

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, C. C-36, AS AMENDED
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC.,
2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND
2147650 ONTARIO INC.

Applicants

FACTUM OF THE MOVING PARTIES
**MEDI GROUP INCORPORATED, 1865721 ONTARIO INC., CANADIAN
CONCRETE FORMING LIMITED; CARDELL FLOORING LTD.; E.D.
CARPENTERS LIMITED; FOREMONT DRYWALL INC., 1382479 ONTARIO
INC. 1382503 ONTARIO INC. 2203579 ONTARIO INC. CARRYING ON
BUSINESS AS FOREMONT DRYWALL CONTRACTING; GIANCOLA
ALUMINUM CONTRACTORS INC.; GM EXTERIORS INC.; PAVE
PLUMBING & HEATING INC.; PILBRO III INC.; AND SOLO ELECTRIC LTD.**

PART I – NATURE OF THE MOVING PARTIES' MOTION

1. The Moving Parties Medi Group Incorporated, 1865721 Ontario Inc., Canadian Concrete Forming Limited, Cardell Flooring Ltd.; E.D. Carpenters Limited, Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc., 2203579 Ontario Inc. carrying on business as Foremont Drywall Contracting, Giancola Aluminum Contractors Inc., GM Exteriors Inc., Pave Plumbing & Heating Inc., Pilbro III Inc, and Solo Electric Ltd. bring this motion for an order to lift the stay of proceedings and granting leave to issue continue and prosecute an action against Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., 2147650 Ontario Inc., Imran

Jinnah and Asma Jinnah and other parties (the "Medi-Group Action") and for leave to issue this action under the commercial list.

PART II – THE FACTS

Background

2. The moving parties are construction trades on the Puccini Project cumulatively owed the sum of \$2,784,728.40.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraphs 1 and 9 Exhibit "A"

3. The Puccini Project is a low rise residential project consisting of several phases. Title to phases I, II and II are in the names of 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc..Silver Stream Homes Inc. and Silver Streams (Puccini) Inc. collectively "Silver Streams" developed the project (the "Puccini Project").

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 2

4. Imran Jinnah is the sole officer, director and shareholder of the Silver Streams companies. Asma Jinnah is listed as an officer in the corporate profile report on Silver Stream Homes (Puccini) Inc..

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 3 and Exhibit "B"

Forbearance Agreement

5. In or about the fall of 2012, the Puccini Project was at the stage of commencing construction of Phase III. The moving parties were owed significant amounts of money from work done and services provided on earlier phases of the Puccini Project.

At the request of Silver Streams they returned to the project and forbore their legal remedies all in accordance with a Forbearance Agreement dated December 17th, 2012.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 4 and Exhibit "C"

6. The moving party trades provided labour, materials and services on Phase III of the Puccini Project and were not paid in full for this work. Claims for lien have been filed by the moving parties.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 5

Con Drain Action

7. Con Drain obtained an order in an action commenced in Newmarket in which closing proceeds from Phase III closings were paid into court. The moving parties have an interest in these proceeds.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 15; Exhibit "T" and "J"

8. The Con Drain Newmarket is to be traversed to the Commercial list.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 15

CCAA Proceedings

9. An initial order under the CCAA was made by Justice Newbould on December 17th, 2013 and a monitor was appointed over 2148990 Ontario Inc., 2148993 Ontario Inc.,

2147650 Ontario Inc. and 2147681 Ontario Inc., Silver Streams Homes Inc. and Silver Streams (Puccini) Inc.. The initial order provided for a stay of proceedings against these companies as well as the officers and directors of the companies (paragraph 16 of the initial order).

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraphs 6; Exhibit "D"

10. The stay of proceedings was extended several times most recently to September 26, 2014.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 7; Exhibits E-G

11. The CCAA proceedings concern only secured claims. The various mortgagees on the Puccini Project are claiming priority over the lien claimants as well as challenging the validity of the lien claims. The moving parties wish to issue and proceed with the prosecution of a trust action and other relief arising out of the forbearance agreement.

