CLERK'S STAMP

COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
APPLICANTS	**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 DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.**
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS** **(Diavik JV COVER PAYMENTS)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Peter L. Rubin / Peter Bychawski / Claire Hildebrand / Morgan Crilly Telephone No.: 604.631.3315 / 604.631.4218 / 604.631.3331 / 403.260.9657 Email: peter.rubin@blakes.com / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com Fax No.: 604.631.3309 File: 00180245/000013

I. INTRODUCTION

1. The Applicants were granted protection under the *Companies Creditors' Arrangement Act* (the "**CCAA**")[1] on April 22, 2020 (the "**Initial Application**"), with a comeback hearing (the "**Comeback Hearing**") held on May 1, 2020. This motion is effectively a continuation of the Comeback Hearing.[2]

2. At both the hearing of the Initial Application and at the Comeback Hearing, the Applicants sought an order principally in the form of the Alberta Model Order (the "**Model Order**"). Notably, the relief sought by the Applicants with respect to a stay of proceedings (found in paragraph 13 of the Amended and Restated Initial Order granted May 1, 2020 (the "**ARIO**")) and staying the exercise of rights and remedies as against the Applicants (found in paragraph 14 of the ARIO) followed the form of the Model Order.

3. The issue of onus and whether this is a de novo hearing raised by Diavik Diamond Mines (2012) Inc. ("**DDMI**") in their Bench Brief is, in the respectful view of the Applicants, a red herring. An Initial Order stays all creditors. It is DDMI that is now asking the Court to vary the standard stay created under the Model Order, Initial Order and ARIO to grant it additional protections – and exemptions from the stay – that no other secured creditor has and that DDMI does not have under the Diavik JVA with Dominion Diamond.

4. On this motion, DDMI, the 60% joint venture partner of Dominion Diamond in the Diavik Mine joint venture (the "**Diavik Joint Venture**") as well as the manager of the Diavik Joint Venture (in this capacity, the "**Manager**"), seeks an order that effectively has two components:

a) Exempting DDMI from the usual CCAA stay provisions to allow DDMI to make cover payments under the Diavik JVA (the "**Cover Payments**") if DDMI elects to do so; and

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

[2] Capitalized terms not herein defined shall have the meaning ascribed to them in the first Affidavit of Kristal Kaye, sworn April 21, 2020 (the "**First Kaye Affidavit**")

b) Ordering that Dominion Diamond's 40% share of diamonds from the Diavik Joint Venture be segregated, not delivered to the Applicants and held by DDMI at DDMI's production splitting facility in Yellowknife (the "**Facility**").

5. It is well established that the protection offered by a stay of proceedings granted pursuant to s. 11 of the CCAA is very broad. It is a "key element of the CCAA process" and "the engine that drives the broad and flexible statutory scheme of the CCAA."[3] To effect this expansive stay, the provisions in the Model Order are intended to capture all rights, remedies, elections, and steps, procedural or otherwise (even including such matters as notices or deliveries), that may be taken in respect of a debtor company.[4]

6. Notwithstanding the breadth of the CCAA stay, the Applicants do not object to the first part of the relief sought by DDMI on this application, being DDMI's ability to make a Cover Payment should it chose to do so. This was communicated to the Court and to DDMI by the Applicants at the Comeback Hearing.

7. However, the Applicants oppose the second aspect of the relief being sought by DDMI, being that the diamonds owing to the Applicants under the Diavik JVA be held by DDMI at DDMI's Facility instead of being delivered to the Applicants. This relief is also opposed by other key stakeholders, the Credit Agreement Lenders (the Applicants' senior secured first lien lenders) and the Ad Hoc Noteholder group (collectively, the "**Key Stakeholder Group**").

8. Both the Applicants and the Key Stakeholder Group agree that if DDMI chooses to make a Cover Payment then DDMI should be permitted to do so. However, other than this ability to make such an optional payment, the broad protections afforded to the Applicants by the stay of proceedings should apply to DDMI as they apply to the Key Stakeholder Group and all of the Applicants' other stakeholders. Specifically, DDMI should not be permitted to refuse to deliver diamonds to the Applicants in accordance with the Diavik JVA. To allow such a step by DDMI would be contrary to the usual stay provisions.

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[3] *Re Canwest Global Communications Corp* (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J.) at para. 28, Tab 1

[4] *Re Blue Note Caribou Mines*, 2010 NBQB 12 at paras. 32-36, Tab 2

9. Further, DDMI's decision to make a Cover Payment is adequately secured and no further relief is required to protect its interests. Should DDMI elect to make a Cover Payment, its decision to do so will be secured against Dominion Diamond's 40% interest in the Diavik Joint Venture and all of the assets of that joint venture.

10. Attached as **Schedule "A"** to this Bench Brief is a form of Second Amended and Restated Amended Order that the Applicants, in consultation with the Key Stakeholder Group, believe is an appropriate order in the circumstances.

II. FACTS AND BACKGROUND

(A) The Evidence on this Application

11. The details of DDMI's position on this application are set out in the affidavit of Thomas Croese dated April 30, 2020 (the "**Croese Affidavit**") and filed in support of DDMI's application. On behalf of the Applicants, Kristal Kaye, the Chief Financial Office of Dominion Diamond and Dominion Canada, has sworn a second affidavit in these proceedings dated May 6, 2020 (the "**Second Kaye Affidavit**") setting out further factual background relevant to this application and responding to certain portions of the Croese Affidavit.

12. As noted in the Second Kaye Affidavit, the Applicants do not agree with much of what is contained in the Croese Affidavit, which, say the Applicants, paints an incomplete picture of the facts and does not accurately portray the true state of affairs.[5]

13. While DDMI may disagree with the position and concerns of the Applicants on this point (as is indicated in the Croese Affidavit), it clear that Dominion Diamond has previously expressed concerns relating to the operation of the Diavik Mine, such as:

(a) the operational and financial performance of the Diavik Mine generally and DDMI's repeated failure to meet costs budgets, production (ore processed) plans and diamond recovery budgets, including a significant failure to meet these in the January to March period of this year as against the approved budget, which budget is noted at

[5] Second Kaye Affidavit at para. 4

paragraph 35 of the Croese Affidavit; many of which failures preceded the COVID-19 pandemic;

(b) the operation of the Diavik Mine in a manner that is inconsistent with the annual planned program and appears to be a result of DDMI adopting a high-grade approach, which makes little economic sense and is destructive of value for the joint Venture and its participants;

(c) the operation of the Diavik Mine since March in light of the current COVID-19 environment;

(d) the operation of the Diavik Mine since March in light of the current status of the diamond industry, including sales channels, diamond prices and current diamond stockpiles;

(e) the operational and financial performance of the Manager in relation to the Diavik Mine including the amount of the bi-weekly cash calls;

(f) the inability of the Manager to achieve appropriate cost reductions; and

(g) the lack of appropriate consultation with Dominion Diamond and the failure to properly take into consideration the interests and views of Dominion Diamond.[6]

14. In particular, the Applicants are of the view that the frequency and amount of the cash calls in this particular environment could have a negative impact on their restructuring efforts. All of the above is prejudicial to the Applicants.[7]

15. While the focus of the current dispute has been on recent cash calls made by DDMI, including those that have been or may be missed, there is a long history of substantial investment by Dominion Diamond (and its predecessor companies) in the Diavik Joint Venture. Dominion Diamond has funded the infrastructure and costs of the Diavik Mine for many years.

