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

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

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

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

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

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

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

11 The Union challenges this conclusion.

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

13 Nor does the Union argue that any of the unionized former employees, who would receive these

periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

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

15 In our opinion, this argument must fail.

Analysis

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

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

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

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

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

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

21 The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al.* (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but

provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

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

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

24 The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

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

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

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

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

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

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

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

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

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

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1; [the Bankruptcy and Insolvency Act and the Winding Up Act]
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49 The appeal by the former employees is also dismissed.

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

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

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

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

Tab 7

Case Name:

Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.

SYNDICAT NATIONAL DE L'AMIANTE D'ASBESTOS INC., ASSOCIATION DES POLICIERS-POMPIERS DE JM ASBESTOS INC., SYNDICAT DÉMOCRATIQUE DES TECHNICIENS EN FIBRE ET EMPLOYÉS DU BUREAU DE JMAI and RODRIGUE CHARTIER, APPELLANTS
v.
JEFFREY MINE INC., RESPONDENT/debtor
and
RAYMOND CHABOT INC., RESPONDENT/monitor

[2003] J.Q. no 264

[2003] Q.J. No. 264

[2003] R.J.Q. 420

J.E. 2003-346

40 C.B.R. (4th) 95

35 C.C.P.B. 71

[2003] R.J.D.T. 23

2003 CarswellQue 90

125 A.C.W.S. (3d) 16

2003 CanLII 47918

No.: 500-09-012972-022 (450-05-005118-027)

Quebec Court of Appeal
Montreal Registry

The Honourable Michel Robert C.J.Q., Melvin L. Rothman J.A. and Pierre Dalphond J.A.

Heard: January 24, 2003.
Judgment: January 31, 2003.

(70 paras.)

Counsel:

Denis Lavoie and Annick Desjardins (Melançon Marceau Grenier & Sciortino), counsel for the appellants.
Pierre M. Lepage and Jean Legault Lepage LaRoche, counsel for the debtor/respondent.
Louis Leclerc (Heenan Blakie), legal adviser.

JUDGMENT

1 THE COURT, ruling on the appellants' appeal from a judgment of the Superior Court, district of Saint-François, rendered on November 29, 2002 and amended on December 2, 2002, by the Honourable Pierre C. Fournier, renewing the initial order and rendering various orders, including one stating that the monitor was not bound by the collective agreements and, accordingly, was not obliged to comply with the provisions therein;

2 Having examined the record, heard the parties and taken the case under advisement;

3 For the reasons given by Pierre J. Dalphond J.A., attached hereto, to which Chief Justice J.J. Michel Robert and Melvin L. Rothman J.A. subscribe:

4 ALLOWS the appeal in part, as follows:

- Deletes the words [TRANSLATION] ", in the latter case," from paragraph 22 of the initial order, as renewed on November 27, 2002 and as of that date;
- Adds the words [TRANSLATION] "which, for certified positions, are those provided for in the appropriate collective agreement, as amended, where applicable" to paragraph 20 (h) of the initial order, as renewed on November 27, 2002 and as of that date, and to paragraph 7 (a) of the judgment, after the words [TRANSLATION] "according to the terms and conditions it deems appropriate";
- Quashes paragraph 16 of the judgment and declares it to be without effect;

5 THE WHOLE, without costs.

MICHEL ROBERT C.J.Q.
MELVIN L. ROTHMAN J.A.
PIERRE DALPHOND J.A.

REASONS OF DALPHOND J.A.

6 Under the Companies' Creditors Arrangement Act (R.S.C. 1985, c. C-36) (hereinafter referred to as the "CCAA"), could the Superior Court authorize the monitor, appointed by it and empowered to continue the operations of the debtor's enterprise not to comply with the provisions of the collective agreements concluded between the debtor and the appellant unions?

7 Could the Superior Court authorize the monitor to cease making the payments required to offset the actuarial liability of the pension plan?

THE FACTS

8 Jeffrey Mine Inc. is a company specialized in asbestos mining and processing. It operates, in Asbestos, the largest open-pit mine in the world. In early October 2002, faced with an untenable financial situation, the company's board of directors decided to avail themselves of the CCAA. All of the directors then resigned.

9 On October 7, 2002, further to a motion that was not served on the appellants, the company obtained from the Superior Court an initial order designating the respondent company, Raymond Chabot inc., monitor. Under the draft arrangement contemplated by Jeffrey Mine Inc., the site would be salvaged and agreements would be concluded with secured creditors and governments with a view to possibly resuming operations or to selling the complex. The following passages from the initial order are relevant to the appeal:

> [TRANSLATION]
>
> [6] Orders the monitor to mail a copy of this order, within the next 10 days, to all ordinary creditors of Jeffrey Mine Inc., and, for the employees of Jeffrey Mine Inc., to their union;
>
> [8] Authorizes Jeffrey Mine Inc. to file an arrangement with its creditors, the whole in accordance with the CCAA;
>
> ...
>
> [16] Authorizes the monitor to take possession of all of the tangible and intangible assets, movable and immovable, belonging to Jeffrey Mine Inc. or used in its business operations;
>
> ...
>
> [18] Authorizes the monitor to take all necessary action to preserve and maintain the property and premises of Jeffrey Mine Inc. according to commercial standards in the field;
>
> ...
>
> [20] Authorizes the monitor to exercise the following powers:
>
> ...
>
> (h) hire and retain the services of certain former directors of Jeffrey Mine Inc., and of any other person, whether a former employee or not of Jeffrey Mine Inc., according to the terms and conditions it deems appropriate, with a view to completing the collection of accounts receivable, the sale of finished products, the implementation of capital asset protection measures, the formulation of a plan to salvage assets and shut down the mining complex for a time, and the conclusion of an arrangement with Jeffrey Mine Inc.'s creditors;
>
> (i) proceed with shutting down Jeffrey Mine Inc.'s production operations and with implementing measures to protect the company's capital assets;

(l) lay off Jeffrey Mine Inc.'s employees, and terminate their employment contracts, as it deems appropriate;
(m) retain, in the service of Jeffrey Mine Inc., all employees it deems appropriate for the purpose of implementing the arrangement;
(n) incur and pay, out of Jeffrey Mine Inc.'s receipts, the fees and expenditures relating to the arrangement, including, in particular, the salaries of the employees kept on and of the consultants hired, as well as the expenditures relating to the salvaging of Jeffrey Mine Inc.'s property;

[22] Authorizes the monitor to suspend, as it deems appropriate, any agreement obliging Jeffrey Mine Inc. to pay amounts on behalf of current or former Jeffrey Mine Inc. employees, with regard to the fringe benefits granted by Jeffrey Mine Inc. to its current and former employees, such as drug and dental insurance, life and disability insurance, and contributions to pension plans made by employees other than those kept on by the monitor, the whole reserving any right of such creditors to file a proof of claim;

[26] Declares that the monitor is not and cannot be considered an employer or the successor of Jeffrey Mine Inc., in any regard whatsoever concerning Jeffrey Mine Inc. or its current or former employees;

[27] Declares that the monitor and any persons whose services it retains under the present order and, subsequently, under the arrangement cannot incur statutory or civil liability for any action, decision or omission arising out of the exercise of the powers authorized under the terms of this order, or its renewal or amendment, and that no actions, suits or other proceedings may be brought against the monitor or any persons whose services it retains, without prior authorization from this Court;

...

[My emphasis]

10 That very day, the monitor effected a mass layoff of Jeffrey Mine Inc.'s employees. At the time, there were 258 active, unionized employees, all members of one of the three appellant unions. As of the next day, the monitor gradually retained the services of some 90 people, 60 of whom belonged to the appellant unions. The monitor had each of them, irrespective of their status (manager, unionized employee or non-unionized employee), sign an individual employment contract in which the monitor described itself as acting in that position with respect to the arrangement and the affairs of Jeffrey Mine Inc. The following were among the provisions contained in the contract:

[TRANSLATION]

2. REMUNERATION

The Employee shall be remunerated weekly, on the basis of the customary hourly wage for the job held at Jeffrey Mine Inc.

3. HOLIDAYS AND FRINGE BENEFITS

Holidays and all fringe benefits, in whatever form, shall be paid to the Employee, as a taxable lump sum equivalent to twenty-two percent (22%) of gross remuneration, at

the end of each week.

4. PENSION PLAN

A lump sum equivalent to eight percent (8%) of gross remuneration earned between October 7 and November 30, 2002 shall be paid to the pension plan of the Employee.

5. UNION DUES

The Employee specifically asks that the customary union dues be withheld from his/her remuneration by the Monitor, for remittance to the union of which the Employee is a member.

The Employee acknowledges that the Monitor is not and cannot be considered the Successor Employer of Jeffrey Mine Inc., and that the Monitor shall in no way assume any past or present debts or obligations Jeffrey Mine Inc. may have with respect to the Employee.

11 In a letter dated October 23, 2002 addressed to the chair of the retirees committee of the pension plan of Jeffrey Mine Inc.'s hourly-paid employees, the monitor wrote the following, in accordance with the authorization in paragraph 22 of the initial order:

[TRANSLATION]

Jeffrey Mine Inc., as employer, is a party to the aforementioned pension plan and makes employer contributions to the pension fund on behalf of contributors and beneficiaries.

On October 7, the monitor effected a mass layoff of Jeffrey Mine Inc.'s employees, and kept on at Jeffrey Mine Inc. only a limited number of employees contributing to the pension plan.

With regard to contributions subsequent to October 1, 2002, the monitor will pay, on behalf of contributing employees whose services it retains, a lump sum equivalent to eight percent (8%) of the gross remuneration earned by each employee between October 7 and November 30, 2002. The contributions will be paid into the pension fund at the end of each month.

Lastly, given Jeffrey Mine Inc.'s precarious financial situation, the monitor notifies you that, beginning on October 1, 2002 and ending on a date to be determined, employer contributions will no Ionizer be made to the pension fund for the purpose of offsetting the plan's actuarial liability.

...

[My emphasis]

12 The evidence shows that the actuarial liability was between $30 million and $35 million at that time, and that there were 1200 retired employees. The actuarial liability had been evaluated at approximately $12 million in December 1999, and the debtor made monthly payments of $170,500 until September 1999 to absorb it. As indicated in the letter of October 23, the monitor suspended those

payments in October 2002.

13 The monitor also terminated the dental care, disability, medical and travel insurance plans provided for in the collective agreements, replacing them with a 22% increase in the salaries of the workers still actively employed.

14 On November 7, 2002, further to a motion filed by the monitor, the Superior Court rendered a second order renewing the initial order to January 10, 2003, ordering the calling of the creditors' meeting to be postponed indefinitely and authorizing the monitor to borrow and give guarantees in order to finance the expenditures and outlays necessary to salvage assets.

15 At that time, the monitor mentioned a possible contract for 600 tonnes of asbestos with a U.S. company, ATK Thiokol Propulsion Corp., a NASA supplier. The contract required operations to be resumed temporarily, for about four months. Upon leaving the hearing room, the monitor informed the president of the principal union that the contract was worthwhile only if the collective agreements were disregarded, and asked the president his opinion. The latter did not answer.

16 In the following weeks, the monitor negotiated with bankers, secured creditors holding rights in regard to the facilities and certain suppliers, such as Hydro-Québec, with a view to executing the Thiokol contract. However, no attempt was made to negotiate with the appellants for the purpose of amending the collective agreements or temporarily suspending their application. On November 22, the monitor accepted Thiokol's order, then turned to the Superior Court to obtain various orders - including a declaration that it was not bound by the collective agreements - considered necessary to carrying out the contract. In its motion, the monitor alleged that [TRANSLATION] "the representatives of the Banner unionized employees of the Debtor informed the Monitor that they would demand that the latter apply all working conditions provided for in the Collective Agreements".

17 On November 27, 2002, at around 7:20 p.m., the appellants' attorneys received the monitor's motion by fax, along with a notice of presentation for the next morning in Sherbrooke.

18 That motion gave rise to a debate before the trial judge on November 28 and 29, 2002. The monitor argued that it had obtained a major contract that was capable of generating net receipts of over $2 million and that would allow some 275 employees to be recalled for four months. The monitor further pointed out that, were it obliged to comply with the provisions of the collective agreements, the Thiokol project would not be worthwhile because of insufficient profits. The monitor objected primarily to the employer's obligation, under the Supplemental Pension Funds Act (R.S.Q. c. R-15.1), to amortize, over a five-year period, the actuarial liability of the pension plans provided for in the collective agreements, which would necessitate monthly payments of at least $500,000, even $600,000. There was also the matter of the vacation days accumulated in 2002, before October 7, which represented approximately $1,334,000 and which, under the collective agreements, were payable on January 1, 2003. Maintaining the retirees' life insurance provided for in the agreements, the premiums of which were assumed exclusively by the debtor, posed another problem. Lastly, the monitor contended that the drug, dental and disability insurance plans could not be reinstated in such a short lapse of time. The monitor concluded that the obligation to meet all of the requirements of the collective agreements during the four months of operation would cost some $4 million, an amount that the monitor did not have and that far exceeded the anticipated profits from the Thiokol project.

19 On November 29, 2002, the trial judge allowed the motion and rendered a third order, without rising, authorizing the monitor to resume certain operations of Jeffrey Mine Inc. and hire all necessary personnel for the purpose of the Thiokol project, without having to comply with the collective agreements.

20 Since then, the monitor has retained the services of some 220 employees belonging to one of the three appellant unions. Although the employees were hired in accordance with the rules of seniority set forth in the collective agreements, the appellant unions were not involved in any way. The monitor required each employee to sign an individual employment contract similar to the one described above.

21 The salaries paid are consistent with those stipulated in the collective agreements, and the amounts granted for fringe benefits and the pension plan (30%) correspond to the costs assumed by the debtor in that regard before October 7, with the exception of the amount to offset the actuarial liability.

