

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

APPLICANTS

**BOOK OF AUTHORITIES OF THE APPLICANTS
(Re CEP Severance/Hardship Motion)**

February 26, 2010

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TAB 1

Case Name:

**Communications, Energy, Paperworkers, Local 721G v.
Printwest Communications Ltd.**

Between

**Communications, Energy, Paperworkers,
Local 721G and Local 75G, applicants, and
Printwest Communications Ltd., Mister Print
Productions Ltd., Sentry Press Ltd. and August
Communications Ltd., respondents, and
Saskatchewan Cooperative Financial Services Limited
operating as Cucorp Financial Services, respondent**

[2005] S.J. No. 484

2005 SKQB 331

272 Sask.R. 239

16 C.B.R. (5th) 244

141 A.C.W.S. (3d) 749

2005 CarswellSask 508

Q.B.G. No. 12 of 2005 J.C.R.

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

Matheson J.

July 28, 2005.

(18 paras.)

*Creditors and debtors law -- Legislation -- Companies' Creditors Arrangement Act -- Insolvency
law -- Claims -- Creditors -- Unsecured creditors.*

Application by the union for an order declaring that its claims were not affected by the plan of compromise of the employer, the respondent Printwest Communications. The union asserted monetary and other claims against Printwest. The monetary claims consisted substantially of claims, pursuant to the collective agreement, for severance pay for laid-off employees.

HELD: Application dismissed. If the union's request were accepted such that all claims for severance pay be dealt with outside the plan of compromise and thereby paid in full, such result could not be viewed as fair and reasonable with respect to other unsecured creditors, who would possibly receive only a small fraction of the amounts owing to them.

Statutes, Regulations and Rules Cited:

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

Counsel:

R.M. Gillies for the applicants

W.R. Waller for the respondents, Printwest et al.

C.D. Hadubiak for Cucorp. Financial Services

M.W. Milani, Q.C. for the Monitor, KPMG Inc.

FIAT

1 MATHESON J.:-- By an order dated January 4, 2005, all proceedings against Printwest Communications Ltd., and its related companies, ("Printwest") were stayed, pursuant to The Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a period of 30 days. The stay period has subsequently been extended to September 30, 2005, and Printwest has presented a plan of compromise which it has been authorized by the court to present to its creditors.

2 The union locals 721G and 75G (the "Union") has asserted monetary, and other, claims against Printwest on behalf of nearly two dozen Union members. The monetary claims total \$248,115.46. However, counsel for the Union stated that the total includes alternative claims, with the result that the total of the claims is only approximately \$160,000.00. Nevertheless, the Union filed a proof of claim which stated that its claim totalled \$248,115.46. The claim was disallowed in its entirety, but it was revised by the claims officer as an unsecured claim of \$44,362.48 and a contingent claim of \$52,906.50.

3 The monetary claims consist substantially of claims, pursuant to the collective bargaining agreement, for severance pay for laid-off employees of Printwest.

4 The portion of the Union claim which was rejected represents claims for severance on behalf of employees who had received layoff notices, were subsequently called back to work, but refused to do so without a guarantee of permanent employment or because they had taken other work.

5 The contingent claims represent severance pay with respect to laid-off employees who were called back to work, and did report for work, but may be laid-off again by the time implementation of the plan of compromise is completed.

6 The Union has applied for an order declaring that the claims of the Union are not affected by the plan of compromise.

UNION SUBMISSION

7 The Union has placed significant reliance on statements made by LoVecchio J. in Smoky River Coal Ltd. (Re) 2000 ABQB 621; [2000] 10 W.W.R. 147 (Alta. Q.B.) such as, at para. 28:

[paragraph]28 The CCAA is a statute that provides protection for companies who are experiencing financial difficulties, enabling them to reorganize their affairs in the hopes of continuing on in business. A broad and liberal interpretation of the Act has been adopted by the Courts in order to achieve the intended mandate ...

8 No issue can be taken with the foregoing statement.

9 As in this case, a special Charge had been established in the Smoky River case for the benefit of post-petition trade creditors. Several creditors had applied to be granted special status and be entitled to participate in the Charge. At para. 40 it was stated:

[paragraph]40 The main purpose of the Charge was to encourage the creditors who supply Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping "the lights of the company on" ...

10 The Union has argued that it should be granted special status because the employees, on whose behalf the Union has asserted claims, were essential in keeping the lights on at Printwest. That submission cannot, however, be accepted.

11 The laid-off employees have been paid all amounts required by statute. The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.

12 In *Mirant Canada Energy Marketing Ltd. (Re)* 2004 ABQB 218; (2004) 1 C.B.R. (5th) 252 (Alta. Q.B.), an employee of Mirant by the name of Schaefer had applied for an order that he be entitled to immediate payment of severance pay, rather than have his claim dealt with in the course of the CCAA proceeding.

13 One of the arguments advanced by Schaefer was that the agreement to pay him severance pay was an integral part of his employment contract; a necessity for Schaefer to continue his employment. However, it was concluded that an undertaking to pay severance is not an incentive but an obligation arising upon termination of employment services. Thus, the claim for severance pay had to be dealt with in the same manner as other unsecured creditors' claims.

14 As was stated in *Alternative Fuel Systems Inc. v. Remington Development Corp.* 2004 ABCA 31, [2004] 5 W.W.R. 475 (Alta. C.A.) at para. 55 "What the CCAA requires is that the end result, the plan of arrangement, be fair and reasonable."

15 If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

16 The Union has also requested an order that its non-monetary grievances, relating to grievances, seniority, training, etc., also be dealt with outside the plan of compromise. For the same reasons, that request must be rejected.

17 Finally, the Union requested that it be entitled to vote on the basis of the full amount set out in its proof of claim, or, alternatively, the sum of approximately \$160,000.00, rather than the amounts allowed by the claims officer. No basis was established to support that submission.

18 In the end result, the application of the Union is dismissed in total. There will be no order as to costs.

MATHESON J.

cp/e/qw/qlrds

TAB 2

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

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 Québec¹ 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

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 3

that he should be terminated. However, when all of the circumstances are weighed, it is my strong conviction that though the grievor's conduct was reprehensible, there is room here for a last chance, a last opportunity for the grievor to put his working life in order and to once again become a useful, productive employee. In my view, returning the grievor to work with a severe penalty and a strong admonition about his future conduct would be an appropriate remedy in this case.

**Re ICM/Krebsoge Canada Ltd. and International Association
of Machinists & Aerospace Workers, Local 1975**

[Indexed as: ICM/Krebsoge and I.A.M., Loc. 1975, Re]

Ontario, A. Barrett. November 23, 1993.

Benefits — Severance pay — Plant closure — Employer provided advance notice of impending mass termination in compliance with Employment Standards Act (Ont.) but no individual notices issued — Grievor found other work then requested severance pay — Grievor resigned before terminated and before statutory notice period activated — No entitlement to severance pay.

[See *Brown & Beatty*, 2:2100; 4:2230; 8:3800]

EMPLOYEE GRIEVANCE concerning entitlement to severance pay. Grievance dismissed.