Reference: Affidavit of Dominic Montemurro, dated September 19, 2014, at paragraph 8

PART III – ISSUES AND LAW

12. The *company creditor's Arrangement Act* enables the court to order a stay of proceedings in order to maintain the status quo while the debtor company develops a compromise

Reference: Re Canadian Airlines Corp (2000) 19 C.B.R. (4th) at para 12

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

There are no statutory provisions for the lifting of the stay and accordingly the courts have developed the “sound reasons” test to determine whether a stay should be lifted. There should be sound reasons consistent with the scheme of the CCAA for the stay to be lifted. Factors to be considered are;

- (a) the balance of convenience;
- (b) the relative prejudice to the parties; and
- (c) the merits of the proposed action where relevant to the issue of “sound reasons” for lifting the stay.

Reference: ICR Commercial real estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007) SKCA 72 at para. 67 (Sask.CA)

Timminco Limited and Bécancour Silicon Inc., Applicants
[2012] O.J. No. 1949 at para 17.

13. The following is a list of situations in which the court will lift a stay and that the courts have considered in determining whether to lift a stay:

- (a) When the 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 (where the creditor’s financial problems are created by the order or where failure to pay the creditor would cause it to close and thus jeopardize the debtor company’s existence);
- (d) The applicant would be significantly prejudiced by the refusal to lift the stay and there would be no resulting prejudice to the debtor company or the position of the creditors;

- (e) It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time;
- (f) After a lapse of a significant time period, the insolvent 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.
- (i) It is in the interest of justice to do so.

Reference: Bank of Montreal. v. NFC Acquisiton GP.,((2012) ONSC at para.11

(a) Balance of convenience

- 14. The balance of convenience favours the lifting of the stay to allow the Medi Group claim to be issued and prosecuted. The lien claimants will not realize a recovery of the amounts owing to them in the lien proceedings. To the extent that there is are monies owing beyond what is recovered in the lien proceedings or where liens are found to lack priority any recovery will come from a trust action.
- 15. There is no plan of compromise which has been put forward and none is expected. The realization from the sale of the homes will be distributed according to the priorities to secured creditors only. The mortgagees are challenging the validity and priority of the lien claims.

16. The moving parties should not be required to wait until the conclusion of the CCAA proceedings to exercise their remedies to make what amounts to an unsecured claim.
17. Given that some of the claims in the Medi Group action arise from the December 17th, 2012 Agreement, those rights could be lost by the passage of time.

(b) Relative prejudice to the parties

18. The defendants would suffer no prejudice in that there is no restructuring contemplated of the Silver Stream Homes. To the extent that the CCAA process was used to complete the construction and sale of 10 homes at the time of the initial order that task is almost complete.
19. The prejudice to the moving parties is that they may certain rights to make a claim under the December 17th, 2012 agreement and as trust beneficiaries due to the passage of time.

(c) Merits of the proposed action relevant to soundness for lifting the stay

20. As there will be a shortfall to the lien claimants arising from any recovery within the CCAA process, the remaining legal recourse to the moving parties will be to pursue a claim for breach of trust under the *Construction Lien Act*. Such a claim is an unsecured claim and not intended to be considered under these CCAA proceedings. It is submitted there are sound reasons for lifting the stay of proceedings and granting leave to issue and prosecute the Medi Group claim.
21. A trust claim is a separate proceeding not to be joined with a lien claim.

Reference: *section 50(2) Construction Lien Act*

22. Lifting the stay will permit the moving parties to preserve rights and realize a recovery of the amounts owing to them. The failure to lift the stay would result in a loss of those rights by virtue of the passage of time and limitation periods.
23. It is in the interest of justice to lift the stay and allow the Medi Group to be issued and prosecuted as it will have limited or no distraction from the CCAA proceedings.