THE TRIAL JUDGMENT

22 The order rendered on November 29, 2002 contained the provisions below:

> [TRANSLATION]
>
> [6] RENEWS to May 31, 2003 the second order, rendered by the Honourable Pierre C. Fournier J.S.C. on November 7, 2002, as amended by this order;
>
> [7] AUTHORIZES the monitor, in that position, to resume certain operations of Jeffrey Mine Inc., for and in the name of the latter, and, to that end, AUTHORIZES the monitor to exercise the following powers:
>
> (a) hire and retain the services of any person, regardless of whether or not that person is a former employee of Jeffrey Mine Inc., according to the terms and conditions it deems appropriate;
> (b) mine raw asbestos ore and convert it into a finished product;
>
> ...
>
> (c) incur and pay, out of Jeffrey Mine Inc.'s receipts, the cost and expenditures relating to the resumption of operations for the purpose of the Thiokol project;
>
> ...
>
> (f) exercise any other power necessary or helpful in managing the operations of Jeffrey Mine Inc.;
>
> ...
>
> [12] DECLARES that the Monitor and any persons whose services it retains under the present order and, subsequently, under the arrangement, cannot incur statutory or civil liability for any action, decision, omission or damage arising out of the exercise of the powers authorized under the terms of this order, including, but without being limited to, any damage relating to the quality, and to the effects and consequences stemming from the sale, of asbestos fibre products further to the resumption of the operations of Jeffrey Mine Inc., or any environmental damage resulting from the resumption of the Debtor's operations, unless such a fact or damage is caused by gross negligence or wilful misconduct on their part;
>
> [16] DECLARES that the Monitor is not bound by the collective agreements between

> Jeffrey Mine Inc. and its former unionized employees, and that, consequently, it is not required to comply with the provisions therein for the purpose of the Thiokol project;
>
> [20] DECLARES this order executory notwithstanding all appeals;
>
> [My emphasis]

THE ARGUMENTS OF THE PARTIES

23 The appellants argued that the impugned order allowed the monitor to operate the mine, manage its activities and layoff, hire and dismiss employees, and determine their working conditions, without respecting their rights relating to certification or meeting the obligations stemming from the collective agreements, the whole while enjoying civil and statutory immunity. In their opinion, under section 18.1 CCAA, the Monitor is the successor of Jeffrey Mine Inc., making it a new employer contemplated by section 45 of the Québec Labour Code. Accordingly, it is bound by the certifications and collective agreements. In their view, it follows that the impugned provisions of the orders (i.e. paras. 20 (h), 20 (1), 20 (m), 22, 26 and 27 of the initial order; paras. 7 (a), 12 and 16 of the third order) are contrary to the provisions pertaining to public order and the alienation of undertakings (ss. 39, 45 and 46 of the Québec Labour Code), and must be declared invalid. They further contended that the matters raised did not come under the jurisdiction of the Superior Court, but under that of specialized administrative tribunals.

24 The respondent countered by stating that, pursuant to paragraph 26 of the initial order, it was not and could not be considered an employer or the successor of Mine Jeffrey Inc., and that it was too late for the appellants to request that this Court amend that part of the initial order. In the respondent's opinion, it follows that it is not bound by the collective agreements.

25 As for the parts of the third order pertaining to collective agreements, they would simply suspend them during the Thiokol project, which would in no way violate the employees' freedom of association and would be valid given the very broad powers - including the power to change the rights of the parties other than the debtor without their consent, where justified under the circumstances - conferred on the court under the CCAA.

THE RELEVANT LEGISLATIVE PROVISIONS

26 The following are the relevant provisions of the CCAA:

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.

11.7

(1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affaires of the company while the order remains in effect.

(2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.

(3) The monitor shall

a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5,

or

(iii) at such other times as the court may order;

c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

d) carry out such other functions in relation to the company as the court may direct.

(4) Where the monitor acts in good faith and takes reasonable care in preparing the report referred to in paragraph (3)(b), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

(5) The debtor company shall

a) provide such assistance to the monitor as is necessary to enable the monitor to adequately carry out the monitor's functions; and

b) perform such duties set out in section 158 of the Bankruptcy and Insolvency Act as are appropriate and applicable in the circumstances.

11.8

(1) Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

(2) A claim referred to in subsection (1) shall not rank as costs of administration.

* * *

11.3

L'ordonnance prévue à l'article 11 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués immédiatement les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie valable qui ont lieu après l'ordonnance prévue à cet article;
b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

11.7

(1) Le Tribunal qui accorde l'ordonnance visée à l'article 11 nomme une personne pour agir à titre de contrôleur des affaires et des finances de la compagnie pour la période pendant laquelle l'ordonnance est en vigueur.
(2) Sauf décision contraire du Tribunal, le vérificateur de la compagnie peut être nommé pour agir à titre de contrôleur.
(3) Le contrôleur :

a) dans le cadre de la surveillance des affaires et des finances de la compagnie et dans la mesure où cela s'avère nécessaire pour lui permettre de les évaluer adéquatement, a accès aux biens de celle-ci - notamment locaux, livres, données sur support électronique ou autre, registres et autres documents financiers -, biens qu'il est d'ailleurs tenu d'examiner;
b) est tenu de déposer auprès du Tribunal un rapport portant sur l'état des affaires et des finances de la compagnie et contenant les renseignements prescrits :

(i) dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse ou au chapitre de la situation financière de la compagnie,
(ii) au moins sept jours avant la tenue de l'assemblée des créanciers au titre des articles 4 ou 5,
(iii) aux autres moments déterminés par ordonnance de celui-ci;

c) est tenu de mentionner dans l'avis à envoyer aux créanciers au titre des articles 4 ou 5 que le rapport visé à l'alinéa b) a été déposé;
d) est tenu d'accomplir tout ce que le Tribunal lui ordonne de faire.

(4) S'il agit de bonne foi et prend toutes les précautions voulues pour bien préparer le rapport visé à l'alinéa (3)b), le contrôleur ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.
(5) La compagnie débitrice doit aider le contrôleur à remplir adéquatement ses fonctions et satisfaire aux obligations visées à l'article 158 de la Loi sur la faillite et

l'insolvabilité selon ce qui est indiqué et applicable dans les circonstances.

11.8

(1) Par dérogation au droit fédéral et provincial, le contrôleur qui, ès qualités, continue l'exploitation de l'entreprise de la compagnie débitrice ou succède à celle-ci comme employeur est dégagé de toute responsabilité personnelle découlant de toute réclamation contre le débiteur ou liée à l'obligation de celui-ci de payer une somme si la réclamation est antérieure à sa nomination ou découle de celle-ci.

(2) Une telle réclamation ne fait pas partie de frais d'administration.

[My emphasis]

ANALYSIS

I. A bit of history

27 The CCAA was passed by Parliament in 1933, during the Great Depression. Its validity as a law governing insolvency and bankruptcy was recognized as of 1934 by the Supreme Court, in Attorney General of Canada v. Attorney General of Quebec, [1934] S.C.R. 659.

28 The CCAA was used when it was first passed, but little afterward. In the past 15 years or so, however, it has enjoyed a remarkable rebirth in Ontario, British Columbia and Alberta. Canadian Airlines Corporation[1], the T. Eaton Company[2], Woodward's[3], Westar Mining Ltd.[4], Quintette[5], Royal Oak[6] and the Canadian Red Cross Society[7] are just a few examples. In Québec, the phenomenon is more recent, and this Court has not had to interpret the CCAA for a very long time.

29 In 1992, when Parliament passed a long series of amendments to the Bankruptcy and Insolvency Act (R.S.C., (1985) c. B-3) (hereinafter referred to as the "BIA"), there were many who suggested repealing the CCAA once the new Part III pertaining to proposals came into force. Instead, Parliament chose to keep the CCAA and to substantially amend it in 1997 (S.C. 1997, c. 12). At that time, it codified the powers of the court regarding the compromise of claims against directors (s. 5.1), established the proof required to make an initial order and any subsequent order (s. 11(6)), added provisions pertaining to the appointment and functions of monitors (ss. 11.7 and 11.8) and limited the powers of the court regarding the supply of goods and services on credit (s. 11.3), eligible financial contracts (s. 11.1) and the powers of governments under certain laws (ss. 11. 11 and 11.4).

II. Aim of the CCAA

30 Contrary to a winding-up under the Winding-up and Restructuring Act (R.S.C. (1985), c. W-11) (hereinafter referred to as the "Winding-up Act") or to an assignment under the BIA, the aim of the CCAA is not the termination of the debtor's operations and the distribution of its assets to creditors; rather, as indicated in its very title, the aim is to conclude arrangements between the insolvent company and its creditors so as to enable the company to survive, the whole under the supervision of the court. Chief Justice Duff wrote in Attorney General of Canada, supra, at 661:

> Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the

initiation of proceedings in bankruptcy.

[My emphasis]

31 To achieve that aim, the CCAA allows the court to make all orders necessary to maintain the status quo during the period required for a proposal to be made to the creditors. The Court of Appeal of British Columbia wrote in United Used Auto and Truck Parts Ltd. v. Aziz, [2000] BCCA 146:

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

32 In PCI Chemicals Canada Inc. (Plan d'arrangement de transaction ou d'arrangement relatif à), [2002] R.J.Q. 1093 (S.C.)[8], Danièle Mayrand J. did a remarkable job of summarizing the jurisprudence, making the following comments, with which I agree:

> [TRANSLATION]
>
> [52] The vitality of the CCAA is due in part to the way it has been interpreted by the courts, primarily in Ontario, British Columbia and Alberta. These courts opted for a broad and liberal interpretation of the CCAA and the notion of "inherent jurisdiction" and "equity" in order to give effect to the aims of the CCAA, which are to enable companies to remain in operation so that they can find a solution to their insolvency and turn their financial situation around. The courts concluded that the CCAA must be interpreted and applied in this way in order to provide a flexible tool for restructuring insolvent companies.
>
> [53] On the basis of these concepts, the courts have not hesitated in recent years to render orders-such as the debtor's right to cancel contracts-that have become almost routine under the CCAA.
>
> [54] A number of these judgments draw on the Supreme Court decision in Baxter Student Housing Ltd. v. College Housing Co-operative Limited[9], for the purpose of exercising their inherent jurisdiction and giving effect to the objectives of the CCAA. The Supreme Court stated that a court's inherent jurisdiction does not allow it to render an order negating the unambiguous expression of the legislative will. In Re Westar Mining Ltd.[10], Macdonald J. referred to Baxter and established the principle that would be followed in several judgments:
>
> > Proceedings under the C.C.A.A. are a prime example of the kind of situation where the Court must draw such powers to "flesh out" the bare bones of an inadequate incomplete statutory provision in order to give effect to its objectives[11].
>
> [58] Certain decisions rendered by the Court of Appeal on other CCAA related matters show that the Court of Appeal shares the same vision as the other Canadian courts regarding the need for a broad, liberal interpretation in order to give effect to the objectives of the CCAA.

[59] In Michaud v. Steinberg Inc.[12], the Superior Court rendered an order allowing Steinberg to disclaim its leases, and Steinberg disclaimed certain leases, including the one concluded with Jalbec Inc.

[60] Although that judgment was appealed[13], the Court of Appeal did not rule on that aspect of the case. However, Deschamps J., ruling on another matter, stated that the comments of Forsyth J. in Noreen[14] [TRANSLATION] "[could] be applied unreservedly":

> "These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan[15].
>
> ...
>
> [My emphasis]

[62] In the decision Les Immeubles Wilfrid Poulin Ltée v. Les Ordinateurs Hypocrat Inc.[16], the Court of Appeal had to determine whether it could approve an arrangement providing for the debtor's right to cancel certain contracts, such as real estate leases and other contracts of successive performance.

[63] The Court of Appeal referred to the judgments rendered in other Canadian provinces and confirmed that the Superior Court had exercised its discretion judiciously by approving the arrangement involving the cancellation of lease agreements:

> [TRANSLATION]
>
> ... No provision of this Act prohibits a court from approving an arrangement that provides for the termination of contracts of successive performance, where such a measure can safeguard the interests of the company in difficulty. ...[17].

[65] More recently, it was the judgments and decisions rendered in Re Blue Range Resources Corp.[18] and in Re Eaton Co.[19] that put an end to claims by creditors that section 11 does not provide for the power to allow the cancellation of contracts.

...

[74] A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings made under section 11.

...

[81] However, even if the initial order allows that right of the debtor, creditor that believes it has been treated unfairly is entitled to ask the court to review the order. The court can then determine whether it is appropriate for the debtor to cancel the

contract in question.

[My emphasis]

III. The monitor's role

33 I am of the opinion that, like the liquidator appointed under the Winding-up Act, (Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois [1996] 1 S.C.R. 900), the monitor is an officer of the court[20].

34 As indicated in section 11.7(3) CCAA, the monitor's role is primarily one of monitoring the debtor's business and financial affairs and of preparing reports for creditors and the court. Thus, the monitor's role is similar to that of a trustee appointed in conjunction with a proposal under Part III BIA. At no time does that role involve stripping the debtor of its property or of depriving it of control of the property.

35 Section 11.7(3)(d) CCAA, cited above, recognizes that the court can also entrust other functions to the monitor. Examples include control over property, which was awarded in this case under the initial order. Similarly, the court can authorize the monitor to carry on the business of the debtor's company, as explicitly recognized under section 11.8 CCAA ("where a monitor carries on in that position the business of a debtor company"). That was allowed under paragraph 7 of the impugned order. Thus, in the case at bar, the debtor's affairs are administered by a monitor further to orders rendered by the court. That was, of course, made necessary by the resignation of the debtor's directors and the need to resume operations in order to follow through on the Thiokol project and generate a substantial profit while preserving business relations with a very important client of the debtor, which is crucial to any effort to revitalize the company.

36 Hence, the monitor found itself in a situation comparable to that of a liquidator under the Winding-up Act, who is designated by the court to act in the stead of the directors of the company being wound up and who, to that end, "take[s] into his custody or under his control all the property, effects and choses in action" of the company[21] and, so far as is necessary to the beneficial winding-up of the company, "carr [ies] on the business of the company" with the authorization of the court[22]. In Coopérants, supra, at 915, commenting on the effects of the orders rendered under the Winding-up Act, the Supreme Court ruled that, contrary to what occurs in the case of bankruptcy, the company being wound up continues to own its property, which is not transferred to the liquidator.

37 In my opinion, the situation is not otherwise in this case, as the property and rights of the insolvent company were not devolved to the monitor under the CCAA. In fact, the orders rendered cannot be construed as including devolution of the debtor's property and rights to the monitor.

38 I add that my conclusion is in line with the consequences of a notice of intention of a proposal under Part III BIA, where it is clearly established that this does not lead to the assignment of the property and rights of the insolvent to the trustee or to an interim receiver appointed under section 47 or 47.1 BIA and authorized by the court to "take possession of all or part of the debtor's property" and "exercise [total] control over that property, and over the debtor's business"[23].

39 In short, the monitor becomes the person designated by the court to act in the stead of the debtor's directors during the arrangement negotiation period. As in the case of a liquidator, this officer of the court is not a third party in relation to the insolvent company (Coopérants, supra, at 915).