M. Lewis, for the union.

B. Labord, for the employer.

AWARD

This grievance arose out of an announced closure of the plant. The facility at St. Thomas is a high-tech manufacturer of gears and sprockets for the auto industry. On March 10, 1993, the employees were stunned by the announcement that the plant would be closed in December, 1994, and gradually scaled down prior to that time. On March 10th, management posted a Form 1 pursuant to s. 57(3) of the *Employment Standards Act*, R.S.O. 1990, c. E.14, setting out anticipated termination dates of numbers of employees from April 10, 1993, on a month-by-month basis, up to and including December 10, 1994. This Form 1 is required to be posted by an employer who intends to terminate the employment of 50 or more employees in any period of four weeks or less, giving the employees eight weeks' notice of the termination. In this particular case the employer did not anticipate terminating 50 or more employees until December 10, 1994, but gave the notice

approximately 18 months early to give the employees as much time as possible to rearrange their lives.

- a Pursuant to art. 20(k) of this collective agreement, "Employees indefinitely laid off due to the permanent closure of the company's St. Thomas plant, who are entitled to severance pay under the Employment Standards Act, R.S.O. 1980 as it read on May 19, 1992; and who elect, or are deemed to have elected, to receive
- b severance pay, will receive payment consistent with the act . . .". Thus the provisions of the *Employment Standards Act* as they relate to termination of employment are incorporated by reference into this collective agreement. Article 20(d) provides that in a
- c permanent lay-off situation, lay-offs will be made on the basis of plant-wide seniority with bumping rights to senior employees, provided the senior employee can perform the work available.

- d It became apparent early on that the employer was not going to stick to the Form 1 schedule of anticipated terminations of specified numbers of employees. In meetings with the union and groups of employees, management stressed that production
- e schedules were constantly changing and that they did not know when the lay-offs would actually start. Production was not easily transferable to Ohio, where the plant was going, and a gradual transfer and discontinuance of some production was scheduled, then rescheduled, several times over. Naturally the union and its
- f members were clamouring to know more definite time lines for the loss of their jobs. Management witnesses testified that they advised the union and many groups of members on more than one occasion that they simply did not know when the lay-offs would occur, but notice of termination would be given to individual employees pursuant to the *Employment Standards Act*.

- g Union officials testified that they were not told that individual notices of termination would be given, and that all they had to rely on was the Form 1 which it became increasingly apparent was inaccurate because no lay-offs occurred as the months went by. In fact even at the date of our hearing in November, 1993, no lay-offs had yet occurred. Repeated requests to management to provide more specificity as to the date of lay-offs brought only the response: "We don't know. We'll let you know as soon as we do know." Employees were consulting the seniority list and the Form
- h 1 trying to anticipate when their jobs would end. The Form 1 called for monthly lay-offs of from 2 to 20 employees, with the largest group of 92 not being laid off until the final day of December 10, 1994.

The grievor, Mr. Wächter, was No. 75 on a seniority list of 300 employees, having a seniority date of September, 1975. His job classification was Set-Up Man-Briquetting, where he was in the middle of the seniority ranking of the 10 people who held that job. He also had bumping rights to the job of Set-Up Operator-Briquetting, where about 12 employees were more junior than him.

After the announcement of March 10th, Mr. Wächter understandably became frightened for his future job prospects and started to look for another job. He found one, and on May 13, 1993, gave the employer two weeks' notice of his resignation effective May 25, 1993. It is common ground that the only reason he left was because of the impending loss of his job at the plant. The grievor requested severance pay pursuant to the *Employment Standards Act* and the employer declined to pay it because the grievor had not yet been terminated nor had he been given actual written notice of his termination at some specified future date. Thus this grievance arose.

The outcome of this grievance depends upon an interpretation of the relevant provisions of the *Employment Standards Act*. Part XIV of the Act governs termination of employment, along with R.R.O. 1990, Reg. 327.

The relevant portion of s. 57(1) reads as follows:

57(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employer gives,

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

Thus Mr. Wächter was entitled to eight weeks' notice in writing that his employment was to be terminated. Pursuant to s. 8(1) of the regulation: "Notice of termination of employment shall be in writing addressed to each person whose employment is to be terminated and shall be served personally or by registered mail." That is the type of notice of termination Mr. Wächter was entitled to. It is agreed that he did not receive such an individual notice of termination.

As mentioned above, s. 57(2) and (3) of the Act require a posted Form 1 giving eight weeks' notice to the work-force if the employment of 50 or more persons is to be terminated at an establishment within a four-week period. This was the notice that was posted on March 10, 1993, in conformance with s. 4 of the regulation, but about 18 months in advance of the "statutory notice period".

a Section 57(14) of the Act provides that where notice is not given pursuant to s. 57, the employer must pay termination pay to individual employees amounting to their wages for the "statutory notice period".

b The additional benefit of severance pay is provided to certain employees under s. 58 of the Act for people who have been terminated due to a permanent discontinuance of all of the employer's business at an establishment.

Section 58(2) provides:

58(2) Where,

c (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment . . .

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

d Section 58(4) provides:

58(4) The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work week multiplied by the sum of,

e (a) the number of the employee's completed years of employment; and
(b) the number of the employee's completed months of employment divided by 12,

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week.

f Certain employees are not entitled to severance pay as set out in s. 58(6) which notes the exceptions:

(a) an employee who refuses an offer by his or her employer of reasonable alternative employment with the employer;
(b) an employee who refuses to exercise his or her seniority rights to obtain reasonable alternative employment;

g For the purposes of severance pay, s. 58(13) provides:

58(13) Where an employee who receives notice of termination resigns from employment during the statutory notice period and provides the employer with at least two weeks written notice of resignation, the employee shall,

h (a) where the employee has been given notice of termination because of the permanent discontinuance of all of the employer's business at an establishment, be deemed to have had his or her employment terminated by the employer on the date the notice of termination was to have taken effect; and
(b) in any other case, be deemed to have been laid off by the employer commencing on the date the notice of termination was to have taken effect.

Section 1 of the Act sets out two relevant definitions:

"severance pay" means the amount of pay to which an employee is entitled under section 58;

"statutory notice period" means,

- (a) the period of notice required to be given by an employer under section 57, or
- (b) where the employer provides a greater amount of notice than is required by section 57, that part of the notice period ending with the termination date specified in the notice which equals the notice period required under section 57;

The Ministry of Labour publishes a guide to the *Employment Standards Act* which was posted in this work place. The parties agree that I am not bound by the interpretation found in the guide but I can use it as an aid to the interpretation of the Act. Under the heading "Severance Pay", the guide states, in part:

... Severance pay is payable in addition to any right the employee may have to notice of termination or pay in lieu of notice.

Employees who are entitled to severance pay if they qualify include:

- v) an employee who is terminated as a result of a permanent discontinuance, however caused;

The following employees are not entitled to severance pay :

- i) an employee who refuses reasonable alternative employment with the employer (including an employee who refuses to exercise seniority rights to obtain reasonable alternative employment);

An employee who resigns after receiving notice of termination may still be entitled to severance pay if he or she has given the employer at least two weeks' written notice of resignation and the last day of work falls within the statutory notice period.

