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

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

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

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

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

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

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

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

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

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

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

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Table of Authorities

Cases considered by *Jackson J.A.*:

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

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

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

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

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

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

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

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

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

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

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

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

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

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

S.C.) — referred to

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

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

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

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

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

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

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

Statutes considered:

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Generally — referred to

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

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

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

s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(c) — considered

s. 11(6) — considered

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

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

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

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

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

s. 12(1) "claim" — considered

s. 13 — referred to

Real Estate Act, S.S. 1995, c. R-1.3
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
R. 173 — referred to

Words and phrases considered:

Substantial indemnity costs

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

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

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

I. Introduction

1 This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[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 *CCAA* as creating a narrow right — the right to withhold services without immediate payment.

44 I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a

company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

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

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

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

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

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

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:
>
> (a) the CRO's position or involvement with Bricore Group;
>
> (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
>
> (c) any sale of all or part of the Property pursuant to these proceedings;
>
> (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
>
> (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.[40]

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

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

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

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

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

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

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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.

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

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56 *Stelco*, *supra* note 20.

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

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2011 ONSC 5017
Ontario Superior Court of Justice [Commercial List]

Allen-Vanguard Corp., Re

2011 CarswellOnt 8984, 2011 ONSC 5017, 207 A.C.W.S. (3d) 15, 81 C.B.R. (5th) 270

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 ARRANGEMENT AND REORGANIZATION OF ALLEN-VANGUARD CORPORATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND SECTION 186 OF THE ONTARIO BUSINESS CORPORATIONS ACT., R.S.O. 1990, c.B.16, AS AMENDED (Applicants)

C. Campbell J.

Heard: November 16, 2010
Judgment: August 25, 2011
Docket: CV-09-00008502-00CL

Counsel: Ronald G. Slaght, Q.C., Eli S. Lederman, for Directors and Officers of Allen-Vanguard Corporation
C. Scott Ritchie, Michael G. Robb, Daniel E.H. Bach, for Class Action Plaintiffs
Alan L.W. D'Silva, Daniel S. Murdoch, for Underwriters

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Class actions — Release of directors — Plaintiff shareholders brought class actions against insolvent company and defendant directors and underwriters of company for damages arising from misrepresentations, negligence and oppression — Insolvent company obtained protection under Companies' Creditors Arrangement Act — Creditors agreed to arrangement that contemplated releases of insolvent company and directors but not of any claims under s. 5.1 of Act ("sanction order") — Shareholders agreed to arrangement, subject to hearing regarding wording of proposed release terms — Directors brought motion to enforce release in sanction order — Underwriters brought motion to dismiss or stay class action proceeding — Shareholders brought cross-motion to vary terms in sanction order — Motions were granted — Cross-motion was dismissed — Shareholders' class action against directors was not sustainable — Sanction order released shareholders' claims against directors — Release permitted claims against directors only if they were claims contemplated in s. 5.1(2) of Act not to be released — Exception in s. 5.1(2) of Act did not impose liability on directors in respect of negligence claims — Class action claims were framed in negligence — Such claims were not of same kind as those contemplated in s. 5.1(1) of Act — Release of directors was integral to arrangement's success — Shareholders did not seek leave to continue class action before sanction order was granted — Shareholders were not assigned potential claims against directors.

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Miscellaneous

Companies' Creditors Arrangement Act — Plaintiff shareholders brought class actions against insolvent company and defendant directors and underwriters of company for damages arising from misrepresentations, negligence and oppression — Insolvent company obtained protection under Companies' Creditors Arrangement Act — Creditors agreed to arrangement that contemplated releases of insolvent company and directors but not of any claims under s. 5.1 of Act

("sanction order") — Shareholders agreed to arrangement, subject to hearing regarding wording of proposed release terms — Directors brought motion to enforce release in sanction order — Underwriters brought motion to dismiss or stay class action proceeding — Shareholders brought cross-motion to vary terms in sanction order — Motions were granted — Cross-motion was dismissed — Shareholder's claims against underwriters in negligence and misrepresentation were stayed — Class action against underwriters was brought after initial order was granted — Parties did not discuss allowance of claim against underwriters at time sanction order was approved — Shareholders did not seek leave to commence derivative action prior to or during CCAA process — Section 5.1(2) of Act did not create cause of action that would not exist except by leave of court, but only provided exception to what otherwise could be included in release.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Amendment

Sanction order — Plaintiff shareholders brought class action proceedings against insolvent company and defendant directors, officers and underwriters of company for damages arising from misrepresentations, negligence and oppression — Insolvent company obtained protection under Companies' Creditors Arrangement Act — Creditors agreed to arrangement that contemplated releases of insolvent company, directors, and officers but not of any claims under s. 5.1(1), (2) and (3) of Act ("sanction order") — Shareholders agreed to arrangement, subject to hearing regarding wording of proposed release terms — Directors brought motion to enforce release in sanction order — Underwriters brought motion to dismiss or stay class action proceeding — Shareholders brought cross-motion for variation of terms in sanction order to allow class actions to proceed — Motions were granted — Cross-motion was dismissed — It was not appropriate to vary sanction order after the fact to permit class actions to proceed — Shareholders did not seek to lift stay under initial order and accepted release provisions — Sanction order represented final determination of rights of shareholders as against underwriters — Only in extraordinary circumstances of clear mistake, operative misrepresentation or fraud would variation of sanction order be permitted.

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Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

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Statutes considered:

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s. 131(1) — considered

s. 246(1) — considered

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

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

s. 5.1(1) [en. 1997, c. 12, s. 122] — considered

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 5.1(3) [en. 1997, c. 12, s. 122] — considered

Excise Tax Act, R.S.C. 1985, c. E-15
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s. 130 — referred to

s. 138.3 [en. 2002, c. 22. s. 185] — referred to

MOTION by by defendant directors of insolvent company to enforce sanction order; MOTION by defendant underwriters of insolvent company to dismiss or stay proposed class action; CROSS-MOTION by plaintiff shareholders for variation of terms in sanction order to allow class actions to proceed.

C. Campbell J.:

Reasons for Decision

1 Two motions were heard together: the first by former directors and officers of Allen-Vanguard to enforce the terms of a Sanction Order, which the directors and officers say release them as well as Allen-Vanguard from all claims except those specifically provided for in section 5.1 (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA.") In addition, the former directors assert that the claims of the Plaintiffs in two proposed Class Actions are not sustainable against them in law under s. 5 .1 (2) of the CCAA.

2 The second motion by the Underwriters of Allen-Vanguard seeks to dismiss or stay the action brought against the Underwriters by shareholders in a proposed Class Action.

3 A cross-motion brought by Plaintiffs in the two proposed Class Actions seeks, if required, variation of the terms contained in the Sanction Order granted December 16, 2009, to permit the Class Actions to proceed.

4 By way of an endorsement dated February 9, 2011, the Court sought further information from the parties with respect to the factual circumstances that surrounded the agreement that was embodied in the terms of the Sanction Order. That information has been provided and will be referred to later in these Reasons.

5 The claims that the directors who are the moving parties seek to effectively enjoin are those brought in two Class Actions (hereinafter the "Laneville action" and the "Love action"), wherein former shareholders seek damages against directors, officers and Underwriters based on alleged misrepresentation to shareholders by the Defendants about the effect on Allen-Vanguard of its purchase of another company in 2007.

Background

6 As of December 2009, Allen-Vanguard was insolvent. An Application was made on December 9 for an Initial Order under the CCAA, appointment of a Monitor and a Plan Filing and Meeting Order. The effect of the Initial Order among other matters stayed the existing Class proceeding.

7 The circumstances that surrounded the Plan Filing/Meeting Order, the Court was advised, were necessary to avoid a bankruptcy. The subsequent vote on December 9, 2010 was approved in favour of the Plan by 100% of affected creditors.

8 The circumstances that surrounded the December 9, 2010 Application and Order were a variation on a CCAA process that has come to be known as a "pre-packaged" Application. The secured creditors agreed to a restructuring of their secured debt in circumstances involving a going concern sale of assets where, had a bankruptcy ensued, there would have been no recovery for creditors or shareholders beyond very incomplete recovery for those secured creditors.

9 The First Report of the then proposed Monitor, Deloiite and Touche, in support of the Initial Order, outlined the transaction that had been proposed to all creditors as early as September 2009, posted on SEDAR and to which (apart from the question of releases) no party was opposed on December 9.

10 The Plan provided for the Secured Lenders foregoing a portion of their existing debt and fees, converting the remainder of the existing debt into a multi-year restructured term loan with terms more favourable to the Company and a new revolving credit facility.

11 The Court accepted the opinion of Deloitte & Touche that without the proposed transaction, the Company would likely not be able to meet its financial obligations as they became due and would likely be unable to carry on the business beyond the very short-term, which would then necessitate liquidation.

12 The conclusion by Deloitte & Touche, accepted by the Court, was that the restructuring process in the Plan maximized the value of the Company for the benefit of all stakeholders and represented the best offer from that process.

13 The alternative faced by the Company was that of a forced liquidation, which as estimated by the Monitor would result in a shortfall to secured lenders in excess of $100 million.

The Laneville Action

14 The proposed Class Action Plaintiff in the Laneville action issued on October 9, 2009 a Statement of Claim dated November 26, 2009, which sought appointment on behalf of a Representative Plaintiff and for a class of Allen-Vanguard shareholders who allege that Allen-Vanguard Corporation and its directors and officers are liable for various misrepresentations, negligence and oppression.

15 The Statement of Claim detailed a transaction that occurred in 2007 for which the Class Plaintiffs claim the directors and officers failed to properly value and account for in the financial statements of Allen-Vanguard, when Allen-Vanguard purchased all of the shares of a private corporation called Mid-Eng Systems Inc.

16 In addition, the Class Plaintiff claims damages for negligent misrepresentation not only under the common law but as well under s. 138.3 of the *Ontario Securities Act* in connection with the same transaction.

17 The only creditor objection to the Plan taken at the time of the Initial Order was from counsel for the Proposed Class Plaintiff in the Laneville action, who sought an adjournment of the vote based on the wording of the proposed release terms.

18 The adjournment of the vote was not granted given the financial fragility of Allen-Vanguard, and the sanction hearing, which was to deal with the wording of the proposed release terms, was set for December 16, 2009.

19 The Second Report of the Monitor, dated December 10, 2010, advised the Court of the terms of the release and injunctions that had been negotiated, the terms of which were put forward for approval on an unopposed basis. No objection was taken at

the sanction hearing by counsel for the Class Plaintiff and no amendment to the Release portion of the Sanction Order sought. Whatever had been negotiated between the parties came before the Court on an unopposed basis. Counsel for the Class Action Plaintiffs and for the Defendant directors had input into and agreed to the wording.

20 The Court has been advised that by agreement of counsel, the wording of the Release was negotiated by the parties with the recognition that there would likely remain an issue on which the Court would have to rule. That issue is now the subject of the first motion and the cross motion. I have been advised as a result of the inquiry of February 9, 2011 and what is now obvious as a result of the recent correspondence (including an affidavit sworn June 30, 2011 and objected to) is that Plaintiffs' counsel in the Laneville action and counsel for the directors had quite different views in respect of the kinds of claims that could be included in s. 5.1(2).

21 As I now understand it, counsel for the Allen-Vanguard Corporation made no representation or agreement that the claims in the Laneville action were within those permitted by s. 5.1(2) of the CCAA.

22 Counsel for the Plaintiff in the Laneville action believe that the language in the Sanction Order preserves the claims in both the Laneville action and the Love action, including the claims against the Underwriters. It is submitted by the Plaintiff that the jurisprudence in respect of s. 5.1(2) permits not only claims against directors but as well officers to the extent there is insurance coverage, and that the Plaintiffs' position is consistent with the jurisprudence under s. 5.1(2).

23 Counsel for the Directors and for Underwriters submit that counsel for the Plaintiff knew or ought to have known at the time they agreed to the language of the Plan of Arrangement and the draft Sanction Order that the claims asserted against the Directors and Officers of Allen-Vanguard might nevertheless fail to meet one of the exceptions set out in s. 5.1(2) of the CCAA.

24 In the result, the issue of what was or was not agreed to as part of the Sanction Order comes down to the question of whether or not the wording of s. 5.1(2) of the CCAA, read in context of statutory interpretation, is sufficient to permit continuance of claims in the Laneville and Love actions.

25 As reported by the Monitor in the First Report, the Plan contemplated two releases: a General Release and an Equity Claims Release, both of which had been contemplated in the proposed Plan. Neither the Equity Claims Release nor the General Release was intended to release or deal with or affect in any respect claims under ss. 5.1(1), (2) and (3) of the CCAA, which read:

> 5.1(1) a compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> 5.1 (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressed conduct of directors.
>
> 5.1 (3) the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

26 The Monitor in its Second Report remarked as follows:

> 28. The injunctions provided in the Plan are limited by section 5.1 (2) of the CCAA. The injunctions barring any person from commencing, continuing or pursuing any proceeding on or after the Effective Time for a claim that such person may have against the Company or any current or former officer of the Company of the type referred to in subsection 5.1 (2) of the CCAA... but permit any such subsection 5.1 (2) claim to proceed against a current or former director of the company except that any such claim against a current or former director of the company is permitted

recourse, and sole recourse, to the Company's insurance policies in respect of its current and former directors. The estimated value of any coverage under such insurance is $30 million as per the Luxton Affidavit.

29. The Monitor is aware of at least one group of stakeholders affected and by the Supplemental Injunction, being a group of current and former shareholders of the Company that have served a Notice of Action and Statement of Claim on the Company seeking approximately $80 million in damages from the Company and its directors and officers, as further described in the monitors First Report. As stated above the terms of the Supplemental Injunction would permit this claim to survive against the current and former directors of the Company with recourse limited to the Companies insurance as referenced above.

27 The Releases and Sanctions are contained in the language of the Sanction Order. A summary of the provisions with paragraph references to the Sanction Order is as follows:

22. Releases are essential to the Plan

23. All Persons give full release to each of the Released Parties including contribution and indemnity but directors not released in respect of any claim of the kind referred to in section 5 . 1 (2) of the CCAA.

24. Release of Applicant and current and former directors provided that nothing therein releases a director or current or former officer in respect of any claim of the kind referred to in section 5 .1 (2) of the CCAA.

25. All Persons enjoined and estopped from commencing or continuing actions with the exception of any claim against the directors of the kind referred to in section 5 .1 (2) of the CCAA..

26. Injunction and bar with respect to section 5 .1 (2) against the applicant... and that the sole recourse for any claims against a current or former director or officer of the Applicant Limited to any recoveries from the Applicants insurance policies in respect of current or former directors and officers

27. Laneville Action dismissed as against the Applicant without prejudice to discovery rights against representative of the Applicant.