40 Thus, the orders rendered specified correctly that the monitor could not be considered the employer of the employees kept on or recalled, since Jeffrey Mine Inc. remained their employer. In

paragraph 14 of the decision in Royal Oak Mines (Re), [2001] O.J. No 562, the Court of Appeal of Ontario stated that the monitor appointed under the CCAA, to which the court had also entrusted interim receiver powers under section 47 BIA, did not become the employer even if it operated, as the debtor remained the employer:

> [14] The obligation to pay pension benefits was an obligation of Royal Oak under the collective agreement. That obligation was not altered by the order of April 16, 1999 because Royal Oak remained the employer. That obligation, however, was not honoured by Royal Oak for the simple reason that Royal Oak had no funds. PwC was under no obligation to pay the pension benefits; it was not the employ of the employees, nor was it the agent of Royal Oak. PwC's obligation and liabilities, positive and negative were spelled out in the order of April 16, 1999. In our view, s. 47(2) of the BIA gave the Court jurisdiction to make the order, including paragraph 33.
>
> [My emphasis]

41 It follows that the monitor cannot be considered the new employer, instead of the debtor, with regard to the employees kept on or recalled. Nor is a tripartite relationship[24] involved, since, as mentioned above, the monitor is not a third party in relation to Jeffrey Mine Inc. In reality, when the monitor lays off or rehires employees, it does so in the debtor's name, as specified in paragraphs 20 (i), (l) and (m) of the initial order and in paragraph 7 of the impugned order.

42 I find nothing in section 11.8 to contradict that conclusion. It is true that the first paragraph of the French version of section 11.8 CCAA stipulates the following: "le contrôleur qui, ès qualité, ... succède à la compagnie débitrice comme employeur". Out of context, these words could perhaps be construed to mean that the monitor is a new employer. With respect, however, I find such an interpretation to be contrary to the very spirit of the CCAA, notably because the debtor continues to exist and to own its property, and because the monitor is not a third party in relation to the debtor. Moreover, the English version of section 11.8 is clearer, stating: "where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees". "Continue the employment of the company's employees" describes the decision made by the monitor, while accurately reflecting the idea that the employees are still in the company's employ, since the monitor continues their employment.

43 I find it noteworthy that, in the initial decision, the monitor was authorized to lay off Jeffrey Mine Inc.'s employees and terminate their employment contracts, as well as to retain, in the service of Jeffrey Mine Inc., all employees needed to implement the arrangement.

IV. The CCAA and the appellants' exclusive representation

44 There is nothing in the orders rendered about the abolishment or modification of the certifications. Thus, the appellants' certifications are still valid and in effect. Furthermore, it is doubtful that the Superior Court would have jurisdiction to rule on such matters, as determined by the majority in conjunction with the winding-up of the Coopérants (Syndicat des employés de coopératives d'assurance-vie v. Raymond, Chabot, Fafard, Gagnon inc., [1997] R.J.Q. 776 (C.A.)), unless that were allowed under a constitutionally valid provision in the CCAA. It follows that the appellants' exclusive representation continues, which, incidentally, is recognized in paragraph 6 of the initial order, where it is stated that a notice to their union constitutes a notice to their employees.

45 Since the certifications are still valid, their effects must be recognized, described as follows in Noël v. Société d'énergie de la Baie-James, [2001] 2 S.C.R. 207, at paras. 41 and 42:

> [41] ... Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement... Once the collective agreement is concluded, it is binding on both the employees and the employer...
>
> [42] ... Certification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees. Because of its exclusive representation function, the presence of the union erects a screen between the employer and the employees. The employer loses the option of negotiating different conditions of employment with individual employees.
>
> [My emphasis]

46 Consequently, the monitor cannot disregard the appellants' exclusive representation with regard to the positions covered by certification units. Signing an individual contract with a person occupying any certified position violates the appellants' exclusive representation and is therefore illegal.

V. The working conditions of employees kept on or recalled

47 Under section 11.3 CCAA, a court cannot order suppliers of goods or services, including employees, to make their supply without receiving immediate payment from the monitor. As for the consideration payable, it cannot, in my opinion, be imposed unilaterally by the monitor or the court.

48 Take the case of a fuel oil supplier. By virtue of the extended powers conferred on it under the CCAA with regard to protection of the status quo and stays of proceedings, the court can order the supplier to continue supplying the debtor even if the supplier's contract contains a clause allowing the contract to be disclaimed in the event of customer insolvency. In such a case, subsequent fuel oil deliveries are made at the price determined in the contract. If the monitor is not satisfied with that price, it must negotiate a reduction with the supplier or disclaim the contract. That said, I do not see by virtue of what power the court could order the price reduction deemed appropriate by the monitor given the debtor's financial situation.

49 Similarly, I do not see any judicial basis that could be invoked by a court to order a lessor to agree to a reduction in the rent payable by a debtor placed under the CCAA. If the monitor cannot negotiate a rent reduction, its only option is to vacate the premises and cancel the lease.

50 In short, nothing in the CCAA[25] authorizes the monitor or the court to unilaterally determine the consideration payable to the supplier of goods or services to the debtor. Moreover, the consideration must be agreed upon with the supplier before the supply is made or before the initial order is rendered, as in the case of a contract of successive performance for example, or the consideration must be applicable by law, or under a regulation, a rate scale or market rules. Once again, the situation is comparable to that of a debtor governed by the BIA.

51 In the case at bar, since the certifications are not contemplated in the orders rendered, and since the layoff of all unionized employees did not terminate the certifications and people were recalled the next day or later on to fill certified positions, it follows that the consideration to be paid to these people must be that provided for in the collective agreements or in any amendment of the agreements negotiated with the appropriate union. That consideration includes the salaries and other benefits associated with the services provided since the initial order. Moreover, like other suppliers, they cannot demand to be paid, over and above that consideration, the amounts owing at the time of the initial order (s. 11.3, para. (a) in fine). In the case of those amounts, they will be, within the meaning of the CCAA, creditors to whom

the debtor will eventually propose an arrangement.

52 The respondent emphasized that the impugned order merely suspended the collective agreements temporarily and that it was possible to do so under the court's powers to stay proceedings. In my opinion, such a suspension is illegal when it unilaterally pre-empts the provisions of the collective agreements governing the consideration payable to employees who are covered by the certifications and who were recalled. Aside from the fact that section 11.3 CCAA prohibits any suspension of their right to immediate payment of the consideration, the debtor clearly did not commit to paying them, at a later date, the difference between the amount paid to them and the amount to which they are entitled under the collective agreements. That is not a suspension, but a modification of working conditions implemented unilaterally by the monitor, which is in violation of the appellants' rights stemming from the certifications.

53 I would add that I find it difficult to apply the monitor's power to disclaim a contract, with or without the authorization of the court, to a collective agreement because of the attendant legislative framework, whether federal or provincial as the case may be, which makes such an agreement a truly original instrument rather than a mere bilateral contract[26]. Besides, why cancel collective agreements if the certifications remain in effect and, as a result, the employer is obliged to negotiate with the appropriate union the conditions applicable to a new delivery of services by employees contemplated by the said certifications? Negotiating a new agreement is equivalent to agreeing on amendments to an existing agreement.

VI. Suspension of the payments required to offset the pension fund deficit and maintain retiree insurance plans

54 Under the collective agreements, Jeffrey Mine Inc. must offset any actuarial liability by making the appropriate monthly payments. In November 2002, the actuarial liability was between $30 million and $35 million, necessitating monthly payments of $400,000 to $500,000 over the following five years.

55 The monitor testified before the trial judge that the debtor's present financial situation did not allow such payments to be made, as the profits from the contract with the U.S. buyer were earmarked for a more immediate purpose, namely, ensuring the debtor's survival. In my opinion, it was within the power of the Superior Court to suspend these monthly payments and that, consequently, its decision cannot be varied in appeal.

56 In Royal Oak Mines Inc. (Re), cited above, the Court of Appeal of Ontario was seized of an appeal by the union, which contested the validity of that part of the initial order preventing the monitor, authorized to continue operating the company, from making contributions to the pension plan without the authorization of the court. The Court of Appeal dismissed the appeal in the following terms:

> [11] The appellants submitted that paragraph 33 was beyond the power of the Court to order and, in effect, that paragraph 33 was illegal. They argued that the power of the interim receiver[27] could not exceed the power of Royal Oak and that as Royal Oak could not legally refuse to pay the pension benefits owing under its collective agreements, the Court could not authorize the interim receiver to refrain from paying them.
>
> [12] This submission misconstrues or mischaracterizes the situation. Royal Oak sought the protection of the CCAA, because it was incapable of dealing with the claims against it. The appointment of an interim receiver was sought in April 1999 by Royal Oak, its banker and other creditors because, as one counsel put it, Royal Oak's

management had disappeared. It was hoped that with careful management the operations could be salvaged and the mines sold to others.

[13] The interim receiver, however, had no funds with which to pay debts or with which to continue Royal Oak's operations. Nor did Royal Oak. Work could only begin or continue, and debts could only be paid with the infusion of financial support from Trilon Financial Corporation ("Trilon"), Northgate Exploration Limited ("Northgate") and other prospective lenders. What operations were to be continued and what debts were to be paid were decided upon in advance by PwC and then authorized by Court order.

[14] The obligation to pay pension benefits was an obligation of Royal Oak under the collective agreement. That obligation was not altered by the order of April 16, 1999 because Royal Oak remained the employer. That obligation, however, was not honoured by Royal Oak for the simple reason that Royal Oak had no funds. PwC was under no obligation to pay the pension benefits; it was not the employer of the employees, nor was it the agent of Royal Oak. PwC's obligation and liabilities, positive and negative, were spelled out in the order of April 16, 1999. In our view, s. 47(2) of the BIA gave the Court jurisdiction to make the order, including paragraph 33[28].

[15] Indeed, all that paragraph 33 of the order of April 16, 1999 did was to make it clear to the interim receiver and to others that the money being advanced by Trilon, Northgate and others was not to be applied to pension benefits without the express direction and authority of the Court. Between April 16 and August 29, 1999, approximately $37,174,400. was advanced pursuant to the terms of the order of April 16, 1999 in order to keep Royal Oak in operation.

[16] It was argued that the inclusion of paragraph 33 in the order served to undermine the collective agreement which provided for the payment of pension benefits. We do not accept that submission. The benefits were not paid because Royal Oak had no funds with which to pay the and the financial support available to the receiver did not provide for such payments.

[My emphasis]

57 In the case at bar, the Superior Court did not amend the collective agreements when it authorized the monitor to suspend pension plan contributions [TRANSLATION] "except, ..., for employees whose services are retained by the monitor". In fact, Jeffrey Mine Inc.'s obligations regarding the amounts payable to the pension fund under the collective agreements continue to exist, but are not being honoured because of insufficient funds. Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.

58 The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons become creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mine Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

59 Lastly, the vacation days accumulated at the time of the initial order, as well as any remuneration not paid by Jeffrey Mine Inc. at that time, remain debts of the debtor that the monitor is not required to discharge (s. 11.8 CCAA) and that can be considered eligible claims in the restructuring plan.

VI. Recapitulation

60 The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the payment of the resulting debts.

61 Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement or with the terms of an amended agreement approved by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand be paid immediately (s. 11.3 CCAA).

62 Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date, and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

VII. Conclusions sought by the appellants

63 The appellants are seeking to have quashed paragraphs 20 (h), 20 (1), 20 (m), 22, 26 and 27 of the initial order, renewed by the impugned judgment, as well as paragraphs 7 (a), 12 and 16 of the third order, or to have the Court render any order it deems appropriate.

64 In my opinion, the power conferred on the monitor to proceed with layoffs and disclaim employment contracts as it deems appropriate (para. 20 (1)) is perfectly valid. It is a power of management. The persons concerned are of course entitled to receive from Jeffrey Mine Inc. the compensation provided for in their individual employment contract if they are non-unionized, or in their specific collective agreement if they are unionized. The same is also true of the power to maintain someone in the service of the debtor (para. 20 (m)).

65 As concerns the power to hire employees in accordance with the terms and conditions deemed appropriate by the monitor (para. 20 (h) of the initial order and para. 7 (a) of the third order), it should be made clear that, in the case of persons occupying certified positions, these terms and conditions are set forth in the appropriate collective agreement, as amended, where applicable.

66 Paragraph 22 (suspension of payments) is valid for retired employees or for employees not recalled by the monitor; it does not, however, apply to those who are recalled. The words [TRANSLATION] ", in the latter case," must therefore be deleted after the word [TRANSLATION] "except".

67 For the reasons given above in relation to the liquidator's role, the declaration in paragraph 26 of the initial order is well founded and appears useful, even necessary, in avoiding any debate, notably with the appellants.

68 This is not so with paragraph 16 of the third order, which, in declaring that the monitor is not bound by the collective agreements, is unfounded and null. Instead, the judge should have declared that the monitor was required to negotiate with the appellants any amendment considered necessary. I invite the parties to enter into urgent negotiations, in good faith, in order to agree on any amendments required in order to complete the Thiokol project.

69 As for paragraph 27 of the initial order and its broader version in paragraph 12 of the third order, they seem first and foremost to be declarations as to the relative immunity of the monitor and employees, in compliance with the CCAA, which bear repeating given the special nature of the debtor's operations, and, additionally, to be a valid exercise of the court's power to stay proceedings (second part of para. 27 of the initial order and para. 13 of the third order).

VIII. Conclusion and disposition

70 Therefore, I propose to allow the appeal in part, without costs, considering the novelty of the matters raised and the status of the parties, as follows:

- Delete the words [TRANSLATION] ", in the latter case" from paragraph 22 of the initial order, as renewed on November 27, 2002 and as of that date;
- Add the words [TRANSLATION] "which, for certified positions, are those provided for in the appropriate collective agreement, as amended, where applicable" to paragraph 20 (h) of the initial order, as renewed on November 27, 2002 and as of that date, and to paragraph 7 (a) of the third order, after the words [TRANSLATION] "according to the terms and conditions it deems appropriate";
- Quash paragraph 16 of the judgment and declare it to be without effect;

PIERRE DALPHOND J.A.

cp/i/qw/qlisl/qlesc/qljxl

1 Canadian Airlines Corp., Re, (2001) 19 C.B.R. (4th) 1 (Alb. Q.B.), upheld in appeal (2001) 20 C.B.R. (4th) 46 (Alb. C.A.).

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

3 Woodward's Ltd., Re, (1993) 17 C.B.R. (3d) 236 (B.C.S.C.).

4 Westar Mining Ltd., Re, (1992) 14 C.B.R. (3d) 95 (B.C.S.C.).

5 Quintette Coal v. Nippon Steel Corp., (1990) 47 B.C.L.R. (2d) 193 (B.C.S.C.).

6 Royal Oak Mines inc., Re, (1999) 7 C.B.R. (4th) 293 (Ont. Ct. J.).

7 Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge, (2000) 12 C.B.R. (4th) 194 (Ont. S.C.J.).