Was Mr. Wächter entitled to severance pay in the circumstances of his departure from the company? The union argues for a purposive interpretation of the statute and says that he was so entitled. The union says there was a deemed termination of all employees on March 10th when the Form 1 was posted. At that point, the employment relationship was severed. All the grievor's resignation did was fix the date of the termination. Counsel cites a decision of Referee Gorsky under the *Employment Standards Act* in the matter of the *Great Atlantic & Pacific Co. of Canada Ltd. and U.S.W.A.* (1992), in which he states at p. 66 *et seq.* of his decision:

The purpose of severance pay was described by the then Minister of Labour, The Honourable R.G. Elgie, in the debate which occurred upon second reading of Bill 95 which amended the *Employment Standards Act* on June 16, 1981:

a "In my view, one of the principal reasons for a severance pay scheme of the type proposed relates to compensation in recognition of the past contribution and commitment that an employee has made to the operation of the enterprise. The other main rationale relates to the loss of job-related benefits that occur upon termination."

b Hansard, 1st Sess., 32nd Parl., 1981, at p. 1698.

Referees have taken the same view in distinguishing between termination pay, which is compensation in lieu of notice, and severance pay (*Re Telegram Publishing Co. and Marc Zwelling & Gottlob Essig* (1972), 1 L.A.C. (2d) 1 at p. 19 (upheld 67 D.L.R. (3d) 404, 11 O.R. (2d) 740, 13 L.A.C. (2d) 112n (C.A.))):

c "There appears to be little justification for giving the severance pay provision a more restricted meaning. Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. Financial benefits, such as vacation

d pays, will be calculated on the basis of this seniority and, even more importantly to the employee, his job security in a lay-off situation will depend on the length of his seniority. Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this

e loss of investment. The employee will lose this investment whether he is dismissed for reasons of health, or because staff is reduced because of technological innovations, or because the business is completely closed. In all three cases, he will lose his investment, and it seems reasonable that in all three cases he should receive at least partial compensation in the form of severance pay."

f In *Re Canada Trust Co.*, E.S.A. case No. 2710, Referee Brown at p. 6, the following statement appears:

g "Severance pay, on the other hand, is not allotted in lieu of any other benefit. The lump sum is paid to every employee who meets the qualifications of s. 40a. Since an employee is entitled to severance pay only where he or she has been employed by the employer for five or more years, its purpose must primarily be one of providing some form of monetary cushion for the expenditures that a long-term former employee may have to make in finding comparable employment elsewhere, particularly where the severance off [*sic*] that relationship is initiated by the employer and not by the employee."

h Thus, union counsel argues, the purpose of severance pay is to compensate an employee for his or her commitment and contribution made over the years. It should be perceived as an earned benefit based on long service and should be payable even where the employee severed the employment relationship after being given

notice that the employer would sever the relationship at some future time. Union counsel urges me to find that when the Form 1 was posted, it served as a notice of termination and therefore the resignation occurred within the statutory notice period. Even though the notice did not comply with s. 57 in that it was not addressed to individual employees and did not specify a termination date, I should still find that the Form 1 was a notice of termination sufficient to trigger the provisions of s. 58. Counsel cites another decision of a referee under the *Employment Standards Act*, this one in the matter of *Casual Wear Inc.*, a decision of Referee Brown issued in 1989, for the proposition that a document issued to satisfy one statutory requirement may be used to satisfy another statutory requirement. In that case, the issue was whether or not an employee had been given two weeks' notice in writing that her employment would be terminated. There the employer gave the employee several weeks' oral notice and a record of employment for Employment and Immigration Canada two weeks before the final termination date. The referee found that the record of employment was sufficient notice under the *Employment Standards Act* in that it was written notice directed to the employee specifying a termination date and therefore satisfied the requirements of the Act. At p. 5 of the decision, the referee said: "There would be no reason to duplicate the notice requirement by filling out two separate forms if the form used to satisfy one statutory requirement provides exactly the information needed to advise someone of the date when their employment will terminate. The record of employment provides sufficient information to meet the requirements of the *Employment Standards Act*." Thus, says union counsel, I should find that the Form 1 posted on March 10th should stand as a notice of termination. It is important to the union's case that I find as a fact that the employees were not advised that they would be served with individual notices of termination and that the Form 1 was all they had to go on in trying to decide when they would be terminated. With respect to Mr. Wachter's failure to exercise his bumping rights before leaving, counsel argues that this should not exclude the grievor from the provisions of s. 58 because to be excluded he must have refused to exercise his bumping rights for "reasonable alternative employment". Any job he bumped into was going to end by December 10, 1994, at the latest, and therefore cannot be considered a reasonable alternative.

Employer counsel argues for a literal rather than purposive interpretation of the *Employment Standards Act*. The grievor must fit himself within the statutory framework if he is to gain

entitlement to severance pay. Section 58(2) of the Act requires the employer to pay severance pay to employees whose employment *a* *has been terminated*. The only way to terminate an employee is by notice pursuant to s. 57 that is *in writing, addressed to the person* whose employment is to be terminated, *served personally* or by registered mail, *specifying the termination date*. The posted Form 1 cannot possibly comply with or be compared to a notice of *b* termination in that it does not name names nor give definite dates of termination, nor was it personally served on any employee. The only way a person who resigns can receive severance pay pursuant to s. 58(13) is if he or she has received a notice of termination, then resigns *during the statutory notice period*. The employee is then *c* deemed to have been terminated on the day the notice of termination was to have taken effect. The statutory notice period for purposes of s. 57(2), where 50 or more employees are to be terminated in a four-week period, is eight weeks. Pursuant to s. 57(2), the employer was only required to give eight weeks' notice of the December, 1994 terminations. The definition of "statutory *d* notice" period provided in s. 1 of the Act clearly provides for an employer giving greater notice under s. 57(2) than is required. The statutory notice period is still the final eight weeks of the notice. From a policy point of view, counsel argues that the notice provisions are in the Act to encourage employers to give as much *e* notice as possible. If an employer had to pay severance pay to its entire work-force if it gave lengthy notice, everyone would resign early in order to obtain severance pay while not being required to work. Counsel cites the decision of Referee Haladner in the matter of *Harry Woods Transport Ltd.*, at p. 13, where the referee said: *f* "The *Employment Standards Act* . . . does not make provision for termination of an employee forthwith upon payment of an amount equal to the wage that would have been earned in the period of notice required. Rather, the Act contemplates that employees will work out their period of notice. An employee does, *g* therefore, have an obligation to make himself available for work during the period covered by a notice of termination." Counsel also cites *Redpath Industries Ltd. v. Ison* (1985), 52 O.R. (2d) 770, 9 C.C.E.L. 1, 86 C.L.L.C. ¶14,029 a decision of the Divisional Court for the proposition that [at p. 773]: "Where . . . an employee *h* chooses to terminate the employment relationship at some [time] within the period for which notice would have to be given if the relationship had been terminated by the employer then it is only reasonable to interpret the legislation so as to give effect to the wishes of both. An employee who has chosen a termination date does not need protection against too short a notice." Counsel also

urges me to find that the employees were well aware they would receive individual notices of termination pursuant to s. 57 of the Act and to prefer the employer evidence over the union evidence in this regard. No reasonable employee could think his employment was terminated simply by the posting of the Form 1. It is common ground that the employees who asked were repeatedly told: "We don't know when you'll be laid off but we'll tell you as soon as we do know."