PART IV ORDER REQUESTED

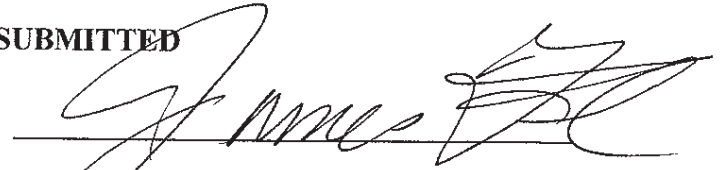
24. The moving parties seek an order;
 - (a) abridging the time for service and filing of this Notice of Motion and the Motion Record, and dispensing with service on any person other than those served;
 - (b) lifting the stay of proceedings and granting leave to issue, continue, and prosecute the Medi Group Action against the Silver Stream Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc.;
 - (c) lifting the stay of proceedings and granting leave to issue, continue and prosecute the Medi-Group Action against Imran Jinnah and Asma Jinnah for the purposes issuing, continuing and prosecuting the Medi-Group Action notwithstanding paragraph 16 of the Order of Justice Newbould dated September 17, 2013;

(d) leave to issue the Medi-Group Action under the commercial list;

(e) costs of this motion on a substantial indemnity basis, or in the alternative on a partial indemnity basis;

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 10, 2014



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Inc.; Canadian Concrete Forming Limited;
Cardell Flooring Ltd. 1382479 Ontario
Inc., 1382503 Ontario Inc. and 2203579
Ontario Inc. carrying on business as
Foremont Drywall Contractors; E.D.
Carpenters Limited; Foremont Drywall Inc.;
Giancola Aluminum Contractors Inc.; GM
Exteriors Inc.; Pave Plumbing & Heating
Inc.; Pilbro III Inc.; and Solo Electric Ltd.

SCHEDULE "A"
LIST OF AUTHORITIES

- Re Canadian Airlines Corp (2000) 19 C.B.R. (4th) at para 12 1
- ICR Commercial real estate (Regina) Ltd. v. Bricore Land Group Ltd.
(2007) SKCA 72 at para. 67 (Sask.CA) 2
- Timminco Limited and Bécancour Silicon Inc., Applicants [2012]
O.J. No. 1949 at para 17 3
- Bank of Montreal. v. NFC Acquisiton GP.,((2012) ONSC at para.11 4

TAB 1

Case Name:
Canadian Airlines Corp. (Re)

**IN THE MATTER OF Canadian Airlines Corporation
and Canadian Airlines International Ltd.**

Between

**The Bank of Nova Scotia Trust Company of New York,
As Trustee for the Holders of Senior Secured Notes
and Montreal Trust Company of Canada, As Collateral
Agent for the Holders of Senior Secured Notes,
Plaintiffs, and**

**Canadian Airlines Corporation, Canadian Airlines
International Ltd., Canadian Regional Airlines Ltd.,
Canadian Regional Airlines (1998) Ltd. and Canadian
Airlines Fuel Corporation Inc., defendants**

[2000] A.J. No. 1692

19 C.B.R. (4th) 1

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

Application by holders of senior secured notes in corporation for order lifting stay of proceedings against them in Companies' Creditors Arrangement Act proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Counsel:

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q. C., and H.M. Kay, Q. C., for Canadian Airlines.
S. Dunphy, for Air Canada and 853350 Alberta Ltd.
R. Anderson, Q.C., for Loyalty Group.
H. Gorman, for ABN AMRO Bank N.V.
P. McCarthy, for Monitor - Price Waterhouse Cooper.
D. Haigh, Q.C, and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.
C.J. Shaw, for Airline Pilots Association International.
G. Wells, for NavCanada.
D. Hardy, for Royal Bank of Canada.