8 Leave to appeal denied, Q.C.A. No. 500-09-012056-024, April 9, 2002, Mailhot J.A.

9 [1996] 2 S.C.R. 475.

10 (1992) 14 C.B.R. (3d) 88 (B.C.S.C.).

11 Ibid. at 93.

12 J.E. 93-743 (S.C.).

13 Michaud v. Steinberg [1993] R.J.Q. 1684 (C.A.).

14 (1989) 72 C.B.R. 20.

15 Michaud v. Steinberg, supra, at 1690.

16 [1998] R.D.I. 189 (C.A.).

17 Ibid. at 191.

18 (1999) 245 A.R. 154 (Alb. Q.B.).

19 (2000) 14 C.B.R. (4th) 288 (Ont. S.C.).

20 Also see Re Quinsam Coal Corp., [2002] B.C.S.C. 653.

21 Section 33 of the winding-up Act.

22 Section 35 of the Winding-up Act.

23 In Faillite et insolvabilité, 1992, Albert Bohémier, wrote, at 197: [TRANSLATION] "In theory, the interim receiver acts only as the custodian of the property of which he acquires possession: the debtor remains the owner. Exceptionally, the interim receiver can also acquire powers of alienation". In Bankruptcy and Insolvency, 2003, Houlden & Morawetz wrote, at 156: "The order appointing an intérim receiver does not divest the debtor of his or her assets".

24 Pointe-Claire City v. Québec (Labour Court), [1997] 1 S.C.R. 1015.

25 Contrary to Chapter 11 of the Federal Bankruptcy Code (s. 1113), the CCAA does not contain a provision expressly allowing the bankruptcy court to amend collective agreements (for example, see, in the United Airlines case file, the judgment amending without pre-empting the ground employees' collective agreement: re: UAL Corporation et al., US Bankruptcy Court, Northern District of Illinois, Eastern Division, File No. 02 B 48191, January 10, 2003, Wedoff J.). S. 1113 codifies the jurisprudence as summarized by the Supreme Court of the United States in NLRB v. Bildisco & Bildisco, (1984) 465 U.S. 513. The Supreme Court unanimously concluded at that time that the collective agreement was a contract within the meaning of the code, which provides that the trustee can, with the court's authorization, continue or disclaim any contract, but that its special nature obliged the debtor-in-possession or the trustee to attempt to renegotiate in good faith with the union before turning to the court to have the agreement pre-empted. Moreover, the court was to ensure that that was appropriate within the framework of the reorganization.

26 Robert P. Gagnon, Le droit du travail du Québec, 4th ed., at 442.

27 Price Waterhouse Coopers (PwC) had been appointed monitor under the CCAA, as well as interim receiver, with powers to continue Royal Oak's operations.

28 The powers of the court under the CCAA are certainly not inferior.

Tab 8

Case Name:

Fraser Papers Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36. as Amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement with Respect to Fraser Papers Inc., FPS Canada Inc., Fraser Papers Holdings Inc., Fraser Timber Ltd., Fraser Papers Limited and Fraser N.H. LLC (collectively, the "Applicants")

[2009] O.J. No. 3188

55 C.B.R. (5th) 217

76 C.C.P.B. 254

2009 CarswellOnt 4469

179 A.C.W.S. (3d) 515

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

July 16, 2009.

(24 paras.)

Bankruptcy and insolvency -- Proceedings -- Practice and procedure -- Courts -- Jurisdiction -- CCAA matters -- Stays -- Pending agreement or settlement -- Application to suspend special payments allowed -- Applicants were number of related companies under protection of Companies' Creditors Arrangement Act -- Due to market conditions, applicants were obligated to make substantial special payments for employee pension deficiencies -- Case law indicated court had jurisdiction to suspend payments and trend had developed to not require special payments during CCAA proceedings -- While jeopardizing employee pensions was not ideal, applicants had no capacity to make payments and forcing them to do so would cause the termination of business operations, which would be even less in the interest of employees.

Application to suspend special payments. The applicants were a number of related companies, all under the protection of the Creditors' Companies Arrangement Act. Due to the market conditions, the applicants had become obligated to make special payments for employee pension deficits. The applicants expected to be obligated to pay $13.5 million in 2009 and $34.7 million in 2010, over and

above their regular contributions. The applicants lacked the financial capacity to make these special payments and argued the special payments were pre-filing, unsecured debts with no special status.

HELD: Application allowed. The CCAA was designed to avoid the termination of business operations and could be interpreted broadly to achieve its objectives. The recent trend had been not to require companies to make special payments during CCAA proceedings. The case law indicated that the court had the jurisdiction to suspend the payments. While jeopardizing employee pensions was not ideal, not suspending the payments would result in the termination of the applicants' business operations, which would be even less in the interest of the employees. Furthermore, allowing the application would merely suspend the special payments, not extinguish the applicants' obligations.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.3

Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 56(2)

Labour Code, R.S.Q., c. C-27, s. 67, s. 68

Pension Benefits Act, S.N.B. 1987, c. P-5.1, s. 50(1), s. 50(2), s. 51(1), s. 51(2), s. 51(3), s. 51(4), s. 51 (5), s. 51(6), s. 52, s. 53

Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 6, s. 49

United States Bankruptcy Code, Chapter 11

Counsel:

M. Barrack and R. Thornton, for the Applicants.

R. Chadwick and C. Costa, for the Monitor.

P. Griffin, for the Directors.

D. Chernos, for Brookfield Asset Management Inc.

K. McEachern, for CIT Business Credit Canada Inc.

T. Wallis, for la Régie des rentes du Québec.

D. Wray and J. Kugler, for the Communications, Energy, and Paper Workers Union of Canada.

C. Sinclair, for the United Steelworkers.

J. Michaud, for the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The Fraser Group ("the Applicants") consists of a number of related companies that carry on an integrated specialty paper business with paper, pulp and lumber operations. For fiscal 2008, the Applicants had consolidated net sales of approximately $688.6 million and suffered a net loss of $71.9 million. For the four months ended May 2, 2009, the Applicants recorded a net loss of $22.1 million on consolidated net sales of $202.8 million. On June 18, 2009, Morawetz J. granted the Applicants protection from their creditors and a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* (the "Initial Order"). He adjourned the Applicants' request that the stay applied to special payments in respect of unfunded and going concern and solvency deficiencies with respect to certain pension plans. On June 18, 2009, the Applicants obtained recognition and provisional relief in an ancillary proceeding pursuant to Chapter 15 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

2 This motion addresses the need for the Applicants to make past service contributions or special payments to fund any going concern unfunded liability or solvency deficiencies ("special payments") of certain pension plans during the stay period as that term is defined in the Initial Order. The Applicants seek to suspend those payments. Current service payments or normal cost contributions are not in issue. The Applicants are supported by the Monitor, PricewaterhouseCoopers Inc., the Directors and one of the DIP lenders, Brookfield Asset Management Inc. Brookfield also directly or indirectly owns 70.5% of the outstanding common shares of Fraser Papers Inc. The other DIP lender, CIT Business Credit Canada Inc., the Superintendent of Pensions for New Brunswick, the Minister of Business New Brunswick, and la Régie des rentes du Québec[1] are all unopposed to the relief requested. The Communications, Energy and Paper Workers Union of Canada and its local unions 4N, 6N, 29,189,894, and 2930 ("the CEP") who represent approximately 660 employees at facilities in New Brunswick and Quebec oppose the request. They are supported by the United Steelworkers and the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

3 On June 30, 2009, I granted the relief requested which was limited to special payments and ancillary relief with reasons to follow. These are the reasons in support of the order granted.

Facts

4 The Applicants sponsor five defined benefit pension plans in three jurisdictions: two in New Brunswick (an hourly and a salaried plan), two in Quebec (an hourly and a salaried plan) and one in the United States. 2297 retirees and 1412 active employees are members of the plans. The Applicants also sponsor one defined contribution plan in the U.S. with 2 active members and 7 retirees and three unfunded supplementary employee retirement plans ("SERPs"), one in Canada and two in the US. The Applicants' accrued pension benefit obligations in the five plans and the SERPs exceed the value of the plans assets by approximately $171.5 million as at December 31, 2008. This figure is based on information received by Fraser Papers Inc. from its actuaries for the purpose of preparing annual audited financial statements. The Applicants are not required to fund the U.S. defined contribution plan for the balance of 2009 and 2010.

5 Changes in global capital markets and borrowing rates have affected the funded status, funding requirements, and pension expense for the plans. Based on market conditions, regulatory filing requirements and preliminary estimates, the Applicants expect that they will be required to make special payments in the amount of $13.5 million in 2009 in respect of the pension deficits with respect to the plans. This is in addition to the $3.3 million required to be paid in 2009 on account of normal cost contributions to the plans.

6 In 2010, the Applicants estimate that they will be required to pay approximately $34.7 million to fund the pension deficits and $5.1 million for normal cost contributions. The Applicants have no ability to pay the special payments or the combined 2010 funding obligations from cash flow generated by the business.

7 According to the Monitor, the Applicants are current with all their actuarial filings with the pension regulators. In 2008, actuarial valuations as at December 31, 2007 were filed with the New Brunswick regulator for the two plans in New Brunswick and an updated actuarial valuation as at December 31, 2006 for the Quebec salaried plan was filed in Quebec in April, 2008. Based on the latest filed actuarial valuations and the current 10 year extended amortization period with respect to the special payments, the monthly special payments in respect of pension deficits for the balance of 2009 amount to $4,693,302 and for 2010, $7,831,857. The next special payments were due on June 30, 2009 and amounted to $380,397. Based on estimates prepared by the Applicants' director of pension administration, a Certified General Accountant with 25 years experience, the Applicants anticipate that they will be required to increase their 2009 special payments by an additional $7.4 million in December, 2009 and in 2010 by an additional $24.6 million.

8 The term sheets in support of the DIP financing were finalized the evening of June 17, 2009, and the financing requirements were not marketed externally to other potential lenders given the nature of the industry and the willingness of the existing lenders to fund ongoing operations. On June 18, 2009, Morawetz J. approved certain DIP term sheets and financing up to $46 million, of which approximately $20 million has been authorized by the lenders. He authorized the Applicants to enter DIP financing agreements with CIT Business Credit Canada Inc. and Brookfield Asset Management Inc. Under the latter's agreement, the Applicants are unable to pay the special payments without the lender's prior written consent and payment of same constitutes an event of default. Absent DIP financing, the Applicants are unable to continue in business. The cash flow forecast contemplates payment of salaries, wages, vacation pay, and current pension funding obligations but not special payments.

9 The CEP is party to five collective agreements in New Brunswick, one of which expires on June 30, 2009, two in Quebec, and one in the U.S. They provide for pension benefits although in argument counsel did not address any particular provisions of them. Schedule "A" to these reasons sets forth the applicable statutory provisions that were attached to the factum of CEP.

Positions of the Parties

10 The Applicants state that the special payments are pre-filing unsecured debts with no special status and relate to employment services provided prior to filing. As in other cases, the Court should stay the obligation to pay. Failure to do so would jeopardize the entire business of the Applicants and would be contrary to the purpose behind the *CCAA* order - namely, to give the Applicants the opportunity to restructure for the benefit of all stakeholders.

The CEP submits firstly that no special payments are currently required. Any such obligations will arise after the June 18, 2009 Initial Order and section 11.3 of the *CCAA* prohibits the suspension of claims resulting from obligations relating to services supplied after an Initial Order. Secondly, the special payments are grounded in the terms and conditions of CEP's collective agreements and they may not be unilaterally modified by the Applicants. Pursuant to section 11.3 of the *CCAA*, the members of CEP are entitled to the benefit of a plan provided for in the collective agreement. That is in accordance with applicable statutes. Thirdly, the relief requested by the Applicants is premature in that actuarial valuations have not been filed. Lastly, CEP submits that the DIP agreements are unreasonable.

Issues

11 The issues for me to address are whether I have jurisdiction to suspend the special payments and, if so, whether I should exercise that discretion and also grant ancillary relief.

Discussion

12 In recent years, a number of Canadian cases have addressed the interaction of employment and labour claims and the obligations of insolvent employers as they relate to pensions. In analyzing these cases and the issues before me, it is helpful to first examine general principles.

13 Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".

> "In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the anticipated returns generated by the investments in which the pension plan is invested.
>
> Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.
>
> A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.
>
> A solvency deficiency arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years."[2]

Directors may be liable in the event of a failure by a company to make a payment to a pension fund.

14 The *CCAA* has been and is to be broadly interpreted: *ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.*[3]. This is in keeping with the purpose of the *CCAA*, namely to facilitate restructuring. The *Act* is designed to avoid the negative consequences of terminating business operations and to allow a company to carry on business. As noted by Professor Janis Sarra, "There is a public policy interest in allowing for a certain transition period to allow debtors to economically adjust in difficult markets in unsettled times."[4]

15 The *CCAA* does not directly address employment or labour claims. The power to stay claims

against a debtor company is found in section 11 of the *CCAA*. Section 11.3 of the *Act* provides some limitation on the Court's discretion. It states:

> (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.

In addition, the *Act* of course provides for the compromise of claims against a debtor company.

16 As to the treatment of special payments in bankruptcy and insolvency proceedings, as noted by Messrs. Starnini, Killey and Prophet, a trend has developed not to make special payments in the course of *CCAA* proceedings and such payments do not enjoy any priority in bankruptcy.[5]

17 Courts in both Ontario and Quebec have addressed the issue of special payments in the context of a *CCAA* proceeding and a debtor company that was party to a collective agreement. In *Collins & Aikman Automotive Canada Inc.*[6], Spence J. concluded that the Court had jurisdiction to permit the debtor to refrain from making special payments. Similarly, in *Re AbitibiBowater Inc.*[7], Mayrand J. determined that the Court had jurisdiction to authorize the suspension of Abitibi's obligation to finance the pension plan by suspending its special payments. She followed the decisions of *Syndicat National de l'amiante d'Asbestos Inc. v. Mine Jeffrey Inc.*[8], *Papiers Gaspesia Inc.*[9], and *Collins & Aikman Automotive Canada Inc*. Like Spence J., she distinguished between rights that flow from a collective agreement and the performance of obligations to give effect to those rights. In that case, she determined that the past service contributions or special payments related to services provided prior to the Initial Order and therefore were not barred by section 11.3 of the *Act*.

18 In *Re Nortel Networks Corp.*[10], Morawetz J.'s decision did not address the issue of special payments but certain other employee and union claims. He noted that employee claims, whether they were put forth by the union or by former employees, are unsecured claims and do not have statutory priority. He observed that section 11.3 is an exception to the general stay provision and should be construed narrowly. "The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services ... . The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view some current activity by a service provider post-filing that gives rise to payment obligations post-filing ... . The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order."[11] Performance of services is the determining factor, not crystallization of the payment obligation.