16. As noted in the First Kaye Affidavit, as of April 21, 2020, in the first three months of 2020, Dominion Diamond has made cash call payments in respect of the Diavik Joint Venture in the amount of $68.9 million.[8] In addition, a further cash call

[6] Second Kaye Affidavit at para. 6

[7] Second Kaye Affidavit at para. 7

[8] First Kaye Affidavit at para. 19

payment was made by Dominion Diamond in early April 2020, for the April 1-15 period, in the amount of $17.2 million.[9]

17. In 2020, Dominion Diamond has made cash call payments totalling approximately $86 million. In just over three years, Dominion Diamond has paid approximately $760 million in cash calls in relation to the Diavik Joint Venture. Over the last 15 years, in excess of $3 billion has been contributed to the Diavik Joint Venture by Dominion Diamond or its predecessor as 40% participant.[10]

18. While arguably not directly relevant to the motion before the Court, but of sufficient note for Mr. Croese to reference in his affidavit, Mr. Croese indicates that the Applicants requested that the mid April 2020 cash call date be altered or delayed. Rather, as set out in the Second Kaye Affidavit, it was DDMI that sought to move the date of the cash call forward. Dominion Diamond simply asked for confirmation that DDMI would comply with and abide by the Management Committee (as defined below) resolution with respect to cash call dates.[11]

19. Finally, the Croese Affidavit may leave the wrong impression with respect to the current state of the diamond industry and the impact of COVID-19 on that industry. While there are certain sales that undoubtedly have taken place, such as private sales as noted by DDMI, these sales are a fraction of what ordinarily takes place as the significant majority of the regular diamond channels are effectively closed.[12]

20. The Croese Affidavit also makes a very general statement about DDMI's sales saying that an affiliate of DDMI has achieved "material sales during March and April 2020." There is no evidence or details in the Croese Affidavit of what "material" means, how the volume of such sales compares to sales in the preceding several months and years and what level of discount (or reduced sale price) these sales occurred at as compared to sales in the preceding several months and years. It is

[9] Second Kaye Affidavit at para. 7
[10] Second Kaye Affidavit at para. 9
[11] Second Kaye Affidavit at para. 5
[12] Second Kaye Affidavit at para. 11

unknown if the discounts were "material", what discounts were offered, and which sales were offered and rejected.[13]

21. In a recent May 3 article by Rapaport News, it was confirmed that while some diamond sales could still take place, Debeers (the world's largest diamond producer) "suspended production at most of its mines" and "Almost all other diamond producers have halted or significantly reduced supply, with some mines unlikely to return to production." The May 3 article also states that "On Friday, India extended its nationwide lockdown by two weeks, raising the question of when diamond manufacturing would revert to normal, especially in the city of Surat, which produces more than 90% of the world's polished goods."[14]

(B) The Diavik Joint Venture Agreement

22. Dominion Diamond holds its 40% interest in the Diavik Joint Venture pursuant to a joint venture agreement, the Diavik JVA, dated as of March 23, 1995 between Dominion Diamond (as successor to Aber Resources Limited) and DDMI (as successor to Kennecott Canada ULC).[15] The Diavik JVA has been amended three times.

23. The following terms of the Diavik JVA are relevant to this application:[16]

(a) Article 7.1: DDMI (previously Kennecott Canada ULC) acts as the Manager of the Diavik Joint Venture. As Manager DDMI has certain rights and obligations, which are exercised under the guidance of the "**Management Committee**". These obligations include that DDMI shall manage, direct and control the Operations of the Diavik Mine.

(b) Article 2.4 (as amended by paragraph 3(b) of Amendment No. 2): Title to the Assets shall be held in the name of the Manager <u>in trust</u> for the Participants in proportion to their Participating Interest – that is Dominion Diamond to a 40% interest and DDMI as to 60%.

(c) Article 8.1: Operations shall be conducted and expenses incurred pursuant to approved Programs.

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[13] Second Kaye Affidavit at para. 12

[14] Second Kaye Affidavit at para. 13

[15] First Kaye Affidavit at para. 54

[16] Defined terms used in this paragraph not otherwise defined are as defined in the Diavik JVA

(d) Article 8.2: Programs and Budgets shall be prepared by the Manager for a period of 12 months or any other reasonable period determined by the Manager.

(e) Article 9.2: Allows the Manager to submit to each Participant a billing for their share of the estimated Costs for the next month (the cash calls). As noted in the Croese Affidavit, the frequency of these cash calls has been changed to bi-monthly.[17]

(f) Articles 9.3 and 9.4: Provide a full range of "rights, remedies and elections". Of note is Article 9.3 which provides that any payment not made by Dominion Diamond shall bear interest at Prime +5%. Article 9.3 expressly limits the remedies of DDMI following the making of a Cover Payment, by stating that, after making a Cover Payment "the non-Default participants shall have the rights, remedies, and elections set forth in Article 9.4" Furthermore, Article 9.4 provides that the Manager (which is DDMI) "may at any time, but shall not be obligated to, elect to make such contribution or meet such cash call on behalf of the defaulting Participant." This Article also provides for a whole host of further rights and remedies and confirms DDMI's security interest over the assets which includes Dominion Diamond's 40% interest in the Diavik Joint Venture and all operational assets (trucks, mining equipment, etc.). Most notably, nothing in Article 9.4 provides DDMI with the right to withhold diamond inventory from a defaulting participant.

(g) Article 11.1: Provides that "Each Participant shall take in kind or separately dispose of its share of all Products in accordance with its Participating Interest." That is, the Manager is obligated to deliver 40% of the diamonds to Dominion Diamond. There is also nothing in Article 1.1 (and the subsequent protocol agreements giving effect thereto) about either party's right to withhold diamonds in the event of a Cover Payment

24. As set out above, pursuant to the terms of the Diavik JVA, an annual budget is set for the Diavik Mine, and cash calls are then made to fund the budget. As explained in the Croese Affidavit, the cash call process involves billing at the beginning of the month "<u>for the next month</u>", with that cash call obligation to be paid within 20 days.[18] As is also explained in the Croese Affidavit, in December 2008 the Management Committee changed the billing cycle to bill at the beginning and middle of each month for estimated costs "<u>for the ensuing period of approximately two weeks</u> to be paid withing seven days."

[17] Croese Affidavit at para. 17

[18] Croese Affidavit at para. 17

25. The Second Kaye Affidavit confirms this twice monthly billing cycle in advance.[19]

26. Dominion Diamond has made all of its cash call payments for the first three and a half months of 2020, in an amount of $69 million in January, February and March, with an additional payment in early April (and for the first two week period of April) in the amount of $17.2 million.[20]

27. The cash call payment that Dominion Diamond missed was the payment due for the period of April 16 - 30. This payment was due no later than April 22, 2020.[21]

28. On April 22, 2020, DDMI was set to deliver diamonds to Dominion Diamond for the period of April 1 – 15 ("**April 1-15 Diamonds**"). This is confirmed in Confidential Exhibit 5 to the Second Kaye Affidavit. These diamonds are still sitting at the DDMI Facility in Yellowknife in violation of the Diavik JVA.

29. It is important to note that as per the Diavik JVA, diamonds from the Diavik Mine are held by DDMI in trust for Dominion Diamond prior to the deliver of the diamonds to Dominion Diamond. Once these diamonds are out of the ground, the beneficial interest belongs to Dominion Diamond, not DDMI.

30. Irrespective of the other relief sought by DDMI on this application, the April 1 – 15 Diamonds should be immediately delivered to Dominion Diamond or be made immediately available for pick-up by Dominion Diamond.

31. The only issue before this Court is whether the diamonds produced from April 16 onwards should also be delivered to the Applicants.

III. ARGUMENT

(A) Section 11.01 Does Not Apply

32. DDMI claims that it is being forced to extend credit to the Applicants, contrary to section 11.01 of the CCAA. This section states that no stay of proceedings made

[19] Second Kaye Affidavit at para. 8
[20] Second Kaye Affidavit at para. 8
[21] Second Kaye Affidavit at para. 19

under s. 11 shall have the effect of "prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration" or "requiring the further advance of money or credit" once a debtor company has filed for CCAA protection. Presumably, DDMI's position is that should it chose to make a Cover Payment, at its election, this would amount to being required to advance further credit to the Applicants.

33. As an exception to the broad stay of proceedings granted pursuant to s. 11, section 11.01 is to be interpreted narrowly in order to facilitate the policy objectives of the CCAA.[22] This exception to the stay is designed to create a "pay as you go" regime for the supply of goods so as to prevent a situation where the stay would "enforce the continued supply of goods and services to the debtor company without payment for current deliveries."[23] In order for s. 11.01 to be engaged, the debtor must request that further goods or credit be provided and the stay of proceedings must force a supplier to comply.[24]

34. The Diavik JVA is not a simple supply contract. It is a sophisticated and complex cost-sharing agreement among joint venture partners for a diamond mine. The Diavik JVA specifically contemplated and confirms that when DDMI makes a cover payment, that payment is "indebtedness" that is secured by a lien. Under the Initial Order, DDMI – like all secured creditors – is stayed from pursuing its secured "indebtedness", just as the as the senior secured first lien lenders and the senior secured noteholders are.

