime Fishermen Co-operative, Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.) , varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.) , reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.)* 51 D.L.R. (4th) 618 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

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

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

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

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the

consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*,

[1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA 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 company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (Que. C.A.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

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.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

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.

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

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.

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), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

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)

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. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

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.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the

authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .

. . . . .

In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

> The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
>
> > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The

entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

FN* As amended by the court.

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2006 CarswellOnt 6230, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16

2006 CarswellOnt 6230, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16

Muscletech Research & Development Inc., Re

Muscletech Research and Development Inc. et al

Ontario Superior Court of Justice

Ground J.

Heard: September 29, 2006
Judgment: October 13, 2006
Docket: 06-CL-6241

Counsel: Fred Myers, David Bish for Applicants, Muscletech Research and Development Inc. et al

Natasha MacParland, Jay Swartz for Monitor, RSM Richter Inc.

Justin Fogarty, Fraser Hughes, Chris Robertson for Ishman, McLaughlin, Jaramillo Claimants

Jeff Carhart for Ad Hoc Tort Claimants Committee

Sara J. Erskine for Ward et al

Alan Mark, Suzanne Wood for Iovate Companies, Paul Gardiner

A. Kauffman for GNC Oldco Inc.

Tony Kurian for HVL Incorporated

Steven Golick for Zurich Insurance Company

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Applicant companies sought relief under Act as means of achieving global resolution of numerous actions brought against them and third parties in United States — Liability of third parties was linked to that of applicants — Certain of third parties agreed to provide funding of settlement of actions — Most of plaintiffs settled claims but claimants in

three actions did not — Claimants brought motions for various interim orders — Motions dismissed — Claimants were not entitled to make collateral attack on claims resolution order — Court had jurisdiction to make order affecting claims against third parties — Practicality of plan of compromise depended on resolution of all claims — Claimants filed proof of claims including their claims against third parties — Claims were not deemed to be accepted pursuant to claims resolution order — Request for better notices of objection could be dealt with by claims officer — There was no reason to appoint investigator given thorough and impartial report already prepared by monitor.

Cases considered by *Ground J.*:

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

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

Generally — referred to

MOTIONS by objecting claimants in proceedings under Companies' Creditors Arrangement Act for various interim orders.

***Ground J.*:**

1 This is a somewhat unique proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. (1985) Ch. c.36 as amended ("CCAA"). The Applicants have also commenced ancillary proceedings under Chapter 15 of the U.S. Bankruptcy Code and are now before the United States District Court for the Southern District of New York ("U.S. Court"). All of the assets of the Applicants have been disposed of and no proceeds of such disposition remain in the estate. The Applicants no longer carry on business and have no employees. The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants against the Applicants and others (the "Third Parties") in the United States. In addition to the Applicants, the Third Parties, which include affiliated and non-affiliated parties, were named as defendants or otherwise involved in some 33 Product Liability Actions. The liability of the Third Parties in the Product Liability Actions is linked to the liability of the Applicants, as the Product Liability Actions relate to products formerly sold by the Applicants.

2 Certain of the Third Parties have agreed to provide funding for settlement of the Product Liability Actions and an ad hoc committee of tort claimants (the "Committee") has been formed to represent the Plaintiffs in such Products Liability Actions (the "Claimants"). Through its participation in a court-ordered mediation (the "Mediation Process") that included the Applicants and the Third Parties, the Committee played a fundamental role in the settlement of 30 of the 33 Product Liability Actions being the Product Liability Claims of all of those Product Liability Claimants represented in the Mediation Process by the Committee.

3 The Moving Parties in the motions now before this court, being the Claimants in the three Product Liability Actions which have not been settled (the "Objecting Claimants"), elected not to be represented by the Committee in the Mediation Process and mediated their cases individually. Such mediations were not successful and the Product

Liability Actions of the Moving Parties remain unresolved.

4 Pursuant to a Call for a Claims Order issued by this court on March 3, 2006, and approved by the U.S. court on March 22, 2006, each of the Objecting Claimants filed Proofs of Claim providing details of their claims against the Applicants and Third Parties. The Call for Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, the Applicants engaged in a process of extensive discussions and negotiations. With the input of various key players, including the Committee, the Applicants established a claims resolution process (the "Claims Resolution Process"). The Committee negotiated numerous protections in the Claims Resolution Process for the benefit of its members and consented to the Claims Resolution Order issued by this court on August 1, 2006, and approved by the U.S. court on August 11, 2006.

5 The Claims Resolution Order appoints the Honourable Edward Saunders as Claims Officer. The Claims Resolution Order also sets out the Claims Resolution Process including the delivery of a Notice of Objection to Claimants for any claims not accepted by the Monitor, the provision for a Notice of Dispute to be delivered by the Claimants who do not accept the objection of the Monitor, the holding of a hearing by the Claims Officer to resolve Disputed Claims and an appeal therefrom to this court. The definition of "Product Liability Claims" in the Claims Resolution Order provides in part:

> "Product Liability Claim" means any right or claim, including any action, proceeding or class action in respect of any such right or claim, other than a Claim, Related Claim or an Excluded Claim, of any Person which alleges, arises out of or is in any way related to wrongful death or personal injury (whether physical, economic, emotional or otherwise), whether or not asserted and however acquired, against any of the Subject Parties arising from, based on or in connection with the development, advertising and marketing, and sale of health supplements, weight-loss and sports nutrition or other products by the Applicants of any of them.

. . . . .

Nature of the Motions

6 The motions now before this court emanate from Notices of Motion originally returnable August 22, 2006 seeking:

> 1. An Order providing for joint hearings before Canadian and U.S. Courts and the establishment of a cross-border insolvency protocol in this CCAA proceeding, to determine the application or conflict of Canadian and U.S. law in respect of the relief requested herein.
>
> 2. An Order amending the June 8, 2006 Claims Resolution Claim to remove any portions that purport to determine the liabilities of third party non-debtors who have not properly applied for CCAA relief.
>
> . . . . .
>
> 3. An Order requiring the Monitor and the Applicants herein,
>
> (a) to provide an investigator, funded by the Claimants (the "Investigator"), with access to all books and records relied upon by the Monitor in preparing its Sixth Report, including all documents listed at Appendix "2" to that report;
>
> (b) to provide the Investigator with copies of or access to documents relevant to the investigation of the impugned transactions as the Investigator may request, and

(c) providing that the Investigator shall report back to this Honourable Court as to its findings, and a Notice of Motion returnable September 29, 2006 seeking.

4. An Order finding that the Notices of Objection sent by the Monitor/Applicants do not properly object to the Claimants' claims against non-debtor third parties;

5. An Order that the Claimants' Product Liability Claims against non-debtor third parties are deemed to be accepted by the Applicants pursuant to paragraph 14 of the Claims Resolution Order;

6. In the alternative, an Order that the Monitor, on behalf of the Applicants, provide further and better Notices of Objection properly objecting to claims against non-debtor third parties so that the Claimants may know the case they are to meet and may respond appropriately.

Analysis

7 With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

> the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

8 Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.

9 It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:

> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

10 I do not regard the motions before this court with respect to claims against Third Parties as being made pursuant to paragraph 37 of the Claims Resolution Order which provides that a party may move before this court "to seek advice and directions or such other relief in respect of this Order and the Claims Resolution Process." The relief sought by the Objecting Creditors with respect to claims against Third Parties is an attack upon the substance of the Claims Resolution Order and of the whole structure of this CCAA proceeding which is to resolve claims against the Appli-

cants and against Third Parties as part of a global settlement of the litigation in the United States arising out of the distribution and sale of the offending products by the Applicants. What the Objecting Claimants are, in essence, attempting to do is to vary or set aside the Claims Resolution Order. The courts have been loathe to vary or set aside an order unless it is established that there was:

> (a) fraud in obtaining the order in question;
>
> (b) a fundamental change in circumstances since the granting of the order making the order no longer appropriate;
>
> (c) an overriding lack of fairness; or
>
> (d) the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing and the time when a review is sought that was not known at the time of the original hearing and that could have led to a different result.

None of such circumstances can be established in the case at bar.

11 In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.

12 The Objecting Claimants also seek an order of this court that their claims against Third Parties are deemed to be accepted pursuant to paragraph 14 of the Claims Resolution Order. Section 14 of the Claims Resolution Order provides in part as follows:

> This Court Orders that, subject to further order of this Court, in respect of any Claim or Product Liability Claim set out in a Proof of Claim for which a Notice of Objection has not been sent by the Monitor in accordance with paragraph 12(b) above on or before 5:00 p.m. (Eastern Standard Time) on August 11, 2006, such Claim or Product Liability Claim is and shall be deemed to be accepted by the Applicants.

13 The submission of the Objecting Claimants appears to be based on the fact that, at least in one case, the Notice of Objection appears to be an objection solely on behalf of the Applicants in that Exhibit 1 to the Notice states "the Applicants hereby object to each and all of the Ishman Plaintiffs' allegations and claims." The Objecting Claimants also point out that none of the Notices of Objection provide particulars of the objections to the Objecting Claimants' direct claims against third parties. I have some difficulty with this submission. The structure of the Claims Resolution Order is that a claimant files a single Proof of Claim setting out its Claims or Product Liability Claims and that if the Applicants dispute the validity or quantum of any Claim or Product Liability Claim, they shall instruct the Monitor to send a single Notice of Objection to the Claimant. Paragraph 12 of the Claims Resolution Order states that the Applicants, with the assistance of the Monitor, may "dispute the validity and/or quantum or in whole on in part of a Claims or a Product Liability Claim as set out in a Proof of Claim." The Notices of Objection filed with the court do, in my view, make reference to certain Product Liability Claims against Third Parties and, in some cases, in detail. More importantly, the Notices of Objection clearly state that the Applicants, with the assistance of the Monitor, have reviewed the Proof of Claim and have valued the amount claimed at zero dollars for voting purposes and zero dollars for distribution purposes. I fail to understand how anyone could read the Notices of Objection as not applying to Product Liability Claims against Third Parties as set out in the Proof of Claim. The Objecting Claimants must have read the Notices of Objection that way initially as their Dispute Notices all appear to refer to all claims contained in their Proofs

of Claim. Accordingly, I find no basis on which to conclude that the Product Liability Claims against the Third Parties are deemed to have been accepted.

14 The Objecting Claimants seek, in the alternative, an order that the Monitor provide further and better Notices of Objection with respect to the claims against the Third Parties so that the Objecting Claimants may know the case they have to meet and may respond appropriately. I have some difficulty with this position. In the context of the Claims Resolution Process, I view the Objecting Claimants as analogous to plaintiffs and it is the Applicants who need to know the case they have to meet. The Proofs of Claim set out in detail the nature of the claims of the Objecting Claimants against the Applicants and Third Parties and, to the extent that the Notices of Objection do not fully set out in detail the basis of the objection with respect to each particular claim, it appears to me that this is a procedural matter, which should be dealt with by the Claims Officer and then, if the Objecting Claimants remain dissatisfied, be appealed to this court. Section 25 of the Claims Resolution Order provides:

> This Court Orders that, subject to paragraph 29 hereof, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him by the parties, as well as any other procedural or evidentiary matters that may arise in respect of the hearing of a Disputed Claim, including, without limitation, the production of documentation by any of the parties involved in the hearing of a Disputed Claim.

15 In fact, with respect to the medical causation issue which is the first issue to be determined by the Claims Officer, the Claims Officer has already held a scheduling hearing and has directed that by no later than August 16, 2006, all parties will file and serve all experts reports and will-say statements for all non-expert witnesses as well as comprehensive memoranda of fact of law in respect of the medical causation issues. To the extent that the Objecting Claimants appear to have some concerns as to natural justice, due process and fairness, in spite of the earlier decision of Judge Rakoff with respect to the Claims Resolution Order and the consequent amendments made to such Order, in my view, any such concerns are adequately addressed by the rulings made by the Claims Officer with respect to the hearing of the medical causation issue. I would expect that the Claims Officer would make similar rulings with respect to the other issues to be determined by him.

16 In addition, as I understand it, all three actions commenced by the Objecting Claimants in the United States were ready for trial at the time that the CCAA proceedings commenced and I would have thought, as a result, that the Objecting Claimants are well aware of the defences being raised by the Applicants and the Third Parties to their claims and as to the positions they are taking with respect to all of the claims.

17 Accordingly, it appears to me to be premature and unproductive to order further and better Notices of Objection at this time.

18 The motion seeking an order requiring the Monitor and the Applicants to provide an Investigator selected by the Objecting Claimants relates to transactions referred to by the Monitor in preparing its Sixth Report which dealt with certain transactions entered into by the Applicants with related parties prior to the institution of these CCAA proceedings. The Objecting Creditors also seek to have the Investigator provided with copies of, or access to, all documents relevant to an investigation of the impugned transactions as the Investigator may request. It appears from the evidence before this court that the Applicants prepared for the Monitor a two-volume report (the "Corporate Transactions Report") setting out in extensive detail the negotiation, documentation and implementation of the impugned transactions. Subsequently by order of this court dated February 6, 2006, the Monitor was directed to review the Corporate Transactions Report and prepare its own report to provide sufficient information to allow creditors to make an informed decision on any plan advanced by the Applicants. This review was incorporated in the Monitor's Sixth Report filed with this court and the U.S. court on March 31, 2006. In preparing its Sixth Report, the Monitor had the full cooperation of, and full access to the documents of, the Iovate Companies and Mr. Gardiner, the principal of the Iovate Companies. No stakeholder has made any formal allegation that the review conducted by the Monitor was flawed or incomplete in any way. The Monitor has also, pursuant to further requests, provided documentation and additional information to stakeholders on several occasions, subject in certain instances to the execution of confi-

dentiality agreements particularly with respect to commercially sensitive information of the Applicants and the Iovate Companies which are Third Parties in this proceeding. There is no evidence before this court that the Monitor has, at any time, refused to provide information or to provide access to documents other than in response to a further request from the Objecting Claimants made shortly before the return date of these motions, which request is still under consideration by the Monitor. The Sixth Report is, in the opinion of the Respondents, including the Committee, a comprehensive, thorough, detailed and impartial report on the impugned transactions and I fail to see any utility in appointing another person to duplicate the work of the Monitor in reviewing the impugned transactions where there has been no allegation of any deficiency, incompleteness or error in the Sixth Report of the Monitor.

19 I also fail to see how a further report of an Investigator duplicating the Monitor's work would be of any assistance to the Objecting Claimants in making a decision as to whether to support any Plan that may be presented to this court. The alternative to acceptance of a Plan is, of course, the bankruptcy of the Applicants and I would have thought that, equipped with the Corporate Transactions Report and the Sixth Report of the Monitor, the Objecting Claimants would have more than enough information to consider whether they wish to attempt to defeat any Plan and take their chances on the availability of relief in bankruptcy.

20 In any event, it is my understanding that, at the request of the Committee, any oppression claims or claims as to reviewable transactions have been excluded from the Claims Resolution Process.

21 The final relief sought in the motions before this court is for an Order providing for joint hearings before this court and the U.S. court and the establishment of a cross-border protocol in this proceeding to determine the application of Canadian and U.S. law or evidentiary rulings in respect of the determination of the liability of Third Parties. During the currency of the hearing of these motions, I believe it was conceded by the Objecting Claimants that the question of the applicability of U.S. law or evidentiary rulings would be addressed by the Claims Officer. The Objecting Claimants did not, on the hearing of these motions, press the need for the establishment of a protocol at this time. An informal protocol has been established with the consent of all parties whereby Justice Farley and Judge Rakoff have communicated with each other with respect to all aspects of this proceeding and I intend to follow the same practice. Any party may, of course, at any time bring a motion before this court and the U.S. court for an order for a joint hearing on any matter to be considered by both courts.

22 The motions are dismissed. Any party wishing to make submissions as to the costs of this proceeding may do so by brief written submissions to me prior to October 31, 2006.

Motions dismissed.

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2012 CarswellOnt 3142, 2012 ONSC 1244

2012 CarswellOnt 3142, 2012 ONSC 1244

NFC Acquisition GP Inc., Re

In the Matter of a Plan of Compromise or Arrangement of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp.