19 Decisions of courts of co-ordinate jurisdiction are not binding but are highly persuasive and ought to be followed in the absence of strong reasons to the contrary: *R. v. Cameron*[12] and *Holmes v. Jarrett*[13]. This is in the interests of predictability, consistency, and stability in the administration of justice. This need is particularly evident in the current economic climate where companies and their stakeholders

including employees and unions require time to restructure and stability in the law is an enabler in this regard. Until such time as an appellate court provides different guidance, it seems to me that this line of cases should be followed. I also note that neither la Regie des rentes du Quebec nor the Superintendent of Insurance for the Province of New Brunswick was opposed to the order requested by the Applicants.

20 Applying these cases, I conclude that I do have jurisdiction to make an order staying the requirement to make special payments. The evidence indicates that these payments relate to services provided in the period prior to the Initial Order and the collective agreements do not change this fact. In essence, the special payments are unsecured debts that relate to employment services provided prior to filing. Furthermore, I am not being asked to modify the terms of the pension plans or the collective agreements. The operative word is suspension, not extinction. In addition, the actuarial filings are current and the relief requested is not premature.

21 I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. On the one hand, one does not wish to in any way jeopardize pensions. On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment of the special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. Claims in this regard are unsecured. The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans.[14] Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained.

22 As to the ancillary relief requested, it seems to me that it naturally flows from the aforesaid order. Given that I am ordering that the special payments need not be made during the stay period pending any further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the *CCAA* process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Directors' Charge. I further understand that the provisions of the proposed order are similar to those granted by Farley J. in *Re Ivaco Inc.*, by Campbell J. in *St. Marys Papers Ltd.* and most recently, by Mayrand J. in *Re AbitibiBowater*.

23 The other argument raised by CEP is that the terms of the DIP financing are unreasonable. Morawetz J. did expressly approve the DIP financing and the term sheets. No motion was brought to amend his order in that regard. Even if one disregards this procedural problem, the Monitor reported to the Court that, based on a comparison of the principal financial terms of the two DIP financing arrangements with a number of other DIP packages in the forestry, pulp and paper sector with respect to pricing, loan availability and certain security considerations, the financial terms of the DIP term sheets appeared to be both commercially reasonable and consistent with current market transactions. The Monitor specifically referred to the treatment accorded to the special payment obligations. I also observe that no evidence of any alternative DIP financing was advanced or even suggested.

24 For these reasons, the relief requested by the Applicants was granted. CEP requested that the Applicants pay its costs of this motion and made submissions to this effect in its factum. If they are unable to agree, the Applicants are to make brief written submissions on costs in response to the request by CEP. CEP is at liberty to file a reply if it so desires.

S.E. PEPALL J.

* * * * *

Schedule "A"

Industrial Relations Act, R.S.N.B. 1973, c. I-4

56(2) A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

Pension Benefits Act, S.N.B. 1987, c. P-5.1

50(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.

50(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.

51(1) If an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

51(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

51(3) An employer who is required by a pension plan to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions due and not paid into the pension fund.

51(4) If a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) The administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer.

52 If the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an

administrator of the plan.

53 The administrator may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this Act and the regulations.

Labour Code, R.S.Q. c. C-27

67. A collective agreement shall be binding upon all the present or future employees contemplated by the certification.

The certified association and the employer shall make only one collective agreement with respect to the group of employees contemplated by the certification.

68. A collective agreement made by an employers' association shall be binding upon all employers who are members of such association and to whom it can apply, including those who subsequently become members thereof.

A collective agreement made by an association of school boards shall bind those only which have given it an exclusive mandate as provided in section 11.

Supplemental Pension Plans Act, R.S.Q. c. R-15.1

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

cp/e/qllxr/qlmxb/qlbdp/qlmxl/qlaxw/qlced/qlcas/qlmlt

1 It reserves its rights to return to Court if necessary to address any issues relating to current service payments to be made.

2 2009, Ontario Bar Association, Continuing Legal Education

3 [2008] O.J. No. 3164, 2008 CarswellOnt 4811 (C.A.).

4 "Rescue! The Companies' Creditors Arrangement Act "Toronto: Thomson Carswell, 2007 at p. 9.

5 Supra, Note 2 at p. 18 and 31.

6 [2007] O.J. No. 4186, 2007 CarswellOnt 7014.

7 May 18, 2009 Decision of Quebec Superior Court, [2009] J.Q. no 4473.

8 [2003] R.J.Q. 420 (C.A.)

9 [2004] Q.J. No. 11022, [2004] CanLII 40296 (QC.S.C.)

10 [2009] O.J. No. 2558, June 18, 2009 Decision of Ontario Superior Court.

11 Ibid at para.

12 [1984] O.J. No. 683.

13 [1993] O.J. No. 679.

14 [1993] O.J. No. 679.

Tab 9

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-11-036133-094

DATE : **MAY 4, 2009**

PRESENT : THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF :

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Debtors listed on Schedules "A", "B" and "C"
Debtors
And
Ernst & Young Inc.
Monitor
And
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL SECTIONS 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 and 1455
Petitioners

REASONS FOR JUDGEMENT PRONOUNCED ON THE BENCH ON A MOTION FOR A DECLARATORY JUDGEMENT (#30)

INTRODUCTION

[1] In the context of the restructuring process initiated by Abitibibowater Inc. under the *CCAA*[1], the CEP[2] presents a motion[3] aiming to have declared null and illegal Abitibi-Consolidated Inc.'s decision to suspend, commencing May 1st, 2009:

a) the right to early retirement without actuarial reduction of its employees aged 57 and counting 20 years of continuous service; and

b) the increase in the pension formula applicable to the active employees from 1,70% to 1,75%.

[2] The context is as follows.

THE CONTEXT

A) THE *CCAA*

[3] On April 17, 2009, the Court pronounced an initial order placing AbitiBowater under the protection of the *CCAA*.

[4] Although each of the numerous intervenor's familiarity with the process varies largely, the objective of this law is well known. The *CCAA* aims at allowing AbitibiBowater to restructure its business, operations and debt.

[5] The means the law gives AbitibiBowater is the development, negotiation, and implementation of a reasonable and fair plan of arrangement with its creditors on which they will vote.

[6] This process is above all the debtors' and creditors' affair. The Court's role is one of supervision. The ultimate goal is the conclusion of a successful plan of arrangement with a perspective of continuity of the operations and survival of the company. At stake is the interest of all the intervenors and that of society as a whole according to some. To paraphrase Judge Blair in *Metcalfe*[4], the *CCAA* has a "*broader social economic purpose*" and a "*wider public interest*".

[7] To achieve this objective, the *CCAA* gives the Court an important statutory discretion coupled with a certain inherent jurisdiction. These powers must be exercised in accordance with the fundamental objective of the law, which is to facilitate the conclusion of possible plan of arrangement between the debtors and their creditors.

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
[2] Communications, Energy and Paperworkers Union of Canada.
[3] Motion for a declaratory judgement aiming at maintaining in effect collective agreements existing until the conclusion of a new agreement between the parties.
[4] *Metcalfe & Mansfield Alternative Investments II Corp.*, (Re), 2008 ONCA 587 (CanLII), paragraph. 52 and 53.

[8] In this perspective, maintaining a certain status quo during the process is essential. As of its pronouncement, an initial order, like the one rendered in the case at bar, suspends for all creditors all rights and remedies pending against the debtors and their assets. The same applies to the payment of debts arising from these rights and remedies.

[9] However, even if the Court has to be certain that the pursuit of the *CCAA*'s objective is done at the best cost and at the best possible conditions for the creditors, an inevitable finding remains. This process cannot be conducted without hurt and sacrifice. At the end of the line, the creditors or certain classes of creditors will unavoidably pay a price.

[10] Indeed, it must be stressed that in a restructuring process where the company is insolvent from the start, it would be unrealistic to think that the process would result in an absence of sacrifice or concessions from the concerned creditors. The perspective of continuity of the operations and of survival that the law favors cannot be realized without paying a certain price.

[11] Thus, with regards to the concerned creditors, it is altogether rare that the claims of certain creditors shall not have precedence over the claims of other creditors. The supervisory role of the Court then takes all its meaning. In the search of the optimal avenue leading to a successful restructuring, the Court must be conscious of the necessity of maintaining an equilibrium, that may be fragile and is often painful, between the rights of all.

[12] AbitibiBowater's situation is no different. The company is insolvent. It claims it faces a serious liquidity crisis in a market undergoing important changes in the context of a financial and economical crisis.

[13] The importance of its debt is undeniable. It approaches US$ 6 billion for Abitibi and is around US$ 3 billion for Bowater[5].

[14] Not surprisingly, the impacts of the process are significant. They affect a wide and disparate scope of creditors, whether guaranteed or not, who may be lenders, holders of debentures or other debt securities, suppliers or employees.

B) THE LITIGATION

[15] For the time being, in the present case, the litigation only concerns Abitibi's side of the process. It is also limited to a question that is only related to the collective agreements of its unionized employees members of the CEP. However, it would be false to think that it only impacts Abitibi and Abitibi's unionized employees members of the CEP.

[5] See paragraphs 165 and 205 of AbitibiBowater's initial claim dated April 17, 2009.

[16] The issue arises from a Memorandum of Agreement[6] signed by the CEP and Abitibi in July of 2004. This memorandum has an impact on no less than 18 collective agreements negotiated by the CEP for its members[7]. It is admitted that this memorandum is part of the collective agreements and that all the collective agreements are in full force.

[17] At its page 4, the Memorandum of Agreement states the following with respect to the pension plans:

> As of May 1, 2009, the rules of the pension plan will be modified so that the pension and bridge benefit of an active employee 57 years old and counting at least 20 years of continuous service at the time of his early retirement will be payable without reduction, [...].

[18] At the same page, the Memorandum states that an adjustment of the pension formula of active employees from 1,70 to 1,75 % is to take place as of May 1st, 2009. There is also an increase in the contribution of the employees to pension plans from 7 to 7,5 % as of the same date.

[19] No one doubts the validity and legality of these clauses that, of course, improve the pension plans to the benefit of the active employees of Abitibi as of May 1st, 2009.

[20] However, by e-mail and letter sent April 27th, 2009[8], Abitibi notified the CEP of the changes. Firstly, in the e-mail, it says inter alia:

> Tried now just to call you to inform you that we are suspending the pension benefit improvements scheduled for May 1st, 2009.

[21] Furthermore, in the letter, it sets forth the following:

> [...], the Company is no longer in a position to process amendments to its pension plans which have the effects of increasing liabilities, including the increase in the pension formula and the changes in the eligibility criteria for early unreduced retirement benefits scheduled to come into effect on May 1st, 2009 and resulting from a Memorandum of Agreement between the Company and the unions. [...]

[22] Hence, Abitibi's decision is to suspend, commencing May 1st 2009:

a) the right to early retirement without actuarial reduction of its employees aged 57 and counting 20 years of continuous service; and

b) the increase in the pension formula applicable to its active employees.

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[6] Exhibit S-1.
[7] See pertinent extract, exhibit S-3.
[8] Exhibit S-2 and S-3.

[23] However, it is admitted that Abitibi does not suspend the application of the negotiated corollary, i.e. the increase in the contribution of the employees to the pension plans from 7 to 7,5 %.

[24] It is granted that Abitibi's actions are unilateral, without any preliminary discussions with the CEP and without its consent.

[25] Abitibi's alleges two reasons for acting in this way:

- Firstly, the impossibility of bearing the cost with respect to the financing of these improvements to the pension plans;

- Secondly, the impossibility of amending the plans because of the anticipated refusal of the *Régie des rentes* taking into account the financial consequences of such modifications.

[26] Abitibi alleges[9] that the improvements would increase the already existing 960 million dollar[10] actuarial deficit of the benefit based plans by 68 million dollars.

CLAIMS OF THE PARTIES

[27] The CEP considers Abitibi's decision illegal because it would amount to a repudiation of the collective agreement's negotiated terms which are in force and apply to the active employees.

[28] Abitibi replies that it does not have the capacity to respect its commitments and that the *CCAA* authorizes it to act as it did with respect to these benefits since the costs related to such benefits relate, for the most part, to the value of services rendered before the initial order was delivered.

DISCUSSION AND ANALYSIS

[29] With respect for the contrary opinion, the Court's view is that the CEP is right. Abitibi's decision is illegal and therefore null and without effect.

[30] Following the Court of Appeal's teachings on the subject, the Court considers that Abitibi cannot unilaterally modify the terms of a collective agreement applicable to its active employees in order to deprive them of certain rights, like the ones under the clauses discussed hereinabove.

[31] Neither the *CCAA*, nor the initial order authorize it to act in such a way.

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[9] Exhibit I-1.

[10] Paragraph 222 of AbitibiBowater's initial claim dated April 17, 2009.

[32] The reasons alleged by Abitibi to act as it did do not hold up. They result from an erroneous confusion on its part between the rights these collective agreements confer and the execution or enforceability of the potential claims in which they could result.

[33] Certain explanations to the benefit of all are appropriate.

a) The Court of Appeal's Teachings

[34] The Court's answer to the question in dispute resides in the reasons of three decisions of the Court of Appeal of Quebec of the last years, each in the context of restructuring under the *CCAA*. Abitibi should have taken these into account. It didn't.

[35] Firstly, in *Mine Jeffrey*[11] pronounced in 2003, the Court of Appeal states the following:

> [50] [...], nothing in the *CCAA* authorizes the monitor or the court to unilaterally suspend the consideration payable to the party supplying a good or service to the debtor. Furthermore, this consideration must be agreed upon with the supplier before the delivery or before the initial order, as for example in a contract involving sequential performance, or the consideration could also be provided in the law, in a by-law, a tariff or in other market rules. [...]
>
> [51] In this case, given that the accreditations are not concerned by the orders rendered, that the lay-off of all the salaried unionized workers does not terminate the accreditations and that individuals are called back the following day or later to exercise positions concerned by accreditations, the consideration to be paid to these individuals must be the consideration provided by the collective agreements or any amendment thereto negotiated with the concerned union. This consideration includes the salary and any other benefit related to the services rendered following the initial order. In addition, like any other supplier, they may not require the supplemental payment of any other amount due when the initial order is delivered (s. 11.3, paragraph a) *in fine*); as regards these amounts, they will be creditors under the *CCAA*, to whom the debtor will possibly present an arrangement.
>
> [52] The defendant underlines that the impugned order only suspends temporarily the collective agreements and that this is possible under the staying powers of the court. I believe such a suspension to be illegal when its effect is to unilaterally set aside the clauses of the collective agreements relating to the consideration payable to the employees called back and concerned by the accreditations. [...] It is not a suspension but a modification of the working conditions imposed unilaterally by the monitor and therefore does not respect the rights of the appellants resulting from the accreditations.
>
> (emphasis added)

[11] *Syndicat national de l'amiante d'Asbestos inc. v. Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.).