35. DDMI is not a simple post-petition supplier of goods that is being "forced" to supply goods to the Diavik Mine. They are the Manager of the Diavik Mine under a sophisticated cost-sharing contract where the parties have fully negotiated and documented their obligations and their remedies, including for and in respect of this very situation. As Manager, DDMI has decided to continue operating the mine. It has

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[22] *Re Nortel Networks Corp*. 2009 ONCA 833 at para. 17 [*Nortel*], Tab 3, which confirmed that the exception to the broad stay of proceedings found in s. 11.3 (the predecessor to the current s. 11.02) should be interpreted narrowly.

[23] *Nortel* at para. 34; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*, 2007 SKCA 72 at para. 43 [*ICR*], Tab 4

[24] *ICR* at para. 44

issued cash calls to Dominion Diamond and may elect to make Cover Payments of those Dominion Diamond cash calls. The Diavik JVA specifically states what will happen when DDMI decides to make those cover payments – they receive a first-ranking lien (which no one is seeking to prime) and interest. The Diavik JVA contains the complete code of DDMI's remedies when it elects to make those Cover Payments.

36. But what DDMI is now asking the Court to do is grant it another term – that it did not negotiate for and does not have under its agreement – which is to keep the Applicants' share of the diamond production from the Diavik Mine. The Diavik JVA is an expansive agreement with pages upon pages of how the diamonds are to be handled (see the Schedules to the Diavik JVA and the diamond protocol). Nowhere in the Diavik JVA does it give DDMI the right to hold or refuse to deliver diamonds to Dominion Diamonds. DMMI is asking the Court to insert a new provision into the Diavik to further protect their interests. The Court should not do that. The Court should not be asked to do that.

37. The ARIO does not disturb any of the rights granted to DDMI under the Diavik JVA; indeed, it respects their lien and does not seek to prime it. Unlike a widget supplier, DDMI contracted for how it would be treated in the event it had to make a Cover Payment after it issues a cash call, and it is receiving the full benefit of its contractual terms. Unlike other ordinary course suppliers (or even counterparties to a true lease, an analogy used by DDMI in its Bench Brief) who operate with a CCAA debtor on an unsecured basis, DDMI is receiving a dollar-for-dollar security interest in exchange for any Cover Payments made.

38. DDMI has not introduced any evidence of prejudice. DMMI has a first-ranking security interest on Dominion Diamond's 40% interest in the Diavik Mine and all equipment at the mine, and any additional cash calls by DDMI will support the value of both DMMI's 60% interest and its first-ranking (non-primed) lien over Dominion Diamond's 40% interest.

39. There is no evidence the Cover Payments (if made) are at risk or that DDMI will be required to close the Diavik Mine. They can cover the cash call payments exactly as the Diavik JVA cost-sharing contemplates would happen, and receive their

contracted for additional rights. They should not receive any further protection from this Court in addition to their contractually bargained for rights under the Diavik JVA.

40. Will the senior secured first lien lenders and the senior secured noteholders now seek similar exemptions or additional rights? Is the debtor not also using their collateral?

41. Likewise, it does not matter that the senior secured first lien lenders and the senior secured noteholders are subordinated to DDMI on the collateral for a covered call; they are not subordinated on other collateral of the debtors, and yet they are stayed. So too must DDMI be on its secured "indebtedness".

42. Section 11.01 of the CCAA does not apply here. This is a joint venture agreement, not a contract for the supply of widgets as noted above. Any decision by DDMI to make a Cover Payment falls entirely outside the scope of this section.

43. Most importantly, DDMI is not being forced or required to extend any credit or provide any services to the Applicants by operation of the stay of proceedings, nor have the Applicants requested that DDMI do so. Rather, Dominion Diamond has voiced concern as to how DDMI has chosen to operate the Diavik Mine as Manager, as described above.

(B) DDMI Cannot Retain the Diamonds from April 15 Onwards

44. As noted above, both the Applicants and the Key Stakeholder Group agree that if DDMI chooses to make a Cover Payment then DDMI should be permitted to do. However, other than this ability to make such an optional payment, the broad protections afforded to the Applicants by the stay of proceedings should apply to DDMI as they apply to the Key Stakeholder Group and all of the Applicants' other stakeholders.

45. Is it clear that under the JV Agreement, DDMI has no obligation to make a Cover Payment. In other words, it is a choice. DDMI is the Manager of the Diavik Joint Venture and has numerous options at its disposal. It seems equally clear that

the decision by DDMI to make a Cover Payment is an exercise of right, remedy or election – that is the very wording in the Diavik JVA.

46. As noted earlier and as set out in the Second Kaye Affidavit, Dominion Diamonds has expressed concerns with the operation of the Diavik Mine by DDMI. In Dominion Diamond's view, DDMI has failed and refused to act appropriately. These are all DDMI decisions.

47. DDMI should not be permitted to refuse to deliver diamonds to Dominion Diamond in accordance with the Diavik JVA on the basis that it does not have adequate security for the amount of any Cover Payment made. DDMI is adequately secured - to the extent of any Cover Payment made. DDMI can have their lien as against Dominion Diamond's 40% interest in the Diavik Joint Venture and it also retains its lien against all of the other assets of the joint venture including mining plants, equipment, etc. As noted earlier, Dominion Diamond alone has contributed more than $3 billion to the joint venture.

48. The Diavik JVA gives DDMI a broad security interest, including in Dominion Diamond's 40% interest in the Diavik Joint Venture. Dominion is not suggesting that DDMI forego that security interest.

49. On DDMI's own affidavit evidence the Diavik Joint Venture has considerable value – according to the Croese Affidavit:

(a) DDMI making Cover Payments on behalf of Dominion "will preserve and <u>enhance</u> the value of the Joint Venture;[25]

(b) DDMI making Cover Payments "is to <u>Dominion's</u> immediate and ongoing financial benefit";[26] and

(c) The projected 2020 <u>free cash flow</u> benefit to the Participants (as defined in the Diavik JVA) associated with continued operations … "is estimated to be materially favourable and in the order of $100 million or more."[27]

[25] Croese Affidavit at para. 9

[26] Croese Affidavit at para. 26

50. These recent statements from DDMI demonstrate their view that there is real and significant value in the Diavik Mine, making Cover Payments increases the value of the mine and there is a projected amount of $100 million of “free cash flow” for 2020. The ability of the mine to generate such production and cash flow is premised on, among other things, the many hundreds of millions of dollars that Dominion Diamond has contributed to the mine to date. Missed capital calls do not change that.

51. By all accounts, DDMI is fully secured in respect of any Cover Payments they may wish to make by virtue of their security interest in Dominion Diamond’s 40% interest in the Diavik Joint Venture and the significant other assets.

52. In summary, DDMI does not have to keep operating the Diavik Mine the way it currently is, it does not have to make cash calls in the manner it is, and it does not have to make Cover Payments. However, if DDMI choses to do all of those things, and do them in the face of concerns expressed by Dominion Diamond – it has an obligation to deliver Dominion Diamond’s 40% share of the diamonds to the Applicants.

53. Presumably, DDMI will only do all the above if they determine it is in their best interests to do so or if they feel they are adequately secured by the significant security they have.

54. The Applicants submit that DDMI has also not demonstrated that it is suffering material prejudice. The evidence of DDMI through the Croese Affidavit would suggest the opposite – that is, DDMI has adequate security through its security interest in Dominion Diamond’s interest in the Diavik Joint Venture and other assets. In the Applicant’s respectful view, DDMI cannot have it both ways, that is they cannot on the one hand proffer evidence of the value of the Diavik Joint Venture and the enhancement of that value through Cover Payments and then on the other hand, say they are prejudiced.