The Love Action

28 On February 8, 2010, after the Sanction Order had been made, another Proposed Representative Plaintiff, Gordon Love, commenced a second action and is represented by the same counsel as in the Laneville action. The Statement of Claim, dated March 10, 2010 against the directors and officers of Allen-Vanguard Corporation, includes claims against Cannacord Financial Ltd (and others collectively referred to as "Underwriters.")

29 An Amended Statement of Claim dated August 10, 2010 asserts in the Love action claims for negligence against directors, officers and Underwriters, all arising out of the transaction and alleged failure to properly disclose the transaction in the financial statements and transaction referred to in paragraph 15 above in respect of a 2007 acquisition.

Issues

1. Do the Laneville action and the Love action and their proposed class claims fall within those claims non-exempt under s. 5.1(2) of the CCAA?

2. Does the language of the Release contained in the Sanction Order apart from s. 5.1(2) permit either the Laneville or Love actions, including that against Underwriters, to continue?

3. Is there any basis on which the Court could or should vary the terms of the Release section of the Sanction Order?

30 Having reviewed the language of the Releases contained in the Sanction Order, I am satisfied that the only basis that the release language permits claims as against the directors is if they are those contemplated in s. 5.1(2) of the CCAA not to be released.

31 The object of the CCAA is to facilitate the restructuring of an insolvent corporation. In order to effect restructuring, a compromise of creditors' claims is almost inevitably an essential ingredient of a Plan under the CCAA.

32 The Plan, to be effective and to obtain Court approval, requires consensus and agreement by various classes of creditors. Many of the issues that arise before a Plan is approved by the Court involve a contestation between creditor groups as to how they should be classified and what extent of what group approval should be appropriately required. No motion was brought to seek to lift the stay in respect of actions provided for in the Initial Order.

33 In this case, no creditor came forward to oppose approval of the Plan, including the terms of the release language as set out in the Sanction Order. The effect of a Sanction Order is to create a contract between creditors. (See *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2002), 35 C.B.R. (4th) 43 (Ont. S.C.J.).

34 The most significant feature of the CCAA Applications that have come before the Court in the last two or three years is that the negotiation has taken place to achieve consensus among creditors often before the Initial Order under the statute.

35 One can rightly understand the reluctance on the part of a provider of interim financing to continue to do so on an indefinite basis, when the approval process may be dragged out for days, weeks or months.

36 All secured creditors whose security continues to deteriorate during the period of negotiation will seek an early determination of the consensus necessary for approval of a Plan; otherwise, liquidation may be preferable.

37 Such consensus requires agreement among many stakeholders, including not just creditors but as well current and former directors and officers, many of whose continued cooperation is necessary and integral to a Plan's success.

38 To avoid the inequity that would result from creditor claims that were outstanding as against directors at the time of a CCAA application, s. 5.1(2) was amended in 1997 to its present form. As Hart J. noted in *Liberty Oil & Gas Ltd., Re*, 2002 ABQB 949 (Alta. Q.B.) at paragraph 4, before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief against directors of the petitioning company subject to exceptions.

39 It is appropriate to approach statutory interpretation with the assumption that meaning is to be accorded to each of the words used in the provision within the overall purpose of the CCAA. The absence of other words can also be purposeful.

40 The CCAA has been said to be a skeletal statute designed to give flexibility and expediency in the ability of the company, with the concurrence of its creditors, to accomplish a restructuring of its debt in the avoidance of liquidation or bankruptcy, and does not contain a comprehensive code that lays out all that is permitted or barred. (See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) per Blair J.A para. 44.)

41 Since the hearing in this matter, the Supreme Court of Canada has rendered a decision in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), which endorses the broad principles of the CCAA and the discretion granted to the Court to effect a restructuring if possible or an orderly liquidation.

42 The case involved a contest between the deemed trust provisions of the *Excise Tax Act* and the CCAA. Madam Justice Deschamps, speaking for the majority, noted the need for clarity of the underlying purpose with respect to the CCAA.

43 Paragraphs 12 to 14, 17, 58-59 and 63 of that decision read as follows:

12. Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13. Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14. Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

. . . . .

17. Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

. . . . .

58. *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59. Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> *Elan Corp. v. Comiskey*reflex, (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting.)

. . . . .

> 63. Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

44 I have quoted from the above decision at length to stress the nature of the discretion that is inherent in the CCAA statute to allow the Court to fashion a structure or process to best benefit stakeholders. Consistent with that purpose and as a matter of statutory interpretation, it is appropriate to look at the interpretation of s. 5.1(1) and (2) of the CCAA. Section 5.1 (1) deals with "obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

45 A Plan can therefore provide for the compromise of claims against directors where a director may in law be liable for the payment of a company's obligation with the exceptions set out in s. 5.1(2).

46 In my view, the best that can be said of s. 5 is that it is not as clearly drafted as it might have been.

47 It is noteworthy that in the first line of s. 5.1(2), the only claims that may not be excluded in a compromise are those against "directors." Claims that can be excluded in a compromise include those against "officers" and the "company" itself. Why is this the case? One reason undoubtedly is the personal liability that directors face under both Federal and Provincial legislation, or the personal undertaking of a director to a creditor such as a personal guarantee. (See *CIT Financial Ltd. v. Lambert*, 2005 BCSC 1779 (B.C. S.C.).)

48 By way of example, s. 131 (1) of the OBCA provides that directors are made personally liable for unpaid wages of the corporation's employees to a maximum of six months. Reading through s. 5.1 (1) and (2), there is nothing in the wording that would prevent the compromise of such claims against officers or the company itself, but not as against directors. The CCAA does not contain a definition of the word "creditor" but does of the terms "secured creditor," "unsecured creditor" and "shareholder." It would seem that for the purposes of the CCAA and in particular s. 5.1 (2), a creditor would include both a secured creditor and an unsecured creditor, but would not include a shareholder.

49 Section 5.1(2) refers only to creditors and not shareholders as prospective claimants, whether in contract, tort or statutory oppression.

50 In this case, the claims by the Class Action Plaintiffs are on behalf of shareholders against directors, since the effect of the CCAA stayed the action against the company Allen-Vanguard. The claims arise with respect to a 2007 transaction and the pre-filing financial statements, but the claims do not involve officers or the company, only directors.

51 While framed in negligence, the claims in these actions seek to involve the remedy of oppression under the OBCA to enlist the broad scope of remedy possible under that statute. However, it is only in respect of unpaid obligations of the company and other contract-type claims where the law imposes liability on the Defendant directors that invokes the exception in s. 5.1 (2). It is noteworthy that the word "negligence" does not appear in the section at all.

52 In their essence, the claims in the two actions allege a failure on the part of the directors in 2007 and the company to enter into a provident transaction and the transaction represented a misrepresentation to shareholders of the value of the transaction causing a reduction in shareholder value. Such claims are not of the same kind as those contemplated in section 5.1 (1). They do not relate to "obligations of the company where the directors are by law liable."

53 The claims relate to transactions that were well in advance of the Initial CCAA Order. In *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) (leave refused to ABCA [2000 CarswellAlta 919 (Alta. C.A. [In Chambers])] and to SCC [2001 CarswellAlta 888 (S.C.C.)]), it was held that claims against the directors should only be released if they arose prior to the date of the CCAA proceeding.

54 I agree that the oppression remedy is expansive in scope and empowers the Court to make determinations and orders that can have a direct and even a radical impact on the internal management and status of a corporation, including even an order

winding up the corporation. (See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) and *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* [2001 CarswellOnt 4387 (Ont. S.C.J. [Commercial List])], 2001 CanLII 28395 at paragraphs 101-105.) Oppression as it occurs within s. 5.1(2) of the CCAA must be read within the context of the section itself.

55 The claims in the Love and Laneville actions are in negligence and no other remedy is sought apart from a claim for damages and access to whatever insurance may be available to respond to claims against directors and officers. There is nothing before the Court to suggest that the insurers, assuming there is a valid policy, are aware of the restriction on remedy.

56 I see no basis from the pleadings in this action for which it would be appropriate to consider the scope of relief that might otherwise apply under the oppression remedy section of the OBCA. Counsel for the Plaintiffs in the Proposed Class Actions cannot bolster their position by limiting recovery to the applicable Directors and Officers Insurance, when there is no basis for the claim at all, either under the language of the Release or the meaning to be accorded to s. 5.1 (2).

57 In *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), the Supreme Court of Canada commented on the expectations of stakeholders including but not limited to shareholders, in considering a Plan of Arrangement in the context of an oppression claim. Part of the test for "oppression" referred to in that decision is an expectation on the part of the claimant to be "treated in a certain way and that failure to meet the expectation involved unfair conduct."

58 I fail to understand how the expectation of one or more shareholder groups can be any different with respect to the impugned transaction than those of creditors or indeed the company itself vis-à-vis the directors, particularly since neither the officers nor the company itself is pursued.

59 The Sanction Order in this case by its terms provided release of the claims now sought to be pursued. By the terms of the Sanction Order, the only reasonable expectation of stakeholders would be that unless specifically authorized by the Order, any claim against directors would be barred. Potential claims against directors were not assigned to class plaintiffs nor was direction sought by any party about the effect of s. 5.1 prior to the issuance of the Order. Given the issue now before the Court and the disagreement of the parties, perhaps the better practice would have been to advise the Court of the issue and "carve" it out of the Plan.

60 The Court is put in a difficult position when asked in a very constrained timeframe to approve the restructuring with releases. It should certainly not be the expectation that in every instance, releases of the type here should be granted as a matter of course. Those with unpaid obligations of the company may assert that directors are liable if they fail to fulfill the company's obligation when they are legally bound to do so.

61 I am of the view that third-party releases in particular should be the exception rather than the rule. There may very well be instances in which the releases are not integral or necessary to the restructuring and should not be approved. That was not suggested in the approval process here. There was no evidence presented at the time of the granting of the Sanction Order to suggest that directors were not important to the restructuring. Indeed, the only evidence before the Court was to the contrary: that the directors were integral to the Plan's success.

62 In this case, the putative Plaintiffs did not oppose the granting of the Sanction Order and in effect took their chances that the Order might after the fact permit the limited claim referred to in the Monitor's Report.

63 All of the other stakeholders, including the secured creditors, directors, officers and the Applicant Company, approved the form of Order.

64 It is certainly speculative at this time to consider, had the form of Order proposed been objected to, to what extent the Court would have any jurisdiction to grant the language now sought by the Plaintiffs, without rejecting the Plan entirely.

65 The duty of directors is first and foremost to the company itself. The oppression remedy does not in my view permit one group (shareholders) to claim oppression when other stakeholders, for example employees or creditors or indeed the company itself, have allegedly suffered a loss that results in insolvency and are unable to seek redress and still preserve restructuring.

66 To vary or amend the Sanction Order now to permit the claims to continue might at the very least require the presence and concurrence of all of those who supported the form of Order in the first place.

67 Counsel for the proposed Plaintiffs refer to several decisions, which they urged support the proposition that shareholder actions for oppression against directors are permitted under s. 5.1 (2) of the CCCA.

68 Each of those decisions, while fact-specific, in my view is consistent with a narrow range of actions warranted for a shareholder against the director under the exception to s. 5.1 (2).

69 In *Liberty Oil & Gas Ltd., Re*, 2002 ABQB 949 (Alta. Q.B.), where the action did proceed, the allegation involved a personal representation, indeed a fraudulent one, by the defendant director to two individuals who happened to be shareholders. The complained acts were not those of the company (as here), but rather personal and direct as between the director and shareholder. In other words, there was the proximity that one would expect in a tort situation.

70 In *Cheng v. Worldwide Pork Co.*, 2009 SKQB 414 (Sask. Q.B.), the action was not permitted to proceed. At paragraphs 14 and15 Justice Dawson said:

> It must be remembered that the oppression remedy is not designed to settle every dispute of a corporation but only those that involve and abuse of the corporate system and for which a common-law remedy does not exist.
>
> As well, the plaintiffs have pled that their claim is for damages, for loss of profits and loss of pay out dividends. There must be a causal connection between the alleged oppresive conduct and the loss claimed to be suffered by the plaintiffs. That is, there must be a causal nexus between the alleged conduct and the loss suffered by the plaintiffs. There is no pleading which sets out how the alleged loss of profit or dividends resulted from the conduct alleged to be oppressive. But in any event the losses claimed are losses as a result of Worldwide Pork not being profitable, that is, being unable to provide a return to shareholders for their investment. Such a loss cannot support an action for oppression since it comes with in the exception contained in section 5.1 (2) (b.) of the CCAA.

71 In *BlueStar Battery Systems International Corp., Re* (2000), 10 B.L.R. (3d) 221 (Ont. S.C.J. [Commercial List]), Farley J. of this Court dealt with a claim very much like that considered by the Supreme Court of Canada in *Century Services*, *supra*, as it involved G.S.T. At paragraph 12, he said

> Thus it appears to me that RevCan, not having put itself into position where it could (and did) perfect its derivative claims as set out in section 323 (2) (a) of the *Excise Tax Act* never had a claim against the directors which could survive the sanction of the Plan vis-à-vis the Applicants. Nothing that this Court could do at the present time (that is, at the time when considering the CCAA sanctioned motion) could crystallize a RevCan claim against the directors. RevCan would have to take additional multiple steps over some period of time to establish a claim against the directors.

72 Farley J. went on to discuss the hypothetical of a claim in oppression against the directors as provided for in s. 5.1(2) in the context where the creditor had put the directors on notice of the promise of the company to pay the tax.

73 The argument of the Proposed Plaintiffs here is that "oppressive conduct" is not to be carved out, but that wrongful conduct that involves directors, even though the action as against the company cannot continue, it can continue against the directors.

74 What in my view is consistent with the decisions in the three cases mentioned and in the Québec case *Papiers Gaspésia inc., Re*, 2006 QCCS 1460 (Que. Bktcy.) (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises

to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released.

75 It would be inconsistent with the scheme of the CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order. There would be little if any incentive to directors to pursue restructuring if they were going to be so exposed. On the other hand, personal undertakings or obligations of directors made during the CCAA process should not easily be released.

76 To permit the kind of claims as the Proposed Plaintiffs would see them would create a priority to that class of unsecured creditors that properly should belong to the creditors as a group. No leave to continue the Class action was sought before the Sanction Order was granted and even on this motion no submission was put forward for the exercise of discretion under section 5 .1 (3).

77 None of the cases referred to in argument dealing with s. 5.1(2) squarely deals with the issue raised here - that the section was intended to related to post-filing claims or personal undertakings of directors to creditors in connection with the proposed plan prior to filing.

78 The final argument on behalf of Class Plaintiffs is that to deny the claim of shareholders as against directors would only benefit their insurers, since the Class Plaintiffs have agreed to limit any recovery to the amount of the insurance. I fail to see how this advances the position of the Proposed Plaintiffs. No information was put before the Court about the particulars of the insurance. The Court has no information to know whether or not the insurers even know of this issue.