1 PAPERNY J. (orally):-- Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAC") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is \$175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the \$56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent

of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of \$500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

- interest has continued to accrue at approximately \$2 million U.S. per month;
- the security has decreased in value by approximately \$6 million Canadian;
- the Collateral Agent and the Trustee have incurred substantial costs;
- no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;
- no outstanding accrued interest has been paid; and-they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). She stated:

The status quo is not always easy to find... Nor is it always 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.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.). Thackray J. comments that the maintenance of the

status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

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

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization:

Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Oat. CA.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stake-

holders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Re-gional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately \$115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of \$1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at \$445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The

Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, *inter alia*:

...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Mc. v. Toronto Dominion Bank*, *supra*, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (NS.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of 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 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 Section 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).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and en-danger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

PAPERNY J.

cp/s/qw/qlmmm

---- End of Request ----

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TAB 2

Case Name:

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

Between

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

[2007] S.J. No. 313

2007 SKCA 72

[2007] 9 W.W.R. 79

299 Sask.R. 194

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

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

2007 CarswellSask 324

Dockets: 1443 and 1452

Saskatchewan Court of Appeal

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

Heard: June 7, 2007.

Judgment: June 25, 2007.

(82 paras.)

Civil procedure -- Costs -- Solicitor and client or substantial indemnity -- As damages or punishment for improper conduct -- Appeal from Supreme Court decision that awarded substantial in-

demnity costs to respondent -- Appeal allowed -- There was no basis upon which to order substantial indemnity costs.

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

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

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

Statutes, Regulations and Rules Cited:

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

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

Counsel:

Fred C. Zinkhan for the Appellant.

Jeffrey M. Lee for the Respondents.

Kim Anderson for the Monitor, Ernst & Young.

The judgment of the Court was delivered by

JACKSON J.A.:--

I. Introduction

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

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

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

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

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

II. Issues

6 The issues are:

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

III. Background

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

8 Bricore sold the Building, at a purchase price of \$700,000,² to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of \$1,075,000.³ The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

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

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

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

- (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. ...⁴ [Emphasis added.]

12 On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

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

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

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

14 ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contend-

ing that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

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

4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in his capacity as chief restructuring officer for the Bricore Group.
- ...
7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]
8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.
9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.
10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.
11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.
12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith**, proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan Ltd., which became the owner of the [Building] on or about January 3, 2007.⁹ [Emphasis added.]

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

13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.

14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.
15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.¹⁰

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

Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:

1. 1500 - 4th Avenue [Department of Education Building] - we have been in regular contact with the City of Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alford's 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, 2006.¹¹

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

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

3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.
4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:
 - (a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and
 - (b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.¹²

19 The CRO filed a report in response to ICR:

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

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

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

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

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].
 4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].
 5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit "F" to this my affidavit.
 6. In reply to paras. 2 and 12 of Mr. Duval's Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the "ugly duckling" of the Bricore Properties and therefore had been excluded from the reported sale. ICR's efforts were directed at the sale of [the Building] and leasing the other two Regina properties.
 7. In response to para. 13 of Mr. Duval's Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.
 8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an "information" or "fact" sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.
- ...
11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.

12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

...

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

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

[1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "CCAA") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the CCAA that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.

...

[16] Although the interpretation of s. 11.3 of the CCAA is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:

- (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the CCAA which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall

- objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).
- (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).
 - (c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re)*, *supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the CCAA does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

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

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

[19] As stated previously, the overriding purpose of the CCAA must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to

accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.¹⁵

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

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

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

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

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

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

- 5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.
- 6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:
 - a) against Bricore Group or the Property;
 - b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or

- c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.

...

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.¹⁶ [Footnote omitted.]

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

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

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

CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;

CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;

CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;

CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year;¹⁸

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

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

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

...

11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the *CCAA* authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the *CCAA* and does not authorize the court to determine claims which fall outside of *CCAA* proceedings, such as the Trust Claim and the Post-Filing Claim.²²

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

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

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

24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding - in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of

prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York - whose alleged misdeeds are the real focal point of the attack on both sets of defendants - is able to participate.