In my view, it does not particularly matter whether or not the grievor expected to receive an individual notice of termination or whether or not he was or should have been aware that due to his seniority he would not have been laid off until December, 1994. Both parties were aware that their conduct was governed by the provisions of the *Employment Standards Act* as incorporated into their collective agreement, and both parties must be deemed to be aware of the required notice procedures.

Regardless of the purpose of severance pay, it is only payable under certain very explicit conditions. For an employee who resigns, it is only payable if the employee resigns during the statutory notice period. Until the employee is terminated upon individual notice, the statutory notice period is not even activated. The grievor resigned before he was terminated, and before the statutory notice period was activated and he is therefore not entitled to severance pay. I find that he was not terminated on March 10th when the Form 1 was posted, but was merely notified that he would be terminated at some future indeterminate time. Once the employer determined the time, it was required under the Act to give the grievor eight weeks' written notice of the actual date, or pay termination pay in lieu thereof. It does not assist the union to say that it or its members were not aware they would receive individual notices of termination. The Act says that they must receive such notices and those provisions of the Act are incorporated into their collective agreement.

Accordingly, the grievance is dismissed.

**Re PanAbrasive Inc. and United Steelworkers of America,
Local 8777**

[Indexed as: PanAbrasive Inc. and U.S.W.A., Loc. 8777, Re]

Ontario, J.T. Clement, Q.C. October 7, 1993.

Discrimination — Handicap — Position sought by grievor already occupied — Employer not obligated to make position available to grievor — In

TAB 4

Indexed as:

Lehndorff General Partner Ltd. (Re)

**IN THE MATTER OF The Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36**

**AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990,
c. C. 43**

**AND IN THE MATTER OF a plan of compromise in respect of
Lehndorff General Partner Ltd., in its own capacity and in
its capacity as general partner of
Lehndorff United Properties (Canada)
Lehndorff Properties (Canada)**

- and -

**Lehndorff Properties (Canada) II
and in respect of certain of their nominees
Lehndorff United Properties (Canada) Ltd.,
Lehndorff Canadian Holdings Ltd.,
Lehndorff Canadian Holdings II Ltd.,
Baytemp Properties Limited and
102 Bloor Street West Limited**

and in respect of

**The Lehndorff Vermögensverwaltung GmbH in
in its capacity as limited partner of
Lehndorff United Properties (Canada)**

Applicants

[1993] O.J. No. 14

9 B.L.R. (2d) 275

17 C.B.R. (3d) 24

37 A.C.W.S. (3d) 847

Court File No. B366/92

Ontario Court of Justice - General Division
Toronto, Ontario

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

(36 pp.)

Alfred Apps, Robert Harrison and Melissa J. Kennedy, for the Applicants.

L. Crozier, for the Royal Bank of Canada.

R.C. Heintzman, for the Bank of Montreal.

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

Jay Schwartz, for Citibank Canada.

Stephen Golick, for Peat Marwick Thorne Inc., proposed monitor.

John Teolis, for the Fuji Bank Canada.

Robert Thorton for certain of the advisory boards.

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

- (a) short service of the notice of application;
- (b) a declaration that the applicants were companies to which the CCAA applies;
- (c) authorization for the applicants to file a consolidated plan of compromise;
- (d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
- (e) A stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and
- (f) certain other ancillary relief.

The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a

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

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

- (a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
- (b) The restructuring of existing project financing commitments.
- (c) New financing, by way of equity or subordinated debt.
- (d) Elimination or reduction of certain overhead.
- (e) Viability of existing businesses of entities in the Lehndorff Group.

- (f) Restructuring of income flows from the limited partnerships.
- (g) Disposition of further real property assets aside from those disposed of earlier in the process.
- (h) Consolidation of entities in the Group; and
- (i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

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

"Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fisherman Co-Op* (1988), 67 C.B.R. (N.S.) 44, at pp. 55-6, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 at pp. 165-6; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) at pp. 250-1; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Gammon* (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

The CCAA is intended to facilitate compromises and arrangements between companies and

their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; in *Re Companies' Creditors Arrangement Act*; *A.G. Can. v. A.G. Que.*, (1934) S.C.R. 659 at p. 661; 16 C.B.R. 1; (1934) 4 D.L.R. 75; *Meridian Developments Inc. v. Toronto-Dominion Bank*; *Meridian Developments Inc. v. Nu-West Group Ltd.*, (1984) 5 W.W.R. 215 at pp. 219-20; *Norcen Energy Resources v. Oakwood Petroleum Limited et al.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Alta., Q.B.), at pp. 12-13 (C.B.R.); *Re Ouintette Coal Limited* (1990), 2 C.B.R.(3d) 303 (B.C.C.A.), at pp. 310-1, affirming *Ouintette Coal Limited v. Nippon Steel Corporation et al.* (1990) 2 C.B.R. (3d) 291, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.); *Elan*, supra at p. 307 (O.R.); *Fine's Flowers v. Creditors of Fine's Flowers* (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p. 592.

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

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the Bankruptcy Act, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the Bankruptcy and Insolvency Act

("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the CCAA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Chef Ready*, supra, at p. 318 and *Re Assoc. Investors of Can. Ltd.* (1987), 67 C.B.R. (N.S.) 237 at pp. 245; rev'd on other grounds at (1988), 71 C.B.R. 72. It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Assoc. Investors*, supra, at p. 318; *Re Amirault Co.* (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

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

Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
 - (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either or them;
 - (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
 - (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affects the position not only of the company's secured and unsecured creditors, but also all non-creditors and

other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen*, supra at pp. 12-7 (C.B.R.) and *Ouintette*, supra, at pp. 296-8 (B.C.S.C.) and pp. 312-4 (B.C.C.A.) and *Meridian*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Chef Ready*, supra, at p. 320 where Gibbs J.A. for the Court stated:

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

The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Wynden Canada Inc. v. Gaz Métropolitain Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. in Bankruptcy) at pp. 290-1 and *Ouintette*, supra, at pp. 311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Limited et al.* (1988), 73 C.B.R. (N.S.) 141 (B.C.S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *In Re Nathan Feifer et al. v. Frame Manufacturing Corporation* (1947), 28 C.B.R. 124 (Qué. C.A.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Pepler Furniture Corporation* (1992), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

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

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Ouintette*, supra, at pp. 312-4 (B.C.C.A.).

It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order

which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *In the Matter of the Proposal of Norman Slavik*, unreported, [1992] B.C.J. No. 341. However in the Slavik situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact:

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

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

It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.B. Ltd.*, unreported, (1992) N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

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

I am not persuaded that the words of s. 11 which are quite specific as relating as to a company can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, (1992) O.J. No. 1946 at pp. 4-7.

The Power to Stay

The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.),

and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, which provides as follows:

- s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd. (1988), 72 C.B.R. (N.S.) 1 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp.