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[27] Croese Affidavit at para. 42(a)

55. DDMI should be subject to the same stay as the other creditors who all have similar security and lien rights and who are prevented from enforcing. Giving DDMI free reign as they seek is prejudicial to the Applicants and the other stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF MAY, 2020

BLAKE, CASSELS & GRAYDON LLP

Peter Rubin

Peter Rubin / Peter Bychawski / Claire Hildebrand/ Morgan Crilly
Counsel to the Applicants

LIST OF AUTHORITIES

TAB	Description
1	*Re Canwest Global Communications Corp* (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J.)
2	*Re Blue Note Caribou Mines*, 2010 NBQB 12
3	*Re Nortel Networks Corp*. 2009 ONCA 833
4	*ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*, 2007 SKCA 72

SCHEDULE "A"

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DOCUMENT	**SECOND AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BLAKE, CASSELS & GRAYDON LLP Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Peter L. Rubin / Peter Bychawski / Claire Hildebrand / Morgan Crilly Telephone No.: 604.631.3315 / 604.631.4218 / 604.631.3331 / 403.260.9657 Email: peter.rubin@blakes.com / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com Fax No.: 604.631.3309 File: 00180245/000013

DATE ON WHICH ORDER WAS PRONOUNCED: May 1, 2020

LOCATION OF HEARING: Calgary

NAME OF JUDGE WHO MADE THIS ORDER: The Hon. Madam Justice K. Eidsvik

UPON the application of Dominion Diamond Mines ULC, Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, and Dominion Finco Inc. (collectively, the "**Applicants**"); **AND UPON** having read the Applicants' Notice of Application, filed, the Affidavit of Kristal Kaye sworn April 21, 2020, filed, and the Affidavit of Service of Jade Field sworn April 30, 2020; **AND UPON** reading the consent of FTI Consulting Canada, Inc., to act as monitor (the "**Monitor**"); **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; A**ND UPON** hearing counsel for the Applicants, counsel for the Monitor, and any other counsel present; **AND UPON** reading the Pre- Filing Report of the Monitor dated April 21, 2020; **AND UPON** reading the First Report of the Monitor dated April 29, 2020; **AND UPON** reading the Affidavit of Thomas Croese sworn on April 30, 2020;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

(a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "Business") and Property;

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Kristal Kaye sworn April 21, 2020 or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order; and

   (c) with the consent of the Monitor, obligations owing for goods and services supplied to the Applicants prior to the date of this Order if, in the opinion of the Applicants after consultation with the Monitor, the supplier or vendor of such goods or services is necessary for the operation or preservation of the Business or Property, provided that such payments shall not exceed $5,000,000 in the aggregate without prior authorization by this Court.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

   (b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iii) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated

by the Applicants from time to time for the period commencing from and including the date of this Order, but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

   (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

   (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

   (c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

   (a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $2,000,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

   (b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

   (c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor or further Order of the Court, their arrangements or agreements of any nature

whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or

prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including June 1, 2020, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien;

(e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment; or

(f) prevent Diavik Diamond Mines (2012) Inc. ("**DDMI**"), with the prior written consent of the Monitor, from making one or more cover payment(s) ("**Cover Payments**") in respect of outstanding contributions or cash calls due and owing by the Applicants pursuant to the Diavik Joint Venture Agreement, dated March 23, 1995 (as amended from time to time, the "**Diavik Joint Venture Agreement**") and obtaining a security interest in the Applicants' Participating Interest and the Assets (as those terms are defined in the Diavik Joint Venture Agreement) in all cases in accordance with, and only to the extent expressly provided by, Section 9.4(c) of the Diavik Joint Venture Agreement.

15. Except to the extent expressly permitted under paragraph 14(f) above, DDMI and Rio Tinto plc and each of their affiliates are subject in all respects to the stay of proceedings provided in this Amended and Restated Initial Order which, for greater certainty, prohibits any such party from retaining any portion of the Applicants' diamond production from the Diavik Joint Venture (the "**DJV**"), or from taking any action with respect to the Applicants, their Property, or the DJV (including any actions set forth in the Diavik Joint Venture Agreement) which could adversely affect the Applicants, their Property, or their interest in the DJV or its share of production therefrom.

16. Nothing in this Order shall prevent the Applicants or their designees from repaying the outstanding amount of any Cover Payment in accordance with the terms of the Diavik Joint Venture Agreement and as consented to by Credit Suisse AG, Cayman Islands Branch, as administrative agent under the Revolving Credit Agreement dated as of November 1, 2017, as amended and any lender under any interim facility entered into by the Applicants, and any such repayment shall correspondingly reduce the indebtedness owed by the Applicants to DDMI.

17. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such

party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

18. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

19. Without limiting paragraph 18, DDMI shall promptly deliver to the Applicants their share of diamond production from the DJV as required by, and in accordance with, the terms of the Diavik Joint Venture Agreement.

CONTINUATION OF SERVICES

20. During the Stay Period, all persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

21. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 17 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

23. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

24. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $4,000,000, as security for the indemnity provided in paragraph 23 of this Order. The Directors' Charge shall have the priority set out in paragraphs 34 and 36 herein.

25. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 23 of this Order.

APPOINTMENT OF MONITOR

26. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

27. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) advise the Applicants in the preparation of the Applicants' cash flow statements;

(d) advise the Applicants in their development of the Plan and any amendments to the Plan;

(e) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

28. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

29. The Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

30. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

31. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis.

32. The Monitor and its legal counsel shall pass their accounts from time to time.

33. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $3,500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 34 and 36 hereof.

VALIDITY AND PRIORITY OF CHARGES

34. The priorities of the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $3,500,000); and

Second – Directors' Charge (to the maximum amount of $4,000,000).

35. The filing, registration or perfection of the Directors' Charge and the Administration Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

36. Each of the Directors' Charge and the Administration Charge shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

37. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge or the Administration Charge, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

38. The Directors' Charge and the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(iii) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

39. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

40. The Monitor shall (i) without delay, publish in the *Globe and Mail* and *The Northern Miner* a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed

under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

41. The Monitor shall establish a case website in respect of the within proceedings at cfcanada.fticonsulting.com/Dominion (the "Website").

42. Any person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to the service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up-to-date form of the Service List on the Website.

43. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on the Website.

44. Applicants and, where applicable, the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

45. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

GENERAL

46. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

47. Except as expressly provided for in this Order, nothing herein shall in any way prejudice or affect any of the Applicants' rights, claims, interests and/or defences under the Diavik Joint Venture Agreement or otherwise available to them at law, and this Order is made expressly without prejudice to the same.

48. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

49. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

50. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

51. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

52. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen's Bench of Alberta

TAB 1

2009 CarswellOnt 7882
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634, 61 C.B.R. (5th) 200

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

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

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities
Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
K. McElcheran, G. Gray for GS Parties
Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild
Hilary Clarke for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.

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

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.l and GS VI AA One Parallel Holding S.ar.l (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

> (i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
>
> (ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
>
> (iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
>
> (iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred

shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

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

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor

was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
>
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
>
> (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
>
> (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
>
> (e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re* [1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS

parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 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.

(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.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re*[3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the

appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of 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" [11] , 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.* [12] . That decision also indicated that the judge should consider the good faith and due diligence of the debtor company. [13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re* [14] 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.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.

- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company [15] without the prior written consent of one of the GS Parties [16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re*[17] :

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*[19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

Footnotes

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

2 (B.C. C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

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

5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

9 R.S.O. 1990, c.C.43.

10 Supra, note 6 at paras. 24 and 25.

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

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

TAB 2

2010 NBQB 12
New Brunswick Court of Queen's Bench

Blue Note Caribou Mines Inc., Re

2010 CarswellNB 2, 2010 NBQB 12, 183 A.C.W.S. (3d) 632,
353 N.B.R. (2d) 249, 62 C.B.R. (5th) 69, 910 A.P.R. 249

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

And IN THE MATTER OF THE APPLICATION OF BLUE NOTE CARIBOU MINES INC., a body corporate

And IN THE MATTER OF THE APPLICATION OF PRICEWATERHOUSECOOPERS INC., Trustee in Bankruptcy of BLUE NOTE CARIBOU MINES INC.

And IN THE MATTER OF AN APPLICATION BY BREAKWATER RESOURCES LTD. and CANZINCO LTD. FOR VARIOUS ORDERS RELATING TO THE STAY OF PROCEEDINGS AGAINST BLUE NOTE CARIBOU MINES INC.

J.A. Réginald Léger J.

Heard: December 11, 2009
Judgment: January 11, 2010
Docket: B/M/06/09

Counsel: Stephen J. Hutchison, Jeffrey Parker for CanZinco Ltd., Breakwater Resources Ltd.
Aaron T. Collins, Steven L. Graffe for Senior Secured Noteholders
John B.D. Logan, Nathalie LeBlanc for Office of the Attorney General for the Province of New Brunswick
Karl R. Seidenz, Howard Gorman for Maple Minerals Corporation
Thomas O'Neil, Melissa Young for Fern Trust
Robert C. Smith for PricewaterhouseCoopers as Court appointed monitor

Subject: Insolvency

MOTION by applicants for declaration that proceedings were not stayed or, in alternative, for lift of stay.