25. In addition to the foregoing, I have considered the following factors in the exercise of my discretion:
 1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
 2. In this sense, the Campeau claim - like other secured, undersecured, unsecured, and contingent claims - must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings - i.e. the action and the CCAA proceeding - the scales tip in favour of dealing with the Campeau claim in the context of the latter:

see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, [1992] O.J. No. 1330, *supra*. **I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan".** This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.²⁴ [Emphasis added.]

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

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

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

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

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

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

36 ICR argued that by the addition of s. 11.3 in 1997³⁰ to the CCAA, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

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

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

No stay, etc., in certain cases

11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C. 1997, c. 12, s. 124)

No stay, etc., in certain cases

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

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

No stay, etc. in certain cases

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

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

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

[Emphasis added.]

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

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

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

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

However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.

...

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

[Footnotes omitted.]

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

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

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

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

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

45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...

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

47 To repeat the relevant portion of the section:

11.3 No order made under s. 11 shall have the effect of

- (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;

It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.³⁹

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the 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.⁴⁰

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

11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

...

- (c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

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

[22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evi-

dence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order.⁴¹

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

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

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

51 Subsection 11(6) of the CCAA states:

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

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

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

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

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

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfies the court that:
 - (i) the applicant has acted, and is acting, in good faith and with due diligence,
 - (ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and
 - (iii) no creditor would be materially prejudiced if the order being applied for were made.

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

A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.

Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.

...

Of the submissions received about proposed subsection 11(6), all but one condemned the provision.

...

The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:

- (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;
- (b) it would more closely align the CCAA with the BIA;
- (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
- (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]

...

The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.

While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).⁴⁶

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

53 The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.⁴⁷ Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.⁴⁸ Neither the amending legislation⁴⁹ nor the proposed Bill presently before the Senate⁵⁰ make any change to s. 11 in this regard.

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

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

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

20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

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

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

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

[16] ...

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

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

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

59 Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the 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. ...⁵⁷

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*,⁵⁸ 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.⁵⁹

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*⁶⁰ may be of assistance. The test from *Ma, Re* is:

3 ... As stated in *Re Francisco*, [1995] O.J. No. 917, 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 prop-

- erty and to earn a commission of 1.25% of the purchase price,⁶¹ 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;⁶²
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;"⁶³
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.⁶⁴ [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.⁶⁵

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.⁶⁶

79 I note that Newbury J.A. in *New Skeena Forest Products Inc., Re*⁶⁷ 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*⁶⁸ and *Hashemian v. Wilde*⁶⁹ 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.

cp/e/qlrds/qlmxt/qltxp/qlcas

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

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

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

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

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

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

7 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.

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

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

10 *Ibid.* at p. 12a.

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

12 *Ibid.* at p. 46a.

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

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

15 *ICR v. Bricore*, [2007] S.J. No. 154, 2007 SKQB 121.

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

17 (1954) 34 C.B.R. 82 (Que. S.C.). There are no cases referring to Ramsay 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.T.S.C.) mentions *Ramsay Glass* but not in reference to the point made here.)

18 *Ibid.* at p. 83.

19 (2003), 45 C.B.R. (4th) 151 (B.C.S.C.), appeal dismissed (2007), 27 C.B.R. (5th) 115 (B.C.C.A.).

20 (2005), 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).

21 (1992), 14 C.B.R. (3d) 303 (Ont. Ct. (Gen. Div.)).

22 *360networks*, *supra* note 19.

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

24 *Campeau*, *supra* note 21.

25 *360networks*, *supra* note 19.

26 *Stelco*, *supra* note 20.

27 *Campeau*, *supra* note 21.

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

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

30 *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.

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

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

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

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

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

36 (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.).

37 [1991] 2 W.W.R. 136 (B.C.C.A.).

38 (1990), 51 B.C.L.R. (2d) 105 (C.A.).