(1990), 51 B.C.L.R. (2d) 105 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the new cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period (emphasis added).

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. (In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77).

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited et al. v. Rank et al.*, (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic et al. v. Township of Bosanquet* (1974) 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (Est) Ltd. v. Allendale Mutual*

Insurance Co. (1982) 29 C.P.C. 60 (H.C.) at pp. 65-6.

Montgomery J. in *Canada Systems*, supra, at pp. 65-6 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach* (Executor of Estate of George William Willis), [1972] 1 All E.R. 430, [1972] 1 W.L.R. 326 (sub nom. *Lane v. Willis; Lane v. Beach*) (C.A.).

...

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

"The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant."

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

A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Depburn, *Limited Partnerships*, De Boo (1991), at p. 1-2 and 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the Bankruptcy Act (now the BIA) sections 85 and 142.

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

It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p. 33-5; *Seven Mile Dam Contractors v. R. in Right of British Columbia* (1979), 13 B.C.L.R. 137 (S.C.) affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad E. Milne, (1985) 23 Alta. Law Rev. 345, at p. 350-1. Milne in that article made the following observations:

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

It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, *The Control Test of Investor Liability in Limited Partnerships* (1983), 21 Alta L. Rev. 303; E. Apps, *Limited Partnerships and the "Control" Prohibition: Assessing the Liability of Limited Partners* (1991), 70 Can. Bar. Rev. 611; R. Flannigan, *Limited Partner Liability: A Response* (1992), 11 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner - the limited partners can vote to (a) remove

the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: Control Test, (1992), supra, at pp. 524-5. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-a-vis) any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

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

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

FARLEY J.

* * * * *

APPENDIX A

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade

creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.

5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:
- (a) borrow such additional sums as it may deem necessary,
 - (b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,
 - (c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and
 - (d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor

including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.

7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited Partnerships be and are hereby directed, until further Order of this Court:

- (a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and
- (b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.

9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

- (a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the Bankruptcy and Insolvency Act, S.C. 1992, c. 27, the Winding up Act, R.S.C. 1985, c. W-11 or otherwise shall be stayed and suspended;
- (b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;
- (c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;
- (d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;
- (e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;
- (f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect of any of the Property, as the case may be;
- (g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any

- indebtedness or obligation as at the date hereof; and
- (h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.
12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or

cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.
14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.
15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.
16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders,

mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.

17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, administrative and restructuring ("GAR") costs for the months of January, February and March, 1993, together with a cash-flow projection for LUPC for the period commencing on January 1, 1993 through to April 30, 1993 inclusive.
18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

TAB 5

Case Name:

Mirant Canada Energy Marketing Ltd. (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act R.S.C. 1985, Chap. C-36, As Amended
AND IN THE MATTER OF Mirant Canada Energy
Marketing, Ltd. and Mirant Canada Energy
Marketing Investments Inc.**

[2004] A.J. No. 331

2004 ABQB 218

36 Alta. L.R. (4th) 87

1 C.B.R. (5th) 252

130 A.C.W.S. (3d) 237

2004 CarswellAlta 352

Docket No. 0301 11094

Alberta Court of Queen's Bench
Judicial District of Calgary

Kent J.

Heard: March 10, 2004.

Judgment: filed March 19, 2004.

(32 paras.)

Counsel:

Brian P. O'Leary, Q.C., for Paramount Resources and NGX.

Tristram J. Mallett and Geraldine Teixeira, for Mirant Corporation.

Frank R. Dearlove and Christopher D. Simard, for Mirant Canada Energy Marketing, Ltd. and
Mirant Canada Energy Marketing Investments, Inc.

Alan R. Anderson and Cassandra P. Malfair, for Enron Canada.
William L. Severson, for Robert Schaefer.
Howard A. Gorman and Paul Nigol, for El Paso and Trans Canada Pipeline.

REASONS FOR JUDGMENT

KENT J.:--

FACTS

1 Mirant Canada Energy Marketing, Ltd. and Mirant Canada Energy Marketing Investments Inc. ("Mirant Canada") applied for protection under the Companies' Creditors Arrangement Act (Canada)¹ ("CCAA") on July 15, 2003. An order (the "Initial Order") was granted on that date.

2 Paragraphs 16(c) and (d) of the Initial Order provide as follows:

- (c) all outstanding (both pre and post the date of filing of the Petition) and future wages, salaries, employee benefits, deferred payments, earned or to be earned, vacation pay (for continuing employees in the normal course), employee severance (subject to approval by the Monitor) and retention payments, statutory deemed trust amounts in favour of the Crown in Right of Canada or of any province thereof which were required to be deducted from employee's wages including without limitation, amounts in respect of employment insurance, Canada Pension Plan, income taxes and other like amounts due or accruing due to employees and present and future directors and the reimbursement of business expenses properly incurred by employees and present and future directors, and payments to operate and fund the payroll accounts (including source deductions) in respect of such employees (the "Employee Obligations"). Sufficient funds to pay the anticipated Employee Obligations may be placed in trust pursuant to a formal Trust Indenture by the Applicants, but only with the approval of the Applicants' shareholders;
- (d) with the consent of the Monitor, all payments, expenses and capital expenditures, whether incurred before or after the making of this Order, reasonably necessary for the economic preservation of the Property;

3 Prior to December 15, 2002, Robert Schaefer ("Schaefer") was employed by Mirant Services LLC in Atlanta, Georgia. In March, 2002, at the request of his employer, Schaefer signed a Retention Agreement. Under the terms of the Retention Agreement, Schaefer was entitled to an "Award Amount" of \$72,800.00 (U.S.) on each of September 30, 2004 and September 30, 2005

provided that he was still employed by Mirant Services LLC and was performing in a satisfactory manner. The Retention Agreement also provided that in the event Schaefer ceased to be employed by Mirant Services LLC and became employed by another Mirant Group company, the Retention Agreement "...shall be assigned to that other Mirant company, which shall accept such assignment." The Retention Agreement was never assigned by Mirant Services LLC to Mirant Canada.

4 Effective December 15, 2002, Schaefer ceased to be employed by Mirant Services LLC and became employed by Mirant Canada in Calgary. The terms of Schaefer's employment with Mirant Canada were governed by a letter agreement dated December 9, 2002 (the "Letter Agreement") which contained the following statement:

This letter agreement supercedes and replaces any terms of employment, benefits, or entitlements outlined in any and all agreements between you and Mirant Americas Energy Marketing LP and Mirant Services LLC.

The Letter Agreement provided for severance pay based upon a specified formula in the event that Schaefer's employment with Mirant Canada was terminated without cause.

5 Schaefer's position with Mirant Canada was Vice-President, Marketing and Development. In his affidavit sworn November 28, 2003, he deposes that both before and after July 15, 2003, the date of the Initial Order, he was involved in various activities and transactions pertaining to the financial difficulties and CCAA protection of Mirant Canada. He further deposes that Rod Pocza, President of Mirant Canada, represented to him that the CCAA protection of Mirant Canada would in no way affect his employment with Mirant Canada. He relied upon those representations in remaining in Mirant Canada's employ. Schaefer's employment with Mirant Canada was terminated on September 2, 2003.