[36] The Court of Appeal concludes by saying:

> [60] The collective agreements continue to be in force like any contract involving sequential performance not modified by mutual agreement after the initial order or not terminated (assuming this is possible for collective agreements). The monitor or the court cannot unilaterally amend them. This being said, a distinction is to be made regarding the payment of claims resulting from collective agreements.
>
> [61] Hence, the unionized employees who continued to provide services, or were called back to do so, have the right to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3) according to the terms of the applicable collective agreement in its original version or as amended with the consent of the concerned union. However for the services provided earlier, the obligations not performed by Mine Jeffrey inc. result in claims against Mine Jeffrey inc. for which the monitor cannot be held liable (s. 11.8 *CCAA*) and for which the employees may not require immediate payment (s. 11.3 *CCAA*).
>
> (emphasis added)

[37] Secondly, in *Uniforêt*,[12] delivered the same year, the Court of Appeal adopts the same perspective in the following terms:

> [22] [...], even though it is not part of the collective agreement, the Participation Plan sets in a large part the working conditions of the employees [...]. Under section 11.3 of the *CCAA* as interpreted in *Mine Jeffrey*, these working conditions could not be unilaterally modified or terminated by the appellants. Admitting they could do so would mean that, notwithstanding what our Court has decided in this judgment, an employer could "terminate" unilaterally any part of the existing working conditions, whether or not they are covered by a collective agreement. He would actually be able to modify them at will in the future. On the contrary, on a going-forward basis, he must accept the existing conditions, end the supply of merchandise or services or negotiate with the supplier of goods and services. In this case with regards to Uniforêt's workers [...], it should have first negotiated and reached an agreement with the defendant union if it chose to suspend the Participation Plan while maintaining the workers in their position.
>
> (emphasis added)

[38] Thirdly, in a judgment from August 1st, 2008, Judge Rayle of the Court of Appeal discusses the status of the claims of unionized workers under the plan of arrangement filed in the context of the restructuring of TQS[13]. In this file, the union wanted the claims under the collective agreement to have a distinct status so that they would not be affected by the proposed transaction and thereby be wholly payable.

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[12] *Uniforêt inc. v. 9027-1875 Québec inc.*, [2003] R.J.Q. 2073 (C.A.).

[13] *Syndicat des employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, J.E. 2008-1578 (C.A.), 2008 QCCA 1429.

[39] Judge Rayle replied that claims under a collective agreement do not benefit from any priority over the other unsecured claims (paragraph 23). She adds that while a debtor cannot exclude under the *CCAA* the conditions imposed by the negotiated collective agreement binding it, this does not mean that the employees' claims previous to the initial order must be wholly paid (paragraph 25).

[40] She is of the opinion that unionized workers do not have a priority or guaranteed status. She states that:

> [27] The representations of the appellant's lawyer are based on the erroneous premise that the workers have the right to a preferential status. [...]

[41] The Court believes these teachings to be clear.

[42] On one part, Abitibi, as debtor, cannot, with regards to its active employees, terminate or suspend unilaterally the clauses of the collective agreements binding it, including the clauses of the Memorandum of Agreement which are an integral part of the collective agreements. By doing so, Abitibi would act illegally, breaching the rights of the CEP and its members.

[43] To set aside these clauses, it must negotiate and reach an agreement with the CEP. In fact, in a *CCAA* context, negotiation and discussion are often the parties greatest ally.

[44] However, on the other hand, with respect to Abitibi's liability for the services rendered before the initial order, the resulting claims, even if they are based on the collective agreements, do not benefit from a particular status, priority, privilege or guarantee.

[45] As a result, theses claims remain subject to the conditions of section 11.3 of the *CCAA* with regards their immediate payment right. According to this section, payment shall be due for the supply of services or valuable consideration provided after the initial order.

[46] Using Judge Journet's comments in TQS which were cited by Judge Rayle in her judgement from August 1st, 2008, the recognition of a right included in a collective agreement is different from the right to receive payment resulting from the former right. The recognition of a right differs from its execution.

[47] In the context of the *CCAA* and section 11.3, this distinction may have important consequences.

b) The Application to this Case

[48] Applied to the circumstances if this case, these teachings lead us to the following findings.

[49] The clauses at stake benefit Abitibi's active employees, i.e. those who have supplied services after the initial order. Commencing on May 1st, 2009, if they have at least 20 year of continuous service, the clauses give them the right to early retirement at 57 years of age, without any actuarial reduction. For some, this right may be exercised immediately. For others, this will occur in one, two, three or even many years.

[50] These clauses also modify the pension formula benefiting the active employees as of May 1st, 2009. The multiplier used to calculate the pension is increased from 1,70% to 1,75%. Again, the active employees who wish to benefit immediately from this increase may do so if they are eligible, others may do so at a later date.

[51] To the Court's understanding, the financial impact of these measures for Abitibi is twofold.

[52] Firstly, the improvements that these clauses bring would increase the actuarial deficit of the plans by about 68 million dollars[14]. However, the impact this will have on the amortization payments ("special payments" or "past service contributions") is unknown, as no evidence was presented, but such impact seems highly probable.

[53] At this time, according to Abitibi's allegation in its initial claim, the existing actuarial deficit of the benefit plans is of about 960 million dollar[15]. This deficit results in monthly amortization payments of about 8,5 million dollars according to paragraph 57 of the third report of the monitor. In all given proportions, the anticipated impact of the improvement clauses on the amortization payments in the present circumstances should be quite relative.

[54] Secondly, the modifications to the pension plans these clauses result in will also probably cause an increase in the employer's current service contributions, be it only because of the number of active employees who become eligible for these additional benefits.

[55] This being said, the pension plans, and not Abitibi, are the ones who pay the pensions or the bridge benefits to the eligible employees. Therefore the impact of the improvement clauses is on the plans themselves. Of course, Abitibi's contributions are directly affected, either because of the amortizations payments or because of the employer's current service contributions.

[56] To justify its decision to suspend the rights conferred by the clauses, Abitibi alleges its incapacity to finance the consequences of the application of the clauses. In doing so Abitibi confuses the costs relating to the performance of the rights the clauses confer and the rights themselves.

[57] On one hand, Abitibi cannot terminate unilaterally these rights conferred to the active employees, particularly given the fact that whatever the situation, these rights

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[14] Exhibit I-1.

[15] Paragraph 222 of AbitibiBowater's initial claim dated April 17, 2009.

have a value, whether payable or not, which cannot be discarded without the consent of the CEP.

[58] On the other hand, it is not correct to allege that the costs related to the execution of the rights conferred by the clauses are necessarily what Abitibi calls amortization payments, special payments or payments relative to obligations or services previous to the initial order. It all depends on the situation.

[59] Two examples can illustrate this.

[60] Firstly, take an active employee of 54 years of age as of May 1st, 2009 who has 17 years of continuous service. The unilateral suspension of the clauses imposed by Abitibi deprives him of a right which gives rise to costs pertaining in part to services to be provided after the initial order and covered at minimum by the increase in the employer's current service contributions. Abitibi's argument based on related costs simply does not hold in such a case.

[61] Secondly, take an active employee of 57 years of age as of May 1st, 2009 who has 20 years of continuous service. The exercise of his right to an immediate early retirement without any actuarial reduction confers him a right to a pension increased by a certain amount and therefore a claim. Even in the case where Abitibi would be able to justify that in such a situation the better part of the costs related to the additional value of this pension were for services provided before the order, Abitibi's decision still deprives the employee at a minimum of his right to a pension increased by this amount. If such a right is valid and recognized but for whatever reason the additional value of the pension is not paid to the employee, this additional value can nonetheless be part of the possible global arrangement proposed to the creditors like any other claim.

[62] Again, Abitibi's decision penalizes without justification such an employee with regards to this right even in the case where the execution of this right would not be possible because, for example, of an impossibility to pay by the debtors or because of the non-application of section 11.3 of the *CCAA*.

[63] The Court considers that this is the unfair impact of Abitibi's illegal decision resulting from Abitibi's confusion between the respect of the right and the potential enforceability of the resulting claims.

[64] Abitibi's decision is even more unjustified given that the pensions are paid by the pension plans and not by itself. For the moment, it is unknown when, how and by whom will be felt the consequences of Abitibi's difficulty to pay amortization contributions or other special payments of the sort.

[65] It may also be added that Abitibi's decision is rather unfair in its application and quite clumsy. Although it alleges not to have the means to respect its commitments, Abitibi still maintains the counterpart payable by its active employees, namely the increase of their payments from 7 to 7,5 %.

[66] In other words, Abitibi is of the view that its unionized workers have the means to honor negotiated commitments which it considers valid and effective, but that Abitibi does not. It seems as if Abitibi is applying a double standard here.

[67] In this regard, the submission of Abitibi's lawyer on postfiling claims and prefiling claims is not relevant to the impugned decision.

[68] At issue here is a completely unilateral suspension of the exercise of a right of the active employees. The impact of this right on the resulting claims is another distinct issue. It arises, according to Abitibi, in particular with respect to amortization payments or special payments. This is another debate.

[69] Similarly the other submission presented by Abitibi's lawyer on the distinction between a "benefit at large" and a "specific work-related benefit" is not relevant at this stage.

[70] The ability to potentially limit the payment of claims that are said to be related to services rendered before the initial order cannot justify the termination, even on a temporary basis, of the right from which the claims arise.

[71] In this perspective, Abitibi's reading of paragraphs 57 and 58 of *Mine Jeffrey* is erroneous. It is not important that its obligations with respect to the benefits paid under the collective agreements do not create a priority status. This does not in any way authorize Abitibi to temporarily and unilaterally suspend the clauses from which the right to these benefits arise.

[72] Finally, Abitibi's last submission that the *Régie des rentes* would likely refuse the modifications the clauses set out because of their impact on the accumulated actuarial deficit of the plans is far from convincing.

[73] This unrealized contingency is not a reason for Abitibi to duck its obligations. This submission sounds more like a false pretence. Abitibi has on the contrary the duty to act diligently and in good faith in the realization of the commitments it has taken up and agreed upon.

[74] In a nutshell, none of Abitibi's arguments can justify the legality of its actions.

c) Summary

[75] It is pertinent to summarize at this point.

[76] The suspension of the right of active employees of 57 years of age and who have 20 years of continuous service to an early retirement without any actuarial reduction as of May 1st, 2009 is illegal.

[77] The same applies to the suspension of the increase in the pension formula applicable to the active employees from 1,70% to 1,75% as of the same date.

[78] However, it must be understood that the illegality of this action and the recognition of the validity of the rights arising from the clauses are not necessarily synonymous of the corollary recognition of the right to the immediate total or partial enforceability of the claims arising from such clauses.

[79] Such a question is not presently at issue before this Court. It may be, at least in part, included in the upcoming debate on the suspension of the amortization payments. This other debate is on different matters and requires an analysis of different questions. Therefore, the Court does not presently take position on these matters.

[80] The second conclusion sought by the CEP is therefore well founded.

[81] The Court deems the first conclusion useless. The debate is not about the fact that the collective agreements are in force or that the debtors must respect them for services provided since the order. This seems granted on each part. The question at stake is rather about a decision alleged to be illegal.

[82] Finally, since the clauses come into force on May 1st, 2009, the exceptional urgency justifies the award of provisional execution. In fact, since provisional execution notwithstanding appeal was ordered by the initial order, subsequent judgments that correct its illegal applications should logically benefit from this as well.

FOR THESE REASONS GIVEN ORALLY AND RECORDED, THE COURT:

[83] **DECLARES** null and illegal the debtor's decision to suspend the right of the active employees who have at least 20 years of continuous service to early retirement at 57 years of age without actuarial reduction as of May 1st, 2009 as well as the increase in the pension formula from 1,70% to 1,75% as of May 1st, 2009, the whole as set out in the collective agreements and in the Memorandum of Agreement (exhibit S-1), and applying to the workers represented by the Communications, Energy and Paperworkers Union of Canada (CEP) and its local sections 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 and 1455;

[84] **ORDERS** the provisional execution of this judgment, notwithstanding appeal and without the need to provide security;

[85] **WITH COSTS.**

CLEMENT GASCON, J.C.S.

Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, and Me Mélanie Béland
STIKEMAN, ELLIOTT
Attorneys for Debtors

Me Avram Fishman and Me Gilles Paquin
FLANZ FISHMAN MELAND PAQUIN
Attorneys for Monitor

Me Robert Thornton
THORNTON GROUT FINNINGAN
Attorneys for Monitor

Me Frederick L. Myers
GOODMANS LLP
Attorneys for Ad Hoc Committee of Bondholders

Me Michael B. Rotsztain
TORYS LLP
Attorneys for Fairfax Financial Holdings Ltd.

Me Nicolas Plourde
HEENAN BLAIKIE
Attorneys for Fairfax Financial Holdings Ltd.

Me Yves Saint-André
TRUDEL NADEAU
Attorneys for Claimant, Communications, Energy and Paperworkers Union of Canada (CEP) and its Local Sections 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 And 1455

Me Jean-François Cliché
MARTEL CANTIN
Attorneys for Fédération des travailleurs et travailleuses du papier de la forêt

Date of hearing April 30, May 1st, and May 4th 2009
Revision and transcript of the reasons May 5th, 2009

Tab 10

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, as amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the other applicants

[2010] O.J. No. 2544

2010 ONSC 1746

82 C.C.E.L. (3d) 180

321 D.L.R. (4th) 561

2010 CarswellOnt 3948

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

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

June 14, 2010.

(38 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Unsecured claims -- Motion by the Union for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with collective agreements dismissed -- The CMI Entities were granted protection under the Companies' Creditors Arrangement Act in October 2006 -- In September and November 2009, CMI Entity employers announced employee layoffs -- The employees were not paid any severance -- However, termination and severance payments were unsecured claims and there was no statutory justification for giving the employees priority over secured creditors -- Companies' Creditors Arrangement Act, s. 11, s. 33.

Creditors and debtors law -- Payment and discharge of debt -- Payment -- Time for payment -- Motion by the Union for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with collective agreements dismissed -- The CMI Entities were granted protection under the Companies' Creditors Arrangement Act in October 2006 -- In September and November 2009, CMI Entity employers announced employee layoffs -- The employees were not paid any severance -- However, termination and severance payments were unsecured claims and there was no statutory justification for giving the employees priority over secured creditors --

Companies' Creditors Arrangement Act, s. 11, s. 33.