79 If the claim does not lie as against the directors in the first place under s. 5.1(2), the limitation of the claim as against the potentially available insurance does not advance the case of the class of Plaintiffs.

80 There would be little meaning left to s. 5.1 if all claims of negligence and wrongful conduct against directors for pre-filing activity could not be released and no need for the discretion provided for in s. 5.1 (3) for Court to override this compromise as not being fair or reasonable. As noted above in the passages from the *Century Services* case, the purpose of the CCAA and the discretion granted to the Court are to permit restructuring to work, not create new causes of action.

81 The concern of the Court, which necessitated the further inquiry, was that the language of the Sanction Order might imply on the part of the Applicant and directors who had knowledge of the particulars of the claim that the facts could give rise to a s. 5.1(2) claim. I am satisfied based on the further information provided that no such admission is to be implied.

82 The relief sought by the directors is therefore granted.

Underwriters

83 Underwriters acted on share and warrant offerings of Allen-Vanguard in September 2007 and certified a related prospectus. The Love Class Action was commenced in February 2010 and the proposed Representative Plaintiff claims damages against Underwriters under s. 130 of the *Securities Act (Ontario)* and also makes claims on the basis of negligence, unjust enrichment and waiver of tort.

84 Underwriters rely on the provisions of the releases granted by the Sanction Order and in particular the claims against the Applicant Company Allen- Vanguard. As well, Underwriters rely on the definition of "Equity Claims" in the Sanction Order and submit that because the provisions of the Order in paragraph 26 (ii) bar certain claims against third parties who might claim contribution and indemnity against the restructured company, they should be entitled to the benefit of that provision.

85 The response of the proposed Class Plaintiffs in the Love litigation is that the claim against Underwriters is based on the negligence, fraud or wilful misconduct of Underwriters. It is submitted that Underwriters are not entitled to indemnity as against Allen-Vanguard for the several negligence of Underwriters, either at law or under s. 130 of the *Securities Act.*

86 The proposed Class Plaintiff submits that given the nature of the claim as against Underwriters, Underwriters would never have had a right to an indemnity for the claims asserted in the Love Action and therefore there were no such claims to be released.

87 It is submitted that Underwriters bargained any possible indemnity away by the terms of their contract with Allen-Vanguard in September 2007, and that even if they had the benefit of an indemnity, all that was required for the Plan's success was that Alan-Vanguard be protected from Underwriters, not that Mr. Love's claims against Underwriters be eliminated.

88 Counsel for the Plaintiff in the Love Action also urges that Underwriters did not have the right of indemnity as at the time of the Initial Order, and the Sanction Order bars any indemnity that they might otherwise have had and there is nothing in the language of either Order to preclude the claim of the Class Plaintiff against Underwriters limited to Underwriters' negligence.

89 Finally, it is submitted that since Underwriters did not "bring anything to the table" in respect of the restructuring, there is no basis on which the Court should vary the Sanction Order to now provide the indemnity that the Order fails to provide.

90 In the alternative, the Class Plaintiffs suggest that the Sanction Order be clarified, if necessary, to clearly provide the right of the Class Plaintiff to proceed against Underwriters.

91 In my view, there is a distinction to be made between the claim as against the directors and that against Underwriters, since in the case as against the directors, the parties appear to have bargained that if the claim could be brought under s. 5.1(2), it could proceed. That consideration was known to the parties who negotiated and agreed on the form of the Sanction Order and that was the only claim not otherwise covered by the Release terms.

92 In the case of Underwriters, there was nothing to suggest that any discussion or negotiation took place with respect to specific protection for Underwriters or the allowance of a claim against Underwriters at the time that the Sanction Order was approved.

93 This is another reason why in my view s. 5.1(2) of the CCAA should be read narrowly with respect to pre-filing claims or claims that relate to pre-filing activity.

94 The *Ontario Business Corporations Act*, R.S.O. 1990 c. B. 16 ("OBCA") contains a statutory process for that kind of action and remedy sought by the Class Plaintiffs in both actions. Section 246(1) reads as follows:

> 246.(1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

95 The Supreme Court of Canada dealt with the issue of collective shareholder claims versus claims that are those of the corporation itself in *Hercules Management Ltd. v. Ernst & Young*, 1997 CanLII 345, [1997] 2 S.C.R. 165 (S.C.C.). The case involved a claim by shareholders of the corporation against its auditors for an alleged negligence in preparation of financial statements of the corporation. Paragraph 48 of the reasons refers to and adopts a statement of Farley J. in *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]) at p 260.

> As a matter of law the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

96 The plaintiffs in *Hercules* asserted reliance on financial statements in monitoring the value of their equity and then due to auditors' negligence, they failed to extract it before the financial demise of the company.

97 The Supreme Court, in assessing the claim, referred at paragraph 59 to the rule in *Foss v. Harbottle* [(1843), 67 E.R. 189 (Eng. V.-C.)]:

59. The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354, at p. 367, as follows:

> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60. The manner in which the rule in *Foss v. Harbottle*, *supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognize that in supervising management, the shareholders must be seen to be acting as a body in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61. This line of reasoning finds support in Lord Bridge's comments in *Caparo*, *supra*, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders.
>
> [Emphasis in Supreme Court decision.]

> It is also reflected in the decision of Farley J. in *Roman I, supra*, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia*, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.
>
> 62. One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

98 The policy of limiting indeterminate liability as in *Hercules* is consistent with the basis for the limitation of claims under s. 5.1(2) as set out above. In my view the words of s. 5.1(2) do not create a cause of action that would otherwise not exist except by leave of the Court. It simply provides an exception to what otherwise could be included in a release.

99 The release terms contained in the Sanction Order would deprive Underwriters from any claims for contribution or indemnity to which they would otherwise be entitled at law from the Company and its directors and officers should the actions of the Class Plaintiffs proceed.

100 This is just one further reason to support not just what is required for a derivative action but also what is required to be taken into consideration before the Court issues a Sanction Order in this case in effect on consent.

101 As noted above, what has come to be known as a "liquidating" CCAA application can provide problems not just for the parties but the Court itself. The presumption behind the timing of the Application in this case was that if not granted quickly, bankruptcy would have ensued with the inevitable loss of jobs, assets and creditor claims.

102 The Class Plaintiffs are taken to have known of the CCAA proposal as early as September 2009 and could have sought leave to commence a derivative action prior to or during the CCAA process. No such step was taken.

103 I am satisfied that it is appropriate in the circumstances to stay the claims as against Underwriters in negligence and misrepresentation.

104 The Claim against Underwriters also alleges fraud. If the only claim were in fraud and full particulars of alleged fraud were contained in the pleading, the claim might survive since the wording of the Release does not extend to fraud.

105 Apart from fraud, claims in negligence against Underwriters are caught by the terms of the Release. Arguably, the claims are those of the Company that are specifically released.

Variation of the Sanction Order

106 As noted above in reference to the decision in *Canadian Red Cross*, a Sanction Order in addition to being an Order of the Court and subject to the normal rules for variation thereof, represents an agreed contract between the creditors of an insolvent corporation.

107 The Class Plaintiffs in the Laneville action did not seek to lift the stay at the time of the Initial Order. The Class Plaintiff accepted the Release provisions which extend to Underwriters when the Sanctioned Order was granted.

108 Underwriters were released by the terms of the Sanction Order, and the Order, which was not appealed, represents a final determination of the rights of shareholders as against Underwriters.

109 As was mentioned above, in respect of the suggestion of variation of the Sanction Order to permit the claim as against the directors, I conclude that it is not appropriate to vary a Sanction Order after the fact. The reliance that parties place on the finality of a Sanction Order is such that it would only be in extraordinary circumstances of a clear mistake, operative misrepresentation or fraud that would permit variation without re-opening the whole process.

110 In *Extreme Retail (Canada) Inc. v. Bank of Montreal*, [2007] O.J. No. 3304 (Ont. S.C.J. [Commercial List]), Stinson J. held at paragraph 21 that an Approval and Vesting Order was a final determination of the rights of parties represented in that proceeding. Morawetz J. adopted those comments in *Royal Bank v. Body Blue Inc.* 2008 CarswellOnt 2445 (Ont. S.C.J. [Commercial List])] 2008 CanLII 19227 to the same effect at paragraphs 19 and 20. In my view the same principle applies to a Sanction Order.

111 I see nothing in the requests of either Underwriters or the Class Plaintiffs that would be appropriate to permit variation of the Sanction Order as each of them have proposed.

112 Should the Class Plaintiff in the Laneville action seek to pursue a claim against Underwriters limited alone in fraud, the action should be permitted to proceed subject to the Plaintiff persuading a judge that such a limited claim should be certified.

Conclusion

113 For the above reasons the motion by the directors will succeed to enjoin the claims as against them in both the Love and Laneville actions. The motion of Underwriters to strike is granted, and motions for variation of the Sanction Order of both Underwriters and the Class Plaintiffs are dismissed. Counsel may make written submissions on the issue of costs.

Motions granted; cross-motion dismissed.

2009 SKQB 186
Saskatchewan Court of Queen's Bench

Cheng v. Worldwide Pork Co.

2009 CarswellSask 303, 2009 SKQB 186, 177 A.C.W.S. (3d) 292, 334 Sask. R. 227, 54 C.B.R. (5th) 86

TOM KING TONG CHENG, in his personal capacity and as Trustee of CHENG FAMILY TRUST (PLAINTIFFS) and WORLDWIDE PORK COMPANY LIMITED, KENJI NOSE in his personal capacity and as Trustee of NOSE FAMILY TRUST (DEFENDANTS)

C.L. Dawson J.

Judgment: May 22, 2009
Docket: Regina Q.B.G. 2885/02

Counsel: David R. Barth for Plaintiffs
Michael W. Milani, Q.C. for Proposed Defendants, Amos Skinner, Ernie Donnawell, Government of Saskatchewan

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

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Miscellaneous issues

AFEF was set up by provincial government and administered by ACS — Plaintiff's company applied for funding from AFEF — Government provided funding through WWP and subscribed 1,000,000 shares in name of AFEF — S was AFEF's appointee to board until he resigned and was replaced by D — Plaintiffs brought action against number of defendants and WWP — WWP failed to redeem preferred shares and ACS converted its shares into demand loan — WWP applied to court for protection under Companies' Creditors Arrangement Act ("CCAA") — WWP filed plan of compromise and arrangement which was approved by court — Under plan all debts owing to creditors were compromised by converting dollar value of debts into shares of holding company — Plaintiffs applied pursuant to R. 165 of Queen's Bench Rules of Court to amend statement of claim and add S, D and government as defendants to action — Application dismissed — Issue arose as to whether CCAA plan settled claims against proposed defendants — Plan settled all rights of action against proposed defendants except for those claims that could not be compromised under s. 5.1(2) of CCAA — Leave was granted for plaintiffs to file motion to amend to add S and D as defendants to claims related to failure to provide notice of shareholder and directors meeting and oppression — CCAA plan compromised claims of creditors — S, D and government were "released parties" by virtue of s. 4.12 of plan and paragraph 16 of court sanction order — Government was not added as defendant as exception under s. 5.1(2) of CCAA related only to claims against directors and government was shareholder — S and D were not added as defendants because claim did not assert cause of action that fell within exceptions set out in s. 5.1(2) of CCAA.

Table of Authorities

Cases considered by *C.L. Dawson J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

BlueStar Battery Systems International Corp., Re (2000), 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216, 2000 CarswellOnt 4837, [2001] G.S.T.C. 2 (Ont. S.C.J. [Commercial List]) — considered

Kvello v. Miazga (2002), 2002 SKQB 521, 2002 CarswellSask 826 (Sask. Q.B.) — considered

NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CarswellOnt 4077, 1 B.L.R. (3d) 1, 181 D.L.R. (4th) 37, 46 O.R. (3d) 514, 47 C.C.L.T. (2d) 213, 127 O.A.C. 338, 15 C.B.R. (4th) 67 (Ont. C.A.) — considered

Smith v. Dawgs Canada Distribution Ltd. (2008), [2008] 11 W.W.R. 342, 317 Sask. R. 1, 2008 SKQB 219, 2008 CarswellSask 316 (Sask. Q.B.) — considered

Statutes considered:

Business Corporations Act, R.S.S. 1978, c. B-10
s. 234 — referred to

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

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 5.1(1) [en. 1997, c. 12, s. 122] — considered

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 5.1(2)(a) [en. 1997, c. 12, s. 122] — considered

s. 5.1(2)(b) [en. 1997, c. 12, s. 122] — considered

s. 5.1(3) [en. 1997, c. 12, s. 122] — considered

s. 6(a) — referred to

s. 11.5(1) [en. 1997, c. 12, s. 124] — referred to

Proceedings Against the Crown Act, R.S.S. 1978, c. P-27
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
R. 38 — referred to

R. 165 — pursuant to

R. 222A [en. Sask. Gaz. May 15/87] — pursuant to

R. 236 — pursuant to

APPLICATION by plaintiffs pursuant to R. 165 of *Queen's Bench Rules of Court* to amend statement of claim and add defendants.

C.L. Dawson J.:

1 The plaintiffs apply, pursuant to Rule 165 of *The Queen's Bench Rules of Court*, to amend the statement of claim in the within action and to add Amos Skinner, Ernie Donnawell and the Government of Saskatchewan as defendants.

2 The plaintiffs (also referred to as "Cheng") seek alternatively, pursuant to Rule 236, that the Government of Saskatchewan produce those documents in its possession that relate to the defendant, Worldwide Pork Company Limited and the directors of Worldwide Pork Company Limited that the Government of Saskatchewan appointed. The plaintiffs seek, in the further alternative, pursuant to Rule 222A, leave to examine that Government of Saskatchewan officer currently in charge of the Agriculture Food and Equity Fund.

Background

3 The Agriculture Food and Equity Fund ("AFEF") was established by the Government of Saskatchewan (the "Government") as a fund administered by the Agricultural Credit Corporation of Saskatchewan ("ACS"). The function of ACS was to provide investment capital to the food industry in Saskatchewan. In 2003 the operations of AFEF were wound up and AFEF's assets and liabilities were transferred to ACS.

4 It appears that around 2000 a corporation called CITA Foods Inc. ("CITA"), which was controlled by the plaintiff, Tom Cheng, applied for funding from AFEF in order to enable CITA to purchase a pork slaughter and processing facility in Moose Jaw, Saskatchewan. AFEF provided funding to CITA through the form of an investment in a company called Worldwide Pork Company Limited ("WWP"). WWP was the company through which CITA operated the pork processing facility.

5 In 2000 the Government, through AFEF, invested $1,000,000.00 in WWP by subscribing 1,000,000 Class "C" preferred shares. The preferred shares were issued in the name of AFEF. At the time that AFEF became a shareholder, the other shareholders of WWP were Kenji Nose, Nose Family Trust, Tom Cheng, Cheng Family Trust, Okanomi House Limited and Yamato Development Canada Inc.