6 Schaefer submitted a claim in the CCAA proceedings for severance pay pursuant to the Letter Agreement in the amount of \$827,755.20 (Cdn.) The amount of that claim was accepted by PricewaterhouseCoopers (the "Monitor") and Mirant Canada. Schaefer also filed a Proof of Claim for \$145,600.00 (U.S.) pursuant to the Retention Agreement. Schaefer and Mirant Canada have now agreed on an amount of approximately \$73,000.00 (U.S.) in respect of that Retention Agreement.

7 The Monitor's eleventh report dated March 8, 2004 says that Mirant Canada had paid severance to three other employees. The payment to two were amounts determined to be in accordance with Mirant Canada's usual severance guidelines. The amount paid to the third was less than the guideline amount but was an amount agreed to by the employee. The Monitor further says that the guideline amounts would not apply to Schaefer in any event because his severance entitlement was determined pursuant to the Letter Agreement. In a letter attached to the eleventh report, the Monitor says that in deciding whether or not to approve severance pay it based its decision "...principally on the effect which, in its view, non-payment of severance amounts would have upon other employees, and to a lesser extent upon the magnitude of the payments." The only amount which the Monitor approved for payment to Mr. Schaefer was statutory severance of \$18,184.62, being the equivalent

of four weeks' pay. The Monitor proposed immediate payment of a compromise amount. Mr. Schaefer refused and brought this application.

ISSUE

8 Is Schaefer entitled to immediate payment of the severance amount of \$827,755.20 and the award amount of \$73,000.00 or is his claim an unsecured claim which must be dealt with in the course of the CCAA proceedings?

APPLICANT'S ARGUMENTS

9 Schaefer put forward four arguments why he was entitled to immediate payment. First, he argues that his job of finding and retaining customers was critical to the continued operation of Mirant Canada because without customers, there would be no business. In essence, he argues that his involvement was crucial to Mirant Canada's ability to carry on business post-CCAA.

10 Secondly, he argues that he is entitled to rely upon representations that he says were made to him by Rod Pocza to the effect that the CCAA proceedings would not affect his employment or compensation including his severance pay.

11 Third, he argues that his claim is like a post-petition claim and that, as a general proposition, post-petition creditors are entitled to be paid in full. His position is that his continued employment with Mirant Canada post-CCAA is equivalent to his having been re-hired after July 15, 2003 and that, in terminating him after that date, Mirant Canada took on the obligation to pay him in full the severance contemplated by the Letter Agreement.

12 Finally, Schaefer argues that there is no principled basis for treating him differently from the two employees referred to in the eleventh report who received their severance payments in full. He argues that the only difference between him and those employees is the quantum of the severance to be paid and that, if fairness of treatment is a goal of the CCAA, the Court should not permit that he be treated differently simply on the basis of the amount owing.

13 Schaefer asks the Court to draw an analogy between his severance payment and the cost of repairs at issue in *Re Smoky River Coal Ltd.*² In that case, *LoVecchio J.* held that monthly rental payments under certain equipment leases entered into post-CCAA should be paid in priority to other claims, but that costs of repair contemplated by the same agreements should not. The Court of Appeal overruled that portion of the judgment, holding that the costs of repair were part of the same contractual obligation and should also be paid in priority. Schaefer asks that the Court treat his monthly salary as analogous to the rental payments in *Smoky River Coal* and his severance pay as analogous to the costs of repair. Schaefer argues that, like the costs of repair in *Smoky River Coal*, his severance entitlement is an obligation which arose during the CCAA period and should be paid in full.

14 In *Smoky River Coal*, LoVecchio J. said that to be paid as post petition creditor, it is necessary to find that the services provided or work done was necessary to "keep the lights of the company on" (p. 137). Schaefer, relying on the Court of Appeal's judgment argues that it is sufficient to conclude that the severance, like the costs of repair, is an integral part of the contract. Schaefer also argues that the Court of Appeal in *Smoky River Coal* noted the need to balance equities in CCAA proceedings. There is nothing inequitable in paying his severance notwithstanding the fact that it is an amount larger than that received by other employees.

15 With respect to the payment of the amount under the Retention Agreement, Schaefer argues that since Mirant Canada has agreed to the amount of approximately \$73,000.00 (U.S.), there is no issue as to his entitlement to such payment or as to the amount of such entitlement. Rather, he submits that the only issue is whether he should be paid that amount now or should have to make a claim as an unsecured creditor.

RESPONDENTS' ARGUMENTS

16 Argument on behalf of the Respondents was made principally by Enron Canada Corp. ("Enron"), Mirant Canada's largest unrelated creditor. Enron argues that the governing principles of the CCAA are fairness and reasonableness and as a result all creditors should be treated equally absent a statutory priority or order of the Court. Enron says that in *Smoky River Coal*, LoVecchio J. characterized the purpose of the CCAA as allowing a company to carry on business during reorganization and said that any priority given to a creditor must be given in that context. Furthermore, LoVecchio J. said that such priorities should not be created lightly.

17 Enron argues that while paragraph 16(c) of the Initial Order gives Mirant Canada the flexibility to pay severance to employees, the employees have no right to such a payment. The Initial Order creates no charge which would create a priority for employee severance claims; therefore, the present case is distinguishable from *Smoky River Coal*, where a separate charge and fund had been created by Court order. Enron says that had the Initial Order made specific provision for Schaefer's severance, that provision could have been challenged by the other creditors.

18 Enron further says that the determination of Schaefer's severance entitlement pursuant to the terms of the Letter Agreement is merely a question of liquidated versus unliquidated damages and does not affect the question of payment of that amount in priority to other creditors.

19 With respect to the representations made to Schaefer by Rod Pocza, Enron notes that Schaefer claims to have relied upon the Retention Agreement and the Letter Agreement but that there is no evidence of any collateral post-CCAA contract. Enron says that while Schaefer may have a claim against Mirant Canada or Rod Pocza for negligent misrepresentation, that does not affect the question of priority of payments.

20 Enron challenges Schaefer's analogy to the costs of repair in *Smoky River Coal* and notes that the Court of Appeal in that case held that claims in respect of the cessation or termination of

business are not the same. Enron says that the authorities are unanimous in holding that termination of a contract gives rise to an unsecured claim without any special priority.

21 Trans Canada Pipelines ("TCPL"), another major non-related creditor of Mirant Canada, says that Schaefer's claim is for damages for breach of contract that existed pre-CCAA. TCPL acknowledges that parties who agree to continue their contracts post-CCAA should be paid in the ordinary course for goods and services actually received. Schaefer received his salary while he worked for Mirant Canada post-CCAA. With respect to the contractual amounts of severance for breach of his employment contract, TCPL argues that Schaefer is entitled to this amount on the same basis as other creditors rather than receiving it in priority.