Bank of Montreal, Applicant and NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P., Respondents

Ontario Superior Court of Justice [Commercial List]

D.M. Brown J.

Heard: February 22, 2012
Judgment: February 22, 2012
Docket: CV-12-9554-00CL, CV-12-9616-00CL

Counsel: E. Lamek, C. Fell, for Monitor and Proposed Receiver, FTI Consulting Canada Inc.

C. Prophet, F. Lamie, for Applicant, Bank of Montreal

D. Bish, A. Slavens, for NFC Debtors

P. Osborne, B. Gray, for Certain Directors of the Debtors

D. Bulas, for Edgestone Capital

H. Chaiton, for Westco MultiTemp Distribution Centres Inc.

Subject: Corporate and Commercial; Insolvency

Bankruptcy and insolvency.

Commercial law.

***D.M. Brown J.*:**

I. Motion to lift a CCAA stay to appoint a receiver

1 The Bank of Montreal, the senior secured creditor of the debtor respondents, NFC Acquisition GP Inc., NFC

Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P. (the "Debtors"), moves for an order lifting the stay of proceedings in the *CCAA* matter (CV-12-9554-00CL) to permit it to apply to appoint FTI Consulting Canada Inc. as receiver of all of the property, assets and undertaking of the Debtors.

II. Background events

2 NFC produces ground and formed meats and held a 40% market share of the market for frozen burgers sold in grocery stores. On January 17, 2012 Morawetz J. made an Initial Order under the *CCAA* in respect of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp. (the "NFC Entities"). Two features of the Initial Order are of particular relevance to this motion. First, the Court approved a sale process in respect of the NFC Entities. Second, under the terms of the approved DIP facility, the availability of additional commitments under the facility beyond the initial $3.5 million was tied to the success of the sales process — if a Sales Process Default occurred, there would be no further availability of funds under the DIP Facility.

3 The Monitor, FTI Consulting Canada Inc., has filed a Third Report dated February 21, 2012 describing the results of the sales process. Three final offers were received by the February 13, 2012 deadline. The Monitor then worked with NFC management to refine the terms of two bids.

4 On February 13 a Major Customer of NFC advised the company that it had one day to match a competitive bid from another supplier of certain products which had proposed to reduce its prices to the Major Customer. The Monitor informed the two final bidders of this development. Between February 13 and 20 discussions took place amongst the Monitor, NFC, the two final bidders and the Major Customer to ascertain whether a transaction could be structured that would result in a going concern sale of the NFC Saskatoon production facility, or possibly both NFC production facilities.

5 Under the terms of the Sales Process NFC had until the close of business on February 17 to put forward to BMO, in its capacity as DIP Lender, a form of agreement of purchase and sale so that the bank could determine whether it would make further advances under the DIP Facility.

6 On February 17 one of the two final bidders withdrew from the sales process. The remaining bidder was prepared to proceed with an amended offer, but one which would require the DIP Lender to advance the remaining $7 million in the DIP Facility.

7 On Monday, February 20 BMO delivered a notice that a Sales Process Default had occurred under the DIP Facility. Further funding was no longer available to the Debtors. That evening the Board of NFC resigned *en masse*. Management posted notices at the Debtors' facilities advising the employees that no work would be available for them the next day, Tuesday, February 21. That has led the Monitor to make the following recommendation:

> In light of the delivery of the Default Notice by BMO, the resignation of the NFC Board of Directors and management, the lack of funding for NFC's business and the perishable nature of NFC's inventory, the Monitor is of the view that it is vital to have an immediate and orderly shut-down of the NFC manufacturing operations and a swift transition to a court-appointed receivership of the assets of NFC. The Monitor is hopeful that a buyer for the closed NFC manufacturing faculties can be quickly identified among the parties that participated in the Transaction Process, and that the manufacturing facilities can be sold on a turn-key basis in a short period of time, rather than liquidated.
>
> The Monitor has prepared a cash flow projection for the conduct of a shut-down receivership for the assets of NFC, which would be funded pursuant to Receiver's Certificates. BMO has agreed to fund such Receiver Certificate amounts on a basis and priority consistent with the existing DIP Facility and DIP Charge.

8 As of February 20, 2012 the Debtors owed BMO approximately $24.5 million. BMO is the senior secured creditor and the DIP Lender. The priority position of the BMO is not in dispute.

9 BMO applies for a lifting of the stay in the *CCAA* proceeding and the appointment of a receiver over the Debtors to secure the property and assets of the Debtors, including the perishable food inventory, and to proceed with an orderly realization and maximization of the value of the Debtors' assets. Paragraph 36(b) of the Initial Order provided that upon the occurrence of an event of default under the Definitive Documents, BMO, as DIP Lender, could apply to the court for the appointment of a receiver. A Sale Process Default is a Specified Event of Default, and BMO gave notice of such a default this past Monday.

10 FTI has consented to act as receiver of the Debtors.

II. Analysis

11 In *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (S.C.J.) Pepall J. summarized the principles which should guide a court when facing a request to lift a stay of proceedings under the *CCAA*:

> 32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.
>
> 33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.* and Professor McLaren has added three more since then. They are:
>
> 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 significantly 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 passing 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.
>
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

12 Turning to the present case, BMO gave notice of its motion by e-mail yesterday to those on the Service List in the *CCAA* proceedings. Under the circumstances such short notice was necessary, and I validate the short service.

13 No party has appeared to oppose the motions to lift the stay and appoint a receiver. The Monitor supports the lifting of the stay and the appointment of a receiver. The Monitor also advised that the Saskatoon local of the employees' union does not oppose the orders sought.

14 Quite frankly, on the evidence before me, I see no other alternative than appointing a receiver. The Sales Process has fallen apart as a result of the inability to work out an arrangement with the Major Customer. Consistent with the terms of the DIP Facility approved in the Initial Order, BMO, as DIP Lender, has declined to make further advances and has served a notice of Sales Process Default. As a result, the Debtors have no access to further working funds.

15 The Board of the Debtors resigned *en masse* two days ago; the Debtors are rudderless, reducing the prospects of a viable proposal in the *CCAA* process down to nil. The Monitor advises that management instructed employees not to report to work yesterday, so the Debtors are not carrying on any business at the moment. A significant inventory of meat products sits in the Saskatoon facility, although the Monitor advises that any fresh meat either has been shipped out or frozen. In a very real sense the Debtors have ceased carrying on business as a going concern.

16 The appointment of a receiver is required to stabilize this situation for the benefit of all stakeholders of the Debtors.

17 BMO has filed a draft receivership order which contains some amendments to the Commercial List Model Receivership Order. I reviewed the proposed amendments with counsel in open court and heard submissions and explanations on some of the proposed changes. No party opposes the proposed draft receivership order. BMO and the receiver clarified that with respect to paragraphs 24 and 26 of the proposed order, the receiver will be bound by the terms of the February 7, 2012 letter from the Monitor to Westco which was placed before the court on the motion to obtain the February 16, 2012 extension order. BMO and the receiver confirmed, at the request of Debtors' counsel, that the orders sought would not terminate the existing *CCAA* proceedings.

18 In sum, I conclude that the pressing circumstances in which the Debtors find themselves make it just and reasonable to appoint a receiver over them. I therefore grant BMO's motion to lift the stay of proceedings in the *CCAA* matter, and I grant the Bank's motion to appoint FTI Consulting as receiver over the Debtors. I have signed the draft orders submitted by BMO.

END OF DOCUMENT

Case Name:

Nortel Networks 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 or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 3425

76 C.C.P.B. 307

2009 CarswellOnt 4806

57 C.B.R. (5th) 232

179 A.C.W.S. (3d) 801

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: June 16, 2009.
Judgment: August 18, 2009.

(41 paras.)

!!INV1700 !!INV00

[QL:QLKEYWORDS/]

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure Stays -- Of concurrent proceedings -- Motion by corporations for order extending stay to individual defendants in American action allowed and motion by employees of corporations for order lifting stay to allow American action to continue dismissed -- Employees brought action against corporations and individual defendants, who were officers and directors of corporations, alleging breach of duty in management of retirement plan, which was stayed against corporations as a result of Chapter 11 proceedings -- Action fell within terms of stay as allegations against individual defendants not restricted to actions as fiduciaries -- Employees not prejudiced as stay would only postpone action for short time.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.5, s. 11.5(1), s. 11.5(2)

Employee Retirement Income Security Act, 1974,

Rules of Civil Procedure, Rule 21

Counsel:

Alan Merskey, for Nortel Networks Corp. et al.

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

Leanne Williams, for Flextronics Inc.

J. Pasquariello, for Ernst & Young Inc., Monitor.

B. Wadsworth, for CAW-Canada.

Thomas McRae, for Recently Severed Calgary Employees.

(A) McKinnon, for the Former Employees.

Mary Arzoymanidis, for Bell Canada.

Alex MacFarlane, for the Unsecured Creditors' Committee.

Gavin Finlayson, for the Noteholders.

Tina Lie, for the Superintendent of Financial Services of Ontario.

Steven Graff and Ian Aversa, for the Current and Former Employees.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14-15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel,

because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50-109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;
(b) the bulk of documentary discovery issues have been worked out;
(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and
(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the

Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Appli-

> cants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Limited (Re)*, [2001] B.C.J. No. 2497 (S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Limited Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodwards Limited (Re)* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> 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 CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

G.B. MORAWETZ J.

cp/e/qlrxg/qlmxb/qlaxw/qlcas/qlhcs/qljxh/qlcal

Case Name:

Nortel Networks 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 or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation
Between
Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Appellants, and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor, Respondents
And between
National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Appellants, and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor, Respondents

[2009] O.J. No. 4967

2009 ONCA 833

59 C.B.R. (5th) 23

77 C.C.P.B. 161

99 O.R. (3d) 708

[2010] CLLC para. 210-005

256 O.A.C. 131

2009 CarswellOnt 7383

Dockets: C50986, C50988

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, K.N. Feldman and R.A. Blair JJ.A.

Heard: October 1, 2009.
Judgment: November 26, 2009.

(49 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Appeal by union and former employees of company under protection from dismissal of motion for directions dismissed -- Appellants sought direction requiring company to make periodic retirement and severance payments to former employees as required by collective agreement and provincial employment standards legislation -- Appellate court upheld finding that payments were not exempted from stay provisions of protection order -- Payments sought by union were deferred compensation for past services rather than compensation for current services exempted from the stay -- Payments sought by former employees under provincial standards legislation were not exempted under application of doctrine of paramountcy -- Companies' Creditors Arrangement Act, ss. 11, 11.3(a) -- Employment Standards Act, s. 11(5).

Constitutional law -- Constitutional validity of legislation -- Interpretive and constructive doctrines -- Paramountcy doctrine -- Appeal by former employees of company under protection from dismissal of motion for directions dismissed -- Former employees sought direction requiring company to make retirement and severance payments to former employees as required by provincial employment standards legislation -- Appellate court upheld finding that payments were not exempted from stay provisions of protection order under application of doctrine of paramountcy -- To find otherwise would defeat intent of stay provisions providing for restructuring for benefit of all stakeholders -- Companies' Creditors Arrangement Act, ss. 11 -- Employment Standards Act, s. 11(5).

Employment law -- Employment standards legislation -- Constitutional issues -- Appeal by former employees of company under protection from dismissal of motion for directions dismissed -- Former employees sought direction requiring company to make retirement and severance payments to former employees as required by provincial employment standards legislation -- Appellate court upheld finding that payments were not exempted from stay provisions of protection order under application of doctrine of paramountcy -- To find otherwise would defeat intent of stay provisions providing for restructuring for benefit of all stakeholders -- Companies' Creditors Arrangement Act, ss. 11 -- Employment Standards Act, s. 11(5).

Two appeals by the former employees of Nortel, and the union, CAW-Canada, from dismissal of their motions for directions. The Nortel companies were granted protection under the Companies' Creditors Arrangement Act (CCAA). The order provided for a stay of all proceedings against Nortel and a suspension of all rights and remedies against Nortel. The collective agreement between Nortel and the union obliged Nortel to make periodic payments to former employees that had retired or been terminated. Nortel ceased making the periodic payments following the protection order. The payments at issue for the union were monthly payments under the Retirement Allowance Plan, payments under the Voluntary Retirement Option and termination and severance payments. The payments at issue for former employees included payments immediately payable pursuant to the Employment Standards Act (ESA) in respect of termination, severance and vacation pay, payments for continuation of benefit plans, certain pension benefit payments and a transitional retirement allowance. The appellants brought a motion for directions requesting an order directing Nortel to resume the periodic payments. The union submitted that the collective agreement was not divisible into separate obligations to current and former employees, and thus the periodic payments fell within the scope of compensation for services exempted from the protection order under s. 11.3(a) of the CCAA. The former employees submitted that the effect of the protection order could not override payments owed under the ESA. In dismissing both motions, the judge distinguished crystallization of the periodic payment obligations under the collective agreement from the provision of a service within the meaning of s. 11.3, as the services of former employees were provided pre-filing of the protection order. The union and the former employees appealed.

HELD: Appeals dismissed. The periodic payments sought by the union were not excluded from the stay provisions of the protection order under s. 11.3(a) of the CCAA. The payments required for current services provided by Nortel's continuing employees did not encompass the periodic retirement or severance payments owed to former employees. Such payments were best characterized as deferred compensation under predecessor collective agreements rather than compensation for services currently being performed for Nortel. In addition, the vested interest of former employees in such payments was inconsistent with current services being the source of the obligation to pay. The statutory payments sought by former employees were not excluded from the stay provisions of the protection order. The stay provisions of the CCAA were intended to freeze Nortel's debt obligations in order to permit restructuring for the benefit of all stakeholders. Upon consideration of the doctrine of paramountcy, such intent would be frustrated if the order did not apply to termination and severance payments owed under the provincial ESA to terminated employees in respect of past services. The effect of the stay related to the timing of the statutory payments rather than the interrelationship between ESA and the CCAA in respect of ultimate payment of Nortel's statutory obligations.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, s. 11, s. 11(3), s. 11(4), s. 11.3(a)

Employment Standards Act, 2000, S.O. 2000, c. 41, s. 11(5)

Appeal From:

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated June 18, 2009, with reasons reported at (2009), 55 C.B.R. (5th) 68, [2009] O.J. No. 2558.

Counsel:

Mark Zigler, Andrew Hatnay and Andrea McKinnon, for the appellants, Nortel Networks Former Employees.

Barry E. Wadsworth, for the appellant, CAW-Canada.

Suzanne Wood and Alan Mersky, for the respondents, Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation.

Lyndon A.J. Barnes and Adam Hirsh, for the respondents, Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

Benjamin Zarnett, for the monitor Ernst & Young Inc.

Gavin H. Finlayson, for the Informal Nortel Noteholder Group.

Thomas McRae, for the Nortel Canadian Continuing Employees.

Massimo Starnino, for the Superintendent of Financial Services.

Alex MacFarlane and Jane Dietrich, for the Official Committee of Unsecured Creditors

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The judgment of the Court was delivered by

1 **S.T. GOUDGE and K.N. FELDMAN JJ.A.**:-- On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36, ("*CCAA*").

2 In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

3 The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for

directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

4 The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

5 We will address each of the two appeals in turn.

THE UNION APPEAL

Background

6 The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to unionized employees who have been terminated or who have severed their employment at Nortel.

7 Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

8 The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

> 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.

9 The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the *CCAA*.

10 The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

11 The Union challenges this conclusion.

12 In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

13 Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

14 Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

15 In our opinion, this argument must fail.

Analysis

16 Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

17 Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

18 Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

20 Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

21 The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al.* (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

22 Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

23 In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

24 The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

25 The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

26 After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

27 For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

28 Neither the provincial nor the federal governments responded to the notice on this appeal.

29 Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> ...

(b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court.*

...

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business. [Emphasis added.]