Labour law -- Collective agreements -- Motion by the Union for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with collective agreements dismissed -- The CMI Entities were granted protection under the Companies' Creditors Arrangement Act in October 2006 -- In September and November 2009, CMI Entity employers announced employee layoffs -- The employees were not paid any severance -- However, termination and severance payments were unsecured claims and there was no statutory justification for giving the employees priority over secured creditors -- Companies' Creditors Arrangement Act, s. 11, s. 33.

Motion by the Communications, Energy and Paperworkers' Union (CEP) for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with the collective agreements. In October 2006, an initial order granted the CMI Entities protection under the Companies' Creditors Arrangement Act (CCAA). In September and November 2009, CMI Entity employers announced employee layoffs in Kelowna and Saskatoon. The employees were not paid any severance after they were laid off and some employees were also owed money in lieu of notice of termination. The CEP took the position that the employees provided post-filing services and were entitled to severance and termination payments in accordance with the collective agreements. The CMI Entities took the position that the employees' severance entitlements were not converted into post-filing obligations simply because they had provided services following the date of the initial order.

HELD: Motion dismissed. Termination and severance payments were unsecured claims and section 33 of the CCAA did not alter priorities or status. While terminated employees were entitled to such payments, the obligation to make those payments was not immediate. Rather, the obligation was stayed and subject to a compromise. Finally, there was no statutory justification for giving the employees priority over secured creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, s. 6(5), s. 11, s. 11.01, s. 11.01(a), s. 33, s. 33(1), s. 33.1, s. 36

Employment Standards Act, 2000, S.O. c. 41,

Counsel:

Lyndon Barnes and Alex Cobb, for the CMI Entities.

Maria Konyukhova, for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Logan Willis, for the Ad Hoc Committee of Noteholders.

Steve Weisz, for CIT Business Credit Canada Inc.

D. Wray, for the Communications, Energy and Paperworkers' Union.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 On October 6, 2009, I granted the CMI Entities an Initial Order which provided protection under the Companies' Creditors Arrangement Act[1] (the "CCAA") and stayed all proceedings against them. The Communications, Energy and Paperworkers' Union ("CEP") is the certified bargaining agent for certain employees of the CMI Entities. The CEP and the CMI Entities are parties to certain collective agreements. The CEP requests an order directing the CMI Entities to satisfy all obligations in respect of severance payments and notice of termination and/or notice of layoff payments in accordance with the terms of collective agreements. These payments are alleged to be due to union members who rendered services to the CMI Entities after October 6, 2009, the date of the Initial Order. Payments to two groups of employees are in issue. CEP did not proceed with that part of the motion relating to a third group whose effective layoff date predated the Initial Order. In addition, the parties adjourned on consent CEP's request for the establishment of a financial hardship process.

Factual Background

2 On September 3, 2009, the applicable CMI Entity employer announced nine layoffs of employees at the CHBC Kelowna television station. The effective layoff dates were in mid October or December of 2009. The applicable collective agreement provided for severance payments. Specifically, it stated:

> In the event that an employee who has completed their probationary period is laid off, he/she shall receive severance of two (2) weeks pay for each completed year of continuous service up to seven (7) years, and three (3) weeks severance pay for each year of continuous service beyond seven (7) years, to a maximum of fifty-two (52) weeks severance pay. Up to two (2) weeks of the total may be actual notice with the balance paid in a single lump sum or in payments agreeable between the employee and the Company. In the event of a temporary layoff not longer than eight (8) weeks, where the (sic) is guaranteed to be recalled, there shall be no requirement to pay severance pay.

3 In lieu of lump sum severance payments, the CMI Entities proposed to make severance payments by way of "salary continuance". As such, post layoff, the CMI Entities would continue to pay the employees their regular salary until their severance obligations were exhausted. But for the CCAA proceedings and the insolvency of the debtor companies, this salary continuance would have commenced in mid October or December, 2009. All of the employees worked beyond October 6, 2009 and remained employed until their effective layoff dates. They were paid their ordinary wages and benefits until their effective layoff dates and thereafter nothing was paid.

4 On November 12, 2009, the applicable CMI Entity employer announced nine terminations of employment at Global Saskatoon[2]. The effective termination date was November 30, 2009. The CMI Entities did not pay these employees any severance after they were laid off. Some of these employees are also owed money in respect of pay in lieu of notice of termination. These payments were also not made. While the applicable collective agreement was not filed on this motion, it is acknowledged that it provides for termination and severance payments to employees whose employment has been terminated or severed. Even though they were told that they would not be paid any severance, all of the affected employees continued to work until their effective termination date of November 30, 2009. The employer paid the employees their wages plus a retention bonus if they continued to work until November 30, 2009. For example, one employee was paid a retention bonus of $5400. Two layoffs were subsequently rescinded.

5 CEP filed an affidavit of Robert Lumgair, a national representative of the Union. He emphasized the

significance of severance payments to employees. He stated that employees consider the promise of severance pay to be part of their total compensation package. He also noted that anticipated severance often serves as an incentive for employees to remain in the employment of the employer.

6 The Initial Order was largely based on the Commercial List Users' Committee Model Order. Paragraph 7(a) of the Initial Order entitles but does not require the CMI Entities: (a) to pay all outstanding and future wages, salaries, and employee benefits (including, but not limited to, employee medical, dental, disability, life insurance and similar benefit plans or arrangements, incentive plans, share compensation plans and employee assistance programs and employee or employer contributions in respect of pension and other benefits), current service, special and similar pension and/or retirement benefit payments, vacation pay, commissions, bonuses and other incentive payments, payments under collective bargaining agreements, and employee and director expenses and reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements.

7 Subject to certain conditions including such requirements as are imposed by the CCAA, paragraph 12 of the Initial Order authorizes the CMI Entities to terminate the employment of such of their employees or lay off or temporarily or indefinitely lay off such of their employees as the relevant CMI Entity deems appropriate on such terms as may be agreed upon between the relevant CMI Entity and such employee, or failing such agreement, to deal with the consequences thereof in the CMI Plan.

8 The CMI Entities sent letters to the affected employees outlining the anticipated payments due to them.

9 Severance payments to sixteen employees totaling approximately $425,000 are in issue on this motion. Of the sixteen, eleven termination claims amounting to approximately $6000 are also in issue.[3]

Issue

10 The parties agree that: (i) the collective agreements provide for severance and termination pay; (ii) the collective agreements remain in force during the CCAA proceeding; and (iii) section 11.01 of the CCAA provides that employees are entitled to immediate payment for services provided to the CMI Entities after the date of the Initial Order. The issue for me to consider is whether as a result of working for some period of time after the granting of the Initial Order, these sixteen employees are entitled to immediate payment of all severance and termination payments owed to them.

Positions of the Parties

11 CEP submits that these groups of employees provided post-filing service to the CMI Entities and are entitled to severance and termination payments in accordance with the terms of the collective agreements. Section 11.01 of the CCAA provides that employees are entitled to payment for post-filing services. The collective agreements provide for severance and termination payments. Pursuant to section 33(1) of the CCAA, collective agreements remain in force during CCAA proceedings. Severance and termination payments are in respect of post-filing service and therefore should be paid. In the alternative, at a minimum, the termination payments are properly characterized as payments in respect of post-filing service. CEP relies on *Jeffrey Mines Inc.*[4], *Nortel Networks Corp. (Re)*[5], *West Bay SonShip Yachts Ltd. (Re)*[6], and *Fraser Papers Inc.*[7] CEP submits that *Windsor Machine & Stamping Ltd.*[8] was wrongly decided.

12 The CMI Entities submit that they paid the ordinary wages and benefits of the two groups of employees until the effective date of their layoff, based on the fact that they remained at work until that date and that payment of their salary for such service was required by section 11.01 of the CCAA. The

fact that these employees provided services following the date of the Initial Order did not convert their severance entitlements---which take effect upon the termination of their services and are calculated based on tenure of past service---into post-filing obligations. Such a holding would be contrary to the jurisprudence and would have wide spread and unprecedented implications generally for the application of a stay to pre-filing obligations owed to post-filing suppliers. There is a distinction between the conclusion that a collective agreement subsists during the CCAA stay period and the conclusion that any and all amounts owing under the collective agreement can be enforced during that period. The CMI Entities rely on the same cases relied upon by CEP plus *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*[9], *Re ICM/Krebsoge Canada Ltd. and International Association of Machinists & Aerospace Workers, Local 1975*[10], *Re Lehndorff General Partner Ltd.*[11], *Re Mirant Canada Energy Marketing Ltd.*[12], *Providence Continuing Care Centre St. Mary's of the Lake v. Ontario Public Service Employees' Union-Local 483*[13], *Re Stelco Inc.*[14], and *Re Wright Lithographing Co. and Graphic Communications International Union Local 517*[15].

13 The Ad Hoc Committee of Noteholders and CIT Business Credit Canada Inc. both supported the position advanced by the CMI Entities. Counsel for the Ad Hoc Committee also observed that under the proposed Plan, unsecured creditors owed $5000 or less would be paid in full. As such, approximately one half of the 16 employees would be paid in full provided the Plan is approved, sanctioned and remains unchanged in that regard. The Monitor took no position on the motion.

Discussion

14 To properly assess these issues, it is necessary to examine the relevant provisions of the CCAA, the treatment of termination and severance obligations, and recent case law.

15 The CCAA was amended on September 18, 2009. The relevant provisions of the CCAA are sections 11 and 33. Subject to the restrictions set out in the Act, section 11 provides the court with the power to make any order that it considers appropriate in the circumstances and the power to grant a stay of proceedings. Additionally, section 11.01 states:

> No order made under section 11 or 11.02 has 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.

Case law on this provision has focused on the provision of services after the Initial Order has been made.

16 Section 33 for the most part incorporates law that has been established and applied for some time[16]. It is, however, a new provision in the statute itself. Section 33.1 states:

> If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

17 Both termination and severance pay are designed to "cushion the economic dislocation that an employee suffers upon termination of employment and provide support to allow terminated employees to secure new employment: M. Starnino, J-C Killey and C.P. Prophet in "*The Inter Section of Labour*

and Restructuring Law in Ontario: A Survey of the Current Law"[17] In discussing the treatment of termination and severance in CCAA proceedings, the same authors note,

> "... amounts owing to employees whose employment has been terminated in the course of or at the end of the restructuring proceeding are typically treated as unsecured creditors in the restructuring proceeding and subject to compromise in accordance with the plan of compromise or arrangement....
>
> There are remarkably few cases expressly considering whether post-employment benefits, termination pay and severance pay are subject to compromise. What little authority there is tends to support the treatment of these claims as unsecured claims subject to compromise in the plan of arrangement. The apparent rationale behind this approach is that in bankruptcy these claims would be treated as unsecured claims subject to compensation in accordance with the scheme of distribution set forth in the BIA."[18]

18 Turning to the relevant case law, in *Re: Nortel Networks Corp.*[19], two motions were involved. In the first motion, the Union requested a declaration that certain former employees were entitled to post-employment retirement benefits and termination and severance amounts. None of the former employees had provided services to Nortel after the Initial Order. The Union argued that the collective agreement was a bargain that should not be divided into separate obligations and therefore the compensation for services should include all monetary obligations and not just those owed to active employees.

19 The Court of Appeal rejected the Union's appeal. The Court acknowledged the purpose of the CCAA, namely the facilitation of a compromise or an arrangement between a company and its creditors and stated that the Initial Order stays obligations; it does not eliminate them. The Court reiterated that section 11.3 (now section 11.01(a)) of the CCAA is an exception to the general stay provision and should be narrowly construed. Payment for services provided by the continuing employees did not extend to encompass payments to former employees. The latter were in the nature of deferred compensation for prior, not current services. Furthermore, these were independent vested rights.

20 The ratio of *Re: Nortel Networks Corp* did not address post-filing employees and their rights, if any, to severance and termination payments nor did it address any of the amendments to the CCAA[20]. The Court of Appeal did state:

> "What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the [Initial Order]: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.)."[21]

21 The second motion in the *Re Nortel Networks* case was brought by former non-unionized employees who sought payment of statutory termination and severance claims under the

Employment Standards Act, 2000[22]. In addressing their appeal, in a footnote, the Court of Appeal observed that:

> "The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not in issue on the motion. In *Windsor Machine & Stamping Ltd (Re)* [2009] O.J. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed."

22 The leave to appeal proceedings in *Windsor Machine* have been delayed. Although it was a pre-amendment case, the issue was similar to that before me. While it would have been helpful to have the benefit of the Court of Appeal's decision in that case, unfortunately, given timing requirements, I am rendering this decision beforehand.

23 In *Windsor Machine and Stamping Ltd.*[23], the Union sought an order that the CCAA applicants pay termination and severance pay arising from terminations that occurred some time after the CCAA Initial Order. Morawetz J. reiterated and applied certain of his conclusions from *Re: Nortel Networks Corp.* including that the claims for termination and severance pay were unsecured claims and based for the most part on services that were provided pre-filing. A failure to pay did not amount to a contracting out of a payment obligation; rather, during the stay period, there was a stay of the enforcement of the payment obligation.

24 There, as in the case before me, the claims for termination and severance were for the most part based on services that were provided pre-filing. Morawetz J. stated that the court has jurisdiction to order a stay of outstanding termination and severance pay obligations and concluded that the effect of paying termination and severance would be to accord to those claims special status over the claims of other unsecured and secured creditors. He noted that the priority of secured creditors had to be recognized. He also observed that in a receivership or bankruptcy, termination and severance pay claims would rank as unsecured claims.

25 Morawetz J. did order that any incremental increases in termination and severance pay attributable to the post-filing time period were not stayed.

26 The case relied upon by the Court of Appeal in *Re: Nortel Networks Corp.* was *Mirant Canada Energy Marketing.*[24] In that case, a letter agreement provided for severance pay in the event that an employee's employment was terminated without cause. Kent J. held that an obligation to pay severance was an obligation that arose on termination of services, not an obligation that was essential for the continued supply of services. She wrote:

> Thus, for me to find the decision of the Court of Appeal in *Smokey River Coal*, [2001] A.J. No. 1006, analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only his salary which he has been paid falls within that definition.[25]

27 Similarly, in *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications*

Ltd. [26], the court held that severance pay did not fall within the category of essential services provided during the reorganization period in order to enable the debtor company to function.

28 Other cases of note include *Jeffrey Mines Inc.*[27] and *TQS Inc.*[28] both of which accepted that an employer is bound by its collective agreement notwithstanding CCAA proceedings, however, both courts concluded that obligations governed by collective agreements may be compromised.