22 TCPL says that the Initial Order is permissive, allowing Mirant Canada, with the approval of the Monitor, to pay severance amounts, but not compelling it to do so. Paragraph 17(b) of the Initial Order provides that Mirant Canada can lay-off employees and deal with the consequences of such terminations in the Plan of Arrangement. Once the Plan of Arrangement is filed, if it contemplates payment of Schaefer's severance amount in priority to other creditors, the other creditors would then have the opportunity to approve or disapprove of the Plan and therefore of the proposed priority payment.

23 Paramount, the third major non-related creditor, argues that the Court of Appeal in Smoky River Coal in fact held that the costs of repair as part of the lease payment were necessary to 'keep the lights on'. Severance pay, on the other hand, is not an expense associated with the day-to-day operations of the company. Rather, a severance payment is a penalty or obligation associated with the breach of an employment contract.

24 Finally, the Court heard from the Monitor. The Monitor indicated that its decisions with respect to payment of severance pay were based upon the economic preservation of Mirant Canada's business which is contemplated in paragraph 16(d) of the Initial Order. Its decisions were based on balancing the effect of payment or non-payment on other employees versus the economic effect of payment on the company.

ANALYSIS

25 The starting point for analysis of this issue is the decision in Smoky River Coal by the Court of Appeal. There are three passages which I think are relevant to consider. The first is the Court of Appeal's commentary on LoVecchio J.'s analysis of post petition creditors. At para. 14, the Court of Appeal says the following:

The second criteria for eligibility was that the debt in question was incurred in connection with the daily operating activities of Smoky River, as opposed to debts that arose from the cessation or termination of services. As stated by the CCAA judge (*supra*, at para. 40):

The main purpose of the charge was to encourage the creditors who supplied Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping "the lights of the company on". Thus, the costs or expenses incurred must be essential to the continued day-to-day operations of the mine. Penalties or obligations associated with the breach are not expenses associated with continued operations.

We are in substantial agreement with the two eligibility criteria delimited by the CCAA judge.

26 Secondly, the Court of Appeal qualifies what LoVecchio J. said with respect to post petition creditors at para. 19 when it says:

Therefore, while we accept that a CCAA judge's requirement that to qualify, a debt must have been incurred in connection with the daily operating activities of Smoky River, in the circumstances of this case, we interpret that requirement on commercially reasonable terms.

27 Finally, in connection with the specific claim by the equipment leasor which Mr. Schaefer argues is analogous to his situation, the Court of Appeal says the following at para. 24:

Coneco was clearly a post petition trade creditor. The covenant to repair the equipment was just as much a term of the lease and a term of credit as Smoky River's obligation to pay rent. The repair costs were not a damage claim, but a clear contractual obligation that arose during the CCAA period. It is not commercially reasonable that Coneco would lease valuable equipment to Smoky River unless Smoky River maintained it in good operating condition. Had there been no obligation to maintain the equipment, the rental rate would have been considerably higher. This interpretation is consistent with commercial reasonableness.

28 Thus, for me to find the decision of the Court of Appeal in Smoky River Coal 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 is his salary which he has been paid falls within that definition.

29 Schaefer says that Mr. Pocza made a new promise to Schaefer that he would be paid the severance pay in consideration for Schaefer continuing to work. However, the Initial Order provides that employee's severance payments can only be made subject to the approval of the Monitor. I am satisfied that the Monitor applied the right test in determining whether or not payment of the full amount of the contractual obligation was appropriate. As indicated above, the Monitor had to balance the effect of non-payment on the continued operation of the business and more specifically the morale of other employees against the economic effect on the company if the payment was made. The Initial Order excludes severance pay from categorization as a post petition creditor; rather it falls within those discretionary payments which the Monitor may pay. The promise made by Mr. Pocza is irrelevant in light of the provisions of the Initial Order.

30 With respect to the second principle argument of Schaefer, namely that it is fair and equitable that he receive his full severance, fairness and equity in the context of CCAA proceedings must be looked at in a broader context. It cannot trump the clear provisions of the Initial Order. Paying severance amounts is discretionary. That discretion must be exercised in accordance with the purpose of the CCAA which is to provide protection to a company while it attempts to reorganize its affairs. The Monitor correctly exercised his discretion.

31 The application by Schaefer for immediate payment of the severance pay is dismissed.

32 With respect to the Award Amount, there was no assignment to Mirant Canada. The application is dismissed.

KENT J.

cp/e/qw/qlmmm

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

2 (2000) 83 Alta. L.R. (3d) 127 (Q.B.), reversed in part (2001) 95 Alta. L.R. (3d) 1 (C.A.) ("Smoky River").

TAB 6

Case Name:
Nortel Networks Corp. (Re)

**RE: IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation,
Applicants
APPLICATION UNDER the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as Amended**

[2009] O.J. No. 2558

55 C.B.R. (5th) 68

75 C.C.P.B. 233

2009 CarswellOnt 3583

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 21, 2009.

Judgment: June 18, 2009.

(89 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Unsecured claims -- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore payments to the employees dismissed -- Nortel was granted protection under the Company's Creditors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority -- Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized

or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore payments to the employees dismissed -- Nortel was granted protection under the Company's Creditors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority -- Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

Motion by the union for an order requiring Nortel to recommence payments that was obligated to make under the collective agreement. Motion by former employees for an order requiring Nortel to pay termination pay, severance pay and other benefits. Nortel was granted protection under the Company's Creditors Arrangement Act in January 2009. At that time, Nortel ceased making payments of amounts that constituted unsecured claims, including termination and severance payments. The union took the position that Nortel was obligated to make the payments under the collective agreement. The former employees took the position that it would be inequitable to restore payments to unionized former employees and not non-unionized former employees. However, Nortel took the position that its financial pressure precluded it from paying all of the outstanding obligations.

HELD: Motions dismissed. The employee claims were unsecured claims and therefore did not have any statutory priority. Furthermore, the claims were based mostly on services that were provided pre-filing. As a result, there was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors and Nortel's resources were to be used to attempt restructuring.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.3

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

Labour Relations Act, 1995, S.O. 1995, c. 1, Schedule A,

Counsel:

Barry Wadsworth, for the CAW and George Borosh et al.

Susan Philpott and Mark Zigler, for the Nortel Networks Former Employees.

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

Alan Mersky and Mario Forte, for Nortel Networks et al.

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

Leanne Williams, for Flextronics Inc.

Joseph Pasquariello and Chris Armstrong, for Ernst & Young Inc., Monitor.

Janice Payne, for Recently Severed Canadian Nortel Employees ("RSCNE").

Gail Misra, for the CEP Union.

J. Davis-Sydor, for Brookfield Lepage Johnson Controls Facility Management Services.

Henry Juroviesky, for the Nortel Terminated Canadian Employees Steering Committee.

Alex MacFarlane, for the Official Unsecured Creditors Committee.

M. Starnino, for the Superintendent of Financial Services.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process - which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

2 In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

3 The first motion is brought by the National Automobile, Aerospace, Transportation and General

Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

4 The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

5 The Union seeks continued payment of certain of these benefits including:

- (a) retirement allowance payments ("RAP");
- (b) voluntary retirement options ("VRO"); and
- (c) termination and severance payments.