30 Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

31 As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

32 Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

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; [the Bankruptcy and Insolvency Act and the Winding Up Act]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

33 As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

34 Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

35 As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 at para. 43.

36 The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

37 However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

38 Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or

> that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

39 The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

40 The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

41 In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

42 While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

43 The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

44 However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances

and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

45 Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

46 Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the *CCAA* process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

47 The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

48 We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

49 The appeal by the former employees is also dismissed.

S.T. GOUDGE J.A.
K.N. FELDMAN J.A.
R.A. BLAIR J.A.:-- I agree.

cp/e/ln/qlaim/qlaxw/qlsxs/qlced/qlhcs/qlcas/qljyw/qlhcs

1 The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

2 The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd. (Re)* [2009] O.J. No. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

1990 CarswellBC 384, 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105

1990 CarswellBC 384, 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105

Quintette Coal Ltd. v. Nippon Steel Corp.

RE QUINTETTE COAL LTD.; QUINTETTE COAL LTD. v. NIPPON STEEL CORPORATION et al.

British Columbia Court of Appeal

Legg, Wood and Gibbs JJ.A.

Heard: October 30, 1990
Judgment: November 16, 1990
Docket: Doc. Vancouver CA012636

Counsel: *J.D. McAlpine*, Q.C., *P.A. Hildebrand* and *P.R. Bennett*, for appellant.

Jack Giles, Q.C. and *W.D.S. Wade*, for respondent.

James P. Taylor, Q.C., for Bank of Montreal and Canadian Imperial Bank of Commerce (creditors).

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act.

Corporations — Arrangements and compromises — Company obtaining order under Companies' Creditors Arrangement Act allowing it 6 months to prepare plan of compromise or arrangement between itself and its creditors and restraining proceedings against it during that time — Order specifying that no creditors permitted to exercise right of set-off against corporation — Right of set-off being "proceeding" under Act — Order within discretionary power granted by Act and in accordance with Act's overall intent — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The petitioner obtained an order under the *Companies' Creditors Arrangement Act* (the "Act") permitting it to prepare and present a plan of compromise or arrangement between itself and its creditors within 6 months and restraining further proceedings in any action, suit or proceeding against the petitioner during that period. The order also provided that no creditor of the petitioner could exercise any right of set-off against debts owed to the petitioner. The respondent Japanese steel companies had entered into contracts with the petitioner in 1981 whereby they agreed to purchase all of the petitioner's coal production. The contracts provided for a price review every 4 years. The parties were unable to agree on pricing in 1985 and the matter was referred to arbitration. The effect of the arbitration award was that the petitioner owed the respondents $46 million. The respondents applied for a declaration that the order under the Act did not affect the arbitration award and to have the set-off provision set aside as against them. The application was un-

successful and the respondents appealed.

Held:

The appeal was dismissed.

The Act permits a court to restrain further "proceedings" and if the object of the Act is to be achieved, that term must be construed as including not just legal proceedings but also extra-judicial conduct such as a withholding of payment. The Chambers Judge did not err in the exercise of his discretion.

Cases considered:

Feifer & Frame Manufacturing Corp., Re, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Food Ltd., [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *applied*

Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *applied*

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.) — *applied*

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 201, 48 B.L.R. 32 (S.C.), aff'd (1990), [1991] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207 (C.A.), leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d) xxviii (note) (S.C.C.) — *referred to*

Ursel Investments Ltd., Re (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.) — *referred to*

Vachon v. Canada Employment & Immigration Comm., [1985] 2 S.C.R. 417, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 63 N.R. 81 — *applied*

Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.), aff'd 45 C.B.R. (N.S.) 11 (Que. C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3 —

s. 49 [now R.S.C. 1985, c. B-3, s. 69]

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 69

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

s. 2

s. 6

s. 11

International Commercial Arbitration Act, S.B.C. 1986, c. 14.

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 12

APPEAL from dismissal of application for order setting aside portion of order made under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 restraining further proceedings against petitioner and restraining right of set-off against debts owed to the petitioner, reported at 2 C.B.R. (3d) 291.

The judgment of the Court was delivered by *GIBBS J.A.*:

1 This is an appeal from a judgment of Thackray J. (reported at (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193), dismissing an application by the appellant Japanese companies for an order setting aside part of an order made by him on June 13, 1990 under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A."). The primary ground of appeal is stated in the factum of the Japanese companies to be that:

> The Learned Chambers Judge erred in holding that the power to stay any 'suit, action or other proceeding ... against the company', in s. 11 of the CCAA conferred jurisdiction upon the Court to restrain the JSI from exercising their right to set-off the Overpayments in paying for future coal deliveries.

2 The "right to set-off the Overpayments in paying for future coal deliveries" as asserted by the Japanese companies arose upon the delivery of an arbitral award made under the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14 on May 28, 1990. The background to the arbitral award and the details of the award were discussed at some length in the judgment of Esson C.J.S.C. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 201, 48 B.L.R. 32, and in the judgments of a division of this Court on the appeal from Esson C.J.S.C. handed down on October 24, 1990 under Vancouver Registry No. CA012743 [now reported [1991] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207 (C.A.), leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d) xxviii (note) (S.C.C.)]. It is sufficient for purposes of this appeal to note that the award set a schedule of prices to be paid for coal deliveries made by Quintette for a 4-year period commencing April 1, 1987. The Japanese companies had paid higher prices for coal deliveries during the arbitration process than those set in the award. As a consequence, upon delivery of the award, the respondent Quintette owed the Japanese companies $45,745,220.22, representing the total amount of the overpayment.

3 Quintette continued to make coal deliveries, as it was required to do by contract, and also as it had to do if it wished to survive as a going concern. The Japanese companies collectively are the sole customer for Quintette coal. They are obliged by contract to pay for coal delivered at the rates set by the arbitral award. However, not surprisingly, they also want the overpayment debt to be paid. On May 31, 1990, they demanded payment. Quintette did not pay. Thereupon the Japanese companies commenced to retire the debt by withholding funds otherwise payable as the purchase price of the ongoing coal deliveries. By June 13, 1990, the date of the C.C.A.A. order, the debt had been reduced by the withholding process to $36,180,876.22.

4 At some time prior to June 12, 1990, Quintette became a debtor company as defined in s. 2 of the C.C.A.A. On that day, Quintette applied ex parte, by way of a petition, for various C.C.A.A. orders so as to facilitate the making of a formal plan of compromise or arrangement with its creditors. The then total of secured and unsecured debt, according to the petition, was of the order of $772 million. On the following day, Thackray J. made a comprehensive order which includes this paragraph which is at the root of this appeal:

> AND THIS COURT FURTHER ORDERS that no creditor of the Petitioner may exercise any right of set-off against any debts owed to the Petitioner including, without limitation, monies owed in respect of the sale of the Petitioner's coal to the Japanese Coal Purchasers or any member thereof and monies on deposit with any bank or other accounts of the Petitioner.

5 On June 14, 1990, the Japanese companies applied for an order setting aside the prohibition in this paragraph so that they could continue the pattern of withholding funds payable for current coal deliveries. Thackray J. heard the application on June 15, 1990, and dismissed it with written reasons on June 18, 1990, reported, as noted above, at (1990), xx C.B.R. (3d) xxx, 47 B.C.L.R. (2d) 193. Now, on this appeal, the Japanese companies request the following relief:

> The JSI respectfully request an Order setting aside:
>
> (a) The Order of Mr. Justice Thackray made June 18, 1990, dismissing the JSI application made June 15, 1990; and
>
> (b) That portion on the Ex Parte Order precluding the JSI from exercising their right to set-off in respect to the Overpayments.

6 The principal issue on the appeal is whether the prohibition in the impugned paragraph is or is not within the powers vested in the court by s. 11 of the C.C.A.A.:

> 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* or 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 company except with the leave of the court and subject to such terms as the court imposes.

7 However, the issue is not to be resolved by construing the language of s. 11 in isolation. P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) states the basic rule at p. 47:

> It was resolved in the *Case of Lincoln College* that the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself.' Every clause of a statute is to 'be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute.

And at p. 58 reference is made to "an elementary rule" of construction:

> Passing from the external aspects of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself.

8 The starting point in the construction exercise is an understanding of the historical setting of the C.C.A.A. to the end that s.11 is read in such a manner as to achieve the object of Parliament. *Maxwell* speaks of the historical setting as an aid to construction at pp. 47 and 48:

> 'The Court,' said Sir George Jessel M.R., 'is not to be oblivious ... of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended.' In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject-matter, and may also consider whether a statute was intended to alter the law or to leave it exactly where it stood before. But although 'we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge ... we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act.'

9 In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, Vancouver Registry CA12944, judgment handed down on October 29, 1990 [now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], another division of this Court reviewed the historic background of the C.C.A.A., saying, at pp. 10 and 11 [unreported, p. 91 B.C.L.R.]:

> The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed — the Bankruptcy Act and the Winding-up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

10 The Court then quoted excerpts from an article by Stanley E. Edwards at p. 587 of (1947) 25 Can. Bar Rev. entitled "Reorganizations Under the Companies' Creditors Arrangement Act" which, it said, "explain very well the historic and continuing purposes of the Act":

> It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the manage ment may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

(p. 592)

> There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.
>
> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations.

(p. 590)

11 It is evident from the above that, providing no violence is done to the words used by Parliament, s. 11 is to be construed so as to confer on the Court the power to permit Quintette to continue as a going concern while the attempt at compromise or arrangement or reorganization is being actively pursued. Here Thackray J. gave Quintette 6 months from June 13, 1990, or such longer period as may be or dered, to reach an accommodation with its creditors. As the Court pointed out at p. 7 [unreported, pp. 88-89 B.C.L.R.] of *Chef Ready*:

> [I]f the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

12 Narrowing the focus of the enquiry somewhat, it is apparent that, with the possible exception of s. 11, the operative provisions of the C.C.A.A. apply precisely to the fortunes of Quintette and to the circumstances which obtain as between Quintette and the Japanese companies. Quintette is a debtor company; the Japanese companies, collectively, are a creditor. Quintette as debtor is proposing a compromise or arrangement with its creditors, including the Japanese companies. The Court may sanction and make binding on all creditors, including the Japanese companies, a compromise or arrangement agreed upon by a "majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be" (s. 6). With respect to value, the $36 million June 13, 1990 debt owed to the Japanese companies represents approximately 4-1/2 per cent of the total of secured and unsecured debt. It would be anomalous indeed if, by denying or restricting cash flow, a 4-1/2 per cent creditor could frustrate the compromise or arrangement because s. 11 did not apply, whereas if s. 11 did apply so that a stay could be ordered a creditor or creditors of up to 25 per cent could ultimately be forced to defer to the compromise or arrangement agreed upon by the 75 per cent. If the language of s. 11 so confines the Court that that result flows the anomalous consequence must be accepted. On the other hand, if there is a reasonable construction which more nearly reflects the intention of the legislators, and avoids the anomaly, it is to be preferred.

13 The other aid to construction which is appropriate here is the view other courts have taken of s. 11. *Maxwell* at p. 47 (see above) quotes Sir George Jessel M.R. as saying, inter alia, "when ... prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out

that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."

14 Considering that the C.C.A.A. was enacted some 57 years ago, there are relatively few reported cases interpreting its provisions. That may be a reflection of the general level of prosperity, with some short-term reverses, which has been the Canadian experience for the past 50-plus years. In any event, and whatever the reason, the reported cases indicate that the courts have tended to avoid microscopic parsing of the words and phrases of s. 11 in favour of a broader "purposes" perspective, thereby reaching conclusions held to further the objectives of Parliament. Without so stating they have given full effect to the direction in s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

15 The following cases are illustrative of the kind of conduct the courts have found to be within their power to restrain under s. 11: *Re Feifer & Frame Manufacturing Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Canada Inc. v. Gaz Métropolitain* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.), aff'd 45 C.B.R. (N.S.) 11 (Que. C.A.); *Norcen Energy Resources v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.). The judgments also contain helpful and persuasive observations about the intent and purpose of the Act, as do the following judgments: *Meridian Developments Inc. v. Toronto-Dominion Bank*; *Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.); *Re Ursel Investments Ltd.* (2 March 1990), Doc. Q.B. J.C.S. 1917/89 (Sask. Q.B.) [now reported 2 C.B.R. (3d) 291]; and *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.). And in his judgment in this case, Thackray J. adopted the approach followed in *Meridian* and *Norcen*. There is a perceptive observation about the attitude of the courts at the end of the case comment following the C.B.R. report of *Norcen* [at p. 19]:

> The *Norcen* decision is one of the strongest examples to date of the willingness of the courts to permit the C.C.A.A. to be used as a practical and effective way of restructuring corporate indebtedness.

16 By way of brief summary, the subject matter of each of the judgments which has a direct bearing on the scope of s. 11 is as follows: in *Feifer and Frame*, supra, a notice of eviction by a landlord; in *Wynden Canada*, supra, cessation of utility services; in *Meridian*, supra, a letter of credit; in *Norcen*, supra, a replacement of the operator under an oil and gas operating agreement.

17 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. The power is discretionary and therefore to be exercised judicially. It would be a reasonable expectation that it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from, or services thereafter received from, the debtor company, as is the case here. In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances.

18 The order made by Mr. Justice Thackray was in accord with his understanding of the "overall intention of the Act" and consistent with the reported cases. It falls well within the "general principle" distilled from those cases. At p. 199 [B.C.L.R., p. 297 C.B.R.], after considering the submissions of counsel for the Japanese companies, he said:

> I must look to the overall intention of the Act, and, as has been put before me by Quintette, what is required within an order to allow Quintette the time to reorganize and make a proposal. Unless there is a sound legal principle for doing so, I must not carve out one portion of the order and give an advantage to one creditor over another. I have not acceded to the arguments of counsel for J.S.I. and consequently I cannot find the legal basis for compromising the effect of the ex parte order.

19 The one remaining question is whether, to return to an expression used earlier, the order does violence to the words used by Parliament. The critical words in s. 11(b) are "restrain further proceedings in any action, suit or proceeding against the company"; and in s. 11(c) "make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company." Either subsection might apply dependent upon the view taken of the withholding conduct by the Japanese companies. But whichever applies, the question remains the same and that is whether "proceeding" is to be understood as a legal proceeding only. In *Meridian*, Wachowich J. held that it was not to be so narrowly construed, as did Forsyth J. in *Norcen*. As well, there is higher court support for a broad construction which would include extra-judicial conduct within the meaning of "proceeding" in this statute. In *Vachon v. Canada Employment & Immigration Comm.*, [1985] 2 S.C.R. 417, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 63 N.R. 81, Beetz J., for the Court, held that with holding payment of unemployment insurance benefits, even though authorized by statute, was contrary to the provisions of s. 49 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 121 [C.B.R., p. 426 S.C.R.] he said:

> The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to *suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.*

[Emphasis added.]

20 With the exception of the first sentence, what Beetz J. said in this paragraph reflects precisely the attitude the courts have taken in respect of the C.C.A.A. It must be recognized that s. 49 of the *Bankruptcy Act* is worded differently and includes the word "remedy". However, it should also be noted that the paragraph quoted above appears at the end of a section of the judgment entitled "General Nature of Stay of Proceedings Imposed by s. 49(1) of the Bankruptcy Act" in which no fine distinction is drawn between "remedy" and "proceeding". The emphasis is on the intention of Parliament and the objectives of the statute. And earlier on p. 121 [C.B.R., p. 426 S.C.R.], Beetz J., again in language that applies equally to the C.C.A.A., said:

> [I]n my opinion the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*.

21 There is no rational ground for treating withholding by an arm of government, an "administrative" proceeding, differently than withholding by a private person. Accordingly, the withholding by the Japanese companies is as much a proceeding which can be restrained under s. 11 of the C.C.A.A. as was the withholding by the unemployment insurance authorities which was prohibited, except with leave, under s. 49 of the *Bankruptcy Act*.