***J.A. Réginald Léger J.*:**

1 On December 10, 2009, the applicants Breakwater Resources and CanZinco Ltd. filed a motion seeking an order:

> (A) abridging time for service of the within motion pursuant to Rules 2.01, 2.02 and 3.02 of the Rules of Court, declaring that there has been good and valid service of the within motion and dispensing with the necessity of filing a Record on Motion;
>
> (B) declaring that the delivery by Breakwater to Blue Note Caribou Mines Inc. ("Blue Note Caribou") and PricewaterhouseCoopers Inc. ("PwC") of notice of its intention to exercise certain Rights of First Refusal contemplated by Articles 14 and 125 of a Joint Venture Agreement was not stayed by virtue of the Initial Order of the Extension orders issued in this matter under the Companies' Creditors Arrangement Act, R.S.C. 1985, C-c.-36 (the "CCAA") or by the provisions of the Bankruptcy and Insolvency Act, R..S.C 195, c. B-3(the "BIA") or by any other cause;

(C) alternatively, declaring that the stay imposed by virtue of the Initial Order and the Extension Orders issued under the CCAA and by virtue of the provisions of the BIA is lifted *nunc pro tunc* so as to validate delivery of the notice referred to in subparagraph (b) hereof;

(D) in the further alternative, an order declaring that the stay imposed by virtue of the Initial Order and the Extension Orders issued under the CCAA and by virtue of the provisions of the BIA is temporarily lifted for the limited purpose of enabling Breakwater to give the notice referred to in subparagraph (b), and that Breakwater is granted leave so as to give this notice.

2 Despite the short notice of the motion given by the Applicants, all agreed that the motion should be heard as scheduled.

3 All responding parties to the motion opposed the motion, as well as PricewaterhouseCoopers (PWC) acting as the Court appointed monitor. All the respondents to the motion agreed with the monitor's position that the motion should be dismissed either for the reasons advanced by the counsel for the monitor or for reasons which were more particularly related to their own interest in the within matter.

The Background

4 CanZinco is a wholly owned subsidiary of Breakwater Resources Ltd. CanZinco is the previous owner of Caribou Mine, a mineral and processing property located 50 kilometres west of Bathurst in the County of Gloucester, in the province of New Brunswick and the Restigouche Mine, an open pit property which is located in the County of Restigouche New Brunswick. On July 26 2006 CanZinco sold the two New Brunswick mines to Blue Note Metals (now Blue Note Mining Inc.). As part of the consideration for acquiring the mines, Blue Note issued to Breakwater Resources an Unsecured Subordinated Convertible Debenture in the amount of $15,000,000.00. The Debenture contemplates that Breakwater Resources could surrender the Debenture and converts its unsecured claim against Blue Note Caribou (BNC) into a 20% ownership interest in the mines that would be governed by a Joint Venture Agreement.

5 In the month of August 2008, Breakwater Resources surrendered its Debenture and indicated that it wished to convert its unsecured claim into an ownership interest.

6 By "Agreement for Transfer of Caribou and Restigouche Mines" dated June 29, 2007, Blue Note Mining Inc. had transferred its interest in the mines to its subsidiary corporation Blue Note Caribou. Breakwater Resources alleges it only received the Agreement on February 28, 2008.

7 As a result, a Joint Venture Agreement was to be entered into by the parties. Blue Note Caribou alleges that Breakwater Resources refused to execute the Joint Venture Agreement. Breakwater Resources, for its part, states that it did not consent to the assumption by Blue Note Caribou of the obligation to enter into a Joint Venture Agreement and maintains that the proper party to the Joint Venture Agreement should be Blue Note Mining.

8 As a result of this disagreement, Breakwater Resources commenced an action against Blue Note Mining Inc. and Blue Note Caribou Mines Inc. The Notice of Action was issued on December 9, 2008. A Statement of Defence and Counterclaim was filed on January 15, 2009 by Blue Note Mining and Blue Note Caribou.

9 In February 2009, Blue Note Caribou Mines sought protection pursuant to the *Companies' Creditors Arrangement Act* (CCAA). By Initial Order dated February 20, 2009, (Initial Order), this Court ordered that, until and including March 22, 2009, any and all proceedings commenced, taken or continued against or in respect of Blue Note Caribou Mines Inc. were stayed pursuant to section 11 of the CCAA. Pursuant to paragraph 25 of the Initial Order, PricewaterhouseCoopers Inc. was appointed as Monitor of the business and affairs of Blue Note Caribou.

10 By further Orders dated March 20, 2009, May 20, 2009 and November 13, 2009 (the "Extensions Orders"), this Court extended the CCAA stay termination date for successive periods until May 21, 2010. All of the Extension Orders contained a clause which was the same as, or very similarly worded that stated:

> Nothing in this order shall give the Monitor, the Applicant or any liquidator the right to sell any real property including mining rights, leases and licenses in connection with the Caribou Mine without further order of the Court (on reasonable notice to the Fern Trust, CanZinco ltd. and Breakwater Resources Ltd.) or without the written consent of the Fern Trust, CanZinco Ltd. and Breakwater Resources Ltd.

11 On July 3, 2009, Blue Note Caribou assigned itself into bankruptcy pursuant to the *Bankruptcy and Insolvencyy Act* (BIA). By "Order to Continue" dated July 14, 2009, the Clerk of the Court of Queen's Bench ordered that he CCAA proceedings be continued with PWC serving in its capacity as Trustee in Bankruptcy of Blue Note Caribou.

12 In regards to the debenture and the Joint Venture Agreement, Robert Smith, the Court appointed monitor, in his affidavit states:

> As appears from an examination of the Debenture, it was contemplated that BWR could surrender the Debenture and convert its unsecured claim in the property of BNC into a 20% ownership interest that would then be governed by the Joint Venture Agreement.
>
> I am informed by former officers of BNC (at various times John Martin, COO, Michael Judson, President and CEO, Robert Theriault, Vice President Finance, Jean Mayer, Vice President Legal and Corporate Affairs) and believe that BWR surrendered its Debenture and indicated that it wished to convert unsecured claim in BNC's property to an ownership interest, as of August, 2008. I am further informed by former officers of BNC and believe that BWR refused to execute the Joint Venture Agreement and that litigation ensued between BWR and BNC, among others.

13 On the date of BNC's bankruptcy, Breakwater Resources was still engaged in litigation with BNC concerning the Joint Venture Agreement as well as other issues.

14 On July 27th, 2009, a Court Order was issued authorizing PricewaterhouseCoopers to follow a plan of liquidation as outlined in the Monitor's third report. As a result a public auction was scheduled for September 30, 2009.

15 In his affidavit, the Monitor states that pursuant to the Court Order dated July 27, 2009, PricewaterhouseCoopers has liquidated the personal property of BNC in favour of Maple Minerals Corporation ("Maple Minerals") and has entered into an agreement with Maple Minerals for the sale of all of the assets of BNC.

16 The sale of the personal property was completed as of October 7, 2009 and there is a Motion before the Court returnable on January 12, 13 and 14, 2010, seeking court approval of the sale of BNC's real property to Maple Minerals Corporation.

17 The Monitor further states in his responding affidavit:

> PWC consulted with BWR throughout BNC's CCAA and Bankruptcy proceedings and BWR confirmed on numerous occasions that BWR had no interest in acquiring BNC's assets. At no time did any representatives of BWR assert that it had any right to acquire any assets of BNC or that the Joint Venture Agreement was an agreement which affected these proceedings.
>
> BWR was represented by counsel at all of the various proceedings and it did not raise any of the issues raised in its notice of motion prior to December 1, 2009. In addition to having discussions directly with BWR, in the spring of 2009, PWC enquired with BWR's counsel as to whether BWR was a potential purchaser of BNC's assets. PWC was advised that counsel had no instructions but would indicate if there was any interest.
>
> December 1, 2009 was the first time that the Monitor learned of BWR'S new position. The Monitor had relied on BWR's prior representations that it had no interest in acquiring BNC's assets and relied on its Proof of Claim in finalizing the sales process.