29 Having conducted this review, I have concluded that CEP's request for immediate payment should be dismissed. I do so for the following reasons.

30 As noted by numerous courts including the Court of Appeal in *Re: Nortel Networks Corp.*, the purpose of the CCAA is to facilitate a compromise between a company and its creditors. The Act is rehabilitative in nature. A key feature of this purpose is found in the court's power to stay the payment of obligations including termination and severance payments. Section 11.01(a) permits payment for services provided after the date of the Initial Order. Consistent with the purpose of the statute, that subsection is to be narrowly construed.

31 Termination and severance payments have traditionally been treated as unsecured claims. There is no express statutory priority given to these obligations. The nub of the issue is whether section 33 of the CCAA dealing with collective agreements alters the treatment of these obligations. In my view, it does not.

32 Consistent with established law, section 33 of the CCAA does provide that a collective agreement remains in force and may not be altered except as provided by section 33 or under the laws of the jurisdiction governing collective bargaining. It does not provide for any priority of treatment though. The section maintains the terms and obligations contained in the collective agreement but does not alter priorities or status. The essential nature of severance pay is rooted in tenure of service most of which will have occurred in the pre-filing period. As established in the *Re Nortel Networks Corp., Windsor Machine,* and *Mirant* decisions, severance pay relates to prior service regardless of whether the source of the severance obligation is a collective agreement, an employment standards statute or an individual employment contract. As such, terminated employees are entitled to termination and severance but payment of that obligation is not immediate; rather it is stayed and is subject to compromise in a Plan. This conclusion is consistent with the case law and with the statute. As noted by the CMI Entities in their factum, the case law affirms that severance pay is the antithesis of a payment for current service.

33 Furthermore, there is no statutory justification for giving these employees priority of payment over secured creditors. As stated by Morawetz J. in *Windsor Machine*, the priority of secured creditors must be recognized. There are certain provisions in the amendments that expressly mandate certain employee-related payments. In those instances, section 6(5) dealing with the sanction of a Plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.

34 The same is true with respect to other unsecured creditors including other non-unionized employees. Quite apart from the priority to which secured creditors are entitled, quere the merits of a priority regime that treated unionized and non-unionized employees differently. Under such a regime, unionized employees would get immediate payment of termination and severance obligations based on section 33 of the CCAA whereas non-unionized employees would not.

35 Additionally, based on CEP's submissions, someone who worked a day after the Initial Order would be entitled to full and immediate payment of termination and severance obligations ahead of all

others whereas someone who was terminated the day before the Initial Order would not. This cannot be the scheme contemplated by the statutory amendments.

36 I should say in all frankness that it would be appealing to find in favour of the employees in this case. They are a small group and the quantum in issue is not large relative to the amounts involved in this CCAA proceeding. That said, I have a very serious concern that while such a decision would result in immediate payment for these sixteen employees, the precedent such a decision would establish would have long term and negative consequences for employees generally. Although case law on a superficial read might cause one to conclude otherwise, in CCAA proceedings, a judge is extraordinarily conscious of the fate of employees. Indeed, one of the primary benefits of a restructuring that sees the continuance of the debtor company as a going concern is the maintenance of jobs for the employees. Acceptance of CEP's submissions could well result in behavior modification that would be an anathema to the interests of employees as a whole. As stated by Morawetz J. in *Windsor Machine and Stamping Ltd.,* the giving of priority to termination and severance payments would result in:

> "a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs."[29]

Other alternatives such as mass pre-filing terminations are even less palatable.

37 As to CEP's alternative submission that termination payments are properly characterized as payments in respect of post-filing service, I am not persuaded that the distinction between severance and termination payments is a meaningful one within the context of this case. The *West Bay* decision supported the conclusion that a claim for damages for wrongful dismissal carried out in the post-filing period gave rise to a monetary claim that was subject to compromise under a plan. The clear inference to be drawn from the case is that the claim had been stayed and there was no immediate requirement to pay. The same is true in the case before me.

38 As in *Windsor Machine*, any incremental amount of termination and severance pay attributable to the period of time after the date of the Initial Order in which services were actually provided is not stayed. Otherwise, for the reasons outlined, I am dismissing CEP's motion.

S.E. PEPALL J.

cp/e/qlafr/qlmxj/qljxr/qlced/qljyw/qlcas

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

2 Two of these were later rescinded.

3 Of the eleven, four claim 3 months pay in lieu but these claims were not quantified.

4 [2003] J.Q. No. 264.

5 (2009), 55 C.B.R. (5th) 68 (ont. S.C.J.), aff'd 2009 ONCA 833.

6 [2009] B.C.J. No. 120 [B.C. C.A.].

7 [2009] O.J. No. 3188.

8 [2009] O.J. No. 3195.

9 2005 SKQB 331.

10 38 L.A.C. (4th) 426.

11 (1993), 9 B.L.R. (2d) 275.

12 2004 ABQB 218.

13 85 C.L.A.S. 149, 2006 C.L.B. 12961.

14 (2005), 75 O.R. (3d) 5 (C.A.).

15 91 L.A.C. (4th) 129.

16 See for example *Jeffrey Mines*, supra note 3.

17 Ontario Bar Association Continuing Legal Education, April 24, 2009.

18 Ibid, at p.27-29. Although logical, the authors state that there is a lack of clarity as to whether the analysis should end there.

19 2009 ONCA 833.

20 The *Nortel* filing predated the CCAA amendments in September, 2009.

21 *Supra* note 19 at paragraph 19.

22 2000, S.O. c. 41.

23 [2009] O.J. No. 3195.

24 2004 ABQB 218.

25 Supra, note 11 at para. 28.

26 Supra, note 8.

27 2003 CarswellQue 90 (C.A.).

28 [2008] J.Q. no 7151, 2008 CarswellQue 7132 (C.A.).

29 *Ibid* paragraph 43.

Tab 11

** Preliminary Version **

Case Name:

Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia

Health Services and Support - Facilities Subsector Bargaining Association, Health Services and Support - Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia and Harjeet Dhami, Appellants;

v.

Her Majesty The Queen in Right of the Province of British Columbia, Respondent, and

Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Alberta, Confederation of National Trade Unions, Canadian Labour Congress, Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada and British Columbia Teachers' Federation, Interveners.

[2007] S.C.J. No. 27

[2007] A.C.S. no 27

2007 SCC 27

2007 CSC 27

[2007] 2 S.C.R. 391

[2007] 2 R.C.S. 391

283 D.L.R. (4th) 40

137 C.L.R.B.R. (2d) 166

363 N.R. 226

[2007] 7 W.W.R. 191

J.E. 2007-1185

242 B.C.A.C. 1

65 B.C.L.R. (4th) 201

[2007] CLLC para. 220-035

157 C.R.R. (2d) 21

2007 CarswellBC 1289

157 A.C.W.S. (3d) 298

EYB 2007-120552

164 L.A.C. (4th) 1

File No.: 30554.

Supreme Court of Canada

Heard: February 8, 2006;
Judgment: June 8, 2007.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

(252 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Canadian Charter of Rights and Freedoms -- Equality rights -- Discrimination, what constitutes -- Scope -- Fundamental freedoms -- Freedom of association -- Collective bargaining -- Appeal by plaintiffs from dismissal of their action against respondent government, in which appellants challenged the constitutional validity of recently adopted Act relating to health and social services, allowed in part -- The Act invalidated provisions of collective agreements then in force, and precluded meaningful collective bargaining on certain issues -- The Act infringed right to freedom of association, which included the procedural right to collective bargaining -- There was no infringement of equality rights, as distinctions made by the Act did not amount to discrimination -- Canadian Charter of Rights and Freedoms, s. 2(d), s. 15.

Health law -- Public health -- Appeal by plaintiffs from dismissal of their action against respondent government, in which appellants challenged the constitutional validity of recently adopted Act relating to health and social services, allowed in part -- The Act invalidated provisions of collective agreements then in force, and precluded meaningful collective bargaining on certain issues -- The Act infringed right to freedom of association, which included the procedural right to collective bargaining -- There was no infringement of equality rights, as distinctions made by the Act did not amount to discrimination

-- Canadian Charter of Rights and Freedoms, s. 2(d), s. 15.

Labour law -- Labour legislation -- Provincial legislation -- Appeal by plaintiffs from dismissal of their action against respondent government, in which appellants challenged the constitutional validity of recently adopted Act relating to health and social services, allowed in part -- The Act invalidated provisions of collective agreements then in force, and precluded meaningful collective bargaining on certain issues -- The Act infringed right to freedom of association, which included the procedural right to collective bargaining -- There was no infringement of equality rights, as distinctions made by the Act did not amount to discrimination -- Canadian Charter of Rights and Freedoms, s. 2(d), s. 15.

Appeal by plaintiffs from the British Columbia Court of Appeal decision upholding the dismissal of their action against respondent government of British Columbia, in which appellants challenged the constitutional validity of Part 2 of the Health and Social Services Delivery Improvement Act. Appellants were unions and members of the unions representing the nurses, facilities or community subsectors. The impugned Act was quickly adopted as a response to challenges facing British Columbia's health care system, three days after receiving a first reading as a bill before the BC legislature. Part 2 introduced changes to transfers and multi-worksite assignment rights, contracting out and status of employees under contracting-out arrangements, job security programs, and layoffs and bumping rights. It invalidated provisions of collective agreements then in force, and precluded meaningful collective bargaining on a number of issues. Appellants argued that Part 2 violated s. 2(d) of the Charter, freedom of association, and s. 15, equality, by affecting only certain workers, who were primarily women. Both the trial judge and appeal judges concluded that there was no violation of s. 15, and that s. 2(d) did not include a right to collective bargaining.

HELD: Appeal allowed in part, declaration suspended for a period of 12 months. The right of freedom of association under s. 2(d) included a procedural right to collective bargaining. While s. 2(d) put constraints on the exercise of legislative powers with respect to the right to collective bargaining, it only protected against "substantial interference" with associational activity. A breach of s. 2(d) was considered to have occurred where the affected matters were both important to the process of collective bargaining, and whether the measures had been imposed in violation of the duty of good faith negotiation. Although the government was facing a situation of exigency, the measures it adopted constituted a virtual denial of the right to a process of good faith bargaining and consultation. Furthermore, infringement of s. 2(d) was not justified under s. 1, as Part 2 did not minimally impair the workers' rights. The record disclosed no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter. With respect to the right to equality under s. 15, Part 2 did not violate it. The distinctions made by the Act related essentially to segregating different sectors of employment, and they did not amount to discrimination.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S.C. 1970, c. L-1 [am. S.C. 1972, c. 18], Preamble

Canadian Charter of Rights and Freedoms, s. 1, s. 2(d), s. 7, s. 15, s. 32

Conciliation Act, 1900, S.C. 1900, c. 24,

Constitution Act, 1982, s. 52

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, s. 3, s. 4, s. 5, s. 6(2), s. 6(4), s. 7, s. 8, s. 9, s. 10

Health Sector Labour Adjustment Regulation, B.C. Reg. 39/2002, s. 2(1)

Industrial Disputes Investigation Act, 1907, S.C. 1907, c. 20.,

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 35, s. 38

Public Sector Employers Act, R.S.B.C. 1996, c. 384, s. 3, s. 6

Railway Labour Disputes Act, 1903, S.C. 1903, c. 55,

Wartime Labour Relations Regulations, P.C. 1003 (1944),

Subsequent History:

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Court Catchwords:

Constitutional law -- Charter of Rights -- Freedom of association -- Right to bargain collectively -- Health and social services delivery improvement legislation adopted by provincial government in response to pressing health care crisis -- Legislation affecting health care workers' terms of employment -- Whether constitutional guarantee of freedom of association includes procedural right to collective bargaining -- If so, whether legislation infringes right to bargain collectively -- Whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 2(d) -- Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.

Constitutional law -- Charter of Rights -- Equality rights -- Health care workers -- Health and social services delivery improvement legislation adopted by provincial government in response to pressing health care crisis -- Legislation affecting health care workers' terms of employment -- Whether effects of legislation on health care workers constitute discrimination under s. 15 of Canadian Charter of Rights and Freedoms -- Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.

Court Summary:

The *Health and Social Services Delivery Improvement Act* was adopted as a response to challenges facing British Columbia's health care system. The Act was quickly passed and there was no meaningful consultation with unions before it became law. Part 2 of the Act introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of contracted out employees (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9). It gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Furthermore, s. 10 voided any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. The appellants, who are unions and members of the unions representing the nurses, facilities, or community subsectors, challenged the constitutional validity of Part 2 of the Act as violative of the guarantees of freedom of association and equality protected by the *Canadian Charter of Rights and Freedoms*. Both the trial judge and the Court of Appeal found that Part 2 of the Act did not violate ss. 2(*d*) or 15 of the *Charter*.

Held (Deschamps J. dissenting in part): The appeal is allowed in part. Sections 6(2), 6(4), and 9 of the

Act are unconstitutional. This declaration is suspended for a period of 12 months.

*Per***McLachlin C.J.** and Bastarache, Binnie, **LeBel**, Fish and Abella JJ.: Freedom of association guaranteed by s. 2(*d*) of the *Charter* includes a procedural right to collective bargaining. The grounds advanced in the earlier decisions of this Court for the exclusion of collective bargaining from the s. 2 (*d*)'s protection do not withstand principled scrutiny and should be rejected. The general purpose of the *Charter* guarantees and the broad language of s. 2(*d*) are consistent with a measure of protection for collective bargaining. Further, the right to collective bargaining is neither of recent origin nor merely a creature of statute. The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society, emerging as the most significant collective activity through which freedom of association is expressed in the labour context. Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. The protection enshrined in s. 2(*d*) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining. Canada's adherence to international documents recognizing a right to collective bargaining also supports recognition of that right in s. 2(*d*). The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified. Lastly, the protection of collective bargaining under s. 2(*d*) is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*. [para. 22] [paras. 39-41] [para. 66] [para. 68] [para. 70] [para. 86]

The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. Section 2(*d*) of the *Charter* does not guarantee the particular objectives sought through this associational activity but rather the process through which those goals are pursued. It means that employees have the right to unite, to present demands to government employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining. However, s. 2(*d*) does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity. Intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*). It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining. To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer. [paras. 89-90] [para. 92]

Determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries: (1) the importance of the matter affected to the process of collective bargaining, and more specifically, the capacity of the union members to come together and pursue collective goals in concert; and (2) the manner in which the measure impacts on the collective right to good faith negotiation and consultation. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and the employer may be under no duty to discuss and consult. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation. Only where the matter is both important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation will s. 2(*d*) be breached. [paras. 93-94] [para. 109]