6 AFEF's share rights relating to the 1,000,000 preferred shares included the following:

1. AFEF was entitled to elect one director to the Board of Directors of WWP;

2. WWP was to redeem the preferred shares commencing March 31, 2004 according to a formula;

3. In the event that WWP failed to redeem AFEF's preferred shares, AFEF had a right to convert any or all of the shares (and any dividends or interest owing) into a loan payable to AFEF by WWP.

7 In April 2000 Amos Skinner, an investment manager with AFEF, became AFEF's appointee to the Board of Directors of WWP. In 2001 Mr. Skinner resigned as a director of WWP and Ernie Donnawell, an investment manager with AFEF, became AFEF's appointee to the Board of WWP.

8 On May 11, 2001 Mr. Skinner ceased being an employee of the Government. On May 30, 2001 Mr. Skinner became President and Chief Executive Officer of WWP. In January 2002 Mr. Skinner resigned as President and Chief Executive Officer of WWP.

9 On March 28, 2002 Ernie Donnawell resigned as a director of WWP. Between May 2002 and November 2003, Mr. Donnawell was elected to and resigned from the WWP Board a number of times.

10 On December 31, 2002 the plaintiffs, Tom Cheng and Cheng Family Trust ("Cheng") issued the within statement of claim against the defendants, WWP and Kenji Nose.

11 In February 2003 the preferred shares owned by AFEF in WWP were transferred to ACS. After that date, the Government's investment in WWP was held through ACS.

12 On May 28, 2004, ACS wrote to WWP notifying WWP that as WWP had failed to redeem the preferred shares on March 31, 2004, as required, ACS was converting the shares into a demand loan. ACS also advised that it was exercising its conversion rights in respect of 999,999 of the preferred shares. This resulted in all but one of the preferred shares being converted into a demand loan in favour of ACS, in the amount of $1,329,634.00. ACS later indicated to WWP that it had miscalculated the amount owing, and indicated that the demand loan was for $1,512,196.02. WWP was also indebted to ACS under other credit facilities.

13 On July 5, 2005 WWP applied to the court for protection under *The Companies' Creditors Arrangement Act*, R.S., 1985, c.C-36 ("CCAA"). The court file regarding the CCAA proceedings is Q.B.G. No. 1175 of 2005. On July 5, 2005 Justice Ball ordered a stay of all proceedings against WWP under a CCAA initial order. That initial order stayed all claims against WWP, which included the within plaintiffs' statement of claim, which was issued December 31, 2002. That CCAA order said, in part:

> 12. During the Stay Period, no Proceeding or Enforcement shall be commenced or continued against any one or more of the Directors in regard to or in respect of:
>
> (a) claims involving acts or omissions of those individuals in their capacity as Directors or in any way related to matters arising from their role as Directors; or
>
> (b) claims in any way related to any matters arising from the appointment of such individuals by and on behalf of the Applicant to any corporation, partnership or venture, including their appointment or election by or on behalf of the Applicant to any other board of directors or other governing body or committee;
>
> that arose prior to the date of this Order, and without limiting the generality of the foregoing, no shareholder of the Applicant or any other Person may commence or continue any Proceeding or Enforcement or claim any relief in relation to losses or damages that such Person alleges they have suffered in their capacity as shareholder or in relation to derivative rights of that shareholder against any Director, in either case, without first obtaining leave of this Court granting such Person permission to do so.

14 A review of the CCAA court file indicates that on August 17, 2005 Justice Ball made a further order which lifted the July 5, 2005 stay of proceedings order against the directors of WWP, in limited circumstances. The relevant portions of that order lifting the stay are as follows:

> 1. Paragraph 12 of the July 5, 2005 Initial Order (since extended) is amended by adding the following paragraph: "The provisions of this paragraph do not apply to the corporations and individuals described below in respect of any Proceeding or Enforcement against one or more of the Directors in regard to or in respect of:
>
> (a) claims that relate to contractual rights of one or more of the creditors; or
>
> (b) claims based on allegations of misrepresentations made by Directors to creditors or of wrongful or oppressive conduct by Directors;
>
> as described in the draft Statement of Claim attached as an exhibit to the Affidavit of Paul J. Harasen sworn July 29, 2005, and leave is granted to those corporations and individuals who produced and shipped hogs to Worldwide Pork Company Limited that are named as Plaintiffs in the Statement of Claim when it is issued, and those Plaintiffs may assert the allegations asserted in the draft Statement of Claim, and may commence and continue the claims contained in the draft Statement of Claim."

15 This August 17, 2005 order lifting the stay only applied to the specified claims of the creditors who produced and shipped hogs to WWP, as referred to in a draft statement of claim filed in support of the application to lift the stay. It did not apply to the plaintiffs' statement of claim here.

16 The CCAA proceedings continued. A claims proving process was put into place on September 27, 2005, by court order. Under that order, the Monitor was to assess all claims and accept or reject them. Those creditors whose claims were rejected by the Monitor were entitled to apply to Justice Ball for a hearing as to the validity of that creditor's claim. The status and the amount of a creditor's claim was relevant for the purposes of voting on the restructuring plan that was to be submitted to the court by WWP.

17 Cheng filed a Proof of Claim alleging that WWP was indebted to Cheng for various claims in the total amount of $2,602,000.00. The Monitor disallowed the Cheng CCAA claims. Cheng then applied to the court for an order determining the amount of the Cheng claims. Cheng appended the within statement of claim (without the proposed amendments) to the affidavit in support of the application to determine the amount of the plaintiffs' claim. On January 5, 2006 Justice Ball issued a fiat in respect of the Cheng claims. Justice Ball concluded that the total value of the Cheng CCAA claims was $197,500.00.

18 On January 4, 2006 WWP filed its Plan of Compromise and Arrangement (the "Plan"). The Plan was amended on January 20, 2006 (the "Amended Plan"). That Amended Plan dealt specifically with the issue of what creditors' rights would be extinguished, settled or compromised if the Amended Plan were approved by the creditors and the court. Relevant portions of that Amended Plan include the following:

. . . . .

2.3 Unaffected Claims

The Plan does not affect or compromise the Claims of the following Creditors and other Persons;

(a) Post-Filing Claims of any Person;

(b) Claims of the Monitor, its counsel and WWP's counsel and professional advisors for amounts that would comprise all or part of the Administrative Charge as defined in the Initial Order;

(c) Claims of the DIP Lender for any amount owing in respect of the DIP Loan approved by the Court from time to time;

(d) Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or any other taxation authority;

(i) for any statutory deemed trust amounts which are required to be deducted from employees' wages, including amounts in respect of employment insurance, Canada Pension Plan and income taxes;

(ii) for goods and services or other applicable sales taxes payable by WWP or their customers in connections with the sale of goods and services by WWP to such customers; and

(e) Claims of the Excluded Secured Creditors.

For further certainty and to avoid any confusion, the Contingent Employee Claims shall not be a Post-Filing Claim and shall be compromised as set forth in this Plan.

. . . . .

4.1 WWP's Creditors

(b) Settlement of Claims of Creditors

Each Creditor, other than Employees of WWP in respect of any claims as employees of WWP and the Excluded Secured Creditors, and subject to paragraph 4.1(c) hereof, shall receive in full satisfaction of its Claim as determined in accordance with the Claims Procedure Order;

(i) Where the Claim of the Creditor does not exceed $500, or where the Creditor has elected to reduce the amount of its claim to $500, such Creditor shall receive an amount equal to the lesser of the amount of its Claim and $500, which amount shall be paid within 90 days of the Effective Date;

(ii) Where the claim of the Creditor exceeds $500 and the Creditor has not elected to reduce the amount of its claim to $500, such Creditor shall receive common shares in NewCo. Shares in NewCo. will be issued on the basis of one share for each one hundred dollars (or part thereof) owing pursuant to the Accepted Claim for Voting Purposes of that Creditor.

WWP shall amend its articles and bylaws or cause them to be amended, so that from and after the Effective Date, it shall, subject to the provisions of *The Business Corporations Act* (Saskatchewan) and any other applicable legislation and subject to compliance with financial covenants in agreements with its lenders, be required to annually declare and pay out in dividends such amounts of funds as it has generated annually from operations, after provision is made by WWP for its ongoing operational requirements, after any provision required for debt servicing has been made in compliance with any agreements with third party lenders, after provision is made for any preferred share redemption that is required and subject to any amounts to be paid in priority to any payment of dividends to the holders of common shares of WWP.

(c) Settlement of Shareholders Claims

Notwithstanding each Shareholders:

(a) Accepted Claim for Voting Purposes or Disputed Claim, if any;

(b) number of existing shares in WWP; and

(c) outstanding shareholders loans to WWP;

the Shareholders' Claims shall be compromised by the Shareholders receiving a combined total of 10% of the shares of NewCo. to be allocated amongst such Shareholders on a pro rata basis based upon the common share shareholdings of such parties in WWP on the Filing Date, and all other amounts owing to such Shareholders by WWP shall be extinguished. The existing shares of such Shareholders in WWP, and the preferred share of ACS in WWP, shall be cancelled as at the Effective Date.

. . . . .

(d) Settlement of Employee Claims

The Claims of the Employees of WWP will be compromised under this Plan as follows:

(i) On or after the Effective Date the Employees will be paid 95% of the Admitted Wage Claims;

(ii) The Admitted Vacation Entitlement Claims of the Employees shall be maintained by WWP for the Employees. For those Employees that return to employment with WWP, they shall retain their unused vacation entitlements that form part of the Admitted Vacation Entitlement Claims. In respect of any Employee that does not return to employment with WWP within 12 months of the Effective Date, WWP shall pay to that Employee 85% of the value of the Admitted Vacation Entitlement Claims of that Employee as such existed at the Filing Date, with such amounts to be paid within 18 months of the Effective Date; and

(iii) The Contingent Employee Claims shall be extinguished upon the Effective Date.

(e) Establishing NewCo. and Issuance of Shares to Creditors

On or prior to the Effective Date, WWP shall cause NewCo. to be incorporated or established by WWP (at the expense of WWP). The Monitor, or his designate, shall be appointed as the interim director of NewCo., until the first meeting of the shareholders of NewCo. referred to below. On the Effective Date, NewCo. will issue in favour of the participating Creditors the appropriate number of common voting shares in the capital stock of NewCo. on the bases set forth in sections 4.1(b) and 4.1(c) above, provided that no fractional shares shall be issued. The rights of the holders of these common voting shares shall be consistent with the rights of the holders of common voting equity shares, including the right to receive dividends as and when declared. A meeting of shareholders of NewCo. will be convened within 6 months of the Effective Date to elect a board of directors of NewCo. and to conduct such other business as may be required or determined by the shareholders of NewCo. and the interim acting director of NewCo.

. . . . .

(i) Extent of Release

For greater certainty: each of

(a) **the payments to a Creditor under subparagraph 4(1)(b)(i) above;**

(b) **the issuance of shares in NewCo pursuant to subparagraph 4(1)(b)(ii) above;**

(c) **the issuance of shares in NewCo pursuant to paragraph 4(1)(c) above; and**

(d) **the settlement of the Employee Claims pursuant to paragraph 4(1)(d) above.**

shall settle in full all claims, causes of action, demands, rights, indebtedness, obligations and liability (collectively, "Rights") of the Creditor holding such Rights whether such Rights are made or asserted against WWP or are capable of being asserted against any other Person, including whether pursuant to a joint and several obligation with WWP, a several obligation, a guarantee obligation, an absolute obligation, a contingent obligation or any obligation of any nature derived directly or indirectly from or through or in relation to any Rights, including any Rights that may be asserted under or pursuant to any livestock dealer bond or any livestock dealer regulations, whether against WWP or any other Person, other than the Rights of the DIP Lender in respect of the DIP Loan.

[Emphasis Added]

. . . . .

4.12 Releases

Except as provided hereafter, on the Effective Date, WWP and each and every present and former shareholder, officer, director, employee, financial advisor, legal counsel and agent of WWP and the Monitor and their respective legal counsel (individually, a "Released Party") and any person claimed to be liable derivatively through any Released Party (**including any Person described in paragraph 4.1(i) above, with respect to all rights of such Person**), shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert including, without limitation, any and all claims in respect of potential statutory liabilities of the former and present directors and officers of WWP, and any alleged fiduciary or other duty, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Date in any way relating to, arising out of or in connection with Claims or Post-Filing Claims, the business and affairs of WWP, this Plan and the CCAA Proceedings to the full extent permitted by law, and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce WWP's obligations under the Plan or any related document), provide that nothing herein:

(a) shall release or discharge a Released Party from a Claim which cannot be compromised under the CCAA; or

(b) shall affect the rights of any Person to pursue any recoveries for a Claim against a Released Party that may be obtained against a third-party insurer or other entity not released under this Plan (but, for certainty, any such Claim to which an insurer may be subrogated shall be released hereunder); provided, further, however, that notwithstanding the foregoing releases under the Plan, any Claim asserted against WWP pursuant to Article 2.3(c) of this Plan shall remain subject to any right of set-off that otherwise would be available to WWP in the absence of such releases; or

(c) shall release the directors and former directors of WWP in respect of any claims that may be made against them by creditors pursuant to the Order of Mr. Justice D. Ball, granted on August 17, 2005 in the CCAA proceedings.

. . . . .

6.2 Application for Court Sanction Order

If Creditor approval is obtained, WWP shall forthwith apply for the Court Sanction Order. Unless otherwise provided in the Order, the Court Sanction Order shall not become effective until the Effective Date. On the Effective Date, subject to the satisfaction of the conditions contained in Sections 6.1 and 6.4 hereof, the Plan will be implemented by WWP and shall be binding upon all Creditors having Claims or Rights affected by this Plan and Post-Filing Claims affected by this Plan to the extent of such Claims or Rights or Post-Filing Claims and upon all other Persons. If the conditions contained in Sections 6.1 or 6.4 are not satisfied, the Effective Date will not occur and this Plan and the Court Sanction Order shall cease to have any further force or effect, unless otherwise ordered by the Court.

. . . . . .

8.4 Compromise Effective for All Purposes

The compromise or other satisfaction of any Claim under this Plan, if sanctioned and approved by the Court under the Court Sanction Order shall be binding on the Effective Date on all Creditors in accordance with the term of this Plan and such Creditor's heirs, executors, administrators, legal personal representatives, successors and assigns, for all purposes.

8.5 Consents, Waivers and Agreements

On the Effective Date, each Creditor affected by this Plan shall be deemed to have consented and agreed to all of the provisions of this Plan in their entirety. In particular, each such Creditor (for greater certainty, except for the DIP Lender in respect of the DIP Loan) and other affected Persons shall be deemed:

. . . . .