22 The word "withholding" has been used throughout these reasons so as to distinguish from the concept of "set-off". The Japanese companies put their case forward on appeal primarily on the ground that what they were engaged in was set-off and that set-off was not a proceeding. With respect, the argument failed to recognize the difference between set-off in the colloquial sense and set-off in terms of the legal lexicon. Set-off in law is only available as a defence. It has been described as "a shield and not a sword." In respect of the payments due for ongoing coal deliveries, Quintette has not sued for the amounts withheld. The Japanese companies have not therefore been put into a position where they could raise the set-off shield. On the contrary, they have had, and wish to continue to have, recourse to set-off, in the colloquial sense, as a sword to achieve a species of extra-judicial execution. The sword is being, and is intended to be, wielded "against the company". As it is a proceeding against the company it is within the power of the Court to restrain under s. 11 of the C.C.A.A.

23 As Thackray J. has not been shown to have erred, either in his reasoning or in his disposition of the application before him, he will be upheld on the first ground of the appeal.

24 The second ground of appeal focuses on the exercise of the discretion vested by s. 11. The Japanese companies say that:

> If s. 11 does confer jurisdiction on the Court to restrain the JSI's right of set-off, the Learned Chambers Judge erred in all the circumstances of this case in exercising his discretion under s. 11 to dismiss the application of the JSI that they be permitted to exercise their right of set-off.

25 There is not much substance to this ground. Mr Justice Thackray was called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing the application to vary the stay order. On the one hand, he had the $36 million debt owing to a single creditor, the Japanese companies; on the other hand he had what the Court referred to at p. 13 of *Chef Ready* as "a broad constituency of investors, creditors and employees." The Quintette constituency comprises approximately $3 billion of public and private investment, the other 95.5 per cent in value of the secured and unsecured debt, and 1,500 persons directly employed in the enterprise, plus their dependants. It would not require much reflection on the part of a trial judge to conclude that the equities fell on the side of postponement of steps to be taken to realize the $36 million debt.

26 There was no error in the exercise of the discretion here.

27 For all of the foregoing reasons, I would uphold the judgment of Mr. Justice Thackray. It follows that I would dismiss the appeal.

Appeal dismissed.

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2001 CarswellBC 2662, 2001 BCSC 1644, 95 B.C.L.R. (3d) 116, [2002] B.C.W.L.D. 28

2001 CarswellBC 2662, 2001 BCSC 1644, 95 B.C.L.R. (3d) 116, [2002] B.C.W.L.D. 28

SNV Group Ltd., Re

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

And IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT as amended, R.S.C. 1985, C-44

And IN THE MATTER OF SNV GROUP LTD. and SNV INTERNATIONAL LTD. (PETITIONERS)

British Columbia Supreme Court

Pitfield J.

Heard: November 13, 2001
Judgment: November 28, 2001
Docket: Vancouver L012888

Counsel: *Mary I.A. Buttery*, for Petitioner

Craig D. Johnston, for Respondent, Park Hotel (Edmonton) Ltd.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — General

Debtor was corporation which sold vacation packages — Creditor was corporation which operated hotel — Debtor entered into contract with creditor whereby guests would book and pay for rooms at hotel through debtor — Debtor fell into arrears in payments to creditor — Creditor processed certain payments for guests booked by debtor directly from guests — Debtor entered into arrangement under Companies' Creditors Arrangement Act — Creditor processed remainder of payments for guests booked by debtor directly from guests — Debtor's application to amend order to prevent creditors from seeking payment directly from hotel guests was granted — Debtor brought application for declaration that creditor was in breach of arrangement under Act — Application dismissed — Creditor had not violated arrangement as amendment preventing creditors from seeking payment from guests was made after payments had been processed from guests — Amendments to arrangement was not retroactive — Creditor was no longer creditor at time that arrangement was amended — Court does not have capacity to undo transactions completed before effective date of order under Act — Stay of proceedings or order that creditor repay guests was inappropriate — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Pitfield J.*:

Lehndorff General Partner Ltd., Re, 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

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

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193, 2 C.B.R. (3d) 291 (B.C. S.C.) — considered

T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Woodward's Ltd., Re, 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

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

Generally — considered

s. 11 — referred to

s. 11(3) — considered

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

APPLICATION by debtor for declaration that creditor's actions were in violation of arrangement under *Companies' Creditors Arrangement Act*.

***Pitfield J.*:**

1 SNV Group Limited and its wholly owned subsidiary SNV International Ltd. (collectively "SNV") are operating under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 pursuant to the terms of an initial *ex parte* order obtained October 18, 2001 and amended on October 29, 2001. On November 16, 2001 the initial stay of proceedings was extended to 6:00 p.m. on December 14, 2001 unless extended by further order of the Court before that time.

2 SNV applies for an order finding Park Hotel (Edmonton) Ltd., carrying on business as Dominion Hotel in Victoria, British Columbia, in contempt of the order for having taken steps to collect room charges from guests rather than limiting its pursuit of payment to SNV to whom the guests had pre-paid the room charges.

3 The relevant facts are the following. SNV is engaged in the business of marketing vacation packages that include hotel accommodation. SNV sells the packages at both the wholesale and retail levels of trade. SNV entered into an agreement with Dominion Hotel whereby the hotel was obliged to provide rooms at specified rates to persons on whose behalf SNV made reservations. The agreement describes the manner in which Dominion Hotel would be paid as follows:

> The Dominion Hotel will invoice your organization for all contracted services. Payment terms are 30 days net. Accounts more than 30 days overdue are subject to a surcharge equivalent to 1.5% per month calculated from the billing date.

4 The agreement describes the voucher system that would be used by guests in the following terms:

> [SNV] clients travel with pre-paid travel vouchers which will be presented upon check-in. These vouchers normally cover room and taxes only. However, if there are any variances to that, it will have been noted at the time of reservation. As well, the voucher will make note of this variance. Our wholesaler partners might also issue vouchers on our behalf and in such cases it will be clearly indicated that billing is to be forwarded to SNV International. Should your records differ from that of the voucher, please call us immediately.

5 Upon arrival at the Dominion Hotel with room voucher in hand, each guest was obliged to provide a credit card imprint and to sign a guest registration form, the text of which included the following:

> The management is not responsible for valuables not secured in safety deposit boxes provided at the front desk. *I agree that my liability for this bill is not waived and agree to be held personally liable in the event that any of the above indicated person(s), company(s), or association(s) fails to pay any or the full amount of all charges associated with this account including the 'DB' rate.* I further agree that I am responsible for any damages to or missing items from my guest room and will be charged accordingly by hotel management. I also agree that all charges contained in this account are current and any disputes or requests for copies of charges must be made within five days after my departure. [emphasis added]

6 By mid-September 2001, SNV owed Dominion Hotel approximately $40,000 in respect of guest room charges and the account was in arrears. Dominion Hotel concluded that the collection of the amount owing by SNV was in jeopardy. It began to process room charges to the credit cards of the guests in reliance upon the guest registration forms it had in hand. Charges made to guests in this manner during the week of September 26, 2001 approximated $30,000. The remaining portion of the unpaid room charges approximating $10,000 was billed to guests on October 27, 2001. SNV owed no amount to Dominion Hotel after October 27, 2001 in respect of pre-October 18th room charges as a result.

7 Paragraph 3(h) of the initial order obtained October 18, 2001 provided as follows:

> 3(h) no creditor of [SNV] who has received pre-payment in respect of post-filing claims may seek payment directly from a traveller in respect of the same services, or in an effort to satisfy any pre-filing claims.

8 The initial order was amended on October 29, 2001 upon further application by SNV on notice only to SNV's banker. Paragraph 3(k) was added as follows:

> 3(k) no creditor of [SNV] may seek payment directly from a traveller for travel that has already occurred in an effort to satisfy any pre-filing claims, and a creditor who has charged a traveller directly in satisfaction of such claim shall immediately process a refund to that traveller.

9 SNV agrees that paragraph 3(h) of the initial order did not apply to the actions of Dominion Hotel in respect of guest charges for the period preceding October 29, 2001. It says, however, that paragraph 3(k) applies to Dominion Hotel and the hotel acted in contravention of the order by seeking payment directly from travellers and omitting to process refunds in the manner directed by the paragraph.

10 Dominion Hotel says it was not a creditor of SNV at October 29, 2001 when paragraph 3(k) became effective. It says it elected to recover payment from the guests rather than SNV and, by processing the credit card charges, it

ceased to be a creditor of SNV. Dominion Hotel also says that the Court does not have jurisdiction, whether under the *CCAA* or by virtue of its inherent jurisdiction, to order the refund of the amounts the hotel charged to guests before October 29, 2001.

11 In the circumstances, the applicable legal principles are these.

12 The *CCAA* confers a statutory power upon the Court to grant a stay of proceedings in respect of a debtor company or its assets. Section 11(3) of the *CCAA* provides as follows:

> 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.

13 The statutory power conferred by s. 11(3) of the *CCAA* is not restricted to a stay of proceedings involving persons who are creditors of SNV but extends to any person who is in position to take action in respect of SNV or its assets: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.), at pp. 12-17; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 193 (B.C. S.C.) at p. 200; and *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) at p. 5.

14 The statutory power to grant a stay is augmented by the Court's inherent jurisdiction to grant a stay in appropriate circumstances: *Woodward's Ltd., Re*, [1993] B.C.J. No. 42 (B.C. S.C.) at para. 32; *Lehndorff General Partner Ltd., Re*, *supra*, at p.7; and *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.)at para. 6. The power to augment the stay permitted by s. 11(3) of the *CCAA* allows the Court to stay, prohibit or restrain proceedings that may be taken by any person against another person who is not the debtor where that proceeding may have the effect of placing the possibility of concluding a compromise or arrangement at risk: see *Woodward's Ltd., Re*, *supra*, at para. 32; *T. Eaton Co., Re*, supra, at para. 6. In *CCAA* proceedings, the inherent power to augment the stay should be exercised with caution: *Woodward's Ltd., Re*, *supra*, at paras. 33, 34.

15 I have concluded that the actions of Dominion Hotel cannot and should not be controlled by a stay of proceedings or order to repay.

16 Dominion Hotel was not a creditor of SNV at October 29, 2001. The actions of Dominion Hotel in respect of the outstanding guest accounts were taken prior to the grant of any order of the Court that might apply to the hotel. Three-quarters of the amounts owing were billed to guests in the latter part of September, considerably in advance of the October 18th initial order. The remaining actions in respect of outstanding guest accounts were taken by Dominion Hotel on October 27, 2001, two days before the initial order was amended by the addition of paragraph 3(k).

17 On October 18th, SNV applied for the protection it thought necessary to facilitate the compromise or arrangement it wished to complete with its creditors. It made no application to stay any proceeding by any person claiming indemnity from a third party in relation to a SNV trade obligation. When it applied for and obtained an amendment on October 29, 2001, SNV did not attempt to extend paragraph 3(k) of the order to anyone other than creditors, nor did it apply to make the order retroactive.

18 The capacity to stay, whether pursuant to s. 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the *CCAA* or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The *CCAA* is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

19 It follows that in this proceeding, I need not be concerned whether there was a binding agreement between any guest and Dominion Hotel obliging the guest to pay the amount of the room charge notwithstanding the presentation of a pre-paid room voucher to the hotel or, if so, whether the contract is in the nature of a guarantee so that the Court might be prohibited from making an order in the nature of a stay by virtue of s. 11.2 of the *CCAA*. The question whether there was an enforceable agreement between Dominion Hotel and any guest permitting the hotel to recover room charges from the guest is a matter that must be resolved in proceedings taken by the guests against Dominion Hotel and perhaps SNV independent of the *CCAA* proceedings.

20 Because Dominion Hotel was not a creditor of SNV at October 29, 2001 and because the Court cannot order a stay of proceedings in relation to actions completed before the effective date of an order, Dominion Hotel cannot be in contempt of the order of October 29, 2001 due to the fact that it processed charges to guests.

21 Dominion Hotel is not in contempt of the requirement in paragraph 3(k) of the order requiring repayment of amounts to persons from whom payment has been obtained. Paragraph 3(k) should not be construed to require repayment of amounts received before the effective date of the order. The purpose of paragraph 3(k) is to require repayment where, by virtue of lack of notice of the order that was in place, payment might have been obtained in innocent rather than contemptuous contravention of the stay imposed by paragraph 3(k).

22 Were the Court empowered to make an order requiring Dominion Hotel to undo that which it has done to the guests, I would decline to exercise my discretion to do so.

23 There is insufficient evidence from which I could conclude that repayment would improve the prospects of concluding a compromise or arrangement. I could not conclude that the fact room charges have been collected from the guests will adversely affect, in any substantial respect, the prospect of a compromise or arrangement being concluded.

24 SNV claims that the fact Dominion Hotel has unilaterally collected amounts from guests may affect the willingness of travellers to do business with SNV. There is no circumstantial evidence to indicate that the concern is real, particularly in light of the fact that suppliers to SNV in the post-filing period are insisting upon pre-payment of guest room charges in any event.

25 SNV is concerned that a company called Canadian Affair with which it deals has refused to pay an account of approximately $400,000 because approximately $8,000 of that sum that was ear-marked for payment by SNV to Dominion Hotel has already been collected by the Dominion Hotel through credit card charges to guests. The question whether the agreements among Dominion Hotel, SNV, Canadian Affair and the guests justify the refusal of Canadian Affair to pay any part of its outstanding debt to SNV will have to be determined in independent enforcement proceedings initiated by SNV. The Court's power to stay proceedings cannot assist in the resolution of that dispute.

26 I do not agree with the SNV claim that other creditors who are hotels might attempt to do to guests as Dominion Hotel has done. Other SNV creditors who might claim to be in a position similar to that of Dominion Hotel in respect of guests are precluded from taking any steps to recover amounts directly from guests by credit card charges

because of the prospective application of paragraph 3(k) from and after October 29, 2001.

27 In the circumstances the SNV application to find Park Hotel (Edmonton) Ltd. in contempt is dismissed. Because it is unclear whether, having regard for the contractual relationship between SNV and Dominion Hotel, the hotel had an enforceable agreement with guests permitting it to charge them directly, this is an appropriate case for the parties to this application to bear their own costs.

Application dismissed.

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1991 CarswellOnt 215, 8 C.B.R. (3d) 62

Sairex GmbH v. Prudential Steel Ltd.

Re ALGOMA STEEL CORPORATION, LIMITED; SAIREX GmbH v. PRUDENTIAL STEEL LIMITED, DOFASCO INC. and TITAN INDUSTRIAL CORPORATION

Ontario Court of Justice (General Division), Commercial List

Farley J.

Heard: August 16, 1991
Judgment: August 19, 1991
Docket: Docs. 75663/91Q, RE 313/91

Counsel: *D. Wilson* and *T.W. Ward*, for plaintiff.

C. Thompson, Q.C. and *D. Short*, for Algoma Steel Corp., Dofasco Inc. and Prudential Steel Ltd.

M. Barrack, for Algoma Steel Corp.

B.S. Wortzman, Q.C. and *C. Simco*, for Titan Industrial Corp.

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

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act.

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restrictive covenants.

Corporations — Arrangements and compromises — Motion for leave to proceed against company having protection order under Companies' Creditors Arrangement Act and for injunctions restraining company's activities — Factors considered — Motion dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The plaintiff S entered an agreement with the plaintiff A whereby S would be the sole sales representative of A in China. A breached the agreement, allowing another agent to represent it in China. S brought a motion for: (1) leave to proceed against A, as A had obtained a protection order pursuant to s. 11 of the *Companies' Creditors Arrangement Act* ("CCAA"); (2) an interlocutory injunction restraining A from continuing to breach the agreement; (3) an interlocutory injunction restraining A's other agent and A's parent company from causing A to breach the agreement. A was willing to provide S with the specifics necessary to enable S to calculate its loss of commissions.

Held:

The motion was dismissed.

The status quo should be maintained for the period in which the proposal was being developed for approval by A's creditors. The injunctions sought would seriously impair the company's ability to continue in business during this period. That the defendant might be impecunious at the time of trial was not germane to a consideration of the balance of convenience in determining whether an injunction should issue. In considering these factors and weighing the various degrees of prejudice that would flow, leave was refused.

Public policy dictates that a company under CCAA protection should not be allowed to engage in offensive business practices from the safety of the Act. However, in this case A's dominant purpose was not to harm S but an ill-conceived attempt to save money.