39 *Smith Bros.*, *supra* note 36.

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

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

42 [1943] O.R. 683 at 698.

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

44 *Supra* note 28.

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

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

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

48 *Ibid.*

49 *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.

50 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.

51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.

52 (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial]) at para 3.

53 [2006] O.J. No. 5029 (Ont. S.C.J.).

54 *ICR v. Bricore*, *supra* note 15.

55 *360networks*, *supra* note 19.

56 *Stelco*, *supra* note 20.

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

58 *Ivaco*, *supra* note 53.

59 *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.

60 Ibid.

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

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

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

64 *Supra* note 11.

65 *ICR v. Bricore*, *supra* note 15.

66 *ICR v. Bricore*, [2007] S.J. No. 253, 2007 SKQB 144.

67 [2005] 8 W.W.R. 224 (B.C.C.A.) at para. 23.

68 2002 SKCA 84, [2002] 11 W.W.R. 246.

69 2006 SKCA 126, [2007] 2 W.W.R. 52.

----- End of Request -----

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TAB 3

Case Name:
Timminco Ltd. (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
Timminco Limited and Bécancour Silicon Inc., Applicants**

[2012] O.J. No. 1949

2012 ONSC 2515

Court File Nos. CV-12-9539-00CL and CV-09-378701-00CP

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 26, 2012.
Judgment: April 27, 2012.

(25 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of proceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of proceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of pro-

ceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Motion by Penneyfeather for an order lifting a January 2012 stay of proceedings to permit Penneyfeather to continue a class proceeding against Timminco and others. Timminco was pursuing a restructuring process intended to maximize recovery for stakeholders. It continued to operate as a going concern with a greatly-reduced staff of 10 employees including the president and three executive officers. The class proceeding was commenced in May 2009. Settlement discussions had been terminated and there was a pending motion to strike portions of the statement of claim. Penneyfeather planned to seek leave to appeal to the Supreme Court of Canada an order declaring that the three-year limitation period provided in the Securities Act was not suspended by the operation of the Class Proceedings Act. Timminco consented to lift the stay to permit Penneyfeather to pursue this leave application only. Timminco submitted that key members of its executive team would have to expend considerable time dealing with Penneyfeather's class proceeding if the stay was lifted completely, thereby taking their focus away from the restructuring process.

HELD: Motion allowed in part. If forced to spend significant amounts of time dealing with Penneyfeather's class action in the coming months, the Timminco executive team would be unable to focus on the sales and restructuring process to the potential detriment of Timminco's other stakeholders. A delay in the sales process could have a negative impact on Timminco. It was premature to lift the stay other than with respect to the leave application.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 12, s. 28

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

Securities Act, R.S.O. 1990, c. S.5, s. 138.14

Counsel:

James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, *Penneyfeather v. Timminco Limited et al.*

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 Haley Plan.

S. Weisz, for FTI Consulting Canada Inc., Monitor.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- 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 Ca-*

nadian 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 timeliness 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 fol-

lows, 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.

G.B. MORAWETZ J.

---- End of Request ----

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TAB 4

Case Name:

Bank of Montreal v. NFC Acquisition GP Inc.

**IN THE MATTER OF a Plan of Compromise or Arrangement of NFC
Acquisition GP Inc., NFC Acquisition Corp. and NFC Land
Holdings Corp.**

**RE: 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**

[2012] O.J. No. 785

2012 ONSC 1244

Court Files Nos. CV-12-9554-00CL and CV-12-9616-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: February 22, 2012.
Judgment: February 22, 2012.