18 Breakwater Resources takes the position that pursuant to paragraphs 14 and 15 of the Joint Venture Agreement, it possesses rights of first refusal (The Rights of First Refusal) in connection with any proposed sale of the mine. More specifically, BWR relies on articles 14.1 and 15.1(b) of the Joint Venture Agreement which provide as follows:

> **14. Assignment of Interest - Right of First Refusal**
>
> 14.1 If a party (hereafter in this subparagraph 14.1 called the "Vendor") shall wish or seek to sell, assign, transfer, convey or otherwise dispose of all or part of its Interest at any time during the currency of this Agreement, the other parties then having an Interest (hereafter in this subparagraph 14.1 called the "Purchasers") shall be entitled to a right of first refusal in respect thereof...
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> . . . . .
>
> **15 Sale of Property - Right of First Refusal**
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> . . . . .
>
> 15.1...(b) Within 45 days after receipt of the Sale Notice, Breakwater shall have the right (the "Right of First Refusal") to purchase the Property from Blue Note on payment by Breakwater to Blue Note of the same Sale Price that Blue Note specified in its Sale Notice. Where Breakwater determines to exercise its Right of First Refusal, then, on the Sale Date, Breakwater shall deliver or cause to be delivered to Blue Note payment or the total Sale Price for the Property.

19 On December 2 nd , 2009, BWR wrote to PWC as Monitor and as trustee in bankruptcy of Blue Note Caribou Mines Inc. stating its position in regards to the sale of the assets of BNC to Maple Minerals. In the letter, Breakwater's position in regards to the sale of Blue Note Caribou Mines is stated in the following words:

> The proposed sale of Blue Note's interest in the Assets pursuant to the Third Party Sale is not in compliance with the terms and conditions of the Joint Venture Agreement and, in particular, we have not received the notices required under Articles 14 and 15 of the Joint Venture Agreement.
>
> Notwithstanding such non-compliance, in accordance with its rights under Articles 14 and 15 of the Joint Venture Agreement, Breakwater hereby gives notice of its exercise of its rights of first refusal in respect of the sale of Blue Note's interest in the Assets in accordance with the provisions of the Joint Venture Agreement and the Third Party Sale.
>
> Please proceed as soon as possible to complete the sale of the Blue Note's interest in the Assets to us and advise of the closing date. We will advise you shortly as to the entity that will take title.

20 The Monitor, through his counsel, responded by saying that he did not agree with their interpretation of paragraph 3(d) of the initial order. Paragraph 3(d) of the initial order reads as follows:

> (d) the right of any Person to assert, enforce or exercise any right, option or remedy available to it, including, without limitation, any right of dilution, buy-out, divestiture, preemptive right of purchase, option to purchase on default, pledge agreement, forced sale, acceleration... including, without limitation, any Rights arising under or in respect of any arrangement or agreement to which the Applicant is a party or in which the Applicant has an interest (including, without limitation, any security agreement, mortgage, contract, partnership agreement, management agreement, lease license agreement, agreements relating to any charge, credit or debit card arrangements, shareholders' agreement, joint venture agreement, co-ownership agreement, easement agreement, operating agreement or any agreement of purchase and sale but excluding any eligible financial contract within the meaning of the CCAA) where such Rights arise of or, relate to or are ...

21 In his response by letter dated December 3 rd , 2009 to Counsel for Breakwater Resources, the Monitor added the following:

> As is clear from the proceedings in this matter to date, in my capacity as Monitor and in reliance upon the authority granted to me by this Honourable Court, I have sold the assets of BNC. The sale of BNC's personal property to Maple Minerals was agreed upon in the early morning hours of September 30, 2009, prior to the commencement of the then contemplated

> auction process. I immediately filed a report to this Court with copies to all interested parties, including counsel to BWR indicating that an agreement had been reached for the sale of all of the assets of BNC. BWR had consented to the Order of July 27, 2009, pursuant to which the assets were sold and raised no objection when advised of the sale transaction on September 30, 2009. In fact, BWR made no mention of any intention to rely upon the Joint Venture Agreement or a purported Right of First Refusal until it did so in open court on December 1, 2009, four months after the hearing approving the sale of BNC's personal property and two months after learning of the sale of the personal property and the agreement for the sale of the real property.

22 Breakwater Resources now seeks an order declaring that it was entitled to give notice of its intention to exercise its Rights of First Refusal or, alternatively, an order retroactively validating its giving of the notice or, in the further alternative, an order temporarily lifting the stay so as to enable it to give this notice.

23 Counsel for the Applicants made it very clear at the hearing on the motion that in seeking the relief sought in this motion, Breakwater Resources solely wants to give notice to PricewaterhouseCoopers and Blue Note Caribou of its intention to exercise its Right of First Refusal pursuant to Article 14.1 and 15.1 of the Joint Venture Agreement for the purpose of preserving whatever rights the Court may ultimately determine it has pending a determination thereof at a hearing scheduled to be heard in January 2010. In his affidavit, Mr. David Langille, on behalf of Breakwater Resources adds the following:

> In the event that the relief sought in the within motion is not granted, Breakwater would be deprived of its rights under the Debenture and Joint Venture Agreement and would thereby be irreparably prejudiced.

24 Finally, the Monitor, in his affidavit, added the following relevant information.

> It is common ground amongst all parties that any interest that BWR might have in and to the assets of BNC is subordinate to the interests of the Noteholders. The Noteholders have concurred in the proposed sale transaction and concurred in the sale of personal property.
>
> I am advised by counsel to the Noteholders and believe that the Noteholders will delegate or otherwise assign to me, in my capacity as Monitor, the full authority that the Noteholders hold under their security and, by virtue of the *Property Act* (New Brunswick), the authority to exercise such powers of sale or foreclosure powers as exists to fully extinguish any claim that BWR has in and to any of the BNC's assets. As such, BWR's pursuit of this purported right of first refusal is not only meritless but pointless.

Considering this background, I must now determine the issues raised in this motion.

Issues

25 Whether the stay imposed by virtue of the *Companies' Creditors Arrangement Act*, and/or the *Bankruptcy and Insolvency Act*, applies so as to prohibit Breakwater from delivering notice of its intention to exercise the Rights of First Refusal.

26 Alternatively, whether the stay imposed by virtue of the CCAA and/or the BIA should be lifted *nunc pro tunc* as to validate the delivery by Breakwater of notice of its intention to exercise the Rights of First Refusal, or should now be lifted as to permit Breakwater to deliver such notice.

Position of the Parties

27 The Applicants' are of the view that the relief sought by the motion should be granted as they are simply seeking to give notice of its intention to exercise a Right of First Refusal. The sole purpose of the motion is that BWR be allowed to preserve whatever the Court may ultimately determine at the hearing of the motion filed by the Monitor who will be seeking the approval of the sale of BNC's real property to Maple Minerals Corporation.

28 The Monitor opposes the motion on several grounds, namely:

a) delivery of the Notice is a proceeding covered by the stay provisions of the CAA;

b) delivery of the Notice is a proceeding which violates and circumvents the applicable provisions of the claims process of the BIA;

c) none of the requirements to consider when seeking to lift a stay ordered pursuant to section 11 of the CCAA have been met;

d) delivery of the Notice is a proceeding which violates the stay provisions of the Bankruptcy and Insolvency Act (the "BIA");

e) Breakwater Resources Ltd. ("BWR") has made representations contrary to the relief being requested and BWR should not be permitted to act in a manner contrary to those representations;

f) BWR has failed to follow the clear procedures under the BIA to determine interests in property of a bankrupt, and;

g) the issues raised in the within Motion are moot.

29 The Applicants argue that the stay imposed by virtue of the CCAA and the BIA in this matter does not apply so as to prohibit Breakwater from delivering notice of its intention to exercise the Rights of First Refusal to Blue Note Caribou and PWC.

30 They further submit that a stay imposed by virtue of the CCAA applies only to parties who are "proceeding" against the debtor corporation. Section 11 of the CCAA provides, in relevant part, as follows:

11(3) Initial application court orders - 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.

. . . . .

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

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

. . . . .

(4) Other than initial application orders - 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,

. . . . .