To maintain confidentiality, the disclosure of specifics by A to S should be the details necessary to make the calculation of lost commissions and not details of contracts entered into.

Cases considered:

Bank of Montreal v. James Main Holdings Ltd. (1982), 28 C.P.C. 157 (Div. Ct.) — *considered*

Chomedy Aluminium Co. v. Belcourt Construction (Ottawa) Ltd. (1979), 24 O.R. (2d) 1, 97 D.L.R. (3d) 170 (C.A.) — *referred to*

DiGulio v. Boland, [1958] O.R. 384, 13 D.L.R. (2d) 510 (C.A.) — *considered*

Fisher v. Rosenberg (1960), 67 Man. R. 336 (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.) — *considered*

R.G. McLean Ltd. v. Canadian Vickers Ltd., [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.) — *referred to*

Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) — *considered*

Statutes considered:

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

s. 11

Motion for leave to proceed against debtor company, for interlocutory injunction restraining debtor company from breaching exclusive representation agreement and for interlocutory injunction restraining other corporations from causing debtor company to breach agreement.

***Farley J.* (orally):**

1 This was a joint motion for: (i) leave to proceed against Algoma which leave has to be obtained pursuant to the protection order which Algoma obtained under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; (ii) an interlocutory injunction until trial of this action restraining Algoma from breaching an exclusive representation agreement, dated September 22, 1989 ("agreement") between Algoma and Sairex Holding AG ("AG") for the distribution of seamless tubing and casing and related piping products ("products") in the Peoples' Republic of China ("P.R.C.") and ancillary relief, including using Titan to distribute the products; and (iii) an interlocutory injunction against Prudential and its parent corporation Dofasco from causing Algoma to breach the agreement together with ancillary relief.

2 Sairex GmbH (Sairex) attempted to bring this matter on on July 2, 1991, but, in accordance with the practice of the Commercial List that continuing matters are best dealt with if possible and practicable by the same judge, I determined on June 28, 1991 that there was not sufficient urgency in this matter to have it dealt with then. I scheduled this hearing for the first available date, being August 16, 1991, to allow the parties sufficient time to file responding materials and cross- examine.

3 It is unfortunate that information was still being exchanged on the "eve of trial" and I did not receive all the material until the morning of the hearing. Such is to be avoided if at all possible — and usually it is possible. The parties indicated that they urgently desired a determination of the issues involved in these motions to eliminate uncertainty. In fact, they sped through the hearing on Friday to avoid having to come back at a later date this month. Therefore, we are now here on Monday morning.

4 At the hearing, Sairex advised that it did not wish to enjoin the December 1990 and June 1991 orders Titan and Algoma had obtained from the P.R.C. Sairex specializes on a commission basis in representing the manufacturers of piping materials including the products. Titan has dealt as a principal in a trading operation specializing in steel other than piping materials. Prior to December 1990, Titan was never involved with steel products similar to the products. Both Sairex and Titan have had extensive business dealings in the P.R.C., especially with the China National Metals and Minerals Import and Export Corporation ("Minnmetals"), a P.R.C. state organization.

5 Sairex has been involved with the four departments of Minnmetals and Titan with several other departments. While under the umbrella of Minnmetals, these departments appear to act somewhat autonomously in their day-to-day operations. Algoma is owned and controlled by Dofasco as a result of a 1988 transaction. Algoma produces the products and other goods. Dofasco is not involved in the products, but rather with flat rolled steel essentially. Prudential is Dofasco's sales agent. Algoma appointed Prudential its sales agent formally on December 18, 1990, that is, subsequent to its being acquired by Dofasco. Titan has had a long business relationship with Dofasco.

6 Algoma wanted to penetrate the Soviet and Chinese markets in the 1980s. It was unsuccessful in doing so. It turned to AG for assistance. At this stage, there were a number of related companies which used the Sairex name — Sairex Holdings AG ("AG"), Sairex SA ("SA") and Sairex GmbH ("Sairex"). AG and SA merged into a continuing AG just after the agreement was entered into. AG transferred control of Sairex in mid-1990 to Rotec, another company which operated at arm's length to AG. Sairex's position was that Algoma was fully aware of the reorganization of the Sairex group at the time of entering into the agreement and that Algoma recognized that Sairex would be continuing the organization with which Algoma would deal vis-à-vis the agreement.

7 Sairex was successful where Algoma had not been. In 1988, it negotiated a trial order of 21,000 tons of products by Minnmetals. This accounted for about a quarter of Algoma's production of that type of goods that year. After months of negotiations and drafting, the agreement was entered into by AG and Algoma. An equivalent agreement was entered into concerning the U.S.S.R. I set forth the pertinent clauses of this agreement as follows:

I. Subject Matter of the Agreement

(1) ALGOMA appoints SAIREX as its sole sales distributor of the contractual products in the PRC.

SAIREX shall not be empowered to act in the name of ALGOMA unless ALGOMA has given its prior consent.

. . . . .

II. Exclusivity

(1) ALGOMA undertakes not to appoint other than SAIREX any distributor, dealer, commercial agent or representative for the sale and/or distribution of the contractual products in the PRC.

(2) SAIREX shall forward all enquiries for the contractual products from SAIREX customers within the PRC to ALGOMA.

(3) Notwithstanding anything contained herein, it is understood and agreed that in the event a major foreign end user purchaser (i.e. non PRC) chooses to purchase direct from a mill source for shipment to the PRC, Algoma shall be entitled to pursue such direct sales opportunities without any obligation on ALGOMA'S part to SAIREX.

III. Prices and Conditions of Sale

(1) Prices and other conditions of sale to SAIREX customers in the PRC shall be negotiated by SAIREX according to ALGOMA'S instructions taking the actual market situation into consideration.

In any event, unless otherwise negotiated, SAIREX shall be entitled to a three (3) % commission based on the final contracted FOB mill price with the SAIREX customer in the PRC and as confirmed by ALGOMA.

. . . . .

V. Obligations of ALGOMA

(1) ALGOMA undertakes to support SAIREX in its representation of ALGOMA and to place at SAIREX' disposal all information concerning the contractual products, new developments, market strategies etc. which are appropriate to support SAIREX in its activities under this Agreement.

. . . . .

VI. Obligations of SAIREX

(1) SAIREX shall use its best efforts to promote the marketing of the contractual products in the PRC.

(2) SAIREX undertakes to keep ALGOMA informed on the general market situation in the PRC and will submit reports to ALGOMA at regular intervals to be agreed upon.

. . . . .

VIII. Commencement and Term of the Agreement

(1) Subject to paragraph 2 below, this Agreement shall come into effect on September 22, 1989 and shall be in force for three years. At the end of the contractual term the Agreement shall be automatically extended for a further two years unless one of the parties has given to the other party six month's [sic] notice of termination in writing to become effective at the end of the term.

(2) The parties agree to meet annually, as close as possible to the anniversary date of the agreement, to review the previous year's results. In the event either party is dissatisfied with such results and determines that the agreement is no longer mutually beneficial, such party shall be entitled to terminate the agreement by giving six month's [sic] written notice to the other.

(3) Notwithstanding Paragraph (2) above, the Agreement may be immediately terminated by either party for the following reasons:

(a) If the other party should commit a fundamental breach of the terms and conditions of this Agreement.

(b) If the other party should enter into bankruptcy or liquidation, whether compulsory or voluntary, or arrange with their creditors or take or suffer any similar action in consequence of insolvency.

(4) Any termination of this Agreement shall not relieve either of the parties from the obligations which are expressed to be continued after termination. This applies especially to the fulfilment of confirmed purchase orders.

(5) Any notice of termination must be given in writing.

IX. [Which I note is not titled]

SAIREX has the right to handle this Agreement as follows:

For the PRC: via SAIREX GmbH
Novesiastrasse 46

D-4044 Kaarst 2

X. Applicable Law and Jurisdiction

(1) This Agreement shall be governed by the laws of the Province of Ontario, Canada. This applies equally to all individual orders placed in pursuance of this Agreement by SAIREX with ALGOMA.

(2) All disputes hereunder that cannot be resolved by negotiation shall be finally settled by arbitration pursuant to the Rules of the International Chamber of Commerce. Place of arbitration shall be Paris, France.

8 On October 3, 1989, AG transferred this contract to Sairex retaining a transfer fee equivalent to 10 per cent of Sairex's ongoing commissions. Algoma was not advised of the document; however, that same date AG wrote to Algoma enclosing Sairex's financials "as this is the company you are working with and we in Sairex Holding AG have no more activities." On June 15, 1990, Sairex informed Algoma that AG had transferred its ownership of Sairex to Rotec.

9 Sairex continued to obtain significant orders for Algoma from Minnmetals. In November 1990, Sairex received specification from Minnmetals which it relayed to F.J. Potter, previously with Algoma but then with Prudential as vice-president, international sales. Sairex then obtained an invitation from Minnmetals to have representatives of Algoma/Prudential and Sairex visit Minnmetals for the purposes of discussing and negotiating the terms of the order. Apparently, such an invitation is tantamount to an invitation to negotiate final terms and it usually results in a firm order being issued. Potter was instructed by his superiors to give false information that he was not available to visit China then — at least with Sairex; he did so with Titan as instructed, despite his great reluctance to do so.

10 This came about as a result of a December 1990 Calgary meeting involving a high-level decision by four Algoma/Dofasco/Prudential executives who were looking at the restructuring of Algoma's operations. This meeting was attended by Stephen A. Levy of Titan, who said that, as a result of a chance meeting in the halls of Dofasco in Hamilton somewhat earlier, he had suggested that Titan may be able to do something for Algoma as to the products in P.R.C. Levy, a lawyer by training, claimed that he did not know that Sairex had an exclusive contract but rather that such arrangements were unusual in the steel business — channelling arrangements were preferred. It was only on the way to the P.R.C. in December 1990 that Levy discovered that there was a written contract with Sairex.

11 He was advised that it was none of his concern and that it was being taken care of. I would have to infer that Levy was only too happy not to dig further; he must not have been very acute at wondering about his good luck in walking away from the meeting with Minnmetals with a signed contract for 30,000 tons, no preparatory spade work having been done in that respect with Minnmetals.

12 Potter had to advise Sairex that he was in the P.R.C. to deal with "coil products" when by chance he ran into Sairex's representatives in the halls of Minnmetals. Sairex was understandably aghast; it sent Potter a fax on December 27, 1990 asking for a detailed explanation.

13 Wilson, the president of Prudential, went to Germany to meet Sairex on January 15, 1991. There is a dispute as to whether he advised Sairex that the December deal was a one-time shot to compensate Titan for a downturn in flat rolled steel or if he advised Sairex that it was out and Titan was in. Wilson advised that he at least said he would reconsider his decision to use Titan thereafter, rather than Sairex.

14 Sairex continued to attempt to set up meetings for Potter. He avoided a direct negative. Wilson wrote Sairex a letter dated March 14, 1991. The text of that letter, which inexplicably took until March 27, 1991 to reach Sairex, is as follows:

> Prudential Steel Ltd.
>
> March 14, 1991
>
> To Sairex GmbH:
>
> At our meeting with you in January, I explained to you that Algoma had been successful in obtaining sales to Minnmetals through Titan Industrial Corporation with whom Algoma's parent, Dofasco, has a long-standing relationship. At that time, we also indicated that it was Algoma's desire and intention to make use of Titan as a sales agent to secure additional future business in China.
>
> In reporting to the senior management of Algoma regarding the outcome of our meeting, I indicated that, while you would obviously have preferred that Sairex continue to represent Algoma in China, you understood and respected Algoma's decision to Titan as a sales agent for future Chinese business.
>
> Senior management of Algoma asked me to convey their thanks for your response and to assure you regarding Algoma's intentions to continue with our relationship for sales to the USSR in accordance with our agreement. We look forward to a mutually profitable association in this regard.
>
> These matters are always difficult and your response, under the circumstances, was very much appreciated.

15 Sairex faxed back the same day strongly resisting that the agreement be respected and that "in business concluded via Titan or any other company for China market commission shall be payable to Sairex." Not having received any response, Sairex wrote on April 15, 1991 with an echo: "that on business concluded via Titan or any other company for China market com-

mission shall be payable to Sairex."

16 There was another fax by Sairex on April 19, 1991 saying that Sairex had determined that efforts were being made then to get inquiries for Algoma casings via Titan. On April 22, 1991, an officer of Prudential wrote Sairex that Wilson was out of the country but upon his return later that week Prudential would respond. It never did. Another large order was obtained via Titan in June 1991.

17 Sairex complained that Algoma has taken up with Titan to save a few dollars on its commission — Sairex's 3 per cent commission is about $20-25 U.S. a ton versus Titan's markup of about $5 U.S. a ton.

18 On March 13, 1991, Sairex had written to Minnmetals advising it of the agreement and complaining of Algoma's dealings with Titan. Sairex asked for Minnmetals' support. Despite this and other requests, Minnmetals did not involve itself.

19 On June 25, 1991, a few days after issuing its notice of action, Sairex again wrote to Minnmetals indicating that Minnmetals "may not necessarily be involved as a (knowing) participant in breach of contract" but having been so notified on March 13, "Minnmetals — under international law — will come into liability for knowingly inducing or participating in the wrongful breach of contract... In these circumstances the court may be forced to add Minnmetals as a party defendant to the litigation under the rules of international law, which means Minnmetals could become a defendant under Sairex's legal dispute with Algoma."

20 Sairex said that it had suffered irreparable harm by Algoma's breach of the agreement as to its loss of commissions and that such had seriously damaged the credibility of Sairex as a manufacturer's representative in the P.R.C. It was said that this had impacted on a recent order opportunity when Sairex only got 40 tons rather than the hoped for 20,000 tons for another non-competing manufacturer.

21 Sairex says that it is willing to continue to represent Algoma and is better able to do so with its experience and expertise than is Titan. Sairex is also concerned about Algoma's serious financial difficulties, which may jeopardize Sairex's ability to collect a judgment for loss of commission and damages for loss of other business.

22 Algoma stated that it has two mills in Sault Ste. Marie which are suited only for the production of the products and like goods. At present, one of the mills is shut down due to lack of work. Loss of the Titan contracts would have resulted in a 50 per cent reduction at the other plant and a lay-off of at least 300 Algoma employees.

23 Algoma also cited that Sairex had inappropriately delayed in bringing this motion, as it had been aware of Algoma's dealings with Titan since at least December 27, 1990. Sairex's position was that it was trying to sort out the situation, it was being supplied a constant stream of disinformation and it took some time, after it finally realized on March 27 through April 19 that it was all to no avail, to retain and instruct German and Canadian legal counsel.

24 Algoma claims that the status quo had been for the last half-year that it sold to Titan for the P.R.C. and not through Sairex. Titan claims that an injunction against it would harm its other business in the P.R.C.

25 Mr. Thompson candidly admitted that his clients were looking for an out with respect to Sairex. That apparently was why the Calgary meeting grabbed at the thought of the Rotec deal providing them an excuse. One can only wonder why this conclusion was reached instantaneously in a 15-minute meeting and not at least referred to legal counsel. One is astounded that Sairex was never in formed directly. One is baffled by the duplicity involved in having Potter take Levy to conclude a deal initiated by Sairex with the unspoken assumption, it appears, that Sairex would not find out or, if it did find out, complain. It would be naive to think that all business transactions (especially international ones) are transacted on the up-and-up. This one, however, is clearly at the lower end of the ethical scale. In conclusion, it was not very ethical and not very smart. It was dumb. But can the defendants and Algoma thread their way through the legal eye of the needle?