(d) to have released any and all Claims and Rights, save and except the Unaffected Claims and all payments or other Distributions to be made to such Creditor pursuant to the provisions of this Plan or any agreement or arrangement contemplated by this Plan.

[Emphasis in Original]

19 The effect of the Amended Plan was that all debts owing to secured and unsecured creditors of WWP were to be compromised, by converting the dollar value of such debts into shares of NewCo., a holding company that was to hold a specified percentage of the common shares of WWP. As well, all claims of shareholders, whether they were in respect of shareholder loans or any other amounts owed to them by WWP, were to be compromised by such shareholders receiving a pro rata share of 10% of the NewCo. shares. That is, 10% of the NewCo. shares were to be allocated among the existing shareholders of WWP. As well, all employee claims were settled, in general, by a payment of 95% of the admitted wage claim.

20 On January 25, 2006 at the creditors' meeting, the majority of creditors voted to accept the Amended Plan.

21 The Amended Plan was sanctioned by the court on February 6, 2006. The February 6, 2006 Court Sanction Order of Justice Ball stated the following at paras. 10 and 12:

> 10. **Upon the Effective Date, all Claims and Rights, except Unaffected Claims, of Creditors of the Applicant be and they are hereby forever discharged and extinguished, subject to payment of any amounts to be paid under the Plan, the issuance of the shares in the Applicant to NewCo. and the issuance of shares in NewCo. to the Creditors entitled to receive same, as provided in the Plan.**
>
> . . . . .
>
> 12. Upon the occurrence of the Effective Date, subject to:
>
> (a) the repayment of the DIP Loan to the DIP Lender;
>
> (b) the payment of the amounts to be paid under the Plan;
>
> (c) the issuance of the shares of the Applicant to NewCo. as provided in the Plan;
>
> (d) the issuance of shares in NewCo. to the Creditors entitled to receive same, as provided in the Plan; and
>
> (e) the payment of 95% of the Admitted Wage Claims to the Employees;
>
> **all Charges held by any Creditors of the Applicant shall be released and discharged,** except the Administrative Charge (as that term is defined in the Initial Order), and the Post-Application Creditors Charge (as that term is defined in the Order Extending the CCAA Proceedings made July 18, 2005 by Justice D. Ball). In the event that the Creditor holding such released and discharged Charge does not deliver to the Applicant's counsel, Balfour Moss LLP, a withdrawal and discharge respecting such Charge to be utilized on or after the Effective date, the Applicant may apply to the Court for an Order releasing or discharging such Charge, at the cost and expense of such Creditor.
>
> [Emphasis Added]

22 Following the effective date of the Amended Plan, the Monitor issued shares to all creditors of WWP in accordance with the Amended Plan and Court Sanction Order. Cheng was issued 1,521 shares in NewCo., representing 1.7% of the common shares in NewCo., in accordance with the Court Sanction Order.

23 The plaintiffs now apply to amend their statement of claim and applies to add Amos Skinner, Ernie Donnawell and the Government of Saskatchewan as defendants. The relevant portions of the plaintiffs' proposed amended claim include the following (the proposed amendments are underlined):

> 1. This is an action for breach of contract, shareholder oppression, <u>breach of a director's fiduciary duty to his company</u>, and wrongful dismissal.
>
> 2. The Plaintiff, Tom King Tong Cheng ("Tom"), resides in Richmond, British Columbia. Tom is a shareholder and director of Worldwide Pork Company Ltd.
>
> 3. The Plaintiff, Cheng Family Trust, is a trust located in Saskatchewan. Tom is the Trustee and also a director of Cheng Family Trust. Tom and Cheng Family Trust are minority shareholders of Worldwide.
>
> . . . . .
>
> 5. The Defendant, Kenji Nose ("Nose"), resides in Vancouver, British Columbia. Nose is a shareholder, officer, and director of Worldwide. Nose is the Trustee and ~~also is also~~ the managing director of the Defendant, Nose Family Trust. <u>Nose Family Trust is liable for any and all damage suffered by reason of any actions taken by Nose while acting as its trustee</u>.
>
> . . . . .

6.1 The Defendant, The Government of Saskatchewan, represents the Crown in right of the Province of Saskatchewan. The Plaintiffs plead and rely on *The Proceedings against the Crown Act*. The Government of Saskatchewan, is vicariously liable for the actions and inactions of its employees, agents, and principals, including the Minister and Department of Agriculture and Food of Saskatchewan, Amos Skinner, and Ernie Donnawell.

6.2 The Defendant Ernie Donnawell resides in Regina, Saskatchewan.

6.3 The Defendant Amos Skinner resides in Wilkie, Saskatchewan.

. . . . .

8. The current Directors of Worldwide are Ernie Donnawell, Tom and Nose. Amos Skinner was a Director from Worldwides creation in 1999 until about May 2001.

. . . . .

9. The shareholders of Worldwide are Tom, Cheng Family Trust, Nose, Nose Family Trust, Okonomi House Limited ("Okonomi"), Yamato Development Canada Inc. ("Yamato"), and the Minister of Agriculture and Food of Saskatchewan. The Minister is involved through a government program called the Agri Food Equity Fund ("AFEF").

11. The Director Ernie Donnawell is an employee of the Government of Saskatchewan and currently represents the interests of AFEF. Prior to Ernie Donnawell, AFEF was represented by Amos Skinner.

. . . . .

22. On February 18, 2000, Okonomi and Cita Foods Inc. ("Cita") signed a five year contract for the sale of pork products ("the Purchase Agreement"). Tom signed the Purchase Agreement on behalf of Cita. Cita was to provide the pork products to Okonomi. Cita's contract was then assigned to Worldwide.

23. Since the Purchase Agreement was assigned to Worldwide Nose has caused Okonomi to fail or refuse to acquire and pay for pork from Worldwide as required under the Purchase Agreement. Instead the Defendants have caused Worldwide to sell pork at a lower price to Rocky Japan. Rocky Japan is a company owned and controlled by Nose.

24. Furthermore, Worldwide and Nose, Ernie Donnawell and The Government of Saskatchewan have failed to commence and [sic] action against Okonomi for breach of contract or take any other action to rectify the breach of the Purchase Agreement.

. . . . .

26. As a director of Worldwide, Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan has not acted honestly and in good faith with a view to the best interests of the corporation.

27. Nose and The Government of Saskatchewan, through its agents, including Amos Skinner and Ernie Donnawell, has breached the fiduciary duties he owed to Worldwide in his capacity of director.

. . . . .

34. Nose and Worldwide have acted in an oppressive manner and unfairly disregarded the interests of Tom by failing to make any payment on account of deferred start up costs and shareholder loan, contrary to the agreements between Nose and Tom, contrary to Nose's representations, and contrary to Tom's reasonable expectations.

35. The Defendants, including The Government of Saskatchewan, have failed to provide notice to Tom of both director's and shareholder's meetings. Director's meetings have been held without providing notice to Tom and Tom has received no notice of shareholder's meetings, including the annual shareholder's meeting. The Defendants, including The Government of Saskatchewan, have also failed to advise Tom of material changes to Worldwide.

36. Nose and Worldwide, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan have acted in an oppressive manner and unfairly disregarded the interests of Tom and Cheng Family Trust by failing to enforce the Purchase Agreement, failing to try to make any profits, failing to pay dividends, failing to provide notice of director's meetings, failing to provide notice of shareholders meetings, and failing to employ Tom.

37. As a result of the actions, inactions, and breach of fiduciary duty of Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan, Worldwide and its shareholders, including Tom and Cheng Family Trust, have suffered damages, including monetary loss.

. . . . .

39. Prior to Purchase Agreement being closed, Amos Skinner (who represented AFEF and the Minister) and Nose colluded to force Tom to accept a management contract which was not satisfactory to Tom. Tom signed his management contract under duress.

42. Tom had a significant interest in and expectation of management of Worldwide. Tom had a reasonable expectation of a fair management package. Nose and The Government of Saskatchewan, and Worldwide have acted in an oppressive manner and unfairly disregarded the interests of Tom by terminating his employment as President and Chief Executive Officer.

. . . . .

49. THE PLAINTIFFS THEREFORE claim against the Defendants, jointly and severally:

(a) Payment on account of the deferred start up costs, ie. the time, effort and expenses of Tom incurred to get Worldwide up and running;

(b) Buyout of their shares by the company at fair market value;

(c) Compensation for unpaid past and future dividends;

(d) Appointment of an interim receiver-manager;

(e) In the alternative, an order removing the existing Directors and appointing new Directors;

(f) General Damages, for wrongful dismissal, and shareholder oppression, and breach of a director's fiduciary duty, including pay in lieu of notice;

(g) Monetary Damages, including special damages in an amount to be proven at trial;

(h) Vacation pay and other such payments and benefits as Tom may be entitled to;

(i) Pre-Judgment interest pursuant to The Pre-Judgment Interest Act;

(j) Aggravated and Punitive Damages;

(k) Costs of and incidental to the within action on a solicitor-client basis;

(l) A stay of the BC action;

(m) In the alternative, Set Off for any damages awarded in the BC action;

(n) Other such relief as counsel may request and this Honourable Court may award.

24 It is clear that the claims that Cheng seeks to advance against the proposed defendants Donnawell, Skinner and the Government in the proposed amended claim are the identical claims advanced against WWP and the defendant Kenji Nose,

when the claim was issued in December 2002. Cheng advised the Monitor of these claims against WWP when Cheng's proof of claim, alleging that WWP was indebted to Cheng in the amount of $2,602,000.00 was filed. When Cheng was requested to provide particulars of the claim, Cheng filed a copy of the within statement of claim (without the amendments adding the proposed defendants) with the Monitor. The allegations in the statement of claim were the basis upon which Cheng suggested WWP was indebted to Cheng, and the statement of claim was incorporated by reference into the Cheng proof of claim.

25 The only cause of action that might possibly be viewed as a new cause of action in the proposed amended claim is the proposed amendment to paragraph one, which amendment states that this is an action for *"breach of directors' fiduciary duty to his company*". Otherwise the causes of action in the proposed amended claim are the same as they existed at the time Cheng filed the proof of claim under the CCAA proceedings.

Positions of the Parties

26 The plaintiffs now seek an order which would permit them to amend the statement of claim to add the proposed defendants Amos Skinner, Ernie Donnawell and the Government as parties. Counsel on behalf of the plaintiffs indicated, in chambers, that the Monitor in the CCAA action told him that the claims against the directors or other liable parties would not be extinguished by the CCAA court order which sanctioned the Amended Plan.

27 The plaintiffs seek, in the alternative the stated disclosure from the Government and the ability to discover Government officials.

28 The defendants assert that the court should not allow the amendments to the statement of claim, because the Amended Plan and Court Sanction Order clearly compromised and extinguished all of the Cheng claims against the directors, officers, shareholders and employees of WWP. The defendants assert further that the amendments assert no reasonable cause of action, are vexatious and frivolous and/or an abuse of process.

29 The defendants take the further position that the plaintiffs have not established entitlement to disclosure nor to cross-examine Government officials.

Issues

1. Did the CCAA Amended Plan and Court Sanction Order

compromise, extinguish or settle the proposed claims of the plaintiffs against the proposed defendants Skinner, Donnawell and the Government?

2. If the Plaintiffs' Proposed Claims Were Not Extinguished by the CCAA Amended Plan and Court Sanction Order, Should the Plaintiffs Be Allowed to Amend Their Statement of Claim as Proposed?

3. Should the requested disclosure be ordered against the Government?

4. Should the Plaintiffs Be Granted Leave to Examine the Government's Officer Currently in Charge of AFEF?

Analysis

1. Did the CCAA Amended Plan and Court Sanction Order Compromise, Extinguish or Settle the Claims of the Plaintiffs Against the Proposed Defendants Skinner, Donnawell and the Government?

(a) The Law

30 Section 5.1 of the CCAA provides for the release of a petitioning debtor company's directors in a compromise arrangement in respect of a debtor company in limited circumstances. Specifically s. 5.1 states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

. . . . .

31 A plan of compromise respecting a debtor company may include in its terms provision for the compromise of claims against directors of a debtor company, where the directors are legally liable, in their capacity as directors, for the payment of such claims. The right to compromise such claims is limited by the provision of s. 5.1(2) of the CCAA. To facilitate the making of such compromises, s. 11.5(1) of the CCAA permits a stay order to be made against creditors with claims against directors.

32 The Ontario Court of Appeal in the *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) confirmed that a bankruptcy court also has jurisdiction to sanction the release of third parties (which would include parties other than directors referred to in s.5.1 of the CCAA) in circumstances that are deemed appropriate for the success of the plan. The Ontario Court of Appeal in *Metcalfe*, *supra* said at para. 43:

> [43] On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it.

. . . . .

33 The Ontario Court of Appeal went on to comment on this issue of releasing potentially liable parties further at paras. 61-63 and 70 and 74:

> [61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.
>
> [62] A proposal under the *Bankruptcy and Insolvency Act*, R.S. 1985, c.B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 at 349; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000, 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J.)at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Gen. Div.) at 518.

> [63] **There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).**
>
> > [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here in my view.
> >
> > . . . . .
> >
> > [74] Third party releases have become a frequent feature in Canadian restructuring since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] 293 AR. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):
> >
> > > [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.
> > >
> > > [Emphasis Added]

34 It is clear that a plan of compromise or arrangement which releases directors and/or third parties and which is sanctioned by the court is binding on all creditors.

35 There is one relevant exception to the release of a director. Under s. 5.1(2) of the CCAA, a release may not relate to a claim against a director which cannot be compromised under the CCAA. Those claims that cannot be compromised under the CCAA are set out in s. 5.1(2) of the CCAA, which I repeat here for ease of reference:

> 5.1 ...
>
> > (2) A provision for the compromise of claims against directors may not include claims that:
> >
> > > (a) relate to the contractual rights of one or more creditors; or
> > >
> > > (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

36 The Ontario Court of Appeal in *Metcalfe*, *supra* discussed the right of a creditor to pursue a claim for misrepresentation against a director, one of the excepted type of claims under s. 5.1(2)(b) of the CCAA. In doing so, the Ontario Court of Appeal commented on the case of *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.) which allowed a creditor to pursue a claim against a director for negligent misrepresentation. The Ontario Court of Appeal in *Metcalfe*, *supra* court said the following at paras. 83 and 84:

> [83] Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found

liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

37 The Ontario Superior Court of Justice in *BlueStar Battery Systems International Corp., Re* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]), in considering an application by a creditor for a declaration that its claim against directors had not been compromised, said the following about s. 5.1(2) of the CCAA at para. 14:

> 14 What then if RevCan here had in fact perfected its claim against the directors? Would the directors have been able to utilize s. 5.1 of the CCAA as a safe haven? It would appear to me that the directors would have been entitled (s.5.1(1)) to have included in the Plan a compromise of their liability included in the Plan and would not be disqualified (s. 5.1(2)) from doing so. This disqualification from utilizing s. 5.1(1) as is found in s. 5.1(2) relates to (a) contractual rights of a creditor, such as a guarantee by a director for example, or (b) claims based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors. Firstly there was nothing in this case to suggest that there was any sort of a contract (including a guarantee) from any of the directors. Secondly there was no allegation of any misrepresentation by any director nor was there any allegation of wrongful or oppressive conduct by any director. It would seem to me that while the reference in s. 5.1(2) is to "directors", it would seem that the disqualification should relate to those of the directors who may fall within (a) or (b) thereof. As to the (b) category, there was no allegation against any director in the RevCan material; it appears that all of the RevCan dealing and difficulties with respect to either promises or getting information were restricted to non-directors at BSCC. However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1(2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or

officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal.