(18 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motion by secured creditor to lift stay of proceedings to permit it to apply for appointment of receiver allowed -- Initial order was made which approved sales process and made of additional commitments under DIP facility available if sales process successful -- Sales process ultimately unsuccessful, DIP lender delivered notice of sales process default and withdrew funding, debtor company's board resigned and debtor company ceased operations -- No alternative to appointing receiver as sales process had fallen apart, DIP lender had served notice of sales process default and debtors had no access to funds -- No prospect of successful CCAA process.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by secured creditor to lift stay of proceedings to permit it to apply for appointment of receiver allowed -- Initial order was made which approved sales process and made of additional commitments under DIP facility available if sales process successful -- Sales process ultimately unsuccessful, DIP

lender delivered notice of sales process default and withdrew funding, debtor company's board resigned and debtor company ceased operations -- No alternative to appointing receiver as sales process had fallen apart, DIP lender had served notice of sales process default and debtors had no access to funds -- No prospect of successful CCAA process.

Motion by a secured creditor for an order lifting the stay of proceedings in the Creditors' Companies Arrangement Act ("CCAA") matter to permit it to apply to appoint a receiver over the assets of the debtor companies. In January 2012, an initial order was made under the CCAA in respect of the debtor companies which approved a sale process in respect of the companies and the availability of additional commitments under the DIP facility which was tied to the success of the sales process. Three offers were received as a result of the sales process. However, two of the bidders ultimately withdrew from the sales process. The remaining bidder was prepared to proceed, but required the DIP lender to advance the remaining \$7 million in the DIP facility. The DIP lender delivered notice that a sales process default had occurred under the DIP facility and no further funding was available. Subsequently, the debtor's board of directors resigned, the employees were advised there was no work and the company ceased operations. The secured creditor, who was also the DIP lender, sought to lift the stay and appoint a receiver. The motion was supported by the monitor and was not opposed by any party.

HELD: Application allowed. There was no alternative to appointing a receiver. The sales process had fallen apart and the DIP lender declined to make further advances and had served a notice of sales process default, which resulted in the debtors having no further access to funds. Furthermore, the board of directors had resigned, which reduced the prospects of a successful CCAA process to nil.

Statutes, Regulations and Rules Cited:

Creditors' Companies Arrangement Act,

Counsel:

- E. Lamek and C. Fell, for the Monitor and proposed Receiver, FTI Consulting Canada Inc.
- C. Prophet and F. Lamie, for the Applicant, Bank of Montreal.
- D. Bish and A. Slavens, for the NFC Debtors.
- P. Osborne and B. Gray, for certain Directors of the Debtors.
- D. Bulas, for Edgestone Capital.
- H. Chaiton, for Westco MultiTemp Distribution Centres Inc.

REASONS FOR DECISION

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 facilities can be quickly identified among the parties that participated in the Trans-

action 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.) Papall 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.*, [2007] S.J. No. 313. 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.*, [2000] A.J. No. 1692, 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.

D.M. BROWN J.

cp/e/qlacx/qljxr/qljxh/qlana

---- End of Request ----

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SCHEDULE "B"
RELEVANT STATUTES

- <i>section 50(2) Construction Lien Act</i>	1
- <i>Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, s. 11.02</i>	2

TAB 1

PART VIII
JURISDICTION AND PROCEDURE

Lien claims and trust claims

Lien claim enforceable in action

50. (1) A lien claim is enforceable in an action in the Superior Court of Justice in accordance with the procedure set out in this Part. R.S.O. 1990, c. C.30, s. 50 (1); 2006, c. 19, Sched. C, s. 1 (1).

Trust claim and lien claim not to be joined

(2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction. R.S.O. 1990, c. C.30, s. 50 (2).

TAB 2

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a 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.

Stays, etc. — other than initial application

(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.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

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 SILVER
STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990
ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

Court File No: 13-10362-00-CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE MOVING PARTIES

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2203579 Ontario Inc. carrying on business as
Foremont Drywall Contractors; E.D. Carpenters
Limited; Foremont Drywall Inc.; Giancola
Aluminum Contractors Inc.; GM Exteriors Inc.; Pave
Plumbing & Heating Inc.; Pilbro III Inc.; and Solo
Electric Ltd.