26 They have thrown the kitchen sink at Sairex. I must consider this in respect to whether Sairex has an appropriate case against Algoma. Algoma's position vis-à-vis Sairex's capacity is essentially as follows:

(1) An injunction would be of a mandatory nature to force Algoma to deal with Sairex exclusively, a deal that it claims it never agreed to. It contracted with AG. It never agreed to deal exclusively with Sairex and it never consented to the transfer. Given:

(a) the nature of the agreement (including the fact that it was to be handled by Sairex),

(b) the fact that all dealings after October 3, 1989 were with Sairex, not AG,

(c) Algoma was notified that AG was not going to be involved, there being no complaint about this by Algoma,

(d) the June 15, 1990 letter advised Algoma that AG was no longer a shareholder of Sairex, and

(e) Algoma continuing to be governed by a carbon-copy agreement as to the U.S.S.R., I think that Algoma would have great difficulty in claiming it has no contractual relationship with Sairex. See *Chomedy Aluminum Co. v. Belcourt Construction (Ottawa) Ltd.* (1979), 24 O.R. (2d) 1, 97 D.L.R. (3d) 170 (C.A.); *R.G. McLean Ltd. v. Canadian Vickers Ltd.*, [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.), *Chitty on Contracts*, 26th ed. (1989), pp. 1068-1069 and *Fisher v. Rosenberg* (1960), 67 Man. R. 336 (Q.B.) at p. 339.

(2) Algoma says that if the letter did operate as a valid assignment, it was an equitable assignment, since it was not a notice in writing in the terms of the agreement. Therefore, AG is a necessary party to any proceedings brought to enforce the agreement and Sairex is unable to maintain these proceedings in its own name.

However, I note that *DiGulio v. Boland*, [1958] O.R. 384, 13 D.L.R. (2d) 510 (C.A.) referred to situations at p. 402 [O.R.] where the court permitted the assignor to be added nunc pro tunc. While, in light of my view of the other points, this is not necessary here, it may be prudent to do so. I would grant leave to do so.

(3) The October 3, 1989 letter amounted to an unequivocal assertion by AG that it was no longer a party to the agreement and no longer had any obligations under it. This repudiation was accepted by Algoma by its conduct.

In my view Algoma's actions up to December 1990 (some 15 months later) as to the P.R.C. contract and until now (Potter being in the U.S.S.R. now with Sairex) as to the U.S.S.R. contract disentitle it for delay from adopting such position successfully.

(4) Sairex must obtain leave of the court pursuant to s. 11 of C.C.A.A. in order to bring these proceedings against Algoma. Leave should be refused:

(a) the status quo should be maintained for the period in which the proposed agreement is being developed for approval by the company's creditors;

(b) the injunction remedy would seriously impair the company's ability to continue in business during this period;

(c) the court should weigh the relative degrees of prejudice that would flow; and

(d) in this case all three of these factors favour Algoma over Sairex in a refusal for leave.

I found *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) and the cases

therein referred to very helpful. I do, however, note that: "In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances." (pp. 113-114 [B.C.L.R.]).

I would also note that the court in that case at p. 116 did not feel that it required much reflection on the part of a trial judge to conclude that the equities fell on the side of postponement of steps to be taken to realize a $36 million debt when the companies involved in the C.C.A.A. there comprised approximately $3 billion of public and private investment, the other 95.5 per cent in value of the secured and unsecured debt and there were 1500 persons directly employed in the enterprise.

In this case Sairex's lost commission on the Algoma deals is in the neighbourhood of $600,000 and it appears to be a very much smaller operation than Algoma. Algoma is critically dependent on its P.R.C. business continuing as to at least the 300 employees directly involved and it appears many more would be indirectly involved. I would not be inclined to give Sairex leave, having weighed their respective positions. However, I would think that public policy also dictates that a company under C.C.A.A. protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the C.C.A.A. However, it does not appear that Algoma's dominant purpose was to harm Sairex (it does not appear to have been even a significant purpose) but rather it was to save a few dollars for its own benefit. The harm to Sairex was incidental to Algoma's benefit. I would think that such benefit was neither very well thought out or longlived. I also note that Algoma continues to depend on Sairex for the U.S.S.R. I will return to the subject of leave under the C.C.A.A. later.

Let me now turn to the injunction issues.

Galligan J. for the Divisional Court in *Bank of Montreal v. James Main Holdings Ltd.* (1982), 28 C.P.C. 157 (Ont.) said at pp. 160-161, before proceeding reluctantly and hesitating expressing his opinion as to the meaning of the document:

In cases of clear breach Courts are inclined to grant injunctions enforcing negative covenants until trial. In such cases the inquiry as to the adequacy of damages as a remedy, and into the balance of convenience, do not have the importance that they otherwise do: see *Doherty v. Allman* (Allen) (1878), 3 A.C. 709; *Hampstead and Suburban Properties v. Diomedous*, [1969] 1 Ch. 248, [1968] 3 All E.R. 545; *Br. Amer. Oil Co. v. Hey*, [1941] O.W.N. 397, [1941] 4 D.L.R. 725; *Brown v. Bryant* (1979), 11 B.C.L.R. 364 (S.C.) ; and *Hardee Farms Int. v. Cam & Crank Grinding*, [1973] 2 O.R. 170, 10 C.P.R. (2d) 42, 33 D.L.R. (3d) 266.

. . . . .

It seems to me, from a review of the cases mentioned above, that the ordinary tests to be satisfied for the granting of interlocutory injunctions do not apply when the application is for restraint of breach until trial of a negative covenant. In such cases the Court is not as concerned about the adequacy of damages as a remedy, nor about the balance of convenience as in the ordinary case, but I think it must be satisfied that there is a *clear* breach of the covenant. In such a case I do not think that a Court ought to grant an interlocutory judgment if only a triable issue is shown, because cases in which Courts grant interlocutory injunctions when only a triable issue is shown, engage in a careful weighing of the adequacy of damages as a remedy, and particularly, the balance of convenience.

I think in this case, before issuing an interlocutory injunction, the Court must be satisfied that there is to be a *clear* breach of the undertaking.

. . . . .

It seems to me that where an applicant seeks an interlocutory injunction restraining until trial the breach of a negative covenant, unless it can show inadequacy of damages as a remedy and that the balance of convenience favours it, it must satisfy the Court that there is or is about to be a clear breach of that covenant. It is not sufficient merely to establish a triable

issue on the question of breach of covenant and then be entitled to an interlocutory injunction.

[Emphasis in original.]

27 I would note that the court is not to be as concerned about the adequacy of damages as a remedy nor about the balance of convenience — but it should not be unconcerned about such.

28 Cory J., for the court, in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) canvassed the question of negative covenants at pp. 508-509 [O.R.]:

> The approach to contracts that do not provide for such personal service has not been as narrow. For example, the Courts have inferred from a positive covenant granting exclusive and sole authority to sell a product, a negative covenant that such sole and exclusive authority to sell will not be granted to another. The negative covenant so inferred has been enforced by injunctive relief: see *Chitty on Contracts*, 23rd ed. (1968), p. 1562.
>
> In this case the contract gives sole and exclusive authority to the plaintiff with regard to certain matters. It would be unduly technical and restricting if the Court were to find that because of the positive wording of the covenant it could not infer the negative. It is eminently sensible and logical to conclude that if an exclusive and sole authority is given to the plaintiff that there must be inferred a negative covenant that the defendants will not terminate that authority and grant it to themselves or others. There are a number of authorities with factual situations similar to this case wherein the Courts have inferred and enforced the negative aspect of a grant of sole and exclusive authority: see *Evans Marshall & Co. Ltd. v. Bertola S.A. et al.*, (1973) 1 W.L.R. 349; *North West Beverages Ltd. v. Pepsi-Cola Canada Ltd.* (1971), 20 D.L.R. (3d) 341; *Avnet-International Products (Canada) Ltd. v. NTN Bearing Corp. of Canada Ltd.* (1972), 6 C.P.R. (2d) 148; *Baxter Motors Ltd. v. American Motors (Canada) Ltd.* (1973), 40 D.L.R. (3d) 450, 13 C.P.R. (2d) 264, [1973] 6 W.W.R. 501.

29 In my view, given my thoughts on Sairex's status, Sairex appears to have a reasonably strong case as to breach by Algoma.

30 However, I must go on to consider irreparable harm and balance of convenience. Certainly Sairex's losses on its commission are easily calculated. Sairex itself twice demanded that "on business concluded via Titan *or any other company* for China market commission shall be payable to Sairex" (emphasis added). I would conclude that Sairex's main concern was the protection of its commission. As to its suggestion that it lost business and face vis-à-vis its other manufacturers, I view this with considerable scepticism.

31 On questioning it was conceded that Sairex's business was more in the nature of "chunky soup" than a continuous flow of "consommé" and that it could not realistically expect to get all the business it put in for. However, more to the point, I do not find it at all surprising that Sairex's suggestions to and demands of Minnmetals, culminating in the June 25, 1991 letter threatening to bring in Minnmetals as a defendant in these proceedings, has had a chilling effect on Sairex's Chinese business.

32 However, I would think it important for Minnmetals to completely understand that Algoma's switch to Titan from Sairex was not apparently precipitated by anything wrong that Sairex did in 1990. Algoma merely wanted to gain a little extra margin in its sales to the P.R.C. As noted, Algoma still relies on Sairex for the Soviet market.

33 As to delay, Sairex knew that there was something rotten in the relationship starting December 27, 1990. Even on its explanation of the January 15, 1991 meeting, Algoma was known by it to be dealing with them from the bottom of the deck. In any event, it should have been more than abundantly clear on March 27, 1991, when the March 14 letter through Prudential as Algoma's appointed agent was received, that it was all over vis-à-vis the P.R.C. (and on the basis of Sairex's version of the January 15 meeting, Algoma was continuing to bald-facedly lie directly to Sairex).

34 Rather than institute legal action or even consult legal counsel, Sairex continued to take another path — seeing if it

could put some pressure on Algoma through Minnmetals. Given that Sairex knew that Algoma was in serious financial trouble, was in fact under the protection of the C.C.A.A. where timing is critical and was continuing to negotiate with Minnmetals through Titan, I think that this delay until the end of June militates against an injunction being granted.

35 By this time the status quo had been Algoma-Titan for a half-year — a very long time in the circumstances of the financial situation and even more so in light of the relatively short time remaining on the contract, even if it were to proceed on a natural expiration on September 22, 1991.

36 However, I must also look at the question of whether notice has been given under this contract. I believe that there is considerable merit in the position that Sairex was in fact notified of an early termination with its receipt on March 27 of the March 14 letter. If so, then the agreement would terminate on September 27 or about one month from now. Even if this notice were found to be technically invalid, what would stop Algoma from giving the six months' notice now?

37 The agreement does not specify that Algoma be dissatisfied with Sairex but only the results; its position is that the results are better with Titan's lower compensation schedule.

38 The *James Main* case, supra, held that the argument that if no injunction were granted, the defendant might be impecunious at the time of trial was not germane to a consideration of the balance of convenience.

39 I am therefore of the view that on the balance of convenience and irreparable-harm tests, an injunction should not issue. Such consideration also persuades me that even if I were inclined to grant leave pursuant to the C.C.A.A. it should not be to allow Sairex to now pur sue its claim for an injunction.

40 Should leave, however, be granted to Sairex to now pursue its claim for damages? I note that such would not be as simple as collecting a sum of money, say, on a promissory note. There may be some question of allowing Sairex to at least start its engine. However, I must be cognizant of the fact that activity on Sairex's part would likely require activity on Algoma's part — thereby requiring the deployment of executive time in this matter which can be pursued after Algoma comes out from its C.C.A.A. shell, rather than such executives spending their time on the restructuring process or general operations of making and selling steel at a critical time. It would also result in legal expense and a possible diversion of legal talent.

41 Therefore, while I have considerable sympathy for Sairex's position, I would dismiss its motion: (i) for leave to appeal under the C.C.A.A. to add Algoma to its proceedings against the others and (ii) for interlocutory injunction against Algoma, Dofasco, Prudential and Titan. I was advised in June that Algoma would make available to Sairex specifics of any contracts that it enters into as to the P.R.C. so as to enable Sairex to calculate its loss of commissions; to maintain confidentiality the disclosure should be that which is necessary to make the calculation and not details of the order itself.

42 Costs are to be in the cause. The parties may speak to me further if they wish to fix the amounts.

Motion dismissed.

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2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5

2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5

Stelco Inc., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended

And In the Matter of a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other Applicants listed in Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Ontario Court of Appeal

Goudge, Feldman, Blair JJ.A.

Heard: March 18, 2005
Judgment: March 31, 2005
Docket: CA M32289

Proceedings: reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List])); reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 743, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 ((Ont. S.C.J. [Commercial List])); additional reasons to *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List]))

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Kenneth T. Rosenberg, Robert A. Centa for Respondent, United Steelworkers of America

Murray Gold, Andrew J. Hatnay for Respondent, Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., Welland Pipe Ltd.

Michael C.P. McCreary, Carrie L. Clynick for USWA Locals 5328, 8782

John R. Varley for Active Salaried Employee Representative

Michael Barrack for Stelco Inc.

Peter Griffin for Board of Directors of Stelco Inc.

K. Mahar for Monitor

David R. Byers (Agent) for CIT Business Credit, DIP Lender

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

Business associations --- Specific corporate organization matters — Directors and officers — Appointment — General principles

Corporation entered protection under Companies' Creditors Arrangement Act — K and W were involved with companies who made capital proposal regarding corporation — Companies held approximately 20 per cent of corporation's shares — K and W, allegedly with support of over 30 per cent of shareholders, requested to fill two vacant directors' positions of corporation, and be appointed to review committee — K and W claimed that their interest as shareholders would not be represented in proceedings — K and W appointed directors by board, and made members of review committee — Employees' motion for removal of K and W as directors was granted and appointments were voided — Trial judge found possibility existed that K and W would not have best interests of corporation at heart, and might favour certain shareholders — Trial judge found interference with business judgment of board was appropriate, as issue touched on constitution of corporation — Trial judge found reasonable apprehension of bias existed, although no evidence of actual bias had been shown — K and W appealed — Appeal allowed — K and W reinstated to board — Court's discretion under s. 11 of Act does not give authority to remove directors, which is not part of restructuring process — Trial judge erred in not deferring to corporation's business judgment — Trial judge erred in adopting principle of reasonable apprehension of bias.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Corporation entered protection under Companies' Creditors Arrangement Act — K and W were involved with companies who made capital proposal regarding corporation — Companies held approximately 20 per cent of corporation's shares — K and W, allegedly with support of over 30 per cent of shareholders, requested to fill two vacant directors' positions of corporation and be appointed to review committee — K and W claimed that their interest as shareholders would not be represented in proceedings — K and W appointed directors by board, and made members of review committee — Employees' motion for removal of K and W as directors was granted and appointments were voided — Trial judge found possibility existed that K and W would not have best interests of corporation at heart, and might favour certain shareholders — Trial judge found interference with business judgment of board was appropriate, as issue touched on constitution of corporation — Trial judge found reasonable apprehension of bias existed, although no evidence of actual bias had been shown — K and W appealed — Appeal allowed — K and W reinstated to board — Court's discretion under s. 11 of Act does not give authority to remove directors, which is not part of restructuring process — Trial judge erred in not deferring to corporation's business judgment — Trial judge erred in adopting principle of reasonable apprehension of bias.

Cases considered by *Blair J.A.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99, 1991 CarswellBC 494 (B.C. S.C.) — referred to

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — considered

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S.C.J. [Commercial List]) — referred to

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — referred to

Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 187 N.R. 241, 86 O.A.C. 245, 25 O.R. (3d) 480 (note), 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179 (S.C.C.) — considered

Brant Investments Ltd. v. KeepRite Inc. (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1991 CarswellOnt 133 (Ont. C.A.) — considered

Catalyst Fund General Partner I Inc. v. Hollinger Inc. (2004), 1 B.L.R. (4th) 186, 2004 CarswellOnt 4772 (Ont. S.C.J.) — referred to

Country Style Food Services Inc., Re (2002), 2002 CarswellOnt 1038, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) — considered

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London Finance Corp. v. Banking Service Corp. (1922), 23 O.W.N. 138, [1925] 1 D.L.R. 319 (Ont. H.C.) — referred to

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R. v. Sharpe (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — referred to

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Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R.