38 The law is clear that a plan of compromise and the bankruptcy court has the authority to release directors and third parties from claims of creditors, except claims which come under s. 5.1(2) of the CCAA. The claims against directors that cannot be compromised under a CCAA plan include claims that relate to contractual rights of creditors (such as guarantees by directors to a creditor), or claims based on misrepresentations made by directors to creditors or claims for wrongful or oppressive conduct by directors.

(B) The WWP Amended Plan and Court Sanction Order

39 Here, the CCAA Amended Plan compromised the claims of creditors. Section 4.1(c) of WWP's Amended Plan states that each shareholders' claim was compromised by the shareholders receiving a combined total of 10% of the shares of NewCo. The debts owing to all secured and unsecured creditors of WWP were compromised by converting the dollar value of such debts into shares of NewCo.

40 Section 8.4 of the Amended Plan provided that the compromise under the Amended Plan was effective for all purposes. That section states:

8.4 Compromise Effective for All Purposes

The compromise or other satisfaction of any Claim under this Plan, if sanctioned and approved by the Court under the Court Sanction Order shall be binding on the Effective Date on all Creditors in accordance with the term of this Plan and such Creditor's heirs, executors, administrators, legal personal representatives, successors and assigns, for all purposes.

41 Under s. 6(a) of the CCAA, the effect of court approval of the Amended Plan was to make the compromise or arrangement binding on all WPP's creditors or class of creditors, whether secured or unsecured. Further, s. 4.1(i) of the Amended Plan here indicated that the issuance of the shares in New Co. settled, in full, all claims of each creditor, whether such rights were made or asserted against WWP or were capable of being asserted against any other person, including whether pursuant to a joint and several obligation with WWP, a several obligation, a guarantee obligation, an absolute obligation, a contingent obligation or any obligation of any nature derived directly or indirectly from or through or in relation to any rights. Specifically I repeat s. 4.1(i):

(i) Extent of Release

For greater certainty: each of

(a) **the payments to a Creditor under subparagraph 4(1)(b)(i) above;**

(b) **the issuance of shares in NewCo pursuant to subparagraph 4(1)(b)(ii) above;**

(c) **the issuance of shares in NewCo pursuant to paragraph 4(1)(c) above; and**

(d) **the settlement of the Employee Claims pursuant to paragraph 4(1)(d) above.**

shall settle in full all claims, causes of action, demands, rights, indebtedness, obligations and liability (collectively, "Rights") of the Creditor holding such Rights whether such Rights are made or asserted against WWP or are capable of being asserted against any other Person, including whether pursuant to a joint and several obligation with WWP, a several obligation, a guarantee obligation, an absolute obligation, a contingent obligation or any

obligation of any nature derived directly or indirectly from or through or in relation to any Rights, including any Rights that may be asserted under or pursuant to any livestock dealer bond or any livestock dealer regulations, whether against WWP or any other Person, other than the Rights of the DIP Lender in respect of the DIP Loan.

[Emphasis Added]

42 Section 4.12 of the Amended Plan provided that all directors were released and discharged from all claims except, (for our purposes), those that cannot be compromised under the CCAA:

4.12 Releases

Except as provided hereafter, on the Effective Date, WWP and each and every present and former shareholder, officer, director, employee, financial advisor, legal counsel and agent of WWP and the Monitor and their respective legal counsel (individually, a "Released Party") and any person claimed to be liable derivatively through any Released Party (**including any Person described in paragraph 4.1(i) above, with respect to all rights of such Person**), shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert including, without limitation, any and all claims in respect of potential statutory liabilities of the former and present directors and officers of WWP, and any alleged fiduciary or other duty, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Date in any way relating to, arising out of or in connection with Claims or Post-Filing Claims, the business and affairs of WWP, this Plan and the CCAA Proceedings to the full extent permitted by law, and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce WWP's obligations under the Plan or any related document), provide that nothing herein:

(a) shall release or discharge a Released Party from a Claim which cannot be compromised under the CCAA; or

(b) shall affect the rights of any Person to pursue any recoveries for a Claim against a Released Party that may be obtained against a third-party insurer or other entity not released under this Plan (but, for certainty, any such Claim to which an insurer may be subrogated shall be released hereunder); provided, further, however, that notwithstanding the foregoing releases under the Plan, any Claim asserted against WWP pursuant to Article 2.3(c) of this Plan shall remain subject to any right of set-off that otherwise would be available to WWP in the absence of such releases; or

(c) shall release the directors and former directors of WWP in respect of any claims that may be made against them by creditors pursuant to the Order of Mr. Justice D. Ball, granted on August 17, 2005 in the CCAA proceedings.

[Emphasis in Original]

43 Paragraph 16 of the Court Sanction Order tracks the wording of s. 4.12 of the Amended Plan and confirms the release of all "released parties", which includes former shareholders and directors of WWP, as well as third parties. The release extended to include a release for a claim for breach of fiduciary duty. The only limitations on the release are set out in paras. 4.12(a), (b) and (c) of the Amended Plan, which I have referred to above. Paragraph 4.12(1)(a) confirms that the Amended Plan and Court Sanctioned Order does not release a party from a claim which could not be released under s. 5.1(2) of the CCAA. Paragraph 4.12(b) stated that the Amended Plan did not affect the rights of any person to proceed against a third party insurer or other entity not released under the Plan, (which is not applicable here). Paragraph 4.12(c) did not release the directors of WWP in respect of the claims of those specified creditors pursuant to the court's August 17, 2005 interim order, (which is not applicable here).

44 Following the effective date of the Amended Plan, the Monitor of WWP issued shares to all creditors of WWP in accordance with the Plan and Court Sanction Order. Cheng was issued shares in NewCo. in accordance with the order. Cheng was a shareholder and director. The Cheng Family Trust was a shareholder. The plaintiffs received shares in NewCo. under the terms of the Amended Plan.

45 In the plaintiffs' proposed amended claim the claims originally asserted by Cheng against WWP in the statement of claim are now being asserted against Ernie Donnawell, Amos Skinner and the Government. The plaintiffs proposed to assert these claims both jointly and severally against these proposed defendants, when previously they were asserted only against WWP and Kenji Nose.

46 Mr. Skinner is a former director, officer and employee of WWP. Mr. Donnawell is a former director of WWP. The Government, through AFEF and ACS, is a former shareholder of WWP. Each of these proposed defendants is a "released party" under the Amended Plan, by virtue of s. 4.12 of the Amended Plan and paragraph 16 of the Court Sanction Order.

47 It is easy to ascertain that the releases of the former shareholders and directors of WWP, were reasonably connected to the restructuring of WWP. The reason for such a broad release is obvious. WWP was insolvent. The restructuring plan provided a method by which it might be possible for the business to continue, albeit in a new form, without the constraints of the former obligations. The Amended Plan provided a structured environment for the negotiation of compromises between WWP and its creditors, for the benefit of both. A compromise of claims provides for the successful reorganization of the company and avoids a liquidation that might yield little for creditors. Here, the creditors agreed to grant a release to WWP's officers, directors, shareholders and employees. The directors or officers who might be alleged to be liable to creditors for their actions as directors, would not be able to claim against WWP for indemnification, if they were entitled to such indemnification, because of the insolvency. Hence the releases of the directors. The creditors voted on this broad release when they approved the Amended Plan. The court assessed the fairness and reasonableness of the release, as a term of a complex restructuring arrangement, and confirmed the Amended Plan (including the release of directors) by order of the court.

48 It is clear that (with the exception of the type of claims referred to in s.

5.1(2) of the CCAA, which I will deal with in due course) the Amended Plan and Court Order conclusively settled all rights of the plaintiffs against the proposed defendants in this action. In this case the only claims against the proposed defendants which were not compromised, discharged or released are those claims which cannot be compromised under s.5.1(2) of the CCAA.

49 At this point then it is necessary to turn to the proposed amendments to determine whether or not the pleadings, as proposed to be amended, include claims which cannot be compromised by reason of paragraphs 4.12(a), (b) or (c) of the Amended Plan and s. 5.1(2) of the CCAA.

50 Firstly, it is clear that the plaintiffs' proposed amendments do not fall within the exceptions to the releases in paragraph 4.12(b) (third party insurer) or 4.12(c) (those specified creditors referred to in the August 17, 2005 order) of the Amended Plan.

51 The question is whether the plaintiffs' proposed amendments fall within paragraph 4.12(a) of the Amended Plan, which paragraph precludes a release from a claim which cannot be compromised under s. 5.1(2) of the CCAA. None of the plaintiffs' proposed amendments include claims relating to the contractual rights of a creditor (s. 5.1(2)(a) of the CCAA), such as a claim by a creditor for a guarantee executed by a director to a creditor. As a result, the only question is whether the plaintiffs' proposed amendments include a claim of the nature referred to in s.

5.1(2)(b) of the CCAA such as a claim for misrepresentation by a director to a creditor or of wrongful or oppressive conduct by a director.

(c) Do the Proposed Amendments Fall Within S. 5.1(2)(b) of the CCAA?

52 I will deal with each of the allegations in the proposed amendments, as they relate to the exceptions in s. 5.1(2)(b) of the CCAA to determine if any of the proposed amended claims fall within the exception outlined in s. 5.1(2)(b) of the CCAA.

(i) The Proposed Addition of the Government as a Defendant

53 The plaintiffs seek to add the Government as a defendant. The original pleadings, in paragraph 9, assert that the Government, through AFEF, was a shareholder in WWP. There is no assertion that the Government, AFEF or ACS was a

director of WWP. In fact, none of these entities were directors of WWP. The Government, through AFEF and ACS was a shareholder in WWP.

54 The exception under s. 5.1(2) of the CCAA relates only to claims against directors. The CCAA does not limit a release or a compromise of a claim against a shareholder. Here, the release provisions in the Court Sanction Order released all shareholders. The release applies to AFEF and ACS (the Government) as shareholders. The Government was released, as a shareholder, from any claims as a result of the Amended Plan and Court Sanction Order. The plaintiffs, as a result of the Amended Plan and Court Sanction Order, have no right to add the Government as a defendant to this action.

(ii) Paragraph 6.1 of the Proposed Amended Claim

55 Paragraph 6.1 as proposed to be amended states:

> 6.1 The Defendant, The Government of Saskatchewan, represents the Crown in right of the Province of Saskatchewan. The Plaintiffs plead and rely on *The Proceedings against the Crown Act*. The Government of Saskatchewan, is vicariously liable for the actions and inactions of its employees, agents, and principals, including the Minister and Department of Agriculture and Food of Saskatchewan, Amos Skinner, and Ernie Donnawell.

56 The claim proposed in paragraph 6.1 asserts the Government is vicariously liable for the conduct of its employees, Ernie Donnawell and Amos Skinner as well as the Minister of and Department of Agriculture and Food (who are not proposed defendants). As I stated, the Government as a shareholder was released from liability under the CCAA proceedings. Further, an allegation of vicarious liability does not come within the exception of s. 5.1(2) of the CCAA. As a result of the Amended Plan and Court Sanction Order the plaintiffs have no right to assert a claim of vicarious liability against the Government. The plaintiffs are not entitled to amend this claim as proposed in paragraph 6.1.

(iii) Paragraph 24 of the Proposed Amended Claim

57 Para. 24 as proposed to be amended states:

> 24. Furthermore, Worldwide and Nose, Ernie Donnawell and The Government of Saskatchewan have failed to commence and [sic] action against Okonomi for breach of contract or take any other action to rectify the breach of the Purchase Agreement.

58 This proposed amendment asserts a cause of action for failure to commence an action for breach of contract. As stated, the plaintiffs have no right to assert a claim against the Government, as the claims against the shareholders were compromised by the Amended Plan and Court Sanction Order.

59 This proposed amendment, as it relates to Skinner and Donnawell, does not assert a cause of action that falls within the exceptions set out in s. 5.1(2)(b) of the CCAA. The plaintiffs' right to assert this claim against Donnawell and Skinner have been compromised by the Amended Plan and Court Order. The plaintiffs are not entitled to amend their claim as proposed in paragraph 24.

(iv) Paragraph 26 of the Proposed Amended Claim

60 Paragraph 26 as proposed to be amended states :

> 26. As a director of Worldwide, Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan has not acted honestly and in good faith with a view to the best interests of the corporation.

61 The claim here asserts an action for lack of good faith and honesty to ensure the best interests of WWP. As I have stated, the Government was not a director of WWP. It was a shareholder, through AFEF and ACS. The plaintiffs have no right to assert the claim against the Government, as the claims against the shareholders were compromised by the Amended Plan and Court Sanction Order.

62 The allegation contained in the proposed amendment in paragraph 26 against Amos Skinner and Ernie Donnawell, does not allege any cause of action like misrepresentation by Skinner or Donnawell to Cheng, nor does it allege any wrongful or oppressive conduct by Skinner or Donnawell to Cheng. The plaintiffs, as a result of the Amended Plan and Court Sanction Order have no right to assert this cause of action against Skinner or Donnawell. The plaintiffs are not entitled to amend the claim as proposed in paragraph 26.

(v) Paragraph 27 of the Proposed Amended Claim

63 Paragraph 27 as proposed to be amended states:

> 27. Nose and The Government of Saskatchewan, through its agents, including Amos Skinner and Ernie Donnawell, has breached the fiduciary duties he owed to Worldwide in his capacity of director.

The pleading in paragraph 27 relates, it seems, to the proposed amended paragraph 1 which states:

> 1. This is an action for breach of contract, shareholder oppression, breach of a director's fiduciary duty to his company, and wrongful dismissal.

64 The pleadings allege that the Government is liable, for Skinner and Donnawell's alleged breach of their fiduciary duties to WWP. Again, the Government, as a shareholder, is not subject to the exception set out in s. 5.2(2) of the CCAA. The plaintiffs have no right to assert the claim against the Government.

65 Paragraph 4.12 of the Amended Plan and Court Sanction Order specifically released all parties from any claim for breach of fiduciary duty. The Amended Plan and Court Sanctioned Order extinguished all claims against Skinner and Donnawell, except those precluded from extinguishment under s. 5.1(2)(b) of the CCAA. A claim for breach of fiduciary duty to WWP does not come within the exception set out in s.5.1(2)(b) of the CCAA. The plaintiffs do not have the right to pursue this claim against Skinner and Donnawell. The plaintiffs are not entitled to amend the claim as proposed in paragraph 27 and paragraph 1.