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

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

31 They also submit that as with a stay imposed under the CCAA, a stay imposed under the virtue of the BIA applies only to creditors who are "proceeding" against a bankrupt (in particular, for the recovery of a "claim provable in bankruptcy" which consists of a "debt and liability, present or future, to which the bankrupt is subject"). PricewaterhouseCoopers takes the view that BWR is prohibited from delivering its Notice to BNC or the Monitor as delivery of the Notice is a proceeding which has been stayed by virtue of the Initial Order and paragraph 11(3) of the CCAA.

Analysis and Decision

32 The courts have given a broad and liberal interpretation to the stay provisions of the CCAA. In *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (Ont. Gen. Div.), Blair, J. stated the following at paragraphs 19 and 20 of the decision:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is a persuasive obiter, it would appear to be that the courts have concluded that under s.11 there is a discretionary power to restrain judicial or extra-judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.
>
> (emphasis added)
>
> I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

33 In my view, the Notice which Breakwater Resources wishes to deliver to Blue Note Caribou and PricewaterhouseCoopers as the court appointed Monitor, or is seeking to validate the delivery, is a proceeding which is stayed by virtue of the Initial Order and paragraph 11(3) of the CCAA.

34 Clearly the Initial Order and its subsequent extensions act as a stay to the Applicants giving any notice to exercise a Right of First Refusal which Breakwater Resources may hold pursuant to a purported Joint Venture Agreement. By delivering a Notice of its intention to exercise a Right of First Refusal, Breakwater Resources is taking a step vis-à-vis the insolvent company which is part of a larger remedy, that is to say, exercising a Right of First Refusal, and such procedure is in my view, a proceeding contemplated by section 11 of the CCAA and additionally, in this case, the Initial Order. The term procedure has been given a broad interpretation. In *Woodward's Ltd., Re*, 1993 CarswellBC 530 (B.C. S.C.), the Court had to determine whether the calling of letters of credit could and should be stayed pursuant to the s. 11 of the CCAA. The crux of the matter was whether any step or proceeding needed to be taken against the debtor before payment could be effected pursuant to the letters of credit. Tysoe, J., makes the following findings at paragraphs 25 and 26 of the decision:

> Both of paragraphs 8 and 9 of the Montreal Trust Agreement require a step to be taken vis-a-vis the Company before the Trustee can call on the letter of credit. Paragraph 8 requires that the Trustee deliver to the Company a copy of the certificate of the Senior Executive. Paragraph 9 requires that the Trustee must report to the Company that a claim has been made. It is my view that the delivery of a copy of the certificate to the Company and the making of a report to the Company are both proceedings against Woodward's that can be stayed pursuant to s. 11 of the CCAA.
>
> If a step must be taken vis-a-vis the insolvent company before a creditor (or a trustee on behalf of a creditor) may enforce its rights, the form of the step should make no difference for the purposes of s. 11 of the CCAA. It should not matter whether the step is a demand for payment on the company, the delivery to the company of a notice of acceleration or the delivery to the company of some other type of document such as a copy of a certificate or a report. In the Meridian case, supra, Wachowich J. quoted the following portion of the definition of the word "proceeding" in Black's Law Dictionary, 5th ed. (1979) (at p. 582 of D.L.R. and p. 221 of W.W.R.):
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> > • Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. Rooney v. Vermont Invt. Corp. (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.).
>
> The delivery of a copy of a certificate or a report to Woodward's is no less a proceeding than the payment of a letter of credit (Meridian) or the exercise of a right of set-off (Quintette). It is a proceeding against Woodward's because the copy of the certificate or the report must be delivered to Woodward's.

35 In the instant case, the delivery of a Notice by BWR that it intends to exercise a Right of First Refusal to BNC and PWC as Monitor and trustee in bankruptcy is definitely a step that is required by BWR vis-à-vis BNC in order to enforce a right.

36 Furthermore, the Initial Order specifically restrains the right to assert, enforce or exercise any right in respect of any arrangement or agreement to which the Applicants are a party including a Joint Venture Agreement. The Court ordered stay operates to restrain the right to send any notice in order to exercise any pre-emptive first right. In my view, the Initial Order clearly provides to restrain or stay the procedural steps which the Applicants seek to take in its quest to exercise any right they may have by virtue of the Joint Venture Agreement. It may be a simple procedural step as argued by the Applicants but is still a proceeding which was stayed by virtue of the Initial Order as amended and by virtue of paragraph 11(3) of the CCAA. I therefore conclude that the stay imposed by virtue of the CCAA and/or the BIA applies so as to prohibit Breakwater from delivering notice of its intention to exercise the Rights of First Refusal.

37 The second issue raised by the present motion is whether or not the stay imposed by virtue of the CCAA and/or the BIA should be lifted *nunc pro tunc* so as to validate the delivery by Breakwater Resources of its Notice of intention to exercise a Right of First Refusal or should the stay simply be lifted so as to allow Breakwater Resources to deliver such notice.

38 The lifting of a stay of proceedings issued under the CCAA and/or the BIA is discretionary. The Applicants submit that the stay should be lifted *nunc pro tunc* so as to validate the notice already delivered to Blue Note Caribou and PricewaterhouseCoopers or should now be lifted so as to permit Breakwater Resources to deliver such notice. Breakwater Resources further submits that the stay should be lifted since the delivery of the Notice of intention does not confer or create any rights which Breakwater Resources does not otherwise possess but for a procedural step required in order to preserve whatever rights Breakwater Resources may possess in regards to the mines.

39 The respondents oppose the lifting of the stay. They argue that none of the requirements to be considered by a court in lifting a stay of proceedings have been met in the instant case. In addition, the Monitor is of the view that the relief sought should not be allowed as Breakwater Resources has made representations contrary to the relief sought throughout the proceedings and should not now be permitted to act contrary to those representations.

40 Furthermore, the Monitor submits that the motion is moot based on the support from the Senior Secured Noteholders who have indicated to the Monitor their willingness to assign their rights to the Monitor under the Power of sale provision of the *New Brunswick Property Act.* Such process, the Monitor argues, would extinguish any of BWR's alleged rights thereby were rendering obsolete any relief sought by this motion.

41 In the instant case, has Breakwater Resources established sound reasons why the stay issued by virtue of the CCAA and/or the BIA should be temporarily lifted in order to allow Breakwater Resources to deliver Notice of its intention to exercise a Right of First Refusal purportedly by virtue of a Joint Venture Agreement? While there is no doubt that Breakwater Resources clearly states that it does not seek to be conferred any additional rights by being allowed to deliver a Notice of its intention to exercise a Right of First Refusal there is also no doubt that the delivery of a Notice would inject an element of uncertainty in the sale process and could interfere with the orderly process followed by the Monitor to date, under the supervision of the Court. Additionally, the relief sought is not for the collective good, but seeks to benefit the Applicants only. Clearly if the relief sought is granted, the Applicant's position would be enhanced as against the other interest holders. The position which the Applicant would hold contrary to the position they seem to have adopted, would not only be enhanced but would seem to be contrary to the position adopted by BWR from the onset of the proceedings both under the CCAA and the BIA. Clearly if the relief sought is granted, the Applicant's position would be enhanced with respect to their present position, whatever that may be, thus the added uncertainty in the process.

42 A stay of proceeding cannot be lifted lightly. In the instant case, the Monitor as well as all of the other secured and unsecured creditors relied on the representations of Breakwater Resources. Since the issuance of the Initial Order in February 2009, Breakwater Resources has not taken any steps to enforce any rights which they may have in relation to any of the assets of Blue Note Caribou. The first time the Monitor heard of a possible Right of First Refusal is in early December 2009, two months after the sale of the mines had been made. None of the actions of Breakwater Resources would have lead the Monitor and the other parties to these proceedings to believe that Breakwater Resources was interested in exercising a Right of First Refusal in relation to the purchase of the mines.