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Generally — referred to

s. 2(1) "affairs" — considered

s. 102 — referred to

s. 106(3) — referred to

s. 109(1) — referred to

s. 111 — referred to

s. 122(1) — referred to

s. 122(1)(a) — referred to

s. 122(1)(b) — referred to

s. 145 — referred to

s. 145(2)(b) — referred to

s. 241 — referred to

s. 241(3)(e) — referred to

2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

s. 20 — considered

APPEAL by potential board members from judgments reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 742, 7 C.B.R. (5th) 307 (Ont. S.C.J. [Commercial List]) and at *Stelco Inc., Re* (2005), 2005 CarswellOnt 743, 7 C.B.R. (5th) 310 (Ont. S.C.J. [Commercial List]), granting motion by employees for removal of certain directors from board of corporation under protection of *Companies Creditors' Arrangement Act*.

***Blair J.A.*:**

Part I — Introduction

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the *Companies' Creditors Arrangement Act*[FN1] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies — Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. — which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company's restructuring process, the

> Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability — exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation — as opposed to their own best interests as shareholders — in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

Part II — Additional Facts

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the

steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.

18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing — and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" — the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III — Leave to Appeal

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

a) whether the point on appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the appeal is *prima facie* meritorious or frivolous;

d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

Part IV — The Appeal

The Positions of the Parties

27 The appellants submit that,

a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as di-

rectors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group — particular investment funds that have acquired Stelco shares during the CCAA itself — have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Ivaco Inc., Re* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]), at para.15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the *CCAA*". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at para. 11. See also, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines Inc.*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc., Re*, [2005] O.J. No. 251 (Ont. S.C.J. [Commercial List]).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Skeena Cellulose Inc., Re*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C. C.A.) at para. 46, that:

> . . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,[FN2] rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose".[FN3] Hence the better view is that

a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

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

Initial application court orders

(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.

Other than initial application court orders

(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.

Burden of proof on application

(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 satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.), at para. 33, and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff General Partner Ltd.*, *supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. v. Banking Service Corp.* (1922), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.[FN4] The specific power *to remove* directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.).

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, *and removal* of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

49 At paragraph 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [*sic*] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.
>
> [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, *supra* The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"[FN5]:
>
> > SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention.* The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation.* If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.
> >
> > [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors — in which capacity they participated over two days in the bid consideration exercise — in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk — a reasonable apprehension — that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium — the shareholders represented by the appellants on the Board — had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In *Peoples* the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well — in the context of "the shifting interest and incentives of shareholders and creditors" — the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly

those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising re-structuring proceedings — and courts in general — will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, *supra*, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making . . .

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.[FN6]

67 McKinlay J.A then went on to say:

> There can be no doubt that on an application under s. 234[FN7] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Skeena Cellulose Inc., Re*, *supra*, *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. (Re)*, *supra*; *Alberta-Pacific Terminals Ltd., Re* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situa-

tion calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) — which describes the directors' overall responsibilities — and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business *and* affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion — not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction — a jurisdiction which feeds the creativity that makes the CCAA work so well — in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias . . .with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies,

such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants — including the respondents in this case — but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V — Disposition

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

***Goudge J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal allowed.

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

FN2 The reference is to the decisions in *Dyle, Royal Oak Mines, and Westar*, cited above.

FN3 See paragraph 43, *infra*, where I elaborate on this distinction.

FN4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

FN5 Dennis H. Peterson, Shareholder Remedies in Canada (Markham: LexisNexis — Butterworths — Looseleaf Service, 1989) at 18-47.

FN6 Or, I would add, unpopular with other stakeholders.

FN7 Now s. 241.

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CITATION: Timminco Limited (Re), 2012 ONSC 2515
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120427

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, *Penneyfeather v. Timminco Limited et al* (Court File No: CV-09-378701-00CP)**

P. O'Kelly and A. Taylor, for the Applicants

P. LeVay, for the Photon Defendants

A. Lockhart, for Wacker Chemie AG

K. D. Kraft, for Chubb Insurance Company of Canada

D. J. Bell, for John P. Walsh

A. Hatnay and James Harnum for Mercer Canada, Administrator of the Timminco Halcy Plan

S. Weisz, for FTI Consulting Canada Inc., Monitor

HEARD: **March 26, 2012**

ENDORSEMENT

[1] St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue

the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

[2] The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;

(b) a motion to substitute the Representative Plaintiff;

(c) a motion to force disclosure of insurance policies;

(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

(e) settlement discussions;

(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;

(g) a motion for particulars; and

(h) a motion served but not heard to strike portions of the Statement of Claim.

[3] On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

[4] The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

[5] On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

[6] Counsel to Mr Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

[7] Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, (2001) 2 S.C.R. 534 at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

[8] Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

[9] Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank of Canada*, (1992) O.J. No. 889 at paras. 13-15 (C.A.) and *Re Carey Canada Inc.* (2006) O.J. No. 4905 at paras. 7, 16-17.)

[10] In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

[11] The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

[12] Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

[13] Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

[14] It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

[15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[16] Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590 (S.C.J.) at para. 27.

[17] Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re), supra*, at para 27.

[18] Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

[19] I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

[20] It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full

[21] In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

[22] Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

[23] With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

[24] I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

[25] In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

MORAWETZ J.

Date: April 27, 2012

Indexed as:

Woodward's Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF the Company Act, R.S.B.C. 1979, c. 59
IN THE MATTER OF Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.

[1993] B.C.J. No. 42

79 B.C.L.R. (2d) 257

17 C.B.R. (3d) 236

1993 CarswellBC 530

37 A.C.W.S. (3d) 1040

Vancouver Registry No. A924791

British Columbia Supreme Court
Vancouver, British Columbia
(In Chambers)

Tysoe J.

Heard: January 8, 1993
Judgment: January 11, 1993; filed January 12, 1993

(25 pp.)

Counsel for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.:R.A. Millar, M.A. Fitch and J. Irving.
Counsel for W.J. Woodward and others: D.B. Kirkham, Q.C. and G. Tucker.
Counsel for H.J. Zayadi: E.J. Adair.

1 **TYSOE J.**:-- The aspect of these proceedings presently under consideration is whether the Court should grant a stay in respect of payments owing to retired or terminated senior executives of Woodward's Limited ("Woodward's") which are secured by letters of credit issued by Woodward's banker in favour of two trust companies acting as trustees pursuant to agreements or plans benefitting Woodward's senior executives.

2 On December 11, 1992 I granted an interim stay Order pursuant to the Companies' Creditors Arrangement Act (the "CCAA") in favour of Woodward's, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd. The Order was granted on an ex parte basis and it was expressed to expire at 6 p.m. on January 8, 1993, the day on which the hearing of the Petition in this matter was intended to take place. On December 17 and 24, 1992 I made further interim Orders which, among other things, contained a stay in relation to the letters of credit held by the two trust companies.

3 The hearing of the Petition began on January 8, 1993 but there were also between 10 and 15 related applications scheduled to be heard on January 8 and the following days. On January 8, when it was clear that the hearing of the Petition and related applications would take several days, I extended the interim Orders until further Order with the intent that they would continue until I made my determinations on the various issues to be decided. There appears to be little doubt that there will be an extension of the stay Order generally and it is the terms of the continuing stay Order that are in dispute. These Reasons for Judgment relate to one of the issues that is in dispute. I will approach this matter on the basis that the CCAA stay is going to be extended and the issue to be determined is whether the stay can or should apply in relation to the former senior executives and the trust companies acting as the trustees of the letters of credit.

4 Woodward's decided at some point in the past that it would make provision for retiring allowances to benefit its senior executives when they retired or when they were terminated without cause. Until 1991 Woodward's entered into individual agreements with certain senior executives in relation to the retiring allowances. In 1991 Woodward's established its Retiring Allowance Plan which applied to designated senior executives.

5 Mr. Kirkham's clients entered into the individual agreements prior to 1991. Letters of credit have been lodged with The Canada Trust Company ("Canada Trust") pursuant to these agreements as security for the payment of the retiring allowances. Ms. Adair's client was covered by the Retiring Allowance Plan which continues in effect and also applies to senior executives who are still employed by Woodward's. A letter of credit has been lodged with Montreal Trust Company of Canada ("Montreal Trust") pursuant to the Retiring Allowance Plan as security for the payment of the retiring allowances.

6 All of the letters of credit have been issued to the two trust companies by Woodward's banker, Canadian Imperial Bank of Commerce (the "Bank") which holds security against the assets of Woodward's for these contingent obligations. Counsel for Woodward's advised the Court that approximately $10.2 million has been paid by Woodward's to the Bank to "cash collateralize" the letters of credit. Counsel was unable to advise me when this payment was made but I believe that it was made recently and that it was not made at the time of the issuance of the letters of credit.

7 Woodward's entered into trust agreements with both of Canada Trust and Montreal Trust in relation to the letters of credit. It is useful to refer to the relevant portions of the trust agreements

dealing with the calling of the letters of credit. Paragraphs 3, 4 and 5 of the trust agreement with Canada Trust (the "Canada Trust Agreement") read, in part, as follows:

> 3. The Trustee shall be entitled at any time and from time to time to draw on the Letter of Credit comprised in the Fund, either in whole or in part, to obtain money for the purpose of making any payment required to be made by it hereunder.....
> 4. If from time to time the Company shall for any reason whatsoever fail to pay or cause to be paid to the Executive or to a Beneficiary, as the case may be, any amount owing to the Executive or a Beneficiary under the Retiring Allowance Agreement for a period of ten days after its due date, the Executive may deliver to the Trustee an executed or certified true copy of the Retiring Allowance Agreement and concurrently certify in writing to the Trustee that the amount has not been paid thereunder and that he or she is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If within seven days after delivery of the Trustee's report to the Company the Trustee has not been notified by the Company that the Company has made the payment and has not received the certificate of the Company hereinafter mentioned, the Trustee shall pay the claimed amount out of the Fund to the Executive or the Beneficiary, as the case may be, in full discharge of the Company's liability for the payment....
> 5. If the Company ..... becomes insolvent ..... and the Executive certifies to the Trustee that such an event has occurred, the Trustee shall draw the full amount of the Letter of Credit comprised in the Fund .....

8 Paragraphs 8 and 9 of the trust agreement with Montreal Trust (the "Montreal Trust Agreement") read, in part, as follows:

> 8. If the Company ..... becomes bankrupt or insolvent ..... and any officer of the Company or any Senior Executive ..... certifies in writing ..... to the Trustee that such an event has occurred and giving particulars thereof, the Trustee shall within five days after receipt of the certificate deliver a copy to the Company. Subject to any order of a court of competent jurisdiction, the Trustee shall, after the expiration of 14 days from the date of delivery of the certificate to the Company, draw the full amount of all Letters of Credit comprised in the Trust Fund .....
> 9. If the Company shall from time to time for any reason whatsoever fail to pay or cause to be paid to a Senior Executive or a Beneficiary, as the case may be, any amount owing to the Senior Executive or Beneficiary under the Retiring Allowance Plan for a period of ten days after its due date, the Senior Executive or Beneficiary ..... may certify in writing ..... to the Trustee that the amount has not been paid thereunder and that the Senior Executive or Beneficiary named in the certificate, as the case may be, is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If, within seven days after delivery of the Trustee's report to the Company, the Trustee has not been notified in writing by the Company that the Company has made the payment and has not received the certificate

> of the Company hereafter mentioned, the Trustee shall draw under the Letter of Credit .....

9 It not disputed by Woodward's that monthly retirement allowances owing to the former senior executives are overdue or that it has become insolvent.

10 It is the position of Woodward's that the calling of the letters of credit can and should be stayed pursuant to s. 11 of the CCAA or, alternatively, that the Court has the inherent jurisdiction to grant such a stay. Counsel for the former senior executives submit that the Court has no jurisdiction to grant a stay preventing the trust companies from calling on the letters of credit.

11 Section 11 of the CCAA reads 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 company except with the leave of the court and subject to such terms as the court imposes.

12 Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

13 An example of the broad interpretation given to s. 11 is Quintette Coal Limited v. Nippon Steel Corporation (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A. - leave to appeal to S.C.C. dismissed). The B.C. Court of Appeal held that s. 11 was sufficiently broad to prevent a creditor from exercising a right of set-off against the insolvent company. The Court confirmed that the word "proceeding" in s. 11 encompassed extrajudicial conduct and it held that the exercise of a right of set-off was a "proceeding" within the meaning of s. 11. Gibbs J.A. commented on s. 11 in the following general terms at p. 113:

> 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. The power is discretionary and therefore to be exercised judicially.

14 Coincidentally, the authority that is generally considered to be the landmark decision in respect of the broad interpretation to be given to s. 11 is a case involving a letter of credit issued by a bank at the request of the insolvent company in favour of a creditor, Meridian Developments Inc. v. Toronto Dominion Bank (1984), 11 D.L.R. (4th) 576, [1984] 5 W.W.R. 215 (Alta. Q.B.). Wachowich J. posed the issues before him in the following manner at pp. 579-580 of D.L.R. and p. 219 of W.W.R.:

> 1. Is payment of the letter of credit a "proceeding" within the meaning of cl. 2 or 3 of the 21st March order?
>
> 2. If so, is it a proceeding "against the Petitioner" [Nu-West] so as to be restrained by cls. 2 or 3 of that order?
>
> 3. If it is found to be a "proceeding" should the court in any case give leave to Meridian in the circumstances to obtain payment of the letter of credit?

Cls. 2 and 3 of the Order referred to by Wachowich J. followed the wording of s. 11 of the CCAA.

15 Wachowich J. first decided that the payment of a letter of credit fell within the meaning of the word "proceeding" in s. 11 of the CCAA and it is this portion of his judgment that deals with the broad interpretation to be given to s. 11. However, Wachowich J. went on to conclude that the payment of the letter of credit could not be termed "a proceeding against the company" with the result that the stay Order did not prevent the calling of the letter of credit.

16 Counsel for Woodward's submitted that the present situation falls within an exception enunciated by Wachowich J. He first points to the following passage at p. 584 of D.L.R. and p. 224 of W.W.R.:

> It must be noted, however, that by the terms of the March 21, 1984 order it is only "further proceedings in any action, suit or proceeding against the petitioner" that are restrained. Unless the payment of the letter of credit is a "proceeding against the petitioner" (Nu-West) it was not restrained by this order. I agree with counsel for Meredian that the payment of the letter of credit cannot be termed a proceeding against Nu-West unless the money to be paid is Nu-West's property. (my italics)

Counsel next points to points to a passage on p. 588 of D.L.R. and p. 227 of W.W.R. where Wachowich J. is reviewing the American authority of Page v. First National Bank of Maryland (1982), 18 B.R. 713:

17 At p. 4 of the (unreported) decision the court stated:

> In issuing the letter of credit the bank entered into an independent contractual obligation to pay W.C.C. out of its own assets. Although cashing the letter will immediately give rise to a claim by the bank against the debtors pursuant to the latter's indemnification obligation, that claim will not divest

> the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.C., para. 362(4).

> In my view, the Toronto-Dominion Bank is in the same position. It is obliged to honour its contract with Meridian even though the cashing of the letter of credit will increase Nu-West's debt to the bank and even though the bank has no method of enforcing its claim against Nu-West because of the March 21st order.

18 Counsel for Woodward's submits that the present situation falls within the exception recognized in the Meridian case in the sense that the money to be paid under the letter of credit is the property of Woodward's and that payment on the letters of credit will divest Woodward's of its property because the letters of credit are "cash collateralized" by $10.2 million of Woodward's money. I do not accept this submission.

19 The fact that Woodward's may have secured its obligations to the Bank in respect of the letters of credit does not mean that the letters of credit will be paid with Woodward's money. The letter of credit is an independent obligation of its issuer which is obliged to honour a call on the letter of credit with its own money. After being required to make a payment under a letter of credit, the issuer of the letter of credit is then entitled to look to its customer pursuant to the indemnification agreement that usually exists in relation to a letter of credit. If the issuer of the letter of credit holds a cash deposit from its customer as security for the obligations under the indemnification agreement, it may indemnify itself from the cash deposit. This involves the issuer of the letter of credit utilizing the money of its customer to indemnify itself but it is not the money on deposit that is to be used to make payment under the letter of credit.