(vi) Paragraph 35 of the Proposed Amended Claim

66 Paragraph 35 as proposed to be amended states:

> 35. The Defendants, including The Government of Saskatchewan, have failed to provide notice to Tom of both director's and shareholder's meetings. Director's meetings have been held without providing notice to Tom and Tom has received no notice of shareholder's meetings, including the annual shareholder's meeting. The Defendants, including The Government of Saskatchewan, have also failed to advise Tom of material changes to Worldwide.

67 Paragraph 35 alleges that the defendants, including the Government, failed to provide Tom Cheng with notice of directors' meetings and failed to advise him of material changes to WWP. The proposed amendment to paragraph 35 asserts these allegations against the Government, which was a shareholder. The restriction on compromise of claims contained in s. 5.1(2)(b) of the CCAA, as I have stated, does not extend to shareholders. The plaintiffs are precluded from bringing those actions against the Government. The plaintiffs may not amend paragraph 35 to add the Government.

68 If the plaintiffs are allowed to amend to add Skinner and Donnawell as defendants, both individuals would be defendants under paragraph 35 (although they were not specifically referred to in paragraph 35). The pleading here, if allowed against Skinner and Donnawell, of failure to give notice of directors and shareholders meetings is one which could, arguably, potentially, be characterized as oppressive conduct by directors. This same allegation is repeated in paragraph 36.

(vii) Paragraphs 36 and 37 of the Proposed Amended Claim

69 Paragraph 36 and 37 as proposed to be amended claim state:

> 36. Nose and Worldwide, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan have acted in an oppressive manner and unfairly disregarded the interests of Tom and Cheng Family Trust by failing to enforce the Purchase Agreement, failing to try to make any profits, failing to pay dividends, failing to provide notice of director's meetings, failing to provide notice of shareholders meetings, and failing to employ Tom.
>
> 37. As a result of the actions, inactions, and breach of fiduciary duty of Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan, Worldwide and its shareholders, including Tom and Cheng Family Trust, have suffered damages, including monetary loss.

70 As stated earlier, the plaintiffs do not have a right to assert these claims against the Government as a shareholder. The plaintiffs may not add the Government as defendants in paragraphs 36 and 37.

71 The proposed amendments in paragraph 36, and the alleged damages flowing therefrom claimed in paragraph 37, again, as against Skinner and Donnawell could potentially be characterized as a claim which comes under the exception of 5.1(2)(b) of the CCAA, as allegations of oppressive conduct.

72 A more in depth analysis of the claims proposed to be asserted against Skinner and Donnawell contained in paragraphs 35 and 36 is necessary to determine if they do come within the exception (which I will turn to in due course).

(viii) Paragraph 42 of the Proposed Amended Claim

73 Paragraph 42 of the proposed amended claim asserts:

> 42. Tom had a significant interest in and expectation of management of Worldwide. Tom had a reasonable expectation of a fair management package. Nose and The Government of Saskatchewan, and Worldwide have acted in an oppressive manner and unfairly disregarded the interests of Tom by terminating his employment as President and Chief Executive Officer.

74 Again, the plaintiffs have no right to assert this claim against the Government, as shareholder, as a result of the Amended Plan and Court Sanction Order. The plaintiffs are not entitled to amend paragraph 42 to add the Government in paragraph 42.

(d) Proposed Amendments which are Claims which Could Potentially Come within the Exception in S. 5.1(2)(b) of the CCAA

75 In the end, the only proposed amendments which might come within the exception set out in s. 5.1(2)(b) of the CCAA, are contained in the proposed amendments to paragraphs 35,36 and 37 as they relate to Skinner and Donnawell. The balance of the claims, as the plaintiffs propose to amend the claim, have been compromised or extinguished by the Amended Plan and Court Sanction Order and the plaintiffs do not have leave to amend in regard to those claims.

76 As stated, a more in depth analysis of the proposed amendments to paragraphs 35, 36 and 37 needs to be undertaken to determine if the proposed amended pleadings are claims for wrongful or oppressive conduct by directors. I repeat the proposed amendments here for ease of reference.

> 35. The Defendants have failed to provide notice to Tom of both director's and shareholder's meetings. Director's meetings have been held without providing notice to Tom and Tom has received no notice of shareholder's meetings. The Defendants have also failed to advise Tom of material changes to Worldwide.
>
> 36. Nose and Worldwide, Ernie Donnawell and Amos Skinner have acted in an oppressive manner and unfairly disregarded the interests of Tom and Cheng Family Trust by failing to enforce the Purchase Agreement, failing to try to make any profits, failing to pay dividends, failing to provide notice of director's meetings, failing to provide notice of shareholders meetings, and failing to employ Tom.

> 37. As a result a result of the actions, inactions, and breach of fiduciary duty of Nose, Ernie Donnawell, Amos Skinner and Worldwide and its shareholders, including Tom and Cheng Family Trust, have suffered damages, including monetary loss.

77 Justice Gabrielson reviewed the law relating to oppressive conduct under s. 234 of *The Business Corporations Act*, R.S.S. 1978, c.B-10, as am. in *Smith v. Dawgs Canada Distribution Ltd.*, 2008 SKQB 219, [2008] 11 W.W.R. 342 (Sask. Q.B.), commencing at para. 18 and said the following:

> 18 In the case of *Wind Ridge Farms Ltd. v. Quadra Group Investments Ltd.*, [1999] 12 W.W.R. 203, 180 Sask. R. 231 (Sask. C.A.), the Saskatchewan Court of Appeal listed a number of points to be considered when relief is requested against oppression pursuant to s. 234 of BCA. At para. 30, Vancise J.A. stated:
>
> > 30 The primary issue on this appeal is a narrow one — did the chambers judge err in finding that the conduct of the respondents was not oppressive or unfairly prejudicial or unfairly disregarded the interests of the appellants pursuant to s. 234 of the *Act*? The approach to be taken in an application under s. 234 of the *Act* was described by this court in *347883 Albert Ltd. v. Producers Pipeline Inc.* [(1991), 92 Sask. R. 81 (C.A.)]. Section 234 of the *Act* was interpreted by this court in *Eiserman v. Ara Farms Ltd. and Eiserman* [(1989), 67 Sask. R. 1 C.A.)]. Sherstobitoff, J.A., speaking for the court set out the legislative history and jurisprudential development of the remedies available under s. 234 of the *Act*. A number of points emerge from his analysis:
> >
> > . . . . .
> >
> > 2. Oppressive conduct is at the lowest a visible departure from the standard of fair dealing and a violation of the conditions of fair play on which shareholders who entrust their money to a company are entitled to rely. See: *Elder v. Elderand Watson Ltd.*, [[1952] S.C. 49 (Scot. Sess. Ct.)]. Oppressive conduct has also been described as a lack of probity and fair dealings in the affairs of the company to the prejudice of some portion of its members. See: *Scottish Cooperative Wholesale Society Ltd. v. Mayer* [[1958] 3 All E.R. 66];
> >
> > 3. The terms "unfair" and "prejudice" are defined as conduct that is unjust and inequitable and unfairly prejudicial. See: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Miller and Miller v. Mendel (F.) Holdings Ltd. and Mitchell* [(1984), 30 Sask. R. 298 (Q.B.)];
> >
> > 4. Section 234 is remedial legislation for the relief of minority shareholders and is to be given a broad interpretation;
> >
> > 5. Relief may be given upon proof of unfair prejudice to, or disregard of a shareholder's interests. See: *Mason v. Intercity Properties Ltd.* [(1987), 22 O.A.C. 161 (C.A.)];
> >
> > 6. The section should be interpreted broadly to carry out its purpose. See: *Re Ferguson and Imax Systems Corp.* [(1983), 150 D.L.R. (3d) 718 (Ont. C.A.)];
> >
> > 7. Each case will be decided on its own facts: what is oppressive or unfairly prejudicial in one case may not necessarily be so in a different set of circumstances.

78 It can be noted from the *Smith v. Dawgs, supra* case that there is a contextual aspect to the allegation of oppressive conduct. The jurisprudence has stated, that what is oppressive in one situation may not be oppressive in another situation. Here, the claim in paras. 35, 36 and 37 were originally asserted against WWP and Kenji Nose. The plaintiffs now seek to add Skinner and Donnawell as defendants, but do not seek to amend paras. 35, 36 or 37 to add any particulars which are asserted against Skinner or Donnawell. The pleadings as presently proposed make only general and inexact allegations against all defendants and proposed defendants.

79 The pleadings are insufficient to determine whether they disclose material facts which would give rise to such a cause of action against Skinner or Donnawell under the s. 5.1(2)(b) exception. The pleadings just make broad accusations. The pleadings

do not indicate when it is alleged that each or either of the proposed defendants acted in the alleged wrongful or oppressive manner. The pleadings do not indicate with sufficient particularity the material facts alleged which amount to wrongful or oppressive conduct. The pleadings do not indicate with sufficient particularity what liability, loss or prejudice it is alleged that flows from the alleged conduct of each director to Cheng.

80 I am unable to determine that the proposed amendments come within the s. 5.1(2)(b) exception of the CCAA as the pleadings are insufficient to make such a determination. They fail to provide sufficient particulars for me to conclude that the claims are claims that do come within the s. 5.1(2)(b) exception of the CCAA.

81 While it was my initial inclination to dismiss the plaintiffs' application to add Skinner and Donnawell, as I could not be satisfied that the claims against them come within the exception in s. 5.1(2)(b) of the CAA, upon reflection, I am of the view that the plaintiffs should be given an opportunity to more particularly plead the causes of action as they relate to paragraphs 35 and 36. It is possible that the insufficiency here relates to the drafting inadequacy in the pleadings, and not the substance of the claim. As such, I am of the view it would be appropriate to allow the plaintiffs to provide whatever particulars they choose in relation to paragraphs 35 and 36 before I determine whether or not the proposed causes of action come within the exception set out in s. 5.1(2)(b) of the CCAA.

(e) Conclusion

82 The plaintiffs' application to amend the statement of claim and to add Ernie Donnawell, Amos Skinner and the Government is dismissed, except in relation to the claims asserted in paras. 35 and 36 of the statement of claim.

83 In relation to the claims asserted in paras. 35 and 36 of the statement of claim and the loss allegedly flowing therefrom asserted in para. 37, the plaintiffs are not allowed to amend the pleadings or to add Amos Skinner or Ernie Donnawell in the form of the amendments as proposed.

84 However, the plaintiffs have leave to file a motion to amend and to add Skinner and Donnawell in relation to the claims asserted in paras. 35 and 36 within 60 days of the date of this judgment. The plaintiffs must attach and file the draft proposed amended pleadings which more particularly set out the proposed causes of action as they relate to Skinner and Donnawell and paras. 35 and 36 at the time of the filing of the motion.

85 In the event that the plaintiffs do not bring such a motion with the draft proposed amended pleading attached within 60 days of this judgment, the plaintiffs' application to amend the claim and to Add Skinner and Donnawell is dismissed.

2. If the Plaintiffs' Proposed Claims Were Not Extinguished by the CCAA Amended Plan and Court Sanction Order, Should the Plaintiffs Be Allowed to Amend Their Statement of Claim as Proposed?

86 As I have indicated earlier, the pleadings as they relate to the proposed defendants Skinner and Donnawell are inadequate to determine whether there is a claim which falls within the exception set out in s. 5.2(1)(b) of the CCAA. Further, the pleadings in paras. 35, 36 and 37 are inadequate for me to determine whether or not the proposed amendments should be allowed under Rule 38 and 165 of *The Queen's Bench Rules of Court.* As I have allowed the plaintiffs to come back within 60 days, if they choose to, with more particularized pleadings, the issue of whether or not the plaintiffs should be allowed to amend their pleadings having regard to Rule 38 and Rule 165 will be determined at that stage.

87 If the plaintiffs choose not to bring a further motion to amend the pleadings within the 60 days, the plaintiffs application will be dismissed. If the plaintiffs choose to bring a motion back before me within the 60 days, with further amendments to paragraph 35, 36 and 37, I will consider their application to amend and add defendants as it relates to Rule 38 and Rule 165 and the jurisprudence at that time.

3. Should the requested disclosure be ordered against the Government?

88 The plaintiffs seek an order pursuant to Rule 236 that the Government produce those documents in its possession that relate to WWP and the directors of WWP that the Government appointed.

89 There is nothing in the notice of motion which sets out the grounds for such relief. More importantly, there is no evidence contained in the affidavit filed in support of the application to set out the basis for the order. There is no evidence which would indicate why the documents are required, what attempts have been made to obtain them from the present parties to the litigation, and no indication whether examinations for discovery have yet occurred.

90 As no evidentiary basis has been made to order the relief requested, and as it appears to be premature having regard to the fact that neither Ernie Donnawell or Amos Skinner has yet been added as defendants, the application is dismissed at this time.

4. Should the Plaintiffs Be Granted Leave to Examine the Government's Officer Currently in Charge at AFEF?

91 The plaintiffs seek an order, pursuant to Rule 222A of *The Queen's Bench Rules of Court* for leave to examine that officer of the Government that is currently in charge of AFEF. Nothing in the affidavit filed in support of this application indicates the basis upon which the plaintiffs might be entitled to an order under Rule 222A. The Cheng affidavit states at paragraph 19 that the parties are currently at the discovery of documents stage. There is no evidence to suggest that examinations for discovery of any of the defendants have yet occurred. Rule 222A states that an order should not be made under this Rule unless the court is satisfied that the applicant is unable to obtain the information from other persons. In *Kvello v. Miazga*, 2002 SKQB 521, [2002] S.J. No. 775 (Sask. Q.B.), this Court held that where there has been no attempt to obtain information directly from a non-party, and where examinations of a party would perhaps make it possible to obtain the information, the conditions precedent for this rule have not been met and the court should not order the examination of a non-party. It is my view that the relief requested by the plaintiffs here is premature, and I decline to make the order at this time.

Costs

92 The defendant shall have taxable costs of the application, which costs shall be paid in any event of the cause and are payable forthwith.

Application dismissed.

2006 CarswellOnt 8025
Ontario Superior Court of Justice

Ivaco Inc., Re

2006 CarswellOnt 8025, [2006] O.J. No. 5029

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 OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A" HERETO

Ground J.