43 BWR relies on three cases where the stay of proceedings were lifted, namely the *Anvil Range Mining Corp., Re*, [1998] O.J. No. 1088 (Ont. Gen. Div. [Commercial List]), *Cansugar Inc., Re* (2003), 2004 NBQB 2, 270 N.B.R. (2d) 71, [2003] N.B.J. No. 473 (N.B. Q.B.), *Veltri Metal Products Co., Re* (2004), 72 O.R. (3d) 292, [2004] O.J. No. 2994 (Ont. S.C.J. [Commercial List])

44 In all three cases, the courts allowed the stay to be lifted. In *Re Anvil* the claimant was allowed to file a lien under the *Miners Lien Act.* In *Cansugar Inc., Re*, the applicant was granted leave to file a *Mechanic's* lien in respect of the debtor under CCAA protection. Finally, in *Veltri Metal Products Co., Re*, the applicant was granted an order lifting a CCAA stay order *nunc pro tunc* to as to validate a *Repairer's* lien. It is to be noted that in these cases, the stays were allowed to be lifted so they would be permitted to enforce a statutory right. In the instant case, the Applicant seeks to have the stay lifted to deliver a Notice required by virtue of a Joint Venture Agreement which is the subject matter of litigation.

45 It seems to me that the present circumstances are quite different as those found in the cases relied upon by the Applicants as they do not consist of the enforcements of Statutory Rights. On the whole, I am of the view that the lifting of the stay in the instant case is not warranted. The Applicants have not satisfied me that the stay issued under the CCAA or the BIA should be lifted *nunc pro tunc* or simply lifted to allow for the delivery of the Notice to exercise a Right of First Refusal by virtue of the Joint Venture Agreement. There is no denying that the Applicant have brought the within motion in the very late stages of the insolvency process. They have known for quite some time of the sale of BNC by the Monitor, or of the intentions of the Monitor and his efforts to sell the mines.

46 The transaction is partially completed. The Monitor acted according to a court order allowing him to sell the personal property. At no time did the Applicants oppose the order authorizing the Monitor to proceed with the sale of the assets of BNC. The sale of the real property is the subject matter of another motion seeking approval for the completion of the sale.

47 It would be inequitable vis-à-vis the other interest holders and the Monitor who has relied on the representations made by the Applicants to grant the relief sought by the Applicants. The Applicants have not convinced me that there are sound reasons to lift the say either temporarily or *nunc pro tunc*. I conclude that the stay should not be lifted as requested. In the event that I am wrong in this regard, it seems that any order granted allowing the delivery of a Notice as requested by the Applicants, the rights of BWR would still be subjected to the right of all the other parties in these proceedings in particular, the Senior Secured Noteholders, and accordingly any court order allowing the Applicant the right to give Notice would be moot.

48 The Court appointed monitor has stated in his affidavit that the Noteholders have concurred in the proposed transaction and the sale of the personal property. The Monitor is satisfied that the Noteholders will delegate or assign to him the full authority that the Noteholders have by virtue of the *Property Act*, the authority to exercise such powers of sale or foreclosure sale. This, he contends, would extinguish any claim BWR would have in any of the assets of BNC and as a result, the pursuit to exercise any Right of First Refusal is meritless. In short, there are no sound reasons why the stay issued by virtue of the CCAA or the BIA should now be lifted as requested.

49 For those reasons, I conclude that the motion should be dismissed with costs. I will deal with the issue of costs at a later date, on the request of the parties.

Motion dismissed.

TAB 3

2009 ONCA 833
Ontario Court of Appeal

Nortel Networks Corp., Re

2009 CarswellOnt 7383, 2009 ONCA 833, [2009] O.J. No. 4967, 184 A.C.W.S. (3d) 300, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, 99 O.R. (3d) 708

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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

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

Heard: October 1, 2009
Judgment: November 26, 2009 *
Docket: CA C50986, C50988

Proceedings: affirming *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List])

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Gavin H. Finlayson for Informal Nortel Noteholder Group
Thomas McRae for Nortel Canadian Continuing Employees

Massimo Starnino for Superintendent of Financial Services
Alex MacFarlane, Jane Dietrich for Official Committee of Unsecured Creditors

Subject: Insolvency; Constitutional; Employment; Public; Corporate and Commercial; Civil Practice and Procedure

APPEALS by union and former employees from judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]), dismissing motion for continued payments under collective agreement.

***S.T. Goudge, K.N. Feldman JJ.A.*:**

1 On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

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

3 The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

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

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

The Union Appeal

Background

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

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

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

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

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

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

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

11 The Union challenges this conclusion.

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

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

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

15 In our opinion, this argument must fail.

Analysis

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

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

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

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

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits

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

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

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

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

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

24 The Union's appeal must be dismissed.

The Former Employees' Appeal

Background

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

26 After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather

than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

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

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

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

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> > (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> . . .
>
> > (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court*.
>
> . . .
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.
>
> [Emphasis added.]

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

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

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

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

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

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

44 However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

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

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

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

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

49 The appeal by the former employees is also dismissed.

***R.A. Blair J.A.*:**

I agree.

Appeals dismissed.

Footnotes

* A corrigendum issued by the court on December 8, 2009 has been incorporated herein.

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

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

TAB 4

2007 SKCA 72
Saskatchewan Court of Appeal

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

2007 CarswellSask 324, 2007 SKCA 72, [2007] 9 W.W.R. 79, [2007] S.J. No. 313, 159 A.C.W.S. (3d) 671, 299 Sask. R. 194, 33 C.B.R. (5th) 50, 408 W.A.C. 194

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

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

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

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

Counsel: Fred C. Zinkhan for Appellant
Jeffrey M. Lee for Respondents
Kim Anderson for Monitor, Ernst & Young

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

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

***Jackson J.A.*:**

I. Introduction

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

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

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

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

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

II. Issues

6 The issues are:

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

III. Background

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

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

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

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

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

7 ...

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

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

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

7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]

8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.

9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.

10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.

11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.

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

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

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

14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.

15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

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

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

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

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

. . . . .

> 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 Plate Glass* narrow its application.

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

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

> CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;
>
> CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;
>
> CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;
>
> CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year; [18]

I do not interpret *Ramsay Plate Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the *CCAA* stay is in effect. In my opinion, *Ramsay Plate Glass* can be read as authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re*; [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 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, 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 Plate Glass* points out that under the *Bankruptcy and Insolvency Act* [28] (*the* "*BIA*") the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act.* [29]) While s. 12 of the *CCAA* defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

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

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

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

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

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

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

> **No stay, etc., in certain cases**
>
> 11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C.1997, c. 12, s. 124)
>
> **No stay, etc., in certain cases**
>
> 11.11 No order may be made under this Act **staying or restraining**
>
> > (a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;
> >
> > (b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
> >
> > (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)
>
> **No stay, etc. in certain cases**
>
> 11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C.1997, c. 12, s. 124)
>
> 11.3 No order made under section 11 shall have the effect of

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

[Emphasis added.]

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

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

> A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.
>
> Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.
>
> However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.
>
> . . . . .
>
> ... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made. [32]
>
> [Footnotes omitted.]

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

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

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

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

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

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

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

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

47 To repeat the relevant portion of the section:

> 11.3 No order made under s. 11 shall have the effect of
>
> > (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;

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

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

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

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

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

VI. Issue #3: If Leave Is Required, Did the Supervising CCAA Judge Commit a Reviewable Error in Refusing ICR Leave to Commence an Action Against Bricore?

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

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

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

(b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;

(c) any sale of all or part of the Property pursuant to these proceedings;

(d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or

(e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group. [40]

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

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

. . . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.
>
> Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.
>
> . . . . .
>
> Of the submissions received about proposed subsection 11(6), all but one condemned the provision. ...
>
> The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:
>
> (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;
>
> (b) it would more closely align the CCAA with the BIA;
>
> (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
>
> (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]
>
> . . . . .
>
> The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.
>
> While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6). [46]

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

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

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

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

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

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

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

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

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

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

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

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

59 Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the 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 Inc., Re*, [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*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

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

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

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

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

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

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price, [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.

Appeal allowed in part.

Footnotes

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

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

18 *Ibid*. at p. 83.

19 (2003), 45 C.B.R. (4th) 151 (B.C. S.C.), appeal dismissed [*Caterpillar Financial Services Ltd. v. 360networks corp.*] (2007), 27 C.B.R. (5th) 115 (B.C. C.A.).

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

21 (1992), 14 C.B.R. (3d) 303 (Ont. 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 (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).

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

39 *Smith Brothers Contracting Ltd.*, *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 (Sask. C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.) at 1046.

42 [1943] O.R. 683 (Ont. C.A.) 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 List]) at para 3.

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

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

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

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

68 2002 SKCA 84, [2002] 11 W.W.R. 246 (Sask. C.A.).

69 2006 SKCA 126, [2007] 2 W.W.R. 52 (Sask. C.A.).