20 After Wachowich J. made his statement that payment of the letter of credit cannot be termed to be a proceeding against Nu- West "unless the money to be paid is Nu-West's property", he proceeded to review the general nature of a letter of credit and he then reached his conclusion that payment of the letter of credit could not be termed a proceeding against Nu-West. It is my view that Wachowich J. was not creating an exception when he made the statement. Rather, he was stating the issue to be determined in deciding whether it could be termed a proceeding against Nu-West. After he review the general nature of a letter of credit and immediately before stating his conclusion, Wachowich J. said the following at p. 587 of D.L.R. and p. 226 of W.W.R.:

> The customer of the bank has, in my view, never had "ownership" of any funds represented by the letter of credit. He can lay claim only to the debt that has been thereby created.

In addition, it should be noted that in the Parker v. First National Bank of Maryland decision relied upon by Wachowich J., the bank held a certificate of deposit as security for the indemnification obligations of its customer and the U.S. District Court held that a claim on the letter of credit would not divest the debtor of any of its property.

21 Accordingly, I do not think that the letters of credit presently under consideration fall within any exception in Meridian. However, that does not end the s. 11 analysis in my view.

22 Section 11 cannot be utilized to prevent the holder of a letter of credit from requiring the third party who issued the letter of credit to honour it because no steps are taken against the insolvent company when a call is made on the letter of credit. But there will be circumstances where the

holder of the letter of credit will not be entitled to call on it unless he or she first does take some step that is a prerequisite to a drawing under the letter of credit. If such a step constitutes a proceeding against the insolvent company, it may be stayed by the Court under s. 11. For example, the step taken against the insolvent company could be the making of demand on the company. Stay Orders under the CCAA frequently prevent creditors from making demand on the insolvent company.

23 The issue thus becomes whether any proceeding must be taken against Woodward's before the letters of credit may be called upon. The prerequisites under paragraph 4 of the Canada Trust Agreement are the following:

(a) the Company has failed to make a payment;
(b) the Executive has delivered to the Trustee a copy of the Retiring Allowance Agreement and a certificate to the effect that he or she has not been paid;
(c) the Trustee has reported in writing to the Company that a claim has been submitted;
(d) the Company has not notified the Trustee that the payment has been made.

The prerequisites under paragraph 5 of the Canada Trust Agreement are that the Company has become insolvent and that the Executive has certified the occurrence of that event to the Trustee.

24 The prerequisites under paragraph 8 of the Montreal Trust Agreement are as follows:

(a) the Company has become insolvent;
(b) the Executive has certified the occurrence of the event to the Trustee;
(c) the Trustee has delivered a copy of the Executive's certificate to the Company:
(d) a court of competent jurisdiction has not made an order preventing the Trustee from drawing on the letters of credit.

The prerequisites under paragraph 9 of the Montreal Trust Agreement are the same as the prerequisites under paragraph 4 of the Canada Trust Agreement.

25 It is clear that paragraph 5 of the Canada Trust Agreement does not require that any proceeding be taken against the Company before the Trustee can draw on the letter of credit. Paragraph 4 of the Canada Trust Agreement becomes academic because Woodward's is insolvent and Canada Trust can call on the letter of credit pursuant to paragraph 5.

26 Both of paragraphs 8 and 9 of the Montreal Trust Agreement require a step to be taken vis-a-vis the Company before the Trustee can call on the letter of credit. Paragraph 8 requires that the Trustee deliver to the Company a copy of the certificate of the Senior Executive. Paragraph 9 requires that the Trustee must report to the Company that a claim has been made. It is my view that the delivery of a copy of the certificate to the Company and the making of a report to the Company are both proceedings against Woodward's that can be stayed pursuant to s. 11 of the CCAA.

27 If a step must be taken vis-a-vis the insolvent company before a creditor (or a trustee on behalf of a creditor) may enforce its rights, the form of the step should make no difference for the purposes of s. 11 of the CCAA. It should not matter whether the step is a demand for payment on the company, the delivery to the company of a notice of acceleration or the delivery to the company of some other type of document such as a copy of a certificate or a report. In the Meridian case, supra, Wachowich J. quoted the following portion of the definition of the word "proceeding" in Black's Law Dictionary, 5th ed. (1979) (at p. 582 of D.L.R. and p. 221 of W.W.R.):

> Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. Rooney v. Vermont Invt. Corp. (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.).

The delivery of a copy of a certificate or a report to Woodward's is no less a proceeding than the payment of a letter of credit (Meridian) or the exercise of a right of set-off (Quintette). It is a proceeding against Woodward's because the copy of the certificate or the report must be delivered to Woodward's.

28 The result is that a stay under s. 11 of the CCAA can effectively prevent Montreal Trust from calling on the letters of credit held by it but Canada Trust cannot be restrained by such a stay from calling on the letters of credit held by it. It is therefore necessary to consider Woodward's alternative argument that the Court has the inherent jurisdiction to grant a stay that prevents a creditor (or a trustee on behalf of a creditor) from taking proceedings against third parties.

29 To my knowledge, the only example of the Court exercising its inherent jurisdiction in relation to the CCAA is Re Westar Mining Ltd., [1992] B.C.J. No. 1360 (June 15, 1992, B.C. Supreme Court Action No. A921164). In that case Macdonald J. exercised the inherent jurisdiction of the Court in order to create a charge against the assets of Westar for the benefit of suppliers which were continuing to provide goods and services to Westar after the commencement of the CCAA proceedings. Macdonald J. created the charge on June 10, 1992 without giving extensive reasons. His Order was made without prejudice to the claims of the Crown which did oppose the creation of the charge a few days later on the basis that it altered the priorities in the event that Westar went into bankruptcy. In his Reasons for Judgment dated June 16, 1992 Macdonald J. first explained how and why he created the charge (at p. 3):

> The charge has already been created. In doing so, I purported to exercise the inherent jurisdiction of this court. The Company would have no chance of completing a successful reorganization without the ability to continue operations through the period of the stay. It must be able to arrange for further limited credit from its suppliers if it is to continue operations. Thus, security which is sufficient, in the eyes of its suppliers, to justify the extension of some further credit is a condition precedent to any acceptable plan of reorganization.

Macdonald J. rejected the argument of the Crown and he elaborated on the use of the Court's inherent jurisdiction at pp. 9 and 10:

> The issue is whether or not those suppliers who are prepared (or have been compelled, between May 14 and June 10) to extend credit which will hopefully keep the Company operating during the period of the stay, should be secured. I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end. (See, Winnipeg Supply & Fuel v. Genevieve Mortgage Corp. [1972] 1 W.W.R. 651 (Man. C.A. at p. 657).

> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., volume 23, para. 14) as:
>
> > ...the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so...
>
> Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

30 Mr. Kirkham submitted that Westar is distinguishable on the basis that the assets against which the Court created a charge were within the jurisdiction of the Court because they belonged to Westar and that in this case his clients and Canada Trust are not before the Court. I do not think that this is a valid distinction because the charge against Westar's assets affected the Crown which was not before the Court any more than Mr. Kirkham's clients and Canada Trust.

31 It may be argued that the Court should only exercise its inherent jurisdiction to "flesh out the bare bones" of the CCAA and that the Court should not utilize its inherent jurisdiction to grant stays because s. 11 of the CCAA already deals with the subject matter of stays and it contains Parliament's full intentions in that regard. This potential argument has not been given effect in analogous circumstances in the United States when proceedings under Chapter 11 of the U.S. Bankruptcy Code are pending. Under Chapter 11 there is an automatic stay of proceedings and, like s. 11 of the CCAA, it is a stay of proceedings against the debtor company only. The U.S. Courts have used an equivalent of inherent jurisdiction (i.e., a general provision in the U.S. Bankruptcy Code to make necessary or appropriate orders) to grant stays in relation to proceedings against third parties. The most common example is a proceeding against the principals of the insolvent company whose efforts are required to attempt to reorganize the company. One of the leading U.S. authorities is Re Johns-Manville Corp. (1984), 40 B.R. 219 which was referred to by Macdonald J. in the decision of Re Philip's Manufacturing Ltd. (1991), 60 B.C.L.R. (2d) 311 where he declined to continue a stay of all proceedings against the directors and officers of the insolvent company. In that case Macdonald J. expressed a reservation about whether the inherent jurisdiction of the Court could be utilized but this predated his decision in Westar, supra.

32 Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In Westar Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.

33 In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the

benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

34 In this case I am persuaded that it is important to the reorganization process that the former senior executives not be allowed to be paid the entire amounts of their retirement allowances at this time. On the day of the hearing of this matter Woodward's took the first step in implementing the reorganization of its business affairs (which involves a downsizing of its operations) by terminating approximately 1,200 of its 6,000 employees. These terminated employees will be entitled to severance pay which will be a significant obligation of Woodward's. They will be creditors of Woodward's who will be involved in the reorganization of its financial affairs and who will be entitled to vote on the reorganization plan. These former employees will undoubtedly be unhappy when they realize that their severance pay entitlement is an unsecured obligation of Woodward's that will be compromised as part of the reorganization while the former senior executives have security for the entire amounts of their retirement allowances (which are in reality severance payments in the cases of the senior executives who were terminated). If the former senior executives are paid the full amounts of their retirement allowances at this time, the recently terminated employees may not be understanding and it may cause them to vote against Woodward's reorganization plan even if it is in their economic interests to vote in favour of the plan. Negotiations under the CCAA require a delicate balance and payment of the full amounts of the retirement allowances at this time could well irreparably upset the balance.

35 The former senior executives will not be materially prejudiced if the full amounts of the letters of credit are not paid at this time. The amounts owed to them are fully secured by the letters of credit and there will not be any deterioration in the security if the right to draw on the full amounts of the letters of credit is postponed pending the outcome of Woodward's reorganization effort. There was some evidence that there may be adverse income tax consequences if the full amounts of the letters of credit are drawn upon.

36 Another consideration is the dominant intention of the two trust agreements in allowing the full amounts of the letters of credit to be drawn upon. In quoting the relevant provisions of the two trust agreements, I only make reference to the triggering event of Woodward's becoming insolvent. The other triggering events are as follows:

(a) if Woodward's ceases operations;
(b) if Woodward's makes a general assignment for the benefit of creditors or files an assignment in bankruptcy or otherwise becomes bankrupt;
(c) if Woodward's is wound up or dissolved;
(d) if any receiver, trustee, liquidator of or for Woodward's or any substantial portion of its property is appointed and is not discharged within a period of 60 days.

The primary purpose of these triggering events in my view was to allow the former senior executives to cause the full amounts of the letters of credit to be paid if Woodward's has effectively come to an end. The draftspersons of the trust agreements happened to chose insolvency as one of the triggering events because insolvency of a company frequently signifies its end. However, in this case, it will not be known whether Woodward's insolvency will result in its demise until it has made

an attempt to reorganize pursuant to the CCAA. I am not saying that the Court should ignore the wording of the agreements but it is open to the Court to take into consideration the overall intent of the parties when deciding whether it is just and equitable to invoke its inherent jurisdiction.

37 The decision in Meridian, supra, is distinguishable from this case. In Meridian the Court was interpreting an Order that it had previously made and it was not considering whether a further Order could be made pursuant to its inherent jurisdiction.

38 Although I have concluded that the relative benefit of staying the calling of the letters of credit in their entirety outweighs the prejudice to the former senior executives and that I should exercise the Court's inherent jurisdiction to grant a stay to prevent the letters of credit from being fully drawn, it does not necessarily follow that the stay should prevent partial draws upon the letters of credit. In exercising its inherent jurisdiction in these circumstances the Court should endeavour to exercise the jurisdiction in a manner that balances the interests of the parties as much as possible.

39 The main prejudice to the former senior executives if they are not permitted to cause any call to be made on the letters of credit is the fact that the monthly payments of the retiring allowances will not be made. The monthly payments provide a source of income to the former senior executives and they will be prejudiced if the payments cease. Both of Mr. Kirkham and Ms. Adair indicated that if I did grant a stay of proceedings with respect to the letters of credit, one or more of their clients may make an application to have the stay discontinued on the basis that it creates a hardship to them.

40 On the other hand, the continuation of the monthly payments of the retiring allowances is much less likely to create a difficulty in the negotiations with the recently terminated employees than the payment of the retiring allowances in full. Although the former senior executives will be paid the monthly amounts of the retiring allowances without compromise pending the reorganization attempt, they will have to accept payment over a period of time. In addition, the recently terminated employees will hopefully appreciate that Woodward's would not be voluntarily making the monthly payments to the former senior executives and that it is the Court which is allowing the payments to be made.

41 It is my view that the interests of the parties can be largely balanced if the Court exercises its inherent jurisdiction to grant a stay that prevents payment on the letters of credit except to the extent of satisfying the obligation of Woodward's to make the monthly payments of the retiring allowances. In exercising the Court's discretion in this fashion I appreciate that a stay under s. 11 of the CCAA could effectively prevent the calling on the letters of credit for the purpose of paying the monthly amounts. In view of the fact that the Court is exercising its inherent jurisdiction to prevent the letters of credit being drawn in their entire amounts, I am exercising my discretion to decline to grant a stay under s. 11 which would prevent the calling on the letters of credit for the purpose of paying the monthly amounts.

42 It is necessary for the Court to exercise its inherent jurisdiction because a stay under s. 11 could not be utilized to prevent Canada Trust from drawing the full amounts of the letters of credit that are held by it. However, a stay under s. 11 could effectively prevent Montreal Trust from making any call on the letter of credit in its favour. I must now decide whether I should exercise my discretion under s. 11 to prevent Montreal Trust from making the partial draws on its letter of credit that I am permitting Canada Trust to make on each of its letters of credit.

43 As I have indicated above, the main purpose of s. 11 is to preserve the status quo among the creditors of the insolvent company. Huddart J. commented on the status quo in Re Alberta- Pacific Terminals Ltd. (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at p. 105:

> The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

44 In that case Huddart J. dismissed the application of the owner of the insolvent company's operating facilities for payment of ongoing amounts owing under the operating agreement between the two parties. In essence, the payments were the equivalent of rental payments under a lease. Huddart J. dismissed the application because there were insufficient funds to make the payments and the owner of the facilities had not shown hardship. The circumstances in that case were quite unusual because the insolvent company was continuing to pay interest to one of its lenders. In more normal cases under the CCAA one would expect during the reorganization period that rental payments for the ongoing use of facilities would be made and that interest on debt would not be paid. In any event, the case is an example of a situation where the status quo was maintained by way of different treatment of creditors.

45 In the present case I have decided to exercise my discretion under s. 11 of the CCAA so that Montreal Trust is treated in the same fashion as Canada Trust. It is my view that the status quo is best maintained in this case by giving equal treatment to creditors within the same class irrespective of the different wording in the two trust agreements. I add that Woodward's does have surplus cash at the present time and that other creditors will not be materially prejudiced by allowing partial payments to be made under the letter of credit held by Montreal Trust.

46 In the result, I continue the stay to prevent Canada Trust from calling on the letters of credit held by it except to the extent that it may be necessary to obtain payment of the monthly retiring allowances that are overdue. I grant a stay restraining Montreal Trust from delivering to Woodward's a copy of any certificate provided to it under paragraph 8 of the Montreal Trust Agreement.

47 The Order dated December 11, 1992 stipulates that Woodward's is to retain its funds in its operating accounts with the Bank and that Woodward's may only use the funds for certain specified purposes. I anticipate that the continuing stay Order will have a similar provision. If it does contain a similar provision, the permitted purposes for use of funds may include the payment of the monthly retiring allowances to the former senior executives. I appreciate that Woodward's may prefer to require that the letters of credit be called upon so that there is no appearance to the recently termi-

nated employees that Woodward's is voluntarily making payments to the former senior executives. On the other hand, Woodward's may not want to create an administrative nuisance for the Bank by having numerous calls being made on the letters of credit. Woodward's may exercise its discretion as to whether the monthly payments to the former senior executives are made voluntarily or involuntarily, recognizing of course that they will be made involuntarily if they are not made voluntarily.

TYSOE J.

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 SINO-FOREST CORPORATION

Court File No: CV-12-9667-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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