Heard: November 7,10, 2006
Judgment: December 15, 2006
Docket: 03-CL-5145

Counsel: Peter F.C. Howard, Alexander D. Rose, Marie Isabelle Palacios-Hardy for Applicants / Monitor
William J. Burden, John N. Birch, David S. Ward for Heico Companies
Fred Myers for Superintendent of Financial Services
Dan MacDonald for Bank of Nova Scotia
Robert Staley, Evangelia Krians for Informal Committee of Noteholders
Richard B.Swan for National Bank of Canada
Andrew Hatnay for Pension Committee
Geoff R. Hall for QIT

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

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

Table of Authorities

Cases considered by *Ground J.*:

Atkins Nutritionals Inc., Re (2005), 2005 CarswellOnt 4371, 14 C.B.R. (5th) 157 (Ont. S.C.J. [Commercial List]) — considered

Ground J.:

1 There are two motions before this court in the above proceeding. The first is a motion brought by III Canada Acquisition Company, Sivaco Wire Group 2004 L.P., Ifastgroupe 2004 L.P., Ivaco Rolling Mills 2004 L.P., Heico Holding Inc. and the Heico Companies L.L.C. (collectively "Heico") raising a number of issues with respect to privilege claimed by Ivaco relating to specific documents (the "Heico Documents") and the appointment of an Examiner to examine such documents, which issues have been substantially resolved by a consent order issued November 10, 2006.

2 The Supplementary Notice of Motion of Heico seeks an order lifting the stay in these proceedings and granting leave for Heico to commence an action against Ivaco seeking $75,000,000 in damages for negligent and/or fraudulent misrepresentation, breach of contract and breach of duty to act in good faith and seeking certain declaratory relief with respect to the interpretation of the three asset purchase agreements dated August 6, 2004 (the "APAs") entered into between Ivaco and Heico and the Reasons of Farley, J. for his order dated August 4, 2005 or, in the alternative, directing a trial of an issue with respect to the interpretation of the APAs and giving directions for the completion of the working capital adjustment process in accordance with the APAs.

3 Ivaco Inc. and the other Applicants (collectively "Ivaco") have brought a cross-motion, in the event that this court lifts the stay and grants leave for Heico to commence the proposed action, for orders:

(i) directing KPMG LLP ("KPMG") as expert to include in its report on the working capital adjustment, a calculation of such adjustment determined pursuant to the approach specified in each of the initial written submissions of Ivaco and Heico and to indicate in its report which approach it accepts and the reasons on an accounting basis for such acceptance and the reasons on accounting basis as to why the other approach is not accepted;

(ii) directing Heico to provide to the Monitor on a confidential basis financial information with respect to transfers of assets, if any, since December 1, 2004 and to permit the Monitor to determine whether Heico has the ability to pay any amount determined to be owing as a working capital adjustment;

(iii) directing Heico to pay into court the amount of the working capital adjustment;

(iv) in the alternative, directing Heico to pay into court $65,258,000.08 plus interest calculated from December 23, 2004;

(v) directing Heico to pay into court $2,000,000 as security for costs;

(vi) fixing a timetable for the proposed action; and

(vii) precluding Cassels Brock and Blackwell LLP from acting as solicitors of record in respect of the Proposed Action.

4 The court was advised that Ivaco is not proceeding with the relief sought in clause (vii) above.

Background

5 Ivaco and Heico entered into the APAs dated August 2004, and subsequently amended and restated in November 2004, subject to court approval. Court approval was obtained on or about August 18, 2004 and the closing of the asset purchases took place on December 1, 2004.

6 The purchase price to be paid by Heico under each of the APAs was subject to an adjustment based on a number of factors, including the difference between the Working Capital (as defined therein) of the businesses as of the date of closing of the transaction (to be set forth at Exhibit "C" to the APAs) compared to "Estimated Working Capital" as of September 30, 2004 (set forth at Exhibit "B" to the APAs).

7 On January 11, 2005, Heico purported to dispute not only the Exhibit Cs prepared by Ivaco but also the preparation of the Exhibit Bs. It became clear that, totalling the three APAs, the parties were some $50,000,000 apart. Heico conceded at that time that it owed IRM $3,305,000 and Ifastgroupe $14,719,000 for a total of more than $18,000,000 and claimed that Ivaco Inc. owed it $1,541,000.

8 After further discussion failed to resolve matters, KPMG was appointed as the "Expert" to calculate the Adjustments within the meaning of the APAs and provide its report. KPMG did not begin work because Heico had taken the position, disputed by Ivaco, that KPMG was performing an arbitral role.

9 Heico applied to Farley, J. for a declaration that KPMG was performing a judicial, adjudicative and/or arbitral function. Heico's application was dismissed on June 2, 2005 by Farley, J. who concluded that KPMG was performing a non-arbitral

role.

10 In addition, Ivaco and Heico did not agree on the process to be followed under the APAs for resolving the working capital dispute. The Monitor made a parallel application to Farley, J. seeking guidance on the scope of KPMG's authority and sought a declaration that, pursuant to the APAs, the Expert is neither authorized nor directed to make adjustments to Exhibit B. The Monitor proposed that KPMG would adjust Exhibit C and then section 2.11 of the APAs would apply to make any corresponding adjustments to Exhibit B.

11 The Monitor's application was dismissed on August 4, 2005. Farley, J's Reasons contained certain directions to KPMG as Expert as follows:

> In my view therefore the Expert "acting as an expert and not as an arbitrator" would consider the APAs, as a whole. In that regard the KPMG Partner would consider the financial records of the Sellers with the appropriate provisions of Canadian GAAP in a professional manner (including the views of the CICA). Since either party can invoke the Expert dispute resolution process, then it would appear that both sides would be able to make known to the Expert the value of the dispute(s) and their positions in respect thereof. The Expert then would decide those matters in dispute and provide a final and binding report thereon. That report would also provide any revisions to the Adjustments.
>
> The Adjustments as defined in Article 2.11 require a comparison of Exhibits C and B. To the extent that the Expert determines that Exhibit C is to be changed, then similarly Exhibit B "shall be deemed to be amended so as to reflect an identical basis for calculation as Exhibit C". Thus is (sic) appears reasonable that the Expert must deal with Exhibit B so that methodology is consistent. In that regard apples are to be compared with apples (although perhaps a better analogy would be that like colours be compared with each other — namely "green" to "green" while recognizing that "green" may be the result of a mixture of "blue" and "yellow").
>
> In the end results as set out in Article 2.12, the Expert is to decide what the Adjustments are to be — and this determination becomes the "final Adjustments". Therefore it would not in my view be a sensible interpretation that the Expert only consider revisions to Exhibit C, leaving revisions to Exhibit B to be worked out mechanically employing the deeming provision. Certainly, the Expert is in the best position to ensure consistency.

12 The parties were thereafter unable to agree on a protocol and timeline governing the Expert's work without the intervention of Farley, J. The parties returned to Farley, J. on three occasions to resolve a Protocol, which was not approved by Farley, J. until November 6, 2005.

13 Pursuant to the Protocol, the parties made their Initial Written Submissions to KPMG on February 17, 2006. A major disagreement between the parties relates to the correct interpretation of Sections 2.11 and 2.12 of the APAs as well as the interpretation of the Reasons for the August 4, 2005 decision of Farley, J. [*Atkins Nutritionals Inc., Re*, 2005 CarswellOnt 4371 (Ont. S.C.J. [Commercial List])]. The issue may be broadly described as whether the Expert is to do a free-standing review of both Exhibits B and C and revise and prepare final Exhibits B and C (as Heico contends) or whether the Expert is to finalize Exhibit C and then, to the extent Exhibit C is changed and the accounting policies used in Exhibit C are different, the Expert may consider whether a concomitant change to Exhibit B is warranted (as Ivaco contends).

14 This dispute remains unresolved and the cross-motion now brought by Ivaco before this court seeks in part to work toward a resolution of this issue by directing KPMG to prepare in its report calculations of the working capital adjustment determined pursuant to the approaches specified in each of the Initial Written Submissions of Ivaco and Heico.

15 With respect to the balance of Ivaco's motion, I have indicated that I will not deal with motion for security for costs as, in my view, that is an issue to be determined if leave is granted for the action to proceed and to be determined on the basis of the usual criteria applied to a motion for security for costs in an ongoing action. The parties have advised the court that they will work out the details of the financial information relating to Heico to be provided to the Monitor.

Issues

16 Accordingly, it appears to me that the following issues are before this court.

1. Whether KPMG should be directed to prepare a calculation of the working capital adjustments determined pursuant to the approach specified in each of the Initial Written Submissions of Ivaco and Heico or whether a trial of an issue should be directed in this proceeding with respect to the interpretation of the APAs and the Reasons of Farley, J. for his order of August 4, 2005.

2. Whether the stay should be lifted and leave granted to Heico to commence the proposed action.

3. The terms upon which such leave should be granted.

17 In my view, the issue of the directions to KPMG with respect to the calculation of the working capital adjustments must be kept separate and distinct from the issues relating to a lifting of the CCAA stay to permit Heico to bring the proposed action against Ivaco based upon negligent and/or fraudulent misrepresentations, breach of contract and breach of duty to act in good faith. There is clearly a live dispute between the parties as to the method of calculating the working capital adjustments and as to the interpretation of sections 2.11 and 2.12 of the APAs and of the Reasons of Farley J. for his order of August 4, 2005, which are relevant to the method of calculation.

18 It appears to me that, for practical purposes, the first step to get over this impasse is to direct KPMG to do a calculation of the working capital adjustments pursuant to the approaches set out in the Initial Written Submissions of Ivaco and Heico to determine the extent of the differences between the calculations based upon the Ivaco approach and upon the Heico approach. It may well be that the issues relating to the calculation of the working capital adjustments could be settled or resolved once the extent of the discrepancies between the calculations based on the two approaches is determined.

19 If the issues relating to the proper approach to the calculations are not settled or resolved at that time, I accept the submission of counsel for Heico that the stay should be lifted and a trial of issues directed limited strictly to the interpretation of sections 2.11 and 2.12 of the APAs and whether the Reasons of Farley J. for his order dated August 4, 2005 are *res judicata* in this regard and if so, to what extent.

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.

21 Accordingly, an order will issue that:

1. KPMG include in its report a calculation of working capital adjustments under each of the APAs pursuant to the approaches specified in the Initial Written Submissions of Ivaco and in the Initial Written Submissions of Heico; and

2. if the parties do not, within 60 days after receipt of the report of KPMG, resolve the issues with respect to the calculation of the net working capital adjustments, a trial of issues proceed limited to the interpretation of sections 2.11 and 2.12 of the APAs and whether the Reasons of Farley J. for his order of August 4, 2005 are *res judicata* in this regard and, if so, to what extent.

Lifting of Stay

22 The lifting of the CCAA stay to permit the proposed action by Heico against Ivaco to proceed is considerably more problematic. The Statement of Claim for the proposed action is, aside from relief sought with respect to the working capital adjustments, essentially a claim for damages in the amount of $75 million for "misrepresentation including negligent, reckless or alternatively deliberate misrepresentation, breach of contract and breach of the duty to act in good faith". There are entirely new causes of action distinct from the claims relating to the correct method of calculating the net working capital adjustments based upon the terms of the APAs and the information available to the Expert for purposes of such calculations.

23 A number of submissions were made by counsel for the various parties with respect to factors to be considered by this court in determining whether the stay should be lifted and as to any conditions to be attached to the lifting of the stay. More significantly, in my view, were the submissions made by counsel, and in particular, counsel for QIT-Fer et Titane Inc. ("QIT"), to the effect that the Statement of Claim does not disclose a reasonable cause of action with respect to misrepresentation, breach of contract or breach of the duty to act in good faith (collectively the "New Claim").

24 To the extent that the New Claim encompasses the torts of negligent misrepresentation and fraudulent misrepresentation, I fail to see how Heico could establish any damages flowing from the commission of such torts which would be different from the compensation to which Heico would be entitled as a result of adjustments to the estimated working capital to determine the actual working capital as at the closing date. In addition, it appears to be acknowledged by Heico that there are no representations in the APAs other than those contained in Article 3, none of which relate to the estimated working capital.

25 To the extent that the New Claim is based upon breach of contract, I am uncertain as to the contract provision which is alleged to have been breached. The New Claim alleges that misleading or inaccurate information was provided or used in the preparation of the estimated net working capital. There is not, so far as I can determine, any provision in the APAs specifying how the estimated working capital is to be determined, but simply a reference to Exhibit B setting out the components of the estimated working capital and the total estimated working capital. Again, even if misleading or inadequate information was used for the purposes of the estimated working capital, it would appear to me that any damages resulting from the use of such misleading or inadequate information would be incorporated into the compensation to which Heico would be entitled as a result of the adjustment of the estimated working capital to the actual working capital as of the closing date.

26 To the extent that the New Claim is based upon a breach of a duty to act in good faith, I am not satisfied that the law of this province recognizes any duty of good faith owed between parties negotiating a commercial contract beyond what is contained in the contract. Once again, however, it would appear to me that if such duty could be found to exist, and has been

breached, any damages which Heico might have incurred as a result of such breach, would be incorporated into the compensation to which it would be entitled as a result of the adjustment of the estimated working capital to the actual working capital as at the closing date.

27 I must, accordingly, conclude that Heico would be unable to establish any damages as a result of the misrepresentation, breach of contract and breach of duty to act in good faith constituting the New Claim in the proposed action.

28 The balance of the claims and the relief sought in the Statement of Claim for the proposed action appear to me to relate solely to issues surrounding the manner of calculating the working capital adjustment and the interpretation of the contractual provisions and the Reasons of Farley J. relevant thereto and will either be resolved as between the parties upon the receipt of the KPMG report or resolved pursuant to a directed trial of issues as outlined above.

29 Accordingly, in my view, the Statement of Claim for the proposed action does not set forth a reasonable, or even tenable, cause of action and I am not prepared to lift the stay in order to permit such action to proceed.

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.

31 The motion of Heico for an order lifting the stay and granting leave to commence the proposed action against Ivaco is dismissed.

32 Although the question is now moot in view of the dismissal of the motion to lift the stay, I do accept the submissions of counsel for Ivaco that this court does have jurisdiction to impose conditions on the lifting of the stay in a CCAA proceeding. With respect to the specific conditions sought to be imposed by Ivaco, I have indicated above that I would not have imposed a condition of the payment of security for costs at this time. In view of the rather tortuous history of this proceeding, the further delay that would be encountered if the proposed action were allowed to proceed and the impact of such delay upon the distribution of the estate, I would have imposed a condition of payment into court by Heico of an amount equal to the lowest amount determined by KPMG for the total net working capital adjustments. I would also have imposed a condition fixing a very tight timetable for the action to proceed and limitations on document and oral discovery.

33 Counsel may make brief written submissions to me with respect to the costs of these motions on or before January 15, 2007.

Schedule A

Applicants Filing for CCAA

1. Ivaco Inc.

2. Ivaco Rolling Mills Inc.

3. Ifastgroupe Inc.

4. IFC (Fasteners) Inc.

5. Ifastgroupe Realty Inc.

6. Docap (1985) Corporation

7. Florida Sub One Holdings Inc.

8. 3632610 Canada Inc.

End of Document