6 The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

7 There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately \$2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

8 There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately \$202,000.

9 There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c. 41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to

recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately \$18 million.

11 The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

12 In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

13 On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

14 Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

15 The Initial Order provides:

- (a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;
- (b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;
- (c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);
- (d) for a stay of proceedings against Nortel;
- (e) for a suspension of rights and remedies vis-à-vis Nortel;
- (f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);
- (g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or

terminating the supply of such goods or services. The proviso is that the goods or services supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

16 The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

17 The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

18 The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

19 Section 11.3 of the CCAA provides:

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.

20 In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

21 The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smokey River Coal Ltd. (Re)* 2001 ABCA 209 to support its proposition.

22 The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

23 The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly

refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

24 The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

25 The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

26 The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

27 The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

28 Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

29 Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

30 Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws

such as the ESA continue to apply during CCAA proceedings.

31 Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60.

32 In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

33 Counsel to the Applicants sets out the central purpose of the CCAA as being: "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". (*Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

... if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re)*, *supra*).

34 The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

- (a) the ability to stay past debts; and
- (b) the ability to require the continuance of present obligations to the debtor.

35 The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)*, [2004] A.J. No. 331).

36 Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

37 Counsel to the Applicants also relies on the following statement from *Mirant*, *supra*, at

paragraph 28:

Thus, for me to find the decision of the Court of Appeal in Smokey River Coal 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.

38 Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Syndicat nationale de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* [2003] Q.J. No. 264 (C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

39 Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

40 The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 - 58:

Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.

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 became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

41 In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *Syndicat des employées et employés de CFAP-TV (TQS-Quebec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, 2008 QCCA 1429 at paras. 26-27:

[Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.

The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

42 Collectively, RAP payment and TRA payments entail obligations of over \$22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

43 In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

44 The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

45 The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

46 More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

47 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. (See *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070, aff'd by (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd. v. Hongkong*

Bank of Canada (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

48 The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodwards Limited (Re)*, (1993), 17 C.B.R. (3d) 236 (S.C.).

49 The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

50 The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

51 In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

- (a) The Applicants are not in a position to honour their obligations to all creditors.
- (b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.
- (c) The Applicants are in default of certain obligations under the Collective Agreements.
- (d) The Applicants are in default of certain obligations owed to the Former Employees.

52 It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

53 There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

54 However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

55 Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

56 The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

57 In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

58 The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

59 However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

60 An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

61 In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

62 What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

63 It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section

should be interpreted in the manner suggested by the Union.

64 Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

65 No cases were cited in support of this interpretation.

66 I am unable to agree with the Union's argument. 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. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services, ... provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. 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.

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.

68 The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

69 The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

70 The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau et al v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Desener v. Myles*, [1963] S.J. No. 31 (Q.B.); *Hiesinger v. Bonice* [1984] A.J. No. 281; *Werchola v. KC5 Amusement Holdings Ltd.* 2002 SKQB 339 to support its position.

71 The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

72 As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

73 However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

74 There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Re: Pacific National Lease Holding Corp.* (1992) 15 C.B.R. (3d) 265 (B.C.C.A.), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.

...

This case is not so much about the rights of employees as creditors, but the right

of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

75 The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60-62, the court said under the heading Recapitulation (in translation):

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 prospect of the resulting debts.

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 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 to be paid immediately (s. 11.3 CCAA).

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.

76 The issue of severance pay benefits was also referenced in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331 at paras. 11 and 15. The application of the Union was rejected:

... The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.

...

If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

77 At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

78 In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

79 The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

- (i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;
- (ii) nothing has been done or purported to be done that is not authorized by the CCAA;
- (iii) the plan is fair and reasonable. *Re: Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

80 At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

81 It follows that the motion of the Union is dismissed.

82 The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

83 The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

84 Both parties cited *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* [1993] 2 S.C.R. 230 in support of their respective positions.

85 In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

86 The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

87 However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

88 In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating

hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

89 This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

G.B. MORAWETZ J.

cp/e/qllxr/qlpxm/qlaxw/qlaxr

Case Name:

Nortel Networks Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation**

Between

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

And between

**National Automobile, Aerospace, Transportation and General
Workers Union of Canada (CAW-Canada) and its Locals 27, 1525,
1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and
other retirees of Nortel Networks Corporation, Nortel Networks
Limited, Nortel Networks Global Corporation, Nortel Networks
International Corporation and Nortel Networks Technology
Corporation, Appellants, and**

**Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation, the
Board of Directors of Nortel Networks Corporation and Nortel
Networks Limited, the Informal Nortel Noteholder Group, the
Official Committee of Unsecured Creditors and Ernst & Young
Inc. in its capacity as Monitor, Respondents**

[2009] O.J. No. 4967

2009 ONCA 833

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

77 C.C.P.B. 161

[2010] CLLC para. 210-005

2009 CarswellOnt 7383

Dockets: C50986, C50988

Ontario Court of Appeal
Toronto, Ontario

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

Heard: October 1, 2009.

Judgment: November 26, 2009.

(49 paras.)

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

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

11(5).

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

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

HELD: Appeals dismissed. The periodic payments sought by the union were not excluded from the stay provisions of the protection order under s. 11.3(a) of the CCAA. The payments required for current services provided by Nortel's continuing employees did not encompass the periodic retirement or severance payments owed to former employees. Such payments were best characterized as deferred compensation under predecessor collective agreements rather than compensation for services currently being performed for Nortel. In addition, the vested interest of former employees in such payments was inconsistent with current services being the source of the obligation to pay. The statutory payments sought by former employees were not excluded from the stay provisions of the protection order. The stay provisions of the CCAA were intended to freeze

Nortel's debt obligations in order to permit restructuring for the benefit of all stakeholders. Upon consideration of the doctrine of paramountcy, such intent would be frustrated if the order did not apply to termination and severance payments owed under the provincial ESA to terminated employees in respect of past services. The effect of the stay related to the timing of the statutory payments rather than the interrelationship between ESA and the CCAA in respect of ultimate payment of Nortel's statutory obligations.

Statutes, Regulations and Rules Cited:

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

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

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

Appeal From:

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

Counsel:

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

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

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

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

Benjamin Zarnett, for the monitor Ernst & Young Inc.

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

Thomas McRae, for the Nortel Canadian Continuing Employees.

Massimo Starnino, for the Superintendent of Financial Services.

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

The judgment of the Court was delivered by

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

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

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

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

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

THE UNION APPEAL

Background

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

7 Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it

ceased to make the periodic payments at issue in this case.

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

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

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

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

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

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

11 The Union challenges this conclusion.

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

than by the court.

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

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

15 In our opinion, this argument must fail.

Analysis

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

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

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

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

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

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

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

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

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

24 The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

25 The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA") and any other provincial employment

legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

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

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

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

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

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

...

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

...

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also

be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat* and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

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

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

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

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

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

42 While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and

the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

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

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

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

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

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

48 We note again that the question before this court was limited to the effect of the stay on the

timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

49 The appeal by the former employees is also dismissed.

S.T. GOUDGE J.A.

K.N. FELDMAN J.A.

R.A. BLAIR J.A.:-- I agree.